

RGMH
Vol 251
117

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

Volume XXXVIII

- Held: January 12, 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:
Counsel for Donald Marshall, Jr.
- 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, Q.C.: 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

MEDIA POOL COPY

INDEX - VOLUME XXXVII

Witness

Eugene Smith

Examination by Mr. Pugsley (Cont'd.).....	6952
Examination by Mr. Barrett.....	6976
Examination by Mr. Pink.....	6981
Examination by Mr. Ross.....	6984
Examination by Mr. Nicholas.....	6990
Examination by Mr. Bissell.....	6998
Examination by Mr. Spicer.....	7000

Stan Clarke

Examination by Mr. MacDonald.....	7001
Examination by Mr. Ruby.....	7011
Examination by Mr. Murray.....	7012

Milton Veniot

Examination by Mr. Spicer.....	7013
Examination by Mr. Ruby.....	7050
Examination by Mr. Pugsley.....	7060
Examination by Mr. Barrett.....	7061
Examination by Mr. Bissell.....	7062
Examination by Mr. Ross.....	7064
Examination by Mr. Pink.....	7066
Examination by Mr. Chairman.....	7072

Corporal Gary Green

Examination by Mr. MacDonald.....	7076
Examination by Ms. Derrick.....	7108
Examination by Mr. Pugsley.....	7111
Examination by Mr. Murray.....	7121
Examination by Mr. Ross.....	7128

Examination by Mr. Ryan.....	7130
Examination by Mr. Chairman.....	7133

Mr. Donald L. Burgess

Examination by Mr. Spicer.....	7134
Examination by Mr. Pugsley.....	7165

EXHIBIT LIST

<u>Exhibit</u>	<u>Description</u>	<u>Page</u>	<u>Volume</u>
92	Four pages of Mr. Smith's handwritten	6833	XXXVII
93	Mr. Smith's record of polygraph examinations	6833	XXXVII
94	Copy of Donald L. Burgess' job description dated 1983	7134	XXXVIII
95	A-5 with related notes and RCMP correspondence	7150	XXXVIII

1 JANUARY 12, 1988 - 9:00 a.m.

2 EUGENE SMITH, EXAMINATION CONTINUED BY MR. PUGSLEY

3 Q. Mr. Smith, before you gave your evidence yesterday, what
4 documents had you read?

5 A. I went over my polygraph report, which was submitted in
6 '71.

7 Q. That's the two-page report that we have in Volume 16?

8 A. That's correct.

9 Q. Yes?

10 A. And the only other document was the report of Inspector
11 Marshall in 1971. I hadn't seen that until the night before
12 last.

13 Q. Did you read his evidence that he gave?

14 A. Oh, I read portions of his evidence. I didn't read it all.

15 Q. Portions of the evidence he gave in Sydney a month ago?

16 A. Yes, that's correct.

17 Q. Anything else?

18 A. Not that I recall, sir, no.

19 Q. Did Inspector Marshall tell you what his assignment was, why
20 he was going to Sydney?

21 A. I can't give you the exact words but I was under the
22 impression it was to review this new evidence that had come
23 to light.

24 Q. To review this new evidence.

25

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

A. Yes.

Q. How was he going to review this new evidence?

A. I can't speak for Inspector Marshall but from the conversations I had with him, he left me with the impression that he had certainly did a complete review of the original file, read statements, reviewed some of the transcript of the trials. To my knowledge, that was basically what he had done.

Q. What about conducting personal interviews of witnesses, was he planning to do that?

A. I can't answer that question. I don't know.

Q. He didn't tell you that he was going to do that.

A. No.

Q. Did he tell you that he had personally interviewed Jimmy MacNeil?

A. I had the impression that he had, but I don't know that he had.

Q. Or that he had personally interviewed Roy Ebsary?

A. No, I don't believe he had interviewed Roy Ebsary.

Q. So you believe that he had personally interviewed Jimmy MacNeil, he was going to read some evidence taken at the either the preliminary or at the trial, and he was going to have you do the polygraph. Was that about the extent of it?

A. As I say, I don't know the complete details of the

1 investigation that he had done. The areas of importance to
2 me, of course, were MacNeil and Ebsary as to what they were
3 now saying and that was basically what was I was interested
4 in.

5
6 Q. Did he tell you what reliance he was going to place on the
7 polygraph?

8 A. No, he did not.

9 Q. Or why he was using it.

10 A. Well, it was obvious why he was using it.

11 Q. Why was that?

12 A. He was attempting to determine which one was telling the
13 truth.

14 Q. Did you tell him that, had you ever done a polygraph on him
15 before where he was involved in an investigation?

16 A. Inspector Marshall?

17 Q. Yes.

18 A. No, I had not.

19 Q. Have you ever been involved in an investigation where a
20 polygraph had been used before?

21 A. I would doubt it very much.

22 Q. Did you tell him, "Look it, Al, you've got to be careful about a
23 polygraph. It's only an aid to determining the truth."

24 A. I told both he and Donnie MacNeil that in the motel room in
25 Sydney.

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

Q. What words did you use?

A. Again, I would have to generalize but it was basically to the point that in view of the fact that MacNeil's polygraph was indefinite or incomplete, depending on what you want to call it, that they should proceed with caution, that there certainly was doubt left and that the best way to delete that doubt would be to go to Junior Marshall's lawyer and have him submit to a polygraph test.

Q. Yes, but that was because of the rather unusual results or lack of results you got from MacNeil. But did you tell Marshall before you did any polygraphs that you have to be careful with polygraphs, they're only an aid. They're not the sole determination?

A. I don't recall doing that, sir.

Q. I see.

A. I could have but I don't know.

Q. Did you tell him that the use of the polygraph after charges were laid, indeed, after a conviction was obtained, was a violation of guidelines or RCMP policy?

A. I would suggest that I did discuss that with him.

Q. Why was the use of a polygraph after charges were laid a violation of RCMP policy?

A. Why?

Q. Why?

1
2 A. I think I covered that yesterday, but basically, we were of the
3 opinion that if a police officer had reasonable probable
4 grounds to believe that a person committed an offence and he
5 signed an information to that effect, that it then should be in
6 the hands of the court to decide whether the person was
7 telling the truth or not telling the truth; in other words, his
8 guilt or his innocence.

9 Q. I see. And that was the only policy.

10 A. That's correct, yes.

11 Q. You indicated yesterday that it's important to get as much
12 information as you can from the investigating officer before
13 you conduct the polygraph?

14 A. That's correct, sir.

15 Q. Did you ask him whether or not statements had been taken
16 from MacNeil and Ebsary and asked to review them?

17 A. Yes, statements had been taken but I cannot tell you whether
18 I actually read the statements or Inspector Marshall
19 paraphrased them to me or repeated what was in the
20 statements. I don't recall.

21 Q. Would it not have been important for you to see the
22 statements firsthand?

23 A. Oh, certainly, it would be important but it would also cover
24 the same basic ground if the investigator who had taken the
25 statements or who was aware of the statements told me what

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

was in the statements.

A. But they were statements taken by the Sydney Police not by Marshall. Indeed, Marshall, to the best of our knowledge, did not take any statements at all from Ebsary and MacNeil.

A. I don't know that.

Q. But you did not see written statements taken by the police.

A. I can't answer that. I may have, I may not.

Q. Would it have been important for you to have seen them, if such statements existed?

A. I would add just as much importance to the fact that they were given to me by the investigating officer.

Q. Yes, but you already indicated that his mind was poisoned. He had come with a preconceived notion. Before you did the polygraph, you had formed an opinion.

A. No, I never...

Q. Just let me finish.

A. I never said anything was poisoned, his mind was poisoned.

Q. Before you carried out the polygraph, you told us yesterday that he had come to a conclusion that MacNeil was not worthy of belief.

A. No, I did not tell you that, sir.

Q. What did you tell us?

A. I said, "I thought there was some skepticism in my mind."

Q. "Some skepticism."

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

A. Yes.

Q. I see, all right. And so felt that...How much skepticism?

A. Oh, I have no way of knowing that.

Q. Well, skepticism to the extent that he did not believe MacNeil?

A. Well, I think that's obvious. If he believed MacNeil, he wouldn't be calling me to run the polygraph. So I think you're correct in coming to that conclusion.

Q. I see. So you felt it was just as important and just as accurate to take the paraphrasing of a statement by Marshall when he had these preconceived notions before the polygraph was run on these men.

A. Would you repeat that, please?

Q. You felt that it was just as important, you felt that it was not significantly important for you to see the statements taken by the Sydney Police of Marshall, of MacNeil and Ebsary?

A. Sir, I may have seen those statements. I have never denied of not seeing those statements, I have never denied that. I may have been them but I can't tell you for sure that I did or not.

Q. You indicated that you only ran one chart on MacNeil.

A. That's correct, sir.

Q. Which chart was that? What do you mean by saying "You just ran one chart."

1 A. One polygraph chart where the crime questions and control
2 questions were asked to the subject.

3 Q. What do you mean by "one chart"? I don't follow that.

4 A. One series of questions. I went through the questions once on
5 one polygraph test.

6 Q. How many times would you normally go through the
7 questions?

8 A. A minimum of three.

9 Q. The same questions.

10 A. Yes.

11 Q. When you say you "went through them once," did you have
12 all three leads hooked up?

13 A. Yes, absolutely.

14 Q. So the other two times would have just been a repetition of
15 the first two times.

16 A. I didn't run it another two times.

17 Q. I understand that but you said that your normal practice is to
18 run it three times, run the test three times.

19 A. That's correct, yes.

20 Q. And, on this occasion, you only ran it once.

21 A. That's correct.

22 Q. Because of MacNeil's problems...

23 A. Oh, I follow you now. Yes, had I run them, it would have
24 been a repetition of the other questions, but probably in a
25

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

different order.

Q I see.

A. Depending upon the reactions on the first questions.

Q You indicated yesterday, I believe, that there were four questions that were asked, four control questions and four crime questions?

A. That's correct.

Q And that you would take about 20 seconds for each question.

A. Probably in that area, 20, 25.

Q So approximately three minutes, it would take about three minutes to run through a series of one questions completely.

A. Generally speaking, you're correct, yes.

Q And what you did was just a three-minute, the three-minute questioning and if you had gone on, you would have taken another total of six minutes to complete the examination of MacNeil.

A. To complete the actual running of the charts, yes.

Q What did you tell MacNeil after the test, after you decided to abort it after just running it through once?

A. I told him I was not going to be able to reach a conclusion.

Q Did you make any comment to him about his truthfulness or not?

A. No, I did not, sir.

Q Did you say yesterday that at the present time as a

1 consequence of the polygraph you ran of Ebsary you had no
2 reason to believe that he was not truthful in his responses to
3 you?

4 A. That I personally have no reason?

5 Q. Yes.

6 A. No, I don't.

7 Q. And in your report, you talked about indications of
8 truthfulness on page 202 under the heading data with
9 respect to Ebsary, there were "indications of truthfulness in
10 Ebsary's polygraph recordings." This is at page 202.

11 A. I have it, go ahead, sir.

12 Q. You have the quotation?

13 A. Yes.

14 Q. And you said that this phrase "indications of truthfulness" is
15 something that you lift out of the New York guidelines that
16 you were given. Am I correct in that?

17 A. No, I don't recall saying that, sir.

18 Q. Where did you get the phrase, "indications of truthfulness"?

19 A. That polygraph report is a form report, the biggest portion of
20 the front page. In other words, it's all set out as general
21 purpose data and then you put the person's name in and the
22 questions that you use, okay?

23 Q. Yes.

24 A. So that that would be the general phrase that was used. Now
25

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

whether I got that from...

Q. Oh, I see.

A. New York or Michigan or Les Holmes, I can't tell you. But it was a form that I adopted and used.

Q. But the printed form that you had would have written on it, "There were indications of truthfulness in Blank's polygraph recordings when he answered blank to the following test questions." And you just filled in "Ebsary" and "no"? Is that what you're saying?

A. That's what I'm saying.

Q. I see. So there was no, "indications of truthfulness" is not a completely positive type of comment on a reporting. I take it, was there another form that you could have used that said something more positive about truthfulness? Or was that just the only form you had?

A. I don't know how you get any more positive than that, sir.

Q. "Indications of truthfulness"?

A. Uh-huh.

Q. I see. You felt that was as positive as you could be, and that's as positive as the form allowed you to be.

A. That's the way the form was set up and that's the way I used it.

Q. Did you ever use any other affirmation of a truthfulness with respect to a person's responses on a polygraph other than the

1 words "Indications of truthfulness"?

2 A. I would say "no" to that.

3 Q. On the same page near, under the heading "General", it says:

4
5 Before taking the examination, both subjects
6 signed forms stating they were taking the test
7 voluntarily.

8 Is this a form again that you get from New York, the wording
9 of the form?

10 A. No, it was not from New York. It was a form that Sergeant
11 Holmes was using.

12 Q. What did the form say?

13 A. Basically that "I, Joe Schmuck, do hereby agree to voluntarily
14 submit to a polygraph test to be given to me by Corporal E. C.
15 Smith, a member of the RCMP."

16 Q. At what point in time do you ask the individual to sign this
17 consent form?

18 A. As soon as he walks into the room.

19 Q. As soon as he walks into the room?

20 A. The procedure was that you advise the subject that he was
21 not compelled, you don't have to take the polygraph test. If
22 there's any reason why he wanted to object to taking it, he
23 should say so. If he had no objections, he was then asked to
24 sign the permission form. No subject would be given a
25 polygraph unless they did.

Q. And you say this is the first thing you say to him when he

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

comes into the room.

A. That's correct, sir, yes.

Q. Did you tell him why he was there or why you were there?

A. I got into that later on in the procedure.

Q. What did you tell him was the reason for his presence there?

A. I asked him to tell me.

Q. All right, did you make any comment on why you were there?

A. Well, certainly, I told him I was a polygraph examiner.

Q. Yes.

A. And would be running a polygraph test.

Q. Would you tell him where you had come from?

A. I don't recall if I did or not.

Q. Would you say, "I'm down from Saskatchewan or Manitoba."

A. I have no idea, sir, I don't know.

Q. Would you tell him about your training?

A. I don't specifically remember but it would be my normal routine to do that.

Q. To tell him about your training.

A. Yes.

Q. Would you tell him that you were there to assist in trying to determine whether or not he was telling the truth?

A. I can't recall telling him that.

Q. On page 203, you said under your remarks with respect to

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

MacNeil, "The subject was interviewed after the examination."
Was Inspector Marshall present when this interview took
place?

A. No, Inspector Marshall was never in the room with me.

Q. "And on a number of occasions, was quite ready to admit that
he was lying and that he was only joking when he said that
Ebsary had stabbed Seale." Did you say anything to him when
he made this comment?

A. No, as I said yesterday, I don't recall that entire conversation.
But as a result of reading my remarks, I would have to
conclude that following the test, we did have a short
conversation and he flip-flopped about whether he was
telling the truth or whether he wasn't.

Q. But if he joked that he was, said that he was only joking when
he said that Ebsary had stabbed Seale, if he had said that to
you, that I'm only joking, would you have not said, "Look it,
this is a pretty serious matter, you know, a lot of people have
gone to a lot of trouble."

A. Oh, absolutely.

Q. You would have.

A. Yes, I would have gone into it further.

Q. Tried to impress upon him the seriousness of this matter.

A. And I assumed that I did that and then he switched back and
said he was telling the truth. And he had done this two or

1 three times.

2 Q I see.

3 A. Bearing in mind I do not remember that conversation in its
4 entirety. I'm going from what I have in my remarks.

5 Q You say that under the circumstances, in your report:
6

7 I do not feel that he is mentally capable of
8 responding to a polygraph examination and for
9 that reason no other tests were administered.

10 Is the underlying reason that he was suffering from the DT's
11 and that's why he was not capable of responding to a
12 polygraph examination or that he was mentally incapable of
13 responding to a polygraph examination?

14 A. As I said yesterday, as I recall my main reason for, as you
15 said, "aborting the examination," was because of his alcohol
16 problem and then I did feel he was in a state of the DT's.

17 Q Yes.

18 A. Yeah.

19 Q And that was a temporary thing, I take it? The following day,
20 he might not have been in the state of the DT's.

21 A. It would depend on what degree, I guess. I'm not a doctor, so
22 I don't know.

23 Q No, but the impression one receives, at least the impression I
24 received when I read it" Under the circumstances, I do not
25 feel that he's mentally capable," was a judgement you were

1 making about Mr. MacNeil for the future, that he would not
2 be mentally capable at any time. Is that the impression that
3 you wished to create?
4

5 A. No, I don't think I intended that impression.

6 Q. I see. You just meant that on that morning, he was not a
7 capable subject.

8 A. When I said "further testing," I meant on that particular day,
9 further examinations.

10 Q. Sure. But as far as his ability to respond properly and for you
11 to run the three tests on another day, you weren't intending
12 to comment on that at all.

13 A. No.

14 Q. As I understand your evidence yesterday, in the control
15 questions, you want the subject to lie so you can gauge the
16 response and then compare that response to the response he
17 makes to the crime questions and compare the difference. Is
18 that essentially the method?

19 A. Basically, that's right. Maybe "lie" is too strong a word but
20 you want him to be concerned about that control question.

21 Q. Yes, so that the idea is to have him under more stress for the
22 control question than for the crime question, the truthful
23 subject.

24 A. That's correct.

25 Q. Yes, but if the subject, if the truthful subject finds the crime

1 question because it is a direct question addressed to a
2 particular circumstance, more stressful in itself than the
3 crime question, will that not destroy the effectiveness of the
4 polygraph examination?
5

6 A. No, if the control question is properly programmed in the
7 pretest interview.

8 Q. Suppose, for example, that MacNeil was extremely anxious
9 about thinking back to an incident that occurred in May of the
10 same year where he saw Seale being stabbed, where he saw
11 Seale bleeding and where he saw Seale running and falling,
12 suppose that just the recollection and remembrance of this in
13 his mind was extremely upsetting to him, coupled with this
14 failure to go to the police directly, would that not color his
15 response to the control question?

16 A. I don't think so, no.

17 Q. Did you have any sense that MacNeil was anxious or upset
18 when you were running the tests on him, because he might
19 not be believed?

20 A. I couldn't look into Mr. MacNeil's mind, sir. I couldn't answer
21 that question. I don't know. No, I don't know what he's
22 feeling because he may not be believed, I couldn't respond to
23 that.

24 Q. This is a man who six months after a crime has been
25 committed, about a month after a person has been sent to jail

1 and convicted of murder comes forward and would it not be
2 reasonable to expect that he would be under a great deal of
3 anxiety and stress as to whether or not his story was now
4 going to be believed?

5 A. Sir, I can't say what was in Mr. MacNeil's mind, I don't know.

6 Q. You spoke about the meeting with Donnie MacNeil in the
7 motel room and Inspector Marshall that occurred later on that
8 afternoon or early that evening?

9 A. Late afternoon or early evening probably, it was supper
10 hour, probably in that area sometime.

11 Q. Do you recall how long that meeting lasted?

12 A. No, I don't, sir.

13 Q. Do you recall anyone else being present at the meeting?

14 A. No, I don't. As far as I recall, there was three of us there.

15 Q. In particular, do you recall Lou Matheson being present, the
16 assistant crown prosecutor?

17 A. I've never met Lou Matheson.

18 Q. I see. You spoke of the double verification test. You said
19 you, after you ran one test on MacNeil, you decided not to run
20 any more tests of that kind but you did run or did do the
21 double verification test.

22 A. That's correct.

23 Q. Would you explain to me again what the double verification
24 test is?
25

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

A. The DVT or double verification test, as it's referred to, is a stimulation test in where a number of pieces of paper are held out to the subject. It's explained to him that you want him to pick out one piece of paper.

Q. You told pieces of paper in your hand, do you?

A. That's correct.

Q. How many pieces of paper would you have?

A. Probably seven, in that area.

Q. And there would be a number written...

A. A different number on the back of each one of them.

Q. From one to seven or any numbers?

A. No, they were a set series of numbers. I changed them from time to time and what series of numbers I was using then I can't really tell you.

Q. Would there be more than one number on one sheet of paper?

A. No.

Q. Just one. So there might be one, three, ten, twenty-five, whatever.

A. That's correct.

Q. Okay, so you have seven pieces of paper and a different number written on each piece of paper.

A. That's correct.

Q. What happens then?

1
2 A. I instruct the subject that I would like him to pick out one
3 number and not tell me what it is.

4 Q. Does he take the piece of paper out of your hand?

5 A. He picks the piece of paper out of hand and, of course, I
6 caution him to keep it down so that I can't see it.

7 Q. Can he see the numbers that are in, that are on the piece of
8 paper in your hand while they're in your hand, or does he
9 only see the numbers after he takes it?

10 A. He only sees the number after he takes it out and turns it
11 over.

12 Q. Okay, so he takes it...

13 A. That's important because you only want him to have that one
14 number.

15 Q. So he takes a piece of paper out of your hand that has a
16 number on it and he looks at it and puts the piece of paper
17 down.

18 A. No, he gives it back and I put it in and shuffle them up.

19 Q. I see.

20 A. And then I explain to him that I'm going to run a polygraph
21 test on that series of numbers and I run a polygraph
22 examination or a polygraph test on each number saying, "Did
23 you pick number so and so." He's instructed to say "no" to
24 each one.

25 Q. You tell him to say "no".

1 A. Right.

2 Q. I see. No matter whether he had picked the number of not.

3 A. In other words, I want him to deny the number he picked
4 out.

5 Q. I see, and so you read through the seven numbers that you
6 now have back in you hand.

7 A. That's correct.

8 Q. And say, "Is this the number?" and you read it out and he
9 says "no" to each one.

10 A. That's right, with all the components and attachments on him
11 and it's a polygraph test. And then the idea is to attempt to
12 pick out on your chart which number he picked out.

13 Q. I see. Because there should be a greater reaction...

14 A. That's correct.

15 Q. To the number that he had, in fact, picked out.

16 A. That's correct.

17 Q. There's a separate reading for each one of the leads, is there?
18 A separate chart and a separate for each one of the leads?

19 A. Oh, yes, each pneumograph tube operates a pen on the chart.
20 The GSR operates a pen which is giving an inked marking and
21 the cardio cuff operates a pen which is giving an inked
22 marking. So there's four separate ones on that particular
23 polygraph.

24 Q. So, theoretically, when the person is responding untruthfully,
25

1 the recording on each one of the leads will be heightened on
2 the untruthful response?

3 A. You should have a greater area of stress at that particular
4 number.

5 Q. When you ran this number test with MacNeil, what were the
6 results?

7 A. I can only assume that I was unable to differentiate between
8 the number he picked and the other ones, because I feel that
9 was part also of my decision to go no further.

10 Q. But you had no distinct recollection of what his responses
11 were.

12 A. No. No, I don't.

13 Q. You said that during the course that you took in New York,
14 there were polygraph tests run and they were run of, I guess,
15 the people in the course, were they?

16 A. That's correct.

17 Q. Like yourself.

18 A. That's correct.

19 Q. How many of those did you run?

20 A. Sir, I can't recall, but there were many. I just don't know.

21 Q. You say "there were many."

22 A. Yes.

23 Q. Like fifty?

24 A. I would be guessing, sir, I can't tell you.
25

1 Q. Were these, these were "trumped up" as you indicated
2 yesterday and, but a person like yourself, be asked to play a
3 part and be the subject while you were questioned by
4 someone else in the course?
5

6 A. Yes, I was polygraphed many times.

7 Q. I see.

8 A. Yes.

9 Q. Who did you pretend to be?

10 A. Whatever the case scenario was.

11 Q. I see. It might have been a murder case.

12 A. Whatever.

13 Q. It might have been something associated with crime.

14 A. Mmm.

15 Q. Did you fool the people that were testing you, fool the
16 polygraph from time to time?

17 A. These tests were done to instruct you on the instrumentation
18 of the polygraph. They were never done to determine
19 whether you were truthful or deceptive to the issue.

20 Q. Of course, you...

21 A. Because they knew you were not.

22 Q. You were deceptive throughout.

23 A. And everybody knew that.

24 Q. You were deceptive in every response you made, I take it, to
25 the crime in the control questions on these...

1
2 A. No, you wouldn't be because the scenarios would be set up
3 whereby you may be a suspect in a murder. I've never
4 murdered anybody in the city of New York, so I wouldn't be
5 deceptive to that question.

6 Q. But were you, were any of the questions, the control or crime
7 questions put to you during your six-week sojourn in New
8 York, were any of them...

9 A. Only in a scenario setting.

10 Q. Yes, all of them would elicit responses that were inaccurate.

11 A. That's correct.

12 Q. And did the...

13 A. Pardon me?

14 Q. Well, were any of the questions that you responded to in the
15 New York test answers that you truthfully could make?

16 A. Oh, I would say "yes", because if they asked me if I murdered
17 a girl on Fifth Avenue, I could say "no".

18 Q. I see.

19 A. If that was one of the scenarios.

20 Q. Did you test the results? Did you test the charts that were
21 made?

22 A. No, the tests weren't run for that purpose.

23 Q. But did you examine the charts that were made?

24 A. You examine the charts to get your question spacing, your
25 chart markings. It was done for instrumentation purposes

1 only.
2

3 Q. But did you examine the charts to see what the responses
4 were?

5 A. You wouldn't examine them from the point of view of trying
6 to determine truthfulness or deception, no.

7 Q. You would not.

8 A. No.

9 Q. I see.

10 A. No.

11 MR. PUGSLEY

12 Thank you, My Lord.

13 MR. MURRAY

14 I have no questions on behalf of William Urquhart.
15

16 9:55 a.m.

17 EXAMINATION BY MR. BARRETT

18 Q. Yes, Mr. Smith. My name is David Barrett. I represent the
19 Estate of Donald C. MacNeil and I just have several questions
20 of you. Mr. Smith, you've indicated in testimony yesterday
21 that upon completion of your polygraph course in 1971 that
22 you were one of only two operators in Canada in the RCMP.
23

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

25 Q. And to your knowledge Al Marshall had never used the

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

services of a polygraph operator prior to this investigation?

A. I think I said that this morning and I think I'm right in saying that.

Q. And to your knowledge had the polygraph ever been used by the RCMP in Nova Scotia prior to this investigation?

A. Look, I can't tell you that. I had Sergeant Holmes in Nova Scotia earlier in 1970 when he was here to give evidence in a murder trial, but it was not a case that was done in Nova Scotia. He may have run some polygraph tests while he was here, but to my knowledge that was the only time a polygraph examiner was in Nova Scotia.

Q. Okay. And you've indicated that...in your evidence yesterday that following the test you ran on the 23rd of November in Sydney that on the 24th you gave a lecture at the Sydney Detachment on the use of the polygraph.

A. That's correct, sir, I did.

Q. So, I take it from that that there was considerable interest by the RCMP in the use of the polygraph in 1971.

A. Oh, yes, there was, sir.

Q. And you've indicated that Donnie MacNeil was interested in the operation of the polygraph when he attended at the Wandlyn Motel.

A. That's correct.

Q. Do you recall whether he requested that you perform a test

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

on him?

A. I don't recall that, but if he had I wouldn't have.

Q. Now, Mr. Smith, you testified that Donnie MacNeil was interested in Donald Marshall submitting to a polygraph examination.

A. After I suggested it to him, yes.

Q. Okay. Do you recall whether he specifically indicated to you or Al Marshall that he would be contacting Donald Marshall's lawyers?

A. Yes, he did.

Q. And do you recall the names of Donald Marshall's lawyers, whether they were mentioned?

A. I don't know if they were mentioned. I know who they were now after the fact, but whether their names were mentioned that night or not I can't tell you.

Q. You don't specifically recall whether Rosenblum or Khattar's names were mentioned on that date.

A. I just basically referred to Mr. Marshall's lawyer.

Q. Were you aware when you attended in Sydney that the Marshall conviction was being appealed by Marshall's lawyer?

A. No, I was not.

Q. Now, the results of the polygraph tests, those are on page 202 of Volume 16, this is addressed to the CIB office in Halifax

1 and it's dated the 30th of November, '71.

2 A. Correct.

3 Q. I note that on page 203 under the list distribution that there's
4 no list there as to who that would be distributed to, who the
5 distribution would be to. Would that normally, would you
6 expect a copy of that to be sent to the Crown, specifically
7 Donnie MacNeil in Sydney?

8 A. I would not assume, no.

9 Q. And you wouldn't expect one to be sent.

10 A. No, I wouldn't think one would be. That's only any opinion
11 on my part.

12 Q. Now, you've testified that you discussed the results of the test
13 and the operation of the machine with Mr. MacNeil in Al...in
14 Al Marshall's room in the Wandlyn.

15 A. Now, that was in...it was in the room that I was staying in.

16 Q. It was in the room with the machine.

17 A. No, it was in the room where I was staying as my motel room.
18 The polygraph tests were run in a room adjacent to that room.
19 They were in the outer room. The polygraph was on the
20 inner room. And during that time I was back and forth from
21 room to room cleaning up my polygraph.

22 Q. You indicated then that you recall Mr. MacNeil being on the
23 telephone when you left the room to clean the machine?

24 A. Yes, I do recall him making a phone call or being on the
25

1 phone.

2
3 Q. Do you recall any discussion prior to your leaving as to who
4 Mr. MacNeil was calling?

5 A. I have no idea, sir.

6 Q. Okay. So, you don't recall any discussions about the Attorney
7 General's Department.

8 A. No, I don't, sir.

9 Q. And upon your return to the room or at some point in time
10 did you...do you recall Al Marshall discussing with Mr.
11 MacNeil who was going to pay for this telephone call?

12 A. No, I don't, sir.

13 Q. Is there any reason that a telephone call made by Mr. MacNeil
14 would stand out in your mind sixteen years later?

15 A. I see no reason why it would, no.

16 Q. So, you can't enlighten us as to why you would remember him
17 making a phone call.

18 A. Nothing other than the fact that he moved from the chair that
19 he was in over to the chesterfield. It was...there was sort of
20 bed-chesterfield type of thing in there and he moved over to
21 that closer to the phone, and I was in and out of that room,
22 and when I come out of the room on one occasion I do recall
23 seeing him on the phone, but who he made the phone call to I
24 don't know.
25

1
2 MR. BARRETT

3 Those would be all my questions, thank-you.

4 MR. CHAIRMAN

5 Mr. Pink.

6 EXAMINATION BY MR. PINK

7 Q. Mr. Smith, my name is Darrel Pink and I represent the
8 Attorney General's Department and I just have a very few
9 questions for you. You indicated yesterday that there were
10 some things that might occur in your pre-test interview that
11 would rule out conducting a test on an individual, is that
12 correct? I think you mentioned...

13 A. Oh, that's very possible, yes, it has happened.

14 Q. And what could those factors be?

15 A. If the person were suffering from some sort of an injury that
16 was causing them pain, if the individual was under some form
17 of medication and for some reason or other had varied on that
18 particular day and not taken the medication, if it was a
19 female subject and she was pregnant. There are many
20 reasons that could...that could led me to the conclusion that
21 we should not run a polygraph test.

22 Q. And in the course of your ten or so years conducting
23 polygraphs with the RCMP did you have that, in fact, occur
24 where you, as a result of a pre-test interview decided not to
25 administer a test?

1

A. Yes.

2

3

Q. I'd like you to focus on drugs and use of drugs. Are they a factor in determining whether or not the test will be administered?

4

5

A. They could well be.

6

7

Q. You indicated yesterday that as part of your pre-test questioning you ask about medication and use of medication.

8

9

A. That's correct, sir.

10

Q. Is there any kind of medication that will preclude administering a test?

11

12

A. Not so much whether they're on medication, what the medication might be, but if they are normally on medication and for some reason or other they're not taking that medication that was prescribed by a doctor.

13

14

15

Q. Would it matter...

16

17

A. That would cause me more concern than just being on medication.

18

19

Q. Okay. Would it matter whether the medication was for a physical disorder or a nervous disorder, would that make any difference?

20

21

22

A. I would be more concerned if the medication was for a mental disorder.

23

24

Q. Yes. Did you ask or do you have any recollection of asking Jimmy MacNeil about medication that he was taking at the

25

1 time?

2 A. I have no recollection, but I certainly would have covered
3 that because, as I say, it was part of the form...

4 Q. That was part of the standard form.

5 A. Background.

6 Q. Mr. MacNeil in his testimony here has indicated to us that he
7 was taking two form of drugs at the time. He indicated that
8 he was taking a drug called Dilantin for nerves and a
9 phenobarb to prevent seizures. Are you familiar with either
10 of those drugs?

11 A. Only in a general way. No, I'm not familiar with them to
12 speak on what effects they may or may not have.

13 Q. Okay. And if he told you at the time that he was taking those
14 drugs would that have caused you any concern?

15 A. As I say, I would be more concerned if he told me he
16 normally took them and for some reason or other he wasn't
17 taking them. In other words, he was not in the normal state
18 that he generally is in.

19 Q. Did you attribute his anxiety, his increasing anxiety and
20 nervousness throughout the interview to drugs or anything
21 else other than alcohol?

22 A. No.

23 Q. Do you have any recollection of trying to make any
24 association between...
25

1 A. No, I don't.

2 Q. ...those two things?

3 A. No, I don't.

4 MR. PINK

5 Thank-you.

6 MR. CHAIRMAN

7 Mr. Ross.

8 MR. ROSS

9 A couple of questions, please, My Lord.

10 EXAMINATION BY MR. ROSS

11 10:06 a.m.

12 Q. Is it fair to say... Sorry, Mr. Smith, my name is Anthony Ross
13 and I'm asking you one or two questions on behalf of Oscar
14 Seale. I take it, sir, that your involvement in this matter
15 related to the circumstances of the death of Sandy Seale

16 A. My involvement in the matter related to the new information
17 that came to light from Mr. MacNeil regarding that particular
18 death, yes.

19 Q. Sure. And the new information related specifically to the
20 death of Sandy Seale.

21 A. Yes, correct.

22 Q. And you understood this when you got involved.

23 A. That's correct, yes.

24 Q. As a matter of fact, have you got Volume 16 handy?
25

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

A. Yes, I have.

Q. Perhaps we can just go through a couple of pages. Please turn to page 195.

A. I have that, sir.

Q. And on page 195 it seems as though is the telex which set in motion your later involvement.

A. That's correct, sir.

Q. And by that time they had already secured an authorization from MacNeil for a polygraph test.

A. Yes, according to that telex you're correct, they had.

Q. And as we go on, page 200.

A. Yes, sir, I have that.

Q. There's a telex dated November the 17th which refers to the records, the criminal record of Roy Ebsary. Did you see that document?

A. No, I've never see that until now.

Q. I see. So, if this document was in existence, if Al Marshall had this he did not disclose it to you.

A. I did not see the document but he may have disclosed the contents of it, but I have no recollection of it.

Q. And if you had...so you don't have any recollection. I wouldn't go any further with that.

A. Pardon me, sir.

Q. If you have no recollection then I will not go any further.

1 A. I have no recollection of it.

2 Q. Thank-you. And I take it that you were aware when you got
3 involved that your involvement was of vital importance to Al
4 Marshall as the investigator.

5 A. I don't know what importance they were putting on it, but it
6 would be important to know if MacNeil or Ebsary were telling
7 the truth. So, I would say in my opinion it was important.

8 Q. Sure.

9 A. Now, what importance they were putting on it I can't say.

10 Q. Yeah, well, I'm going to speak about you. You recognized that
11 you were coming in to do a very important job.

12 A. Oh, absolutely.

13 Q. Sure. And, in spite of your warnings to Al Marshall about the
14 non-con...that it was not one hundred percent conclusive, the
15 results of the polygraph, you recognize that he was relying to
16 a very large degree on your polygraph results. You
17 recognized that, didn't you?

18 A. I can't say how much he...and he never indicated to me how
19 much he was relying on it.

20 Q. I see.

21 A. I don't know.

22 Q. Now, I take it you met Al Marshall in Halifax and you
23 traveled to Halifax with him.

24 A. Correct, sir, I did.
25

1 Q. And after everything had been resolved in Sydney you
2 traveled back to Halifax with him also.

3 A. That's correct.

4 Q. Yeah. And on the way up I take it that you discussed this
5 case substantially, there must have been substantial
6 discussion of this case.

7 A. I do not recall that, sir. I don't know. I can't tell you that.

8 Q. After you had given your results to Al Marshall did you
9 recognize that that was the end of the reinvestigation by him?

10 A. I certainly didn't draw that conclusion, no.

11 Q. Was it your understanding then that there was going to be
12 further investigation by Al Marshall after you had given him
13 your results?

14 A. You're talking on the 23rd.

15 Q. Whenever you finished your exams.

16 A. Yeah. No, I felt there would be more because we were
17 exploring the possibility of doing a polygraph examination on
18 Mr. Marshall, so I certainly...I certainly felt the investigation
19 would be ongoing.

20 Q. So, as far as you were concerned the investigation was
21 incomplete when you left Sydney.

22 A. My part of it at that time was complete. I can't say...I can't
23 speak for Inspector Marshall.

24 Q. But are you suggesting to me that you were just following
25

1 along Inspector Marshall. He was the person really doing the
2 investigation and you were just there to fill in some blanks,
3 do a polygraph and that's it?
4

5 A. No. I was there to do a polygraph test, and polygraph test
6 only.

7 Q. And that was it.

8 A. That was my function. I did not get involved in investigations
9 after 1971 other than from the point of view of polygraph.

10 Q. But in truth and in fact as an RCMP officer you recognized
11 that an important matter was being reinvestigated. You were
12 brought in from Saskatchewan to administer polygraph tests,
13 correct?

14 A. No, not correct. My understanding of Al Marshall's mandate
15 was that he was reviewing this new evidence as it pertained
16 to James MacNeil.

17 Q. I see.

18 A. And that I was there to run polygraph tests on James MacNeil
19 and Roy Ebsary.

20 Q. I see. It was just an assessment of James MacNeil and Roy
21 Ebsary. That was the extent of it as you understood it.

22 A. That's correct, yes.

23 Q. I see.

24 A. Then as a result of their examinations I made a suggestion of
25 Marshall being done.

1 Q. And, did you ever follow up on your suggestion about
2 Marshall being examined?

3 A. I never did, other than the 24th, the following day. But after
4 that, no, because the information I had at that day was that
5 his counsel was refusing the polygraph exam.

6 Q. Yeah. But the bottom line is that at the end when you came
7 back to Halifax you were of the view that the investigation
8 had not been completed but your role had been completed, is
9 that a fair way to put it?

10 A. At that particular time. I certainly advised Inspector
11 Marshall that he need...if he needed me down the road to get
12 in contact.

13 Q. Yes.

14 A. Because I was flying in and out of the Maritimes all the time
15 in those days.

16 Q. Yeah. I appreciate that, but I don't think you answered my
17 question. I'd like to know from you...

18 A. I'm sorry.

19 Q. ...whether or not at that point you considered your
20 involvement terminated subject to recall but that the
21 investigation was still going on.

22 A. I can say yes and no to that. I was satisfied that my
23 involvement was terminated at that time for the present
24 time.
25

MR. SMITH, EXAM. BY MR. ROSS

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

Q. Yes.

A. How far the investigation was going to go on I have no way of saying that, and I had no...I received nothing later on to indicate whether it went further or didn't go further. I don't know.

Q. I see. Thank-you very much, no more questions.

10:15 a.m.

EXAMINATION BY MR. NICHOLAS

Q. Mr. Smith, I represent the interests of the Union of Nova Scotia Indians in these hearings, and my name is Graydon Nicholas. Now, the particular telex that was sent to Regina, if I could refer first of all to you, on page 195 of Volume 16.

A. Yes, sir, I have that.

Q. Did you yourself read that particular telex before you headed to Nova Scotia?

A. Sir, I can't tell you when I first saw that telex. That telex came in on the 17th of November. It came into S Division Headquarters in Regina, and by my notebook I was in another part of the province on that date. Then later that day I left the province for the Province of Alberta.

Q. So, you had no knowledge then whether you would be conducting the polygraph on MacNeil and the possibility of three others?

1 A. I had knowledge that I would be conducting polygraphs tests
2 on two people. At that time I probably did not know their
3 names and I got that information from the telephone call, as
4 you will note in my notes to Al Marshall on the night of the
5 17th. Now again, I am assuming that I was contacted by
6 somebody from S Division Headquarters when I was at
7 Hanley Detachment that day and advised that a telex had
8 come in and that I was to contact Inspector Marshall. Now,
9 whether I called Marshall or Marshall called me I'm a little
10 hazy on that. But by my notes I would say he called me,
11 because I have in "call from Marshall".

12 Q. Now, after you came to Sydney when...were you made aware
13 that the accused in this case, Mr. Marshall, was an Indian?

14 A. At what stage I became aware of that I'm not sure, but I did
15 become aware of it.

16 Q. And, in the training that you undertook in New York City was
17 any of that training related to dealing with people who are
18 minorities?

19 A. Specifically, no.

20 Q. You were not given any courses in psychology then of
21 whether these tests that would be conducted are, in fact,
22 culturally biased or not.

23 A. In the view of the instructors at NTC there were no difference
24 as far as they were concerned in applying a polygraph test to
25

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

a person from various...

Q And you just...

A. ...backgrounds.

Q And you just accepted that. You yourself just accepted that, that instruction you were given.

A. Well, it's the same as any type of training, sir, you accept the training for what it is and then you put it into practise.

Q Well, may I ask you then, you indicated yesterday that your education is limited to grade twelve.

A. Pardon me, sir.

Q Your education is limited to grade twelve.

A. I graduated from grade twelve, yes.

Q May I ask you what courses in psychology you've taken since that time prior to this particular time when you conducted these tests?

A. The only other courses in psychology or that would touch on psychology would have been the polygraph training course itself.

Q And you only took what your instructors told you to be. You never took courses in abnormal psychology.

A. A structured course as such, no.

Q Did you in any of your training in the RCMP or as a result of this particular training study any particular cultures of other peoples formally?

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

A. Formally, no.

Q. So, you wouldn't know then if psychological tests which determine what you use as to what intelligence...to determine intelligence are cultural-free?

A. What was your question again, sir?

Q. Like any test that would be based on measuring a person's intelligence you don't know if they are cultural-free.

A. No, I wouldn't comment on that at all, I don't know.

Q. Were you aware that ...of the educational level of Mr. Marshall, an Indian in this case?

A. No, I have no knowledge of Mr. Marshall's background whatsoever.

Q. And yet you consider him to be a prime candidate for the polygraph.

A. No, I didn't say that.

Q. Why did you recommend that the polygraph be administered to Mr. Marshall?

A. I suggested that his counsel be contacted for that purpose. Now, whether or not he was suitable for a polygraph test would have been something that I would have had to look at later down the road had he agreed.

Q. At the time you were conducting these tests I understand from you that you were sort of in an apprentice program.

A. That's correct, sir.

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

Q. And at what stage in your career after that had you been declared an expert?

A. As I recall, it was...I got my certification...I was in...it would be more correct to call it a certification program as opposed to apprentice program. But I was certified in late '71 or early '82 [sic].

Q. Were you ever declared an expert in court subsequent to your certification then in the polygraph?

A. I have never gone into a court of law where I attended to give my opinion as a polygraphist in court.

Q. Now, your associate, Mr. Holmes, was he also an apprentice at this time or was he a certified polygraph operator?

A. No, he would have been certified at that time.

Q. Now, you indicated that...yesterday that before you conducted any polygraph to an accused, once charges were laid, that this was in violation of the policy of the RCMP. Now, you...

A. Let's just...I hesitate there for a minute. What was that again, now?

Q. Yesterday you indicated that before a test was conducted on an accused once charges were laid that this was contrary to RCMP policy and...

A. Yes, I'd agree with that.

Q. And I assume you contacted Mr. Holmes, as your notes indicate, to get clearance from him so that you could conduct

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

these tests on Mr. Ebsary and Mr. MacNeil.

A. It's something that I would have to assume too, because I don't recall the conversation other than I know I had a conversation because of my notebook.

Q. When did you then attempt to contact Mr. Holmes to conduct the test, the supposed test, on Mr. Marshall?

A. I never did. I contacted Mr. Holmes, Les Holmes, Sergeant Holmes, whatever, on the night of November the 21st, p.m. of November the 21st, as you can see in my notes.

Q. Yes, I realize that.

A. But at that time Marshall's name wasn't even known to me. I, you know, I wasn't discussing Marshall with Holmes. I can definitely say that.

Q. But if I recall in your report that, and basis of your conversation, you have indicated that at one stage you wanted to conduct a test on Mr. Marshall.

A. No, I made a suggestion, sir, to Donnie MacNeil and Al Marshall that they contact Mr. Marshall, Donald Marshall, Jr.'s, lawyer with that purpose in mind.

Q. Assume they would...had said yes would that have been another violation of the RCMP policy?

A. Assuming who had said yes?

Q. That his...Marshall's lawyer had agreed to the test and you, in fact, conducted it.

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

A. Yes, probably would have been, but I would have done it.

Q. Now, these control questions then that you brought with you from Saskatchewan to Nova Scotia at the time, you say you're not aware of whether they are based on culture or on limited educational ability of a particular person being tested. Have you...had you prior to this conducted any tests on Indians?

A. Yes, I had.

Q. And were you concerned at any stage about the standards of those questions?

A. I have never in my experience in polygraph had any difficulty testing native people as opposed to white people. As far as I was concerned there was no difference.

Q. Even though you have a limited understanding of psychology is, the field of psychology.

A. I don't think you have to be a psychologist to to talk to a native person.

Q. How about to conduct the tests?

A. And, I don't think you have to be a psychologist to conduct the polygraph test.

Q. How do you explain to an Indian then who doesn't understand what the word "polygraph" means?

A. If he does not understand English I would not be taking the polygraph test with him. The subject would have to have an understanding of the English language.

1 Q. Have you ever used interpreters in conducting of your tests,
2 Mr. Smith?

3 A. Not with an Indian, no.

4 Q. And most of these tests are they conducted in the facilities of
5 the RCMP or in motel rooms?

6 A. Times have changed greatly, sir, since I started in '71. In '71
7 the bulk of my tests, because of my travel, would have been
8 in motel rooms. '72, '73, probably the same. It was only after
9 the program became more established and polygraph
10 examination rooms were set up in the various RCMP
11 properties that we started using the office facility.

12 Q. So, these forms that an individual had to sign in order to give
13 his consent, are these standard forms then that you were
14 issued, you were given?

15 A. They were definitely a standard form.

16 Q. In your RCMP training prior to this particular one, did you
17 receive any specific courses on relations with Indians, Mr.
18 Smith?

19 A. I have never received any specific courses in that ...in that
20 regard, sir.

21 MR. NICHOLAS

22 I have no further questions, My Lord.
23
24
25

EXAMINATION BY MR. BISSELL

1
2 10:15 a.m.

3
4 Q. Sir, I just have a couple of questions for you. Are you
5 satisfied in your mind that the manner in which you tested
6 both Mr. MacNeil and Mr. Ebsary conformed to the procedure
7 advocated and used by polygraphs throughout the United
8 States and Canada at the time?

9 A. Absolutely, sir.

10 Q. And would that apply to the method that you used to score
11 the responses that you got on the chart analysis sheet?

12 A. Yes, sir.

13 Q. Now, since 1971 I take it there have been some developments
14 in the method of analyzing or scoring the sheets, is that
15 correct?

16 A. There has been a change in the evaluation of polygraph charts
17 with a numerical evaluation system in recent years, yeah.

18 Q. Yeah.

19 A. That are taught at some schools, at some schools not.

20 Q. That wasn't generally used back in 1971.

21 A. No, it definitely was not.

22 Q. Mr. Ruby had some questions of you, as well, concerning the
23 control question and your ability to assess whether or not you
24 had bled the person dry when you were drawing up your
25 control question. And, I guess the question that I had for you

1 on that was could you tell by looking at the sheet, the
2 printout, whether or not there was a reaction to your control
3 questions?

4 A. Oh, certainly.

5 Q. Yeah. So, that I take it would be an aid to you in determining
6 whether or not you had...you had a good control question or
7 questions.

8 A. And if it had been properly introduced, yes.

9 Q. Yes. And just one other question. You were also asked to
10 look at Volume 18 page 25 yesterday. And there is a
11 reference in paragraph 1 on page 25 there, that you were
12 permitted to review your polygraph report of 1971 and other
13 correspondence pertaining to your involvement. Could that
14 other correspondence have been the letter dated February
15 2nd, I believe it is, that you sent to...of 1982 that you sent to
16 Sergeant MacIntyre?

17 A. I would suggest you're quite correct because it's the only
18 other correspondence that I can think of that would apply.

19 MR. BISSELL

20 All right. Those are all the questions I have, thank-you.

21 MR. CHAIRMAN

22 Mr. Petrie.

23 MR. PETRIE

24 No questions.
25

EXAMINATION BY MR. SPICER

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

Q. I just wanted to follow up on a couple of questions you were asked concerning the possibility of testing Jimmy MacNeil again. If I understand what you said in response to some of the questions from my friend, the reason that prohibited you from continuing with MacNeil on that day was your assessment of his condition due to the...due to alcohol. Did you ever discuss with Al Marshall the...your reason for not testing MacNeil?

A. The reason for aborting the...

Q. For aborting the test, yeah.

A. Oh, I'm sure that I did, but the exact words I couldn't tell you.

Q. And would you have indicated to Al Marshall at the time that the reason for aborting the the test was only limited to that day and that perhaps we ought to do him again at some future date?

A. I don't recall having that discussion, sir.

Q. Did you have any discussion like that with Donald C. MacNeil?

A. I have no recollection of it, sir.

Q. So, to sum it up, you ...are you saying to us today that you have no recollection at all of ever having suggested to Al Marshall that you could have tested MacNeil again?

A. I'm saying I have no re...I'm not saying I didn't say that, but I'm saying if I did I don't recall it.

Q. You indicated to us this morning that you were in and out of

MR. SMITH, EXAM. BY MR. SPICER

1 Halifax all the time so it would have been easy for you to do
2 MacNeil again.

3 A. I traveled a lot back to the Maritimes at that stage of my
4 career and I could have gotten involved in this or any other
5 file.

6 Q. Thank-you.

7 A. If they required me.

8 Q. Thank-you.

MR. CHAIRMAN

9
10 Thank-you, Mr. Smith. This may be a good opportunity to
11 recess for a few minutes.

12 TAPE OFF - 10:30 a.m.

13 TAPE ON - 10:54 a.m.

MR. MacDONALD

14
15 Stan Clarke is the next witness, My Lord.

16 MR. STAN CLARKE, duly called and sworn, testified as follows:

MR. MacDONALD

17
18 My Lord, for your benefit and the benefit of counsel I'll be
19 referring the witness to Exhibit 37, 87 sorry, 87, which is the copy
20 of the notes taken from the notebook of Corporal Clarke at the
21 time.

EXAMINATION BY MR. MacDONALD

22
23 Q. Now, sir, your name is Stan Clarke.

24 A. That is correct.

25 Q. And where do you live, Mr. Clarke?

1 A. I live in Nepean, Ontario.

2 Q. That's outside of Ottawa, is it?

3 A. That is correct.

4 Q. Okay. And are you still a member of the RCMP?

5 A. Yes, I am.

6 Q. Just generally, sir, trace for me your career with the RCMP?

7 A. I joined the force in July of '65, received my training in
8 Regina, graduated in '66 and came to Nova Scotia where I
9 was stationed at Sydney, Cape Breton, approximately two
10 months. Went to St. Peter's, was there for approximately one
11 year. Went back to Sydney, on Sydney Highway Patrol. From
12 there I went to Ingonish Beach where I served the summer at
13 Ingonish Beach and then back to Sydney Highway Patrol.
14 Was transferred to Baddeck in the early...late sixties and then
15 from Baddeck in 1972 to Windsor, Nova Scotia, and from
16 Windsor, Nova Scotia, to Liverpool, Nova Scotia, and then
17 transferred from Liverpool to Ottawa.

18 Q. Your present rank.

19 A. Corporal.

20 Q. You took your training in Regina did you say?

21 A. That is correct.

22 Q. Was there anything in the training given to RCMP people
23 respecting keep notebooks?

24 A. That is basically one of the things that they advise that you
25 should keep almost a day-to-day running notes of your daily

- 1 work or...and it basically becomes a member's habit.
2 Sometimes they get a little lax on them, but most members do
3 keep notebooks.
- 4 Q. What type of thing do you record in the notebook?
- 5 A. Basically you record any events that might happen during the
6 day or times that you do certain things.
- 7 Q. Are you issued the notebooks by the force?
- 8 A. The blank notebook, yes, are issued by the force.
- 9 Q. Do you retain possession of them?
- 10 A. Some members do, some members don't.
- 11 Q. Do you personally?
- 12 A. Yes, I do.
- 13 Q. And, do you keep them for a particular period of time?
- 14 A. I have notebooks dating back to my...when I started in the
15 force in Sydney.
- 16 Q. And that has been your practise then is to keep
17 notebooks...keep notes and then to keep the notebook.
- 18 A. That is correct.
- 19 Q. From your experience with other representatives of the force,
20 would you describe your practise as being the norm?
- 21 A. I would say, yes.
- 22 Q. Thank-you. Now, we have had introduced as an exhibit here,
23 Corporal Clarke, a copy of your notebooks in 1971 of June the
24 4th. You have the original book with you, I believe, do you?
- 25 A. Yes, I do.

1 Q. Do you have any independent recollection of the events of
2 June 4th, 1971, that's the day when Donald Marshall, Jr., was
3 arrested?

4 A. I do recall at that time Detectives MacIntyre and Urquhart
5 coming to the Baddeck Detachment and the three of us
6 proceeding to Whycocomagh to arrest Donald Marshall. When
7 I was first contacted about this incident I couldn't recall any
8 date or time or any other reference, but I did recall that
9 incident happening.

10 Q. Okay. And, is your recollection as a result of having reviewed
11 your notes? Did that refresh your memory?

12 A. Yes.

13 Q. And having reviewed your notes you now have some
14 recollection of the events of that day.

15 A. Dealing with my notes, yes.

16 Q. Did you know Detective MacIntyre and Urquhart prior to
17 their arriving in Baddeck that day?

18 A. Yes, I did.

19 Q. And that's from your time in Sydney.

20 A. Yes, basically, knew them as policemen, that's all.

21 Q. Why would the RCMP in Baddeck be involved in the arrest?

22 A. I suppose basically because we knew the area and we may
23 have more or less knew where to find people of the area.

24 Q. Did you know Donald Marshall, Jr.?

25 A. No, I did not.

1 Q. What were you asked or how did you become aware that
2 your services were being requested on that day?

3 A. I don't recall whether there was a call first or whether the
4 detectives arrived at the detachment and presented
5 themselves and requested our assistance in locating Donald
6 Marshall, who was staying at Whycomomagh at a residence
7 there.

8 Q. And tell us, as best you can recall now, the events that took
9 place?

10 A. Well, referring to my notes in particular, the two detectives
11 arrived and requested that I go with them to Whycomomagh
12 to locate Donald Marshall. The Marshall family had been
13 staying at the home of John Googoo, apparently a grandfather,
14 who had died a few weeks before.

15 Q. Did you know Mr. Googoo?

16 A. I basically knew, I believe, where his residence was.

17 Q. All right. Continue on.

18 A. They...here again there was a few details given about a
19 statement that Marshall had given to them, that they had
20 been walking through the park and two men came up to them
21 and stabbed the other fellow in the stomach. "Both men were
22 big and one had white hair." Those are basically the details
23 that transpired at the detachment why we were going down
24 and that there was a warrant for Mr. Marshall's arrest.

25 Q. Now, those notes you've just referred to about a stabbing by

1 two people, was it your understanding that that is the story
2 that Donald Marshall, Jr., had given to the police?

3 A. Yes.

4 Q. And that that story would subsequently prove to be wrong.

5 A. I don't...well, yes, I guess eventually, yes, it would prove to be
6 wrong.

7 Q. Since they had a warrant for his arrest.

8 A. Yes.

9 Q. Okay. Just continue on would you, please?

10 A. We then proceeded to Whycomagh and as we get to
11 Whycomagh we stop and ask some gentlemen on the side of
12 the road where the home of John Googoo was and they
13 pointed in the direction of across the road. We went to that
14 home. There was a woman and children in the yard and
15 Detective MacIntyre asked if Donald was home. They said,
16 "Yes, " and he came out the door. I got out and Detective
17 MacIntyre got out. He asked if Donald had a jacket and to get
18 it. Donald went back into the house and I opened the back
19 door of the police car for him when he come out.

20 Q. Now, do you ...do you have recollection of that happening?

21 A. No.

22 Q. These are fairly comprehensive notes, corporal, would you
23 have made those at the time or very soon after the event?

24 A. These notes I would take by reading them were made right
25 after Detectives MacIntyre, Urquhart and Mr. Marshall left

1 the Baddeck Detachment because I can see going through the
2 notes that they're...later on down there was a mention that
3 before Mr. Marshall got into the car that Detective Urquhart
4 adjusted the bandage on his arm, his arm that had been cut.

5 Q. Donald Marshall's arm.

6 A. Yes.

7 Q. So your...your intention, in any event, when you made these
8 notes was to be very comprehensive.

9 A. As precise as I could, yes.

10 Q. Okay. Let's go on then. As I understand Mr. Marshall was
11 asked if he had a jacket and to go get it. I take it from these
12 notes that there was no mention made at that time why Mr.
13 Marshall was being asked to go in the police car.

14 A. Not that I recall, no.

15 Q. Okay. Just continue on then, please.

16 A. Donald went back into the house, and he must have come
17 back out. I opened the back door of the PC for him. Detective
18 Urquhart was sitting in the rear seat behind the driver.
19 Detective MacIntyre was then talking to what I took to be
20 Donald's father, I guess, and then he got into the car. We
21 drove to the edge of the Highway 105 and at that time
22 Detective MacIntyre gave the police caution and read the
23 warrant to Donald Marshall.

24 Q. Now, what's the police caution mean?

25 A. It was the standard police caution. I can't recall whether it

1 was read from a card, but basically that, "You need not say
2 anything, you have nothing to hope from any promise or
3 threat, anything you do say may be used as evidence."

4 Q. Read that to him and then read the warrant for his arrest.

5 A. He recited the police caution to him. I don't know whether he
6 read it from a card or whatever.

7 Q. Okay.

8 A. And then he read the warrant to him.

9 Q. Okay. Just continue on with your notes then, please.

10 A. At that time there was no reply. Detective Urquhart
11 handcuffed Mr. Marshall in the back seat and we drove to
12 Baddeck.

13 Q. Is that standard practise to handcuff someone?

14 A. Yes, usually. On the way to Baddeck Mr. Marshall was
15 sobbing in the back seat and he had taken his handcuffed
16 hands and put them over his head.

17 Q. Now, that...do you have any vision of that? How could you see
18 that from where you would be?

19 A. I was driving the police vehicle and Mr. Marshall and
20 Detective Urquhart were sitting in the back seat. I think
21 whoever is in the vehicle at the time you're forever watching
22 the rear-view mirror for your own safety more than anything
23 else, no matter who is there or whatever.

24 Q. When you say "put the handcuffed hands over his head",
25 that...

1 A. Well...

2 Q. Describe what that.

3 A. ...a person can be handcuffed and put them up over his head.

4 Q. Okay. And he was sobbing.

5 A. Yes. Definitely.

6 Q. Do you remember that?

7 A. Just from referring to my notes. I don't recall. Just referring
8 to my notes and what they say here.

9 Q. Okay. Just go on then with your notes then.

10 A. Detective MacIntyre told him to sit up and at this time he
11 said, "I did not do it." And basically those were the only
12 words that he spoke in the trip from Whycomagh to
13 Baddeck.

14 Q. "To sit up," the note is that "Sergeant MacIntyre told him to
15 sit up." Do I take it from that that he was somehow crouched
16 over or somehow not sitting up at that stage?

17 A. Well, I would think that he would maybe be slouching in the
18 seat or leaning over with his hands over his head or whatever
19 the case may be and Detective MacIntyre told him to sit up.

20 Q. But you went on to say "those were the only words he spoke"
21 during the time you were with them.

22 A. Those were the only words that he spoke, yes, that I recall.

23 Q. Just continue on and finish your notes if you would, please?

24 A. We arrived back at the office and before Mr. Marshall got into
25 the Sydney City Police vehicle I gave him a thorough search

1 and nothing was found.

2 Q. Would that be standard, as well, for you to do that?

3 A. It probably should have been done actually before he even
4 got into the police vehicle. It wasn't done at that time so I did
5 it before he got into the Sydney Police vehicle to ensure
6 that...because basically there were only two detectives
7 traveling back to Sydney at that time and there wasn't a third
8 party, and one party would be sitting with him usually in the
9 back seat. He's...he has nothing on his person.

10 A. No, he does not.

11 Q. Just go on then.

12 A. As I note here, "Before we left Whycocomagh and just after
13 he got into the car Detective Urquhart helped him bandage
14 his arm where it was cut." Detective MacIntyre took my
15 name and regimental number when he got into the car and
16 drove and they left Baddeck at approximately 8:50 p.m..

17 Q. Just let me go back to the reference to Detective Urquhart.
18 "Helped him bandage his arm." Was there a bandage there to
19 begin with?

20 A. I would say, yes, that there would have been because we
21 didn't take anything or anything, I wouldn't think that there
22 would be anything there to bandage his arm with. He would
23 have to have something on his arm.

24 Q. Okay. And those are the end of your notes. Did you have any
25 other involvement with this particular case?

MR. CLARKE, EXAM. BY MR. MacDONALD

1 A. No, I did not.

2 Q. Were you contacted at any time by any member of the RCMP
3 or other persons to discuss your involvement in the case prior
4 to this hearing?

5 A. No, I was not.

6 Q. And in particular, were you contacted by a Sergeant Wheaton
7 or Corporal Carroll?

8 A. No, I was not.

9 MR. MacDONALD

10 Those are all the questions I have, thank-you.

11

12

EXAMINATION BY MR. RUBY

13 Q. You've been a police officer for how long?

14 A. Approximately twenty-two years.

15 Q. And I take it that noting verbal statements made by
16 someone in custody is a pretty elementary police technique,
17 it's not something that's sophisticated or complicated?

18 A. No.

19 Q. And you would expect, I take it, as an honest police officer to
20 note any statements protesting innocence.

21 A. Yes.

22 Q. And to write them down so that they could be available for
23 trial later if required.

24 A. That's correct.

25 Q. Thank-you.

1 MR. CHAIRMAN

2 Mr. Pugsley. Oh, Mr. Murray.

3 EXAMINATION BY MR. MURRAY

4 Q. Officer, my name is Donald Murray. I represent William
5 Urquhart. The...do you have a recollection today of the police
6 vehicle you were using on June the 4th, 1971?

7 A. I notice in my notes here...I thought I read in my, oh, yes. "PC
8 Vehicle H10-5" which indicates one of our Mounted Police
9 vehicles from Baddeck to Whycomomagh and returned.

10 Q. Do you recall the...that vehicle, that particular vehicle?

11 A. Not as to make. I believe at that time we were using
12 Plymouth vehicle, a marked Plymouth vehicle.

13 Q. In 1971 would you have had a screen between the front and
14 the back seats?

15 A. No, we did not.

16 Q. In 1971 would the back doors have been operable from
17 inside the vehicle?

18 A. Yes, they were.

19 Q. And that would be two good reasons to, in fact, handcuff a
20 suspect when you were transporting him in a police car.

21 A. That is correct.

22 Q. Did Mr. Urquhart at any time get out of the vehicle, sir?

23 A. I do not recall, sir.

24 Q. The sobbing that you describe in your notes. I take it you
25 don't have any independent recollection of that today.