

1 A. No.

2 Q. And Mr. Urquhart would have been in a position to hear that
3 if it had occurred?

4 A. That is correct.

5 Q. Did you use your emergency equipment at any time during
6 the process of going to Whycoocomagh and returning to the
7 Baddeck Detachment?

8 A. I don't recall, but I would say no offhand.

9 MR. MURRAY

10 I have no further questions.

11 MR. CHAIRMAN

12 That's all, thank-you.

13 MR. SPICER

14 Next witness is Mr. Veniot.

15 MR. MILTON VENIOT, duly called and sworn, testified as
16 follows:

17 EXAMINATION BY MR. SPICER

18 Q. Mr. Veniot, you're a member of the Nova Scotia Bar.

19 A. That's correct, Mr. Spicer.

20 Q. You were admitted in November of 1970.

21 A. That's correct.

22 Q. You articulated with the Attorney General's Department having
23 transferred from Kitz Matheson sometime in the fall of 1970.

24 A. That's right. I had about six weeks left on my articles when I
25 transferred in.

1 Q. What was the reason for the transfer?

2 A. Actually I had then Mr. Malachi Jones to congratulate him on
3 his elevation to the bench. He had taught me criminal law in
4 law school and we got to talking and the next thing I knew I
5 was in the Attorney General's Department.

6 Q. And he was gone.

7 A. He was gone.

8 Q. You were admitted to the bar in November and you stayed in
9 the Attorney's General Department until September of 1972
10 when you went off to study in England.

11 A. That's correct, sir.

12 Q. And you were the solicitor in the Attorney General's
13 Department that handled the original Marshall appeal on
14 behalf of the Crown.

15 A. Yes.

16 Q. Could the witness have volumes 1 and 2, please. When you
17 went to the Attorney General's Department in the fall of 1970
18 how many other solicitors were there there?

19 A. I believe there were seven altogether, six of whom were...six
20 of whom were actually in one physical location, and the
21 seventh, I think, Mr. Graham Walker, was on the staff of the
22 Attorney General's Department, but I believe spent all his
23 time at the Department of Finance as a special counsel there.

24 Q. Who was the Attorney General at the time you went?

25 A. For a very brief period of time it was the Honourable Richard

1 Donahue. He was replaced later by Mr.Pace as result of a
2 Provincial general election.

3 Q. And was Mr. Pace the Attorney General at the time of the
4 Marshall appeal?

5 A. I believe so.

6 Q. January of '72.

7 A. Yeah, I think that's correct.

8 Q. Okay. And the Deputy Attorney General in 1971 would have
9 been?

10 A. When I went there it was Innis MacLeod.

11 Q. Yes. And he was followed up by Gordon Coles.

12 A. Yes. Gordon Coles became the Deputy Attorney General, I
13 think, within a few days of my...when it came my time to
14 leave in September of '72. I think he came in the first of the
15 month and I was gone on the 15th.

16 Q. All right. So at the time of the handling of this particular
17 appeal then it would have been Innis MacLeod who would
18 have been the Deputy A.G..

19 A. That's correct.

20 Q. Were there other solicitors who went to the A.G.'s Department
21 at the time you did? In other words were there other
22 articling students around?

23 A. I don't think there were any articling students, but Mr.
24 William MacDonald, who was recently appointed as Deputy
25 Attorney General had been on the prosecution staff of the

1 Attorney General's Department and I believe he went there a
2 couple of weeks before I did. He was a lawyer and had been
3 admitted, I think, the previous year. But I don't think there
4 were any other articling students.

5 Q. When you left in September of 1972 were you still, would
6 you still have been the junior lawyer in the Department?

7 A. I don't think so. I think Martin Herschorn, who is still with
8 the Department, had come on in the meantime.

9 Q. At the time of the handling of this appeal in January of 1972
10 would you have been the junior solicitor in the Department?

11 A. That would be a matter of record. I think I was but I can't
12 remember.

13 Q. You were pretty close to the bottom.

14 A. Yes, no question about that.

15 Q. What about Mr. Anderson? Was he in the Department at the
16 time?

17 A. You're talking about Mr. ...

18 Q. Bob Anderson.

19 A. N. Robert Anderson.

20 Q. Yes.

21 A. Yes. He was the...he was one of the senior solicitors in the
22 Department and later became the director of criminal matters.

23 Q. And he went from being the director of criminal to being
24 County Court Judge.

25 A. That's correct.

- 1 Q. Do you remember about what time that happened?
- 2 A. No, I don't, Mr. Spicer. It was during the time I was there but
3 I can't give you a date.
- 4 Q. You can't recollect whether it was before or after you became
5 involved in this appeal.
- 6 A. No, I can't.
- 7 Q. What was the division of labour in the A.G.'s Department so
8 far as solicitors were concerned?
- 9 A. Well, it changed while I was there. In terms of...the way the
10 civil service worked, I think, in those days, as far as the A.G.'s
11 Department was concerned, was that they ranked the
12 solicitors as, I think there was Solicitor 1, Solicitor 2, Solicitor
13 3, and I think a senior solicitor. And, I'm not sure whether
14 the 3 meant more senior or more junior, but it was that kind
15 of thing. And, the more senior you got the more
16 responsibility you took on. Then, of course, when Mr. Jones
17 was there he was...he had a post that was sort of purpose-
18 built for him. He was known as the Associate Deputy
19 Attorney General, then there was the Deputy Attorney
20 General and then the Attorney General. During the time I was
21 there, and I can't give you a date for this, the office
22 organization in the Attorney General's Department changed to
23 be more in conformity with the other divisions in the civil
24 service and directorships were established.
- 25 Q. Are you able to tell me whether or not these directorships

1 were in effect at the time that you were working on the
2 Marshall appeal?

3 A. I can't remember, Mr. Spicer. They came into effect when I
4 was at the Attorney General's Department but when they
5 came into effect I can't say. But I can say this, that when
6 they were established the people who took over the
7 directorships I don't think had a major change in
8 responsibility. That is, for example, Mr. Anderson, as he then
9 was, was looking after...was the senior fellow looking after
10 criminal matter and he became the director of criminal
11 matters. Mr. Kavanaugh was the man on the civil side and he
12 just carried on with that.

13 Q. Would it be fair to say then that at the time that you were
14 there that it would have been Mr. Anderson who have been
15 the senior lawyer in the Department with expertise in
16 criminal law?

17 A. Yes, that's correct.

18 Q. And would he be the person to whom you would turn if you
19 had questions concernings the criminal side of things?

20 A. It would depend what the questions were, Mr. Spicer. If I
21 had a ...if I had a legal problem, just I wanted to talk to
22 another lawyer I suppose I'd talk to whoever I could get my
23 hands on.

24 Q. Right.

25 A. But if I had a, I guess what you might call, a procedural

1 problem, do I do this or when do I do this or is this for you to
2 do or for me to, I would go to him, yes.

3 Q. So, on the substantive side you might go to another solicitor
4 but on the more policy side would you go to Mr. Anderson?

5 A. Well, I guess it was a chain of command thing. He was senior
6 to me and he would be...he or someone...someone senior to me
7 would give me my work to do. I wasn't sort of running
8 around the office picking up files. Things would be given for
9 me to do and I would report back to the person who gave
10 them to me.

11 Q. Did you have...was there a division of labour in terms of the
12 content of the work that was being handed out to the various
13 solicitors?

14 A. Not so much to me. When I got there, as in every office,
15 there's a bunch of old-dog files around, and they exist in a
16 number of areas of law and I got to foreclose a bunch of
17 crummy old mortgages that had been kicking around for
18 years that nobody else wanted to do. There were some civil
19 cases that hadn't been farmed out that nobody had picked up,
20 which is one of the reasons I went there and then there were
21 these criminal appeals that got passed out to various people
22 in the Department.

23 Q. And did you have any understanding that the criminal
24 appeals were being passed out...was the intention that they
25 would go to people that had some expertise in the criminal

1 area or they were just being farmed out?

2 A. No. I think...we had a, I think, a fairly strong base in criminal
3 law in terms of training and experience. Mr. Anderson had
4 been there for some time. Mr. Gordon Gale, I think, pretty
5 well restricted his activity to appellate * advocacy on the
6 criminal side and Mr. William MacDonald had been or was the
7 son of the former Deputy Attorney General and I guess all his
8 life had had kind of an association with the Department. He
9 also had a great deal of practical prosecuting experience. So,
10 there were lots of people to talk to around the office about
11 criminal matters, and I would be the junior person. And I
12 had, to the extent that the law school was offering at that
13 time, I had taken the criminal courses that were available.

14 Q. And but at that stage of the game was the law school offering
15 clinical law?

16 A. No. It...the Dalhousie Legal Aid system was set up towards
17 the end of my...my time there. I had something to do with it.
18 But it didn't get actually operational, I think, until the year
19 after I left. Mr. Justice Jones conducted an advanced course
20 in criminal procedure, which I took, and apart from the
21 foundation course in criminal law that was the extent of my
22 academic qualification. So I had an interest in the area.

23 Q. When you went to the A.G.'s Department in the fall of 1970
24 and up until the time that you handled this appeal, would you
25 have had any discussions with other people in the

1 department concerning your obligations as Crown counsel?

2 A. Oh, sure, oh, yeah. That was a...that was something that was
3 discussed a fair bit because the Attorney General's
4 Department was kind of a clearing house for prosecutor's
5 problems from around the Province. The police would get in
6 touch with the prosecutors. The prosecutors would write to
7 the Department and look for direction. And there was a
8 practise in the Attorney General's Department that existed
9 long before I got there of this sort of mid-morning meeting
10 when all the lawyers would get together and problems that
11 had come up would be discussed and solutions proposed and
12 so on. So, yeah, there was quite a bit of that.

13 Q. And in those discussions would there be some discussion of
14 the obligations of Crown counsel, vis-a-vis presentation of
15 evidence in the courtroom?

16 A. Oh, yeah, I think we all understood what our duties were.

17 Q. And what did you understand them to be?

18 A. Well, my own understanding, which I guess I would get
19 partly from those discussions and partly from my own
20 readings, is and always has been, that the obligation of a
21 prosecutor is to present the evidence fairly, vigorously but
22 fairly, and to see that justice is done and not to...not to beat it
23 to death looking for a conviction. If the evidence supports it,
24 fine, if it doesn't, fine.

25 Q. What did you understand your obligation to be vis-a-vis

1 disclosure of material to the defence in 1970-71?

2 A. I don't think I ever had any view on it that's different than
3 the view you'll find in the books, which is if you know of
4 evidence that is relevant to a crime then you have to make
5 your...you either have to call that evidence and let the court
6 decide on it or if you don't think the...if you don't think the
7 witness presenting the evidence is credible you make him
8 available to the defence for whatever use they may want
9 to...want to make of it.

10 Q. What about with respect to say statements of witnesses that
11 you might have that you know that the defence doesn't have?

12 A. If they're...if they're relevant I think you have to apply the
13 rule to them and disclose them.

14 Q. And would you disclose them upon request or upon your own
15 volition?

16 A. I think I'd disclose them on my own volition. I have done, I
17 have done.

18 Q. Did you ever have that experience when you were with the
19 A.G.'s Department?

20 A. Well, I did a number of things when I was there, Mr. Spicer.
21 One of the things that I did and in conjunction with William
22 MacDonald was a long series of prosecutions under the Trade
23 Union Act. We also did...we got cases to do, cases to prosecute,
24 that would involve things that were hot politically on a local
25 level. For example, there was a police chief in Antigonish who

1 was charged with a variety of fraud-related offences. We
2 went down to prosecute that. In those days the prosecuting
3 office in Halifax had two part-time prosecutors, and whenever
4 they got short they'd call the local office, rather the central
5 office, and someone, usually me or Bill MacDonald would go
6 up and fill in. So, yeah, I had some experience in that and I
7 think I conducted myself more or less in the fashion I've
8 indicated I should.

9
10 Q. I'm going to ask you two questions concerning concerning the
11 organization of files in the department. If you were working
12 on a file, where physically would that file be kept?

13 A. There was a file room in a vault. I can't even remember what
14 floor it was on and I think the department has moved a
15 couple of times since then, but there was a large file room in
16 which files were kept. I know there were files to which
17 lawyers in the department did not have access and these
18 would be files that would be sensitive for, I think, what you
19 might call "political" or "politically-related reasons" Files that
20 I think involved, I never got into any of them, but files that,
21 they used to have a green stripe on them and they would be
22 RCMP reports on sensitive matters. But the ordinary run of
23 files were either kept in that vault or kept in a filing cabinet
24 at the desk of the secretary who was working or were kept in
25 other filing cabinets around the office.

1 Q. Would you understand that that would be the, that one
2 location would be the only copy of the file that would be in
3 the department?
4

5 A. Yes, I think so. Although some things had two aspects. We
6 had a lawyer's job to do. We used to argue cases and do
7 things like that. But there was also an administration side
8 that I didn't really know very much about and that had to do
9 with the administration of justice in the province and there
10 was an ongoing dialogue between the commanding officer for
11 "H" division and the more senior people in the department. I
12 have the impression, although I can't tell you exactly where I
13 get it, that there were files that were not circulated and were
14 kept away from the ordinary run of files. The files I'm
15 talking about are lawyer-like files.

16 Q. Right, appeals and...

17 A. Appeals cases, that sort of thing.

18 Q. All right, but with respect to those files, would you
19 understand that anything that was relevant to that particular
20 appeal would end up in that file?

21 A. Oh, yeah, sure.

22 Q. Now with respect to a criminal appeal file, what material
23 would you expect to see in that file?

24 A. Well, typically, what would happen is either Gordon Gale or
25 Judge Anderson, as he now is, would come down and say,

1 "Here's the notice of appeal, here's the transcript." And I
2 think in those days, the judges used to do a report to the
3 appeal division, sort of a judge's statements. I know I've seen
4 one and I think it was still going on because I remember
5 seeing one when I moved on to Legal Aid and I think they've
6 discontinued that now. But sometimes that would be
7 enclosed.

8
9 Q. Would that be something you'd understand the judges to do
10 subsequent to the conviction?

11 A. Mmm. Subsequent to the trial. Sometimes it was the crown
12 that was appealing.

13 Q. Sure, right.

14 A. But they used to do a little report to the appeal division and it
15 was kind, when we were on the defence side, we never used
16 to like those because the judge was always sneaking in things
17 that we didn't think should be there.

18 Q. What sorts of things would they be putting in these little
19 statements to the appeal court?

20 A. Well, I think they'd say, you know, this was a difficult trial in
21 this respect or I made a ruling on evidence and I did it for
22 this reason and that kind of thing. I've only ever seen one of
23 them and the commissioners may be more familiar with the
24 practice than I am, but I think at some point that that
25 practice stopped but I remember seeing one when I was with

1 Nova Scotia Legal Aid, which was a time subsequent to this
2 matter.

3
4 Q. When were you with Nova Scotia Legal Aid?

5 A. I joined Nova Scotia Legal Aid in September of 1974 when I
6 returned from studying in England and I stayed with them
7 until July of 1976.

8 Q. So sometime during that period from '74 to '76, that practice
9 was still being continued?

10 A. There was an appeal, and I can't remember the name of it, in
11 which we were kind of grumpy about it, but I don't know
12 when the thing started. I have an idea it might have been the
13 Thompson case, Queen v. Glen Thompson, which went up and
14 down two or three times, and it might have been an old file.
15 But I know that used to be a practice.

16 Q. Would that report to the Appeal Court be in the
17 Prothonotary's file?

18 A. You know something? I don't know. I don't know.

19 Q. You had it, in any event.

20 A. I've seen one, yeah, I've seen one. But I don't think it was in
21 general circulation. I think that might have been a
22 requirement of the Criminal Code, I'm not sure. I can't
23 remember.

24 VOICE

25 Court of Appeal.

1
2 MR. VENOIT

3 A. Yeah, it had some kind of basis. I can say I don't ever
4 remember seeing one in relation to the Marshall case. I'm
5 just telling you that that kind of piece of paper was
6 ordinarily around and I think, in fact, it was a requirement.

7 Q. Was it the practice at the time in '70 and '71 that criminal
8 appeals, regardless of where the original trial had taken
9 place, the appeal would be handled by somebody in the
10 Attorney General's Department in Halifax?

11 A. If it was to the, well, it would be to the Supreme Court en
12 banco, I guess, in those days. If it was to that court, to the
13 Appellate Division of our Supreme Court, it would be dealt
14 with in Halifax.

15 Q. So the original prosecutor would have no further
16 involvement?

17 A. He wouldn't conduct the appeal. Sometimes you'd call him on
18 some point that wasn't clear. But ordinarily it would come in
19 and we'd deal with it.

20 Q. What was the reason for that?

21 A. Well, I think there are a number of reasons. First of all, the
22 court is in Halifax. It doesn't sit elsewhere. So there's that
23 reason. The Attorney General's Department, in those days,
24 probably still does, have probably the best legal library
25 outside of Dalhousie in the province. So it was an excellent

1 source of materials. There was a collection of expertise that
2 had grown up over the years and I think it was probably
3 saving an expense. Those are the things I would think that
4 would justify it. I never heard it challenged, actually.

5
6 Q. In connection with the Marshall case, in particular, how was it
7 that you came to be the person that was assigned to do the
8 appeal?

9 A. Somebody, and I don't know who the somebody was, would
10 have, typically, would have come down to my office and said,
11 "Here's a notice of appeal and here's the factum and here's the
12 appeal book. Now get to work."

13 Q. And at that time, you would have been practicing for about a
14 year, I guess?

15 A. I would have been, I was admitted in November of 1970. So
16 whatever date I got it, it would be measured from that date.
17 I can tell you that I was, I had been in the appeal division on
18 a number of occasions and written factums when I was with,
19 when I articulated at Kitz Matheson and while I was still
20 articling, the balance of my articles at the Attorney General's
21 Department, they were quite short staffed, so you know, we
22 got thrown in pretty well right away.

23 Q. Was the Marshall case the first murder appeal that you had
24 handled?

25 A. I don't know. I was thinking about that this morning. It's

1 certainly not the only one I ever did but I don't know where
2 it fits, Mr. Spicer. I really don't.

3
4 Q. Are you able to tell us whether or not it would have been
5 usual for somebody as junior as you to be handling a murder
6 appeal?

7 A. I know I did them and there was nobody, I never asked
8 anybody whether they had done them or didn't do them. I
9 just did them.

10 Q. You didn't say, "Hey, wait a minute. I haven't been here long.
11 This is a murder appeal."

12 A. No, I never said anything like that. I couldn't wait to get in
13 there, actually.

14 Q. All right, in connection with the Marshall case itself, what
15 material do you recollect you had in your possession when
16 you were working on your factum?

17 A. I don't have any recollection that's specific to the Marshall
18 case. I can't tell you what I would have got typically, which is
19 the, and maybe not all at the same time. I think Mr. Gordon
20 Gale did the initial appearances when the appeal notice would
21 come in and, typically, what I would get would be the
22 package that would enable me to start work and that would
23 consist of a notice of appeal, the transcript and other parts of
24 the record.

25 Q. You have Volume 16. It's over to the left there. If you could

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just turn to page 204.

A. I have that reference, Mr. Spicer.

Q. Right. That is the report of Al Marshall.

A. Yes.

Q. Which I think you subsequently certainly become familiar with.

A. I have never seen it.

Q. Never seen it at all?

A. No.

Q. Our information to date is that that report which is dated December 21st, 1971, and there's some evidence yesterday from a member of the RCMP that he was, had a recollection that that report was forwarded over to the Attorney General's Department. Are you able to tell us whether or not that report was in the file when you working on the Donald Marshall appeal?

A. I can tell you categorically it was not in the file. I never would have forgotten it. I didn't get these kinds of reports. You know, they just didn't come to me. I was the most junior guy in the office, real dog's body. I mean I just wouldn't have gotten this.

Q. But if that report had been in the possession of the Attorney General's Department at the time, do you think that it's the sort of thing that would have gotten into the file on the

1 appeal? And if you want to, if you need some time to go
2 through that before you can answer that question, go ahead.

3
4 A. Well, no, I think I can answer it right away. No, I don't think
5 I would ever have seen this in the appeal file. Now that
6 doesn't mean that someone wouldn't have, if someone had
7 given me the work and they had got the report, I would
8 expect it to be brought to my attention or brought up or
9 something like that. But I guarantee you, that thing was
10 never in my appeal file. But then I wouldn't expect it to be
11 there. I think they would keep those kinds of things in other
12 places.

13 Q. Is it possible that they might keep those over in the green
14 stripe folders?

15 A. They certainly, I don't think, would be floating around the
16 office like this. I think there was, one of the concerns that I
17 heard voiced about police reports and the circulation of police
18 reports is that there had to be some concern about how
19 widely they were circulated because they often contained
20 material that a lot of people would find libellous or
21 scandalous or so on. These people are investigating offences
22 and they're making suppositions and so on. So this stuff
23 would not be floating around the office for anyone to look at.
24 And I don't ever remember seeing it.

25 Q. You would have expected, though, if it had been in the

1 department that it would have been brought to your
2 attention?

3 A. It depends what's in it. I've never read it.

4 Q. All right, well, let's take a minute and just go through it.
5 Basically what it is is it's a report of an RCMP officer, Al
6 Marshall, of his reinvestigation of the Donald Marshall
7 conviction. What he did was he went up to Sydney and he
8 took with him Mr. Smith and there were a couple of
9 polygraph tests administered to Messrs. Ebsary and Jimmy
10 MacNeil. What had happened was that Jimmy MacNeil, who
11 was said to be, at the time went to the police station and said,
12 "Junior Marshall didn't do it. Roy Ebsary did it. I was in the
13 park that night with him." And this is Al Marshall's report on
14 going up to check on that information in Sydney.

15 A. Uh-huh.

16 Q. Given that that what is contained in that report, is that sort of
17 information that you would have expected to be brought to
18 your attention in conducting the Marshall appeal?

19 A. I'm just reading the conclusion, Mr. Spicer, and I guess
20 Subinspector Marshall's report would speak for itself. But as
21 I read the conclusion, they had concluded that MacNeil was
22 not telling the truth and so, I guess I'm speculating, but no, I
23 wouldn't think anyone would bring that to my attention for
24 the purposes of preparing the appeal because they made the
25

1 investigation and the result of the investigation, as I read it
2 here today, would not appear to indicate that any further
3 action was required. So I guess I would just carry on with the
4 appeal and argue it at the appropriate time. That's my feeling
5 on it. It's only that.

6
7 Q. So the fact that it wasn't brought to your attention then
8 doesn't get you anywhere near to the point of saying that it
9 wouldn't, necessarily wouldn't have been in the Attorney
10 General's Department just because it wasn't brought to your
11 attention.

12 A. No, I certainly couldn't say that. If Subinspector Marshall had
13 gone to Sydney and had come back and said, "Look, you
14 know, we think there's been a miscarriage of justice or we
15 think something terrible has happened," I would certainly
16 expect that in that event that someone would step in and say,
17 "Well, maybe we'd better take another look at this and see
18 how it fits into the appeal scenario."

19 Q. Regardless of that conclusion that Al Marshall reached, do you
20 not think that the information contained in that report would
21 have been information that might have been useful, or at
22 least should have been brought to the attention of the
23 solicitors representing Donald Marshall?

24 A. Yeah. I mean that's my own personal opinion, for sure.

25 Q. And if you had this information, would you have brought it

1 to the attention of Mr. Marshall's lawyers?

2
3 A. Yes, I would have. I have to, I guess, answer that question in
4 two stages. Looking at where I was in the Attorney General's
5 Department, if I had got my hands on this, I certainly would
6 have gone to my superior and said, "What do you think we
7 ought to do with this?" And if he took, I guess it would be an
8 ethical position on whether or not you disclose it or don't
9 disclose it, if he took an ethical position that I agreed with,
10 that would be okay. If I disagreed with it, I guess I'd have to
11 make my mind up where I went from there. But if the
12 decision were mine and mine alone, sure, I'd give it to him.

13 Q. But, in any event, that wasn't a report that you had in your
14 possession nor did you have any knowledge of it.

15 A. I've never seen it before today, Mr. Spicer.

16 Q. In preparing the appeal, did you have any discussions with
17 the prosecutor, Donald C. MacNeil, concerning the trial?

18 A. No, I only ever talked to Mr. MacNeil once, maybe twice, in
19 my life and they were about, it was about different cases,
20 other matters. It had nothing to do with Marshall.

21 Q. In Volume 2 that you have there before you.

22 A. Yes, I do.

23 Q. Your factum commences at page 147 of that volume.

24 A. I have that reference, Mr. Spicer.

25 Q. Okay, it seems fairly clear to me from having gone through

1 the factum that in order to prepare it, you had to go fairly
2 carefully through the transcript. I mean there are numerous
3 page references throughout your factum.
4

5 A. Oh, yeah. I guess I've always been fairly thorough that way
6 and, of course, I to a certain extent, I guess, was learning how
7 to do this and I wanted to do it right.

8 Q. So you would have carefully reviewed the trial transcript.

9 A. Oh, for sure, I read it very carefully.

10 Q. Would you have had any discussions with any of the other
11 solicitors in the department as you were working on your
12 factum?

13 A. Yes, I think I would have. As a matter of fact, one was
14 brought to my attention the other day. I don't recall it but I
15 understand Bill MacDonald, who is now the Deputy Attorney
16 General, remembers me asking him to read the factum. Now I
17 would have done that in, as one lawyer to another saying,
18 "Hey, do you think this is okay?" Or, "Do I need to do
19 something else?" But that's, I don't have any personal
20 recollection of that. Bill remembers it but I don't. But, yeah,
21 in the ordinary course of preparing a factum, I would perhaps
22 go down to somebody more senior and say, "Look, have you
23 ever argued this point before? Is the factum still around?
24 Can I have it?" Or, "What do you think of this?" Or, "What's
25 going on with this point?" So that would happen, I think, in

1 almost any appeal that I would handle. I would rely on the
2 experience of people in the department to assist me where I
3 thought I was having difficulty. As well, I think, it's my
4 recollection that I would, I would ask people, whether
5 formally or informally, to take a look at the factum and Bill
6 MacDonald's recollection is consistent with that, some more
7 senior people. I don't know if I ever did it with Mr.
8 Marshall's case, other than as I've mentioned, but it would
9 have been in the normal course of events for me to do that.

10 Q. Do you have any recollection at all as to whether or not there
11 were any particular points in your preparation of the
12 Marshall appeal that concerned you or that you would have
13 discussed with anybody?

14 A. Well, you know, Mr. Spicer, that's something that I've had to
15 consider very carefully in light of everything that's happened
16 but I have to tell you that when I prepared this factum, it
17 was not a tough job. When you looked at it, there were two
18 eyewitnesses who described what had happened in the park.
19 Mr. Marshall told the story that, just looking at it on the
20 record and looking at the two independent eyewitnesses.
21 This is what I had in front of me, you'll appreciate. It seemed
22 to me that a jury properly instructed on those facts could
23 have returned the verdict. So, no, I didn't see anything
24 unusual in the case.
25

1
2 Q. Do you consider that if you had noticed in the transcript that
3 would have constituted an erroneous ruling by the trial judge,
4 that in your view would significantly contribute to the
5 conviction of the accused, you would have had an obligation
6 as crown counsel to raise that in the appeal court?

7 A. I think the answer to that has to be "yes".

8 Q. You seem to be struggling a little bit with it.

9 A. Well, I am because the system that we work in is an
10 adversarial system and I'm dealing with something that I
11 didn't, where I didn't do the trial and all I've got is the record
12 in front of me. And there are things, as you well know, there
13 are things that go on in a trial that are completely lost when
14 they're transmitted to the written page. Mr. Marshall was
15 represented by two senior counsel at the time. They had filed
16 a fairly detailed notice of appeal and had picked the points
17 that they wanted to argue in the factum. I was certainly
18 prepared, I think, to deal with anything but I guess to the
19 extent that I considered that particular point, I would have I
20 think left that for the defence to bring up. And I dealt with, I
21 think I dealt within my factum the matters that Mr.
22 Rosenblum and Mr. Khattar thought were difficulties that
23 arose at the trial and which they thought contributed to a
24 wrongful verdict. And I guess I really didn't put my mind to
25 a complete critical objective analysis of what might have

1 happened if a ruling had gone one way or another. I left
2 that to Mr. Khattar and Mr. Rosenblum. But I think the
3 answer to your question is "yes".

4 Q. So that your mind said at the time, if I understand you
5 correctly, would have been that if Messrs. Khattar and
6 Rosenblum had missed a point and hadn't brought it up in
7 their notice of appeal or in their factum or in their argument
8 at the appeal court, that that was just too bad.

9 A. No, no, I'm not saying that. I want to be quite clear about
10 that. I didn't see anything at the time which would fit into
11 that category. If I had, I would have formed an opinion on it
12 and I believe the opinion I would have formed is the one
13 that you've put to me in your question.

14 Q. Yes.

15 A. Having done that, I think I would have gone and sought some
16 guidance from somebody who is more senior.

17 Q. Are you aware of the testimony that Bruce Archibald gave in
18 Sydney concerning the erroneous ruling made by Mr. Justice
19 Dubinsky concerning exclusion from John Pratico's testimony?

20 A. Yes, I read Professor Archibald's opinion and I read his
21 evidence.

22 Q. And if you look in Volume 1 of the evidence.

23 A. I'm sorry, which page?

24 Q. Volume 1 at page 183.
25

1 A. All right.

2 Q. Through to 187. There is, that's where the discussion takes
3 place concerning the exclusion of questions being asked by
4 Mr. Khattar based on what Mr. Archibald said was an
5 erroneous ruling and significantly contributed to Mr.
6 Marshall's wrongful conviction, the erroneous interpretation
7 being of Section 11 of the Canada Evidence Act.

8 A. Uh-huh.

9 Q. Are you able....

10 A. Yes, I'm sorry, Mr. Spicer.

11 Q. Did you notice that when you went through the transcript in
12 1971?

13 A. Oh, yeah. Yeah, I read it.

14 Q. Did it occur to you that that was a wrong ruling on the part of
15 Mr. Justice Dubinsky?

16 A. I don't really disagree with, then or now, with the way
17 Professor Archibald has categorized the ruling. But I can tell
18 you this, that that ruling by Mr. Justice Dubinsky haunted the
19 courts of this province for years, and you still get it. When
20 you raise a hearsay, when somebody says, "Somebody said,"
21 and you get into a hearsay argument, someone will always get
22 up and say, "Yes, but the party was there or the accused was
23 there," and that for years was treated, by a lot of judges, as
24 being kind of a litmus test for the hearsay rule, for no reason
25

1 that I could ever fathom. I got tired of arguing the point after
2 awhile. You didn't get anywhere. So what Mr. Justice
3 Dubinsky was doing in this trial was something that I had
4 seen done again and again in the courts. That's one point.
5 The second thing is that the effect of that kind of discussion
6 and the effect of Mr. Justice Dubinsky's ruling were something
7 that I had understanding of on one level but which either Mr.
8 Khattar or Mr. Rosenblum would have had a much greater
9 appreciation for, having been there and having made the
10 argument. And if they didn't think it was important enough
11 to turn the trial, then I just didn't direct my mind to it
12 because it was and is my experience that there are many
13 evidentiary rulings made by trial judges with which a lawyer
14 can object and if feels strongly enough about his objection,
15 then he can do something about it. And they chose not to and
16 I guess I just didn't put my mind to it.

17 Q. Okay, my question, though, was whether or not you had
18 noticed the ruling that was made by Mr. Justice Dubinsky?

19 A. Of course I did, Mr. Spicer. I read the whole transcript at the
20 time.

21 Q. And did it occur to you at the time that what was occurring
22 was wrong and, secondly, that as a result of that wrong ruling,
23 Mr. Khattar was not being allowed to ask why Mr. Pratico had
24 said what he had said outside the courtroom, and that that
25

1 might have been important?

2 A. Well, did not...I cant point to that reference in the transcript,
3 but did not Mr. Pratico say that he said what he said because
4 he was scared?

5 Q. Well, that was another problem later on. But at page 187,
6 what he was, what was happening was he wasn't being
7 allowed to continue or state, however.

8 A. Mr. Justice Dubinsky stepped in and kind of took control of
9 that discussion and I don't think that Mr. Khattar got to ask
10 all the questions he wanted to ask, but I think that question, I
11 may be wrong, Mr. Spicer, but I think that question was
12 asked and I think the answer was given and I think it was
13 given in the presence of the jury. Subject to checking the
14 record, that's...And I wouldn't be, if I was Mr. Khattar, and at
15 the trial, I wouldn't be happy with that ruling either. And I
16 think it's obviously wrong but it's one that we used to have to
17 deal with all the time. And if he didn't think it was such a big
18 deal, then I guess I just didn't pay too much attention to it.

19 Q. Okay, and just to sum it up on this point, if you had thought
20 that the erroneous ruling of Mr. Justice Dubinsky was one that
21 could have significantly contributed to the conviction, do you
22 think then that you would have raised it of your own volition
23 in the appeal court?

24 A. Sure, I would.
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Q But it didn't occur to you at the time that that's what it was.

A No, sir.

Q Would you have expected the appeal court to raise it themselves if neither counsel did?

A I think they did.

Q You think they did?

A Yeah, I got into it a bit in my factum. I can't give you the exact page number but the question of Pratico's evidence and Chant's evidence and the evidence that was given by Marshall was the crux of the appeal and that's what we talked about for the two or three hours that we were there. I think we took a half day on it, because I remember talking to Mr. Rosenblum in the hallway about the case. And I believe...Where's my factum, Mr...

Q 147 is the commencement of it.

A Okay.

Q You refer to, at 173, to help you a bit on that, the last paragraph:

With respect to Pratico, it is submitted there was ample evidence tendered to substantiate Pratico's fears.

That was one reference to it and then there's another one. You talk about the point of the testimony, or the comments made outside the courtroom at the bottom of 171 and up onto 172 as well, the first full paragraph on 172.

1 A. Uh-huh.

2 Q.

3 With respect to his statements before and during
4 the trial that affected Marshall, I submit a good
5 and sufficient reason was shown.

6 A. Yeah.

7 Q. Are you able to tell us today what the nature of the
8 discussion with the appeal court was on that point?

9 A. No, I can't remember but I can tell you this, I talked with Mr.
10 Rosenblum outside the courtroom and I do remember this
11 discussion. Mr. Rosenblum was a very senior lawyer and I
12 was a very junior lawyer and hadn't had a lot of experience
13 in tis and I had the very clear impression, Mr. Spicer, that Mr.
14 Rosenblum thought that Donald Marshall had done what he
15 had been convicted of, no question about that. Because he
16 said to me outside in the hallway, you know, "It's a shame
17 that a 17-year-old boy has to do life for this. You know, you
18 just have to appeal these things." And otherwise conveyed to
19 me the impression that he, I won't say he was going through
20 the motions because he was a better man than that, but that
21 he thought that having marshalled his arguments in support
22 of the appeal, he was not going to be successful. And I
23 remember that. So, and I, he did, we had a long argument
24 and I'm certain, although I can give you the detail, that these
25 matters were discussed. Because, again, as you well know,

1 the judges will ask, often ask you about things that you
2 haven't raised directly, particularly in criminal fields and
3 particularly in a case like this.

4 Q. We'll come back to your discussion with Mr. Rosenblum in a
5 minute but I'm just wondering whether you're able to tell us
6 whether in connection with his discussions of the testimony of
7 Pratico and Chant there was any discussion by the appeal
8 court of Mr. Justice Dubinsky's ruling on Section 11 of the
9 Canada Evidence Act?

10 A. I just can't remember, Mr. Spicer.

11 COMMISSIONER POITRAS

12 Mr. Spicer, I just want to draw to your attention the first full
13 paragraph of page 172, where I think Mr. Veniot indicated:

14
15 The witness, that is Mr. Pratico, was in fear of his
16 life being taken if he testified that Marshall had
stabbed Seale.

17 And it's pretty well along the lines of Mr. Dubinsky's, Mr. Justice
18 Dubinsky's reaction to the fear instilled in Pratico's mind I think.

19 MR. SPICER

20 Yeah, and Mr. Veniot, I think, commented on that a couple of
21 minutes ago that that occurs later on in the transcript. And that's
22 why I think it's in there. It's referred to, in fact, at 173 and 174
23 of the transcript.

24 BY MR. SPICER

25 Q. Let's go back to your discussion with Mr. Rosenblum in the

1 hall for a moment.

2 A. Yes, sir.

3 Q. You say you got that impression in the hall. Was there
4 anything in his conduct in the courtroom that gave you the
5 impression that he was just going through the motions?

6 A. No, and I don't want to be misunderstood on that point. It is
7 not my position that Mr. Rosenblum was just going through
8 the motions. Mr. Rosenblum, I thought, had done a good job
9 at going through the transcript and isolating areas where he
10 thought the charge or the evidence would not support the
11 conviction and he argued that very fully in the courtroom.
12 His words to me conveyed the impression that he thought
13 that no matter how well he put the case, he just didn't have
14 enough to bring it home and I'm sure you're familiar with
15 that feeling. But he didn't lie down and roll over.

16 Q. Did you have any sense from the appeal court as to what their
17 attitude was towards the appeal during the hearing?

18 A. No, I can't remember if I did. I probably did but I can't
19 remember. It just didn't seem, Mr. Spicer, it just wasn't that
20 difficult a case, you know, given the record, given the record.

21 Q. Given the two eyewitnesses.

22 A. Given the two eyewitnesses, it just didn't seem like that tough
23 of a case.

24 Q. Did you argue it on your own?
25

1 A. Yes.

2 Q. Was it a long discussion with Mr. Rosenblum in the hall?

3 A. Oh, we were out there for ten minutes, I guess, while their
4 Lordships had a cup of tea or whatever they did.

5 Q. Were you surprised that he'd indicated what he did to you?

6 A. I liked talking to him because he was a nice old man and he
7 was a senior lawyer and it was a serious case. But, you know,
8 there was no mention, for example, of Mr. Pratico going back
9 on his testimony. There was no suggestion from him at all
10 that he felt that Marshall had been wrongfully convicted in
11 the sense that his story was true. He thought that there
12 might have been errors in the, the basis for his appeal was
13 that there had been errors which should have produced a
14 different result. But he never ever said to me, you know,
15 "It's terrible. This is all taken in on perjured testimony," and
16 so on. There was none of that. And I recollected, just because
17 it was one of the first times I had been in the appeal court,
18 but the case itself, I don't think excited either one of us as
19 lawyers. I mean it was a lawyer's argument on a variety of
20 points. But it wasn't a particularly difficult case for either of
21 us.

22 Q. Did Mr. Rosenblum express any view to you in the hall as to
23 whether or not he ever believed Junior Marshall's story?

24 A. No, no, he didn't. He never said anything like that. I got the
25

1 opposite impression. Not from anything Mr. Rosenblum said
2 directly but his words to me conveyed the effect that this
3 thing had to be appealed and if every stone had to be
4 overturned, because the boy was 17 years old and deserved to
5 have the full benefit of whatever succour and comfort the law
6 could give him at the appellate level. But he never ever
7 suggested to me that what you've suggested in your question.

8 Q. Did you have any discussions with Mr. Rosenblum subsequent
9 to the hearing?

10 A. That is the first and only time in my life I ever met Mr.
11 Rosenblum.

12 Q. Did you have any discussions with Mr. Khattar about it at all?

13 A. I have never met Mr. Khattar ever. I know him by name but
14 I've never had the pleasure.

15 Q. Did you participate in or were you aware of the meetings
16 between the members of the RCMP and the senior solicitors in
17 the Attorney General's department?

18 A. I'm aware that there was a regular meeting or series of
19 meetings which took place at regular intervals at which time
20 the various, I guess what you'd call "administration of justice"
21 matters were discussed. The RCMP are the provincial police
22 force, as you know, and they used to get together to discuss
23 God knows what. I mean they came over ever so often but I
24
25

1 11:55 a.m.

2 just wasn't privy to that and no one ever told me what they
3 were talking about.

4 Q. You weren't aware at all of the nature of the discussions that
5 went on?

6 A. No, sir.

7 Q. Did you discuss the Marshall factum and the preparation of it
8 with anybody at all during the course of putting it together?

9 A. I guess I'm relying on Bill MacDonald's recollection that I gave
10 him my factum to read but other than that I have no
11 recollection, that's not to say I didn't. But I just don't
12 remember.

13 Q. You wouldn't have talked to any of the police officers that
14 were involved with it?

15 A. Oh no, nothing like that. No, I worked strictly from the record
16 and from the points that were raised in the notice of appeal.

17 Q. There's just one point my friend brings to my attention. In
18 your view do you think it's a good practice for somebody
19 different to argue the appeal than the person who conducted
20 the trial?

21 A. I guess I've got two positions on that, Mr. Spicer.

22 Q. Don't tell me they're "yes" and "no".

23 A. No, I can see reasons why somebody who does a trial should
24 argue the appeal because they've got more of a feel for it. On
25

1 the other hand, appellate advocacy has got its own
2 peculiarities and I think when people appear in the appeal
3 courts they can, perhaps, bring a greater degree of objectivity
4 to the process and I think the building of experience is useful.
5 So if I had to say should you have the prosecutor, the
6 question really is should you have the prosecutor in to argue
7 the appeal, I'd say do it from Halifax, the way they've always
8 done it.

9
10 Q. Even when, in a case like this when credibility is a critical
11 issue. You really haven't had any opportunity at all to see
12 how those witnesses performed.

13 A. That's right. And, but, I don't know what your experiences
14 have been, but my experiences in trying to move appeal
15 courts around on matters of credibility have met with limited
16 success to say the least. They're very tough on that and I
17 wouldn't see that as a general proposition as being valid in
18 this case. Well, we all know what happened.

19 Q. I'll give you one more example from this particular case.
20 Don't you think it might have made a difference, the appeal of
21 this particular case, if you had been the person sitting in the
22 court room and had experienced the backing and forthing on
23 this Section 11 of the Canada Evidence Act and the effect that
24 that had.

25 A. I guess looking at it in the abstract I don't have a problem

1 with that proposition, but you see the people, the people with
2 most to lose, who have been in the court room while that was
3 being discussed didn't think it was a big deal so, I, you know,
4 I didn't pay too much attention to it 'cause they didn't. I
5 don't think it got discussed.

6 MR. SPICER

7 Thank you.

8 EXAMINATION BY MR. RUBY

9 Q Mr. Veniot, how long exactly had you been at the Department
10 at the time when you were handed the Marshall file?

11 A. I can tell you when I went there, Mr. Ruby. I went there
12 about the 15th of September of 1970 and, what's the date on
13 the factum? It's not dated, oh, January 24th, '72, and I guess
14 we argued the appeal sometime in, it would be fairly close to
15 that because it's the respondent's factum so I guess I would
16 have been there likely 14 or 15 months.

17 Q During that period how did your time break down into
18 criminal law versus civil law in a rough way?

19 A. I tried to get as much criminal law exposure as I could, Mr.
20 Ruby. That's one of the reasons I went to the Attorney
21 General's Department. I had an interest in it during law
22 school. I'd talked about it often with Mr. Justice Jones who
23 was then teaching at the law school, and thought it was
24 something I'd like to do more of and that was one of the
25

1 reasons I went there. So I kind of courted the work. In
2 terms of how much I would have done, I probably would
3 have spent half my time at it.

4 Q. And of the work that you did, what percentage, if you can
5 help me in a rough way, would have been trial versus
6 appellate work.

7 A. During that period?

8 Q. During that 14 months.

9 A. Almost, I would think, Mr. Ruby, if we weren't such dogs'
10 bodies, I'm really afraid to put a number on it but when it
11 was there I did it. I, it probably took me longer to do it than
12 it would take other people, but I'd really hesitate to put a
13 number of in. I looked for it and I did it when I could.

14 Q. I have no conception, you see, of how the work load in the
15 Attorney General's office is broken down. Is it mostly trial
16 work or mostly appellate work and was your work
17 occasionally in the appellate courts or were you usually in the
18 appellate courts.

19 A. I would say when you're just talking about the criminal stuff,
20 I would spend more of my time working on and in the appeal
21 court than I would working on or in the trial court because
22 what used to happen was you'd get a call at noon saying, you
23 know, "We've got a case up here at 2 o'clock and there's no
24 prosecutor, can you get up here." So, you wouldn't have time
25

1 to prepare, you'd just go up and do it and then you'd go home.
2 And to the extent that I did criminal work there it would be, I
3 wouldn't always go to court, I mean I helped people with
4 factums and things like that, but I would say I probably spent
5 about half my time on criminal matters.

6 Q. In terms of having carriage of appellate matters, can you give
7 me an idea of how many appeals you would have handled
8 before this?

9 A. I can't, sir, I'm sorry.

10 Q. Are we talking about two or about 200.

11 A. Oh, probably it would be a lot closer to two than 200 but I
12 can't give you a number.

13 Q. Would there have been any murder cases prior to this?

14 A. This is not the only murder appeal I've ever argued but I
15 didn't do a lot of them and I don't know whether this was the
16 first one or not. I guess that would be a matter of record
17 somewhere but I just don't have those kinds of records and
18 my recollection isn't good enough to help you any further, I'm
19 sorry.

20 Q. Looking at it now, would you think it wise to give a murder
21 appeal even when it appeared on its face to you to be simple,
22 perhaps it appeared on its face to be simple because you only
23 had been out one year. Was it wise to give it to somebody
24 with that little experience in criminal appellate work of a
25

1 serious nature?

2
3 A. I'd have to say to no to that, and when I say that, Mr. Ruby,
4 I'm looking at the record not at what's happened. On the
5 record it was a fairly simple case. You had two versions of a
6 series of events that led to a death and that is a pretty
7 garden-variety situation in relation to murder cases and it
8 just didn't seem that difficult then or now, looking only at the
9 record, believe me I'm well aware of everything that's
10 happened since then, but what I was given to work with was
11 not a difficult proposition for a properly trained lawyer which
12 I felt I was.

13 Q. I'm thinking, for example, that someone with more experience
14 than you in criminal appellate work might have said, "Look,
15 this Section 11 ruling of Malachi Jones, and his reputation
16 notwithstanding, is just nonsense and it's time for the appeal
17 courts to rule on it and I'm going to raise it." Do you agree
18 with me?

19 A. Is your question whether someone with more experience than
20 me would have taken that position?

21 Q. Might well have been much more ready to take that position
22 than you with one year experience and very limited
23 experience for an appellate court.

24 A. No, I don't agree with that at all. I, and I guess I have to say
25 this, Mr. Ruby. If I think something's right, I do it. I don't

1 care who knows about it or what the cost is. And I, looking
2 through that Department I think if anybody would have
3 raised it it would have been me.

4 Q. I'm not questioning the integrity...

5 A. I hate to give you an answer like that...Well, I think it is a
6 question...

7 Q. What I'm suggesting is...

8 A. I think it is a question about my integrity and I think I have
9 to answer it in that way.

10 Q. No, let me explain it, then, because I want myself clear.

11 You're saying that you looked at that Section 11 stuff and you
12 said, if I recollect your evidence, for years this was the rule in
13 the Province. Lots of trial judges were doing it and I got fed
14 up of arguing it. But obviously you hadn't gone before an
15 appeal court and I'm wondering whether someone with more
16 experience might have said, "Well, it's time for me to raise
17 this before the Court of Appeal so we can get this silly rule
18 changed.

19 A. Well, I think we're getting two things confused here, Mr.
20 Ruby. I, when I said that it had been around for years in the
21 courts, I was really referring to experience that was
22 subsequent, my subsequent experience and a part of my
23 previous experience. I just know that judges used to say that
24 all the time and some of them still do. On the question of
25

1 whether I put my mind, whether someone more experienced
2 than me looking at the transcript would have put their mind
3 to the possible effect of a violation of Section 11 of the Canada
4 Evidence Act and would have done so at a greater effect than
5 me, the answer to that is no. I don't think so. I know the
6 people in the Department and I think I know my own
7 temperament well enough to believe that if I had formed the
8 conclusion in that appeal that that was a serious matter, I
9 would have raised it.

10 Q. And you thought Malachi, sorry that Mr. Justice...

11 A. Mr. Justice Dubinsky?

12 Q. Mr. Justice Dubinsky was right on a Section 11 ruling?

13 A. No, he was wrong.

14 Q. You knew he was wrong.

15 A. Yeah.

16 Q. But you didn't raise it.

17 A. No.

18 Q. And you think no one else would have raised it...

19 A. I can't speak for someone else Mr. Ruby.

20 Q. I thought you were.

21 A. I would have raised it, you know, if I thought it was a serious
22 issue. I think I'm guided, and entitled to be guided, as to
23 what is and what isn't a serious issue particularly in a ruling
24 on an evidentiary point in the circumstances of this case by
25

1 the attitude taken by defence counsel, who were certainly far
2 more senior to me. They just didn't make anything of it to
3 speak of. Maybe they should have.

4 Q. You say "guided", what does that mean?

5 A. I beg your pardon?

6 Q. You say you're entitled to be guided by the way they look. Do
7 you not have your own independent...

8 A. Oh yeah, I have my own independent...

9 Q. Role?

10 A. View, but I also have my job to do. And it's the, you know,
11 we're both officers of the court. I mean if someone goes
12 through a murder trial and they have a problem with this or
13 that, then the place for that is a notice for appeal. If
14 something jumps out at me as (a) being wrong, and (b) being
15 directly linked to some kind of manifest miscarriage of justice
16 then, sure, there's an obligation on me to bring it forward and
17 if I'd felt that way about it I would have made a bigger deal
18 of it. I didn't mention it in the factum, it was discussed, but
19 no one seemed to think that much turned on that at the time.
20 And when you look at the circumstances of the case as the
21 appeal court had it, and as I had it to work with, you basically
22 had a question of credibility as between Mr. Marshall's
23 account of what happened and the accounts of two
24 independent observers. And on that evidence, I thought that
25

1 a jury properly instructed could convict. I just didn't think
2 much turned on it.

3 Q. You agree that you have an independent duty, yes?

4 A. Oh, yes.

5 Q. But you say that that duty is to be guided by the fact that
6 counsel for defence didn't choose to raise it, correct? That's
7 your language.

8 A. I think I'd have to pay some attention to that.

9 Q. Ah, that's what I'm trying to get at.

10 A. Yeah.

11 Q. You're not bound by that.

12 A. I certainly am not.

13 Q. While you paid some attention you should make up your own
14 mind on that.

15 A. I believe so. And I think I did.

16 Q. The, there's one area that confuses me a bit in your testimony
17 if I could. I think you say that if you got that report, because
18 it contains evidence, albeit characterized as untruthful, that is,
19 favourable to the defence, you would have, without question,
20 have notified the defence of it, correct?

21 A. If the decision were mine, sure.

22 Q. Because it contains evidence that's favourable to the defence
23 even though it's characterized as untruthful.

24 A. They may want to do something with it. I mean I regard
25

1 that, Mr. Ruby, as an extension of the rule that says, "Where
2 you know there is relevant evidence and you're not satisfied
3 as to its credibility, you don't sit on it and hide it under a
4 bush. You give it to the defence so that they may make what
5 they choose of it."

6 Q. I agree. And yet I thought I heard you say, you tell me if I'm
7 correct, that you would not expect somebody else in the
8 Department who got this report to pass it on to you. How are
9 those two things consistent?

10 A. Oh, that answer has to do with my level of responsibility. I
11 mean I just didn't feel that the RCMP in, I guess, what you
12 might call administration of justice matters, it just was a
13 country mile outside what I was, the duties I was entrusted
14 with at the time. I just wouldn't be asked. It's a factual
15 matter, not a matter of philosophy or opinion.

16 Q. You would have expected someone to pass it directly on to
17 defence counsel without going through you or notifying you?

18 A. I would have expected that to be passed on to defence
19 counsel. Whether or not I would be notified, I guess, would
20 depend on what defence counsel did with it. I mean if they
21 just ignored it and kept on with their appeal, I guess, there
22 wouldn't be any need to notify me.

23 Q. But surely no one is going to, in your Department, notify
24 defence counsel directly on a case you were working on and
25

1 of what you have (carriage?), without telling you they have
2 done so.

3 A. Oh, I think they probably would have.
4

5 Q. They would have to do, correct?

6 A. I don't think they'd have to, I think they probably would just
7 as a matter of courtesy and convenience.

8 Q. You would, certainly, if you were in the position?

9 A. Yeah, yeah. I, were I in that position I'd say put the brakes
10 on 'til we see what these fellows are going to with this, if
11 anything.

12 Q. The last area I want to ask you about is this. You say you
13 don't remember when Mr. Anderson left his job.

14 A. No, I don't.

15 Q. But let me see if you remember whether, when he did leave,
16 whatever date that was, did he get appointed one day and
17 leave the next, or did he hang about and take care of his files,
18 did he stay on for a while. Do you recall and can you help
19 me?

20 A. My recollection is that the appointment was announced and
21 that within a couple of days or so he was gone. And by that I
22 guess I mean not a long time.

23 Q. Can you help me within the meaning of a "couple of days or
24 so". Are we talking about a week, three days, five days, or
25 you just aren't sure.

1 A. Well, I'm not sure when he found out about his appointment.
2 I know when I found out about it...

3 Q. You read about it in the paper, I assume.

4 A. That sort of thing. Or I came into the office and somebody
5 said, "Hey, Bob Anderson's been appointed to the County
6 Court." And he was gone, I think, fairly shortly after that.
7 Within a couple of days of that.

8 MR. RUBY

9 Thank you.

10 EXAMINATION BY MR. PUGSLEY

11 Q. Just a few questions, My Lord, thank you. Mr. Veniot, our
12 understanding is that someone in the Attorney General's
13 Department made a decision to request the RCMP to carry out
14 some re-investigation as a consequence of Jimmy MacNeil
15 coming forward early in November of 1971.

16 A. Yes.

17 Q. Apparently there's going to be a disparity of evidence as to
18 whether or not the report ever got to the Attorney General's
19 Department.

20 A. Um-hmm.

21 Q. But if it did get to the Attorney General's Department and it
22 was the report that you were referred to this morning, is that
23 the kind of report that should have been passed on to defence
24 counsel, in your opinion.
25

1 A. In my opinion, yes.

2 Q. Yes. So that if that report came to the AG's office it should
3 have been given to defence counsel.

4 A. Yes.

5 Q. Yes. If the, someone in the Attorney General's Department
6 has requested the report and never got the report, does it
7 stand to reason that a request should have come from the
8 AG's office to the RCMP as to where the report was?

9 A. You would expect so.

10 Q. Yes.

11 MR. PUGSLEY

12 Thank you. That's all the questions I have.

13 MR. MURRAY

14 No questions on behalf of William Urquhart.

15 12:12 p.m.

16 EXAMINATION BY MR. BARRETT

17 Q. Just one brief question. Mr. Veniot, my name is David Barrett
18 and I represent the Estate of Donald C. MacNeil. I understand
19 you had no discussions with Mr. MacNeil.

20 A. No, I never did, sir.

21 Q. Was that standard procedure at that time not to contact a
22 prosecutor?

23 A. Not unless you had a question for him. I mean it might
24 or might not happen in a particular case. There wasn't any
25

1 policy on it. If you needed to know something about the case
2 or something wasn't clear for the record you'd give him a call.

3 Q. But he would have been available had you wished to talk to
4 him.

5 A. Oh, I'm sure he would have been. As a matter of fact, I did
6 speak to him on at least one other, and possibly two other
7 occasions on other matters. Once he called up looking for
8 advice on a particular, sort of technical kind of problem, as
9 what might be the appropriate charge for something and then
10 he called up one day to grouse about something and I think I
11 was the only person in the office so I got to listen to him. But
12 apart from that I've never spoken to the man, never met him.

13 MR. BARRETT

14 Thank you, those are all my questions.

15 EXAMINATION BY MR. BISSELL

16 Q. Just a couple of very brief questions, Mr. Veniot. You
17 indicated that you didn't contact Mr. MacNeil when you were
18 preparing your factum or preparing for the appeal. There
19 was another prosecutor who was involved assisting Mr.
20 MacNeil, Mr., he's now a judge, Lou Matheson. Did
21 you contact Mr. Matheson at any time?

22 A. No, Mr. Bissell, I did not.

23 Q. If you had contacted Mr. Matheson, and we now know that he
24 was aware of what occurred after the conviction when Mr.
25

1 MacNeil came forward, would you expect Mr. Matheson, or
2 any prosecutor to have filled you in about that incident?

3 A. Give me a little more detail. What are you saying about...
4

5 Q. About a new witness coming forward and giving a statement
6 that contradicted, or suggested that there had been a
7 wrongful conviction.

8 A. Well, I would certainly expect that, prosecutors just didn't,
9 nobody called me then, Mr. Bissell, except Gordon Gale or Bob
10 Anderson to tell me to do something. I mean I was just the
11 junior guy in the office. I would expect that any prosecutor
12 who got his hands on materials like that would communicate
13 it at once up through the chain of command in the Attorney
14 General's Department for some kind of advice or action or
15 something like that. But I just wouldn't have been the guy
16 who got the call. I would have been the last person to hear
17 about it.

18 Q. And would that be the kind of information that if you had it
19 as a prosecutor you would feel that it should be disclosed to
20 defence?

21 A. Absolutely.

22 MR. BISSELL

23 That's fine. Those are all the questions I have.

24 12:15 p.m.
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EXAMINATION BY MR. ROSS

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Q. Mr. Veniot, my name is Anthony Ross. I'd ask you one or two questions. When you were speaking with Mr. Rosenblum do you recall whether or not anything was discussed with respect to Sandy Seale?

A. No.

Q. Nothing at all?

A. Well, I don't remember anything being discussed. I mean obviously Mr. Seale was the entire background for the conversation because it was a murder appeal but nobody, I don't ever remember Mr. Rosenblum saying anything to me or even mentioning the name.

Q. No discussion as to the circumstances of the death to the best of your recollection.

A. No.

Q. There's one other thing, sir. Your evidence is that you were aware that there were meetings from time to time between the RCMP and people from the Attorney General's Department.

A. Oh yes, that was a regularly scheduled event. I'm not quite sure what the frequency, but it happened.

Q. Would it surprise you if no records were kept of such meetings?

A. No.

1 Q. It would not surprise you?

2 A. No.

3 Q. What did you understand the purpose of these meetings to
4 be?

5 A. I'd be guessing. I never got to go to one. But I presume that
6 they discussed matters which were of interest in the
7 administration of justice in the Province. I mean it, the
8 meetings might generate paper or they might be occasioned
9 by paper generated before them but I guess what I thought
10 they were was Chief Superintendent (Mudge?), or whoever
11 happened to be commanding "H" Division would come over
12 and they'd sort of chew the fat for an hour or two and iron
13 out any problems or bring their agenda up-to-date, but I
14 never was at one, Mr. Ross.

15 Q. And these related to the administration of justice as opposed
16 to specific files.

17 A. Yes. But I don't mean to imply by that that they were talking
18 about things that they were afraid to write down. I just don't
19 think they were those kinds of meetings.

20 Q. Yes, but if, in fact, a specific file was sufficiently important
21 and a report similar to that which appears in Volume 16, the
22 report by Sub-Inspector Marshall, if that had been discussed
23 there ought to have been some record of that, wouldn't you
24 think? It addresses a specific file and a specific request for
25

1 RCMP involvement.

2 A. Gosh, Mr. Ross, I just don't know.

3 MR. ROSS

4 Thank you very much, those are my questions, Mr. Veniot.

5 CHAIRMAN

6 Mr. Nicholas?

7 MR. NICHOLAS

8 No, no questions.

9 12:18 p.m.

10 EXAMINATION BY MR. PINK

11 Q. Mr. Veniot, just a couple of things to follow up. When the
12 assignment was made to you to do the appeal, this one or any
13 other, what specific information would you have before you
14 in terms of preparing for that appeal?

15 A. Well, I would get the, I guess I would get the record upon
16 which the appeal would be argued, and the constituents of
17 that record would be the, well I guess the appeal books which
18 include the notice of appeal, the exhibits, insofar as they were
19 capable of being reproduced on paper, the transcript. I can't
20 think of anything else in a criminal matter.

21 Q. And prior to preparation of your appeal would you have the
22 factum of the appellant if you're representing the
23 respondent?

24 A. If I was responding, yes.

25

1 Q. And it's apparent from your factum, because you make
2 reference to the factum of the appellant, that you had it in
3 this particular case.

4 A. Yes.

5 Q. Could you just identify for us the lawyers in the Department
6 at that time who were involved in criminal matters?

7 A. Well, I think the most senior person was Mr. Anderson and
8 next senior to him would Mr. Gordon Gale and next senior to
9 him would be Bill MacDonald and then after Bill MacDonald
10 would come myself. There was quite a gap between Gordon
11 Gale and Bill MacDonald. Bill MacDonald and I, more or less,
12 were contemporary.

13 Q. The Deputy Attorney General was Innis MacLeod.

14 A. That's correct.

15 Q. And what kind of contact did you have with Mr. MacLeod
16 regarding either criminal matters or the other matters that
17 you were involved in?

18 A. Well, there was a, I think I mentioned this before in my
19 evidence. There was a habit, or a tradition, that all the
20 lawyers would gather in the Deputy Attorney General's office
21 every morning at 10:30 and we'd talk about things that
22 Crown attorneys talk about, be it a Constitutional matter,
23 about this or about some kind of case that was of interest and
24 we would beat around the bush for different opinions on
25

1 different things and this was an everyday thing. It was a
2 tradition, I guess.

3 Q. So the six of you got together in the Deputy's office and that's
4 what...

5 A. Yup.

6 Q. Was the Attorney General present at those meetings?

7 A. Once in a while. Yeah, he'd come in and, if he was around.

8 Q. And was there any difference when Mr. Pace was the
9 Attorney General as when was Mr. Donahoe was the Attorney
10 General?

11 A. I didn't notice any. A few less Cape Breton jokes but, Mr.
12 MacLeod was from Cape Breton. But apart from that it was
13 just an everyday kind of thing.

14 Q. Was there any system in the office in which you reviewed
15 opinions done by others or opinions that were prepared in the
16 office were circulated?

17 A. We had a, I don't know what they do now, Mr. Pink, but in
18 those days we just had an office of six people. The
19 correspondence and what I might call the lawyers' opinions,
20 were all collected on onionskin and they were circulated with
21 a list and you were supposed to read them and tick it off.
22 Most of the time I did and I think most of the other fellows
23 did, too.

24 Q. In other words, the opinions that were given to other
25

1 Government departments ...

2 A. That's right.

3 Q. That sort of thing was circulated...

4 A. Yeah.

5 Q. Within the office. What were the resources that were
6 available to you in terms of legal research, of previous
7 opinions, that sort of thing?

8 A. The, to the extent that the preparation of an opinion consisted
9 of, or dealt with an Act of the Legislature of the Province of
10 Nova Scotia, there was a very large filing cabinet and they
11 just had them all there and you had opinions from Deputies
12 Attorney General going back to the 1800s and so if you got
13 something in the Adoption Act you could pull that file out and
14 there it would be. And, in addition to that the library
15 resources were certainly adequate, there was a good supply
16 of reports and the learned literature and I thought it was
17 probably the best law library in town outside the law school's
18 collection.

19 Q. Can you give the Commission any sense of the attitude or
20 ethos that was in the Department at that time regarding legal
21 issues, I'm talking particularly about criminal issues, that
22 were to be argued?

23 A. Yeah, I think I can. Innis MacLeod was, I guess, the last of a
24 line of very good lawyers who worked in the, I don't mean
25

1 that there are no good lawyers there now, but there was a
2 collection of people who'd been in the Attorney General's
3 Department over a long period of time. Some of the names, I
4 guess, won't mean much to anybody here now because
5 they're retired or died, but John A.Y. MacDonald, who was a
6 former Deputy Attorney General, had a national reputation as
7 a Constitutional expert. Charlie Beazley, Henry Muggah.
8 These guys were just good lawyers. And they were Crown
9 people. It's kind of hard, I know, to get that across, but they
10 were concerned, more concerned I think with being right than
11 being successful, if I can put it that way. They always wanted
12 to know what the answer to the problem was. And very little
13 of "Beat the other side at any cost." And that's what these,
14 sort of coffee clatches were all about and they had, that's, I
15 think that's why they had the good library and they had this
16 kind of dedication to the public service. That's kind of,
17 sounds kind of corny but it's, you could sense it when you
18 were there and I liked it.

19
20 Q. And can you give any sense of how that commitment to being
21 right as opposed to winning translated into instructions that
22 were given to you or the way you, yourself, dealt with cases
23 that you were involved in?

24 A. Well, I guess I'd say that, Mr. Pink that they respected your
25 professional integrity and ability. I got instruction where

1 they thought I needed it. I don't think I was ever asked to do
2 something that I objected to. And I found I was listened to
3 on points where I had something to say. I don't know if that
4 answers your question or not. I enjoyed my time there.

5 Q. The, I'll just conclude with this. The commitment, as you put
6 it to being right, how did that translate into positions that
7 taken by the Attorney General's Department in particular
8 cases?

9 A. Well, I guess if you're talking about criminal stuff and
10 criminal appeals, I think if there was merit in a point I think,
11 I was taught to acknowledge it, not try to beat a dead horse.
12 I think the other, in terms of particulars, and we all knew, I
13 think, what the duty of the prosecutor was, and if you forgot
14 it you were reminded of it.

15 Q. And was that general attitude, was it translated to
16 prosecutors through the prosecutorial ranks?

17 A. The prosecutors in those days, I guess this is a matter of
18 record, it's all subject to being corrected by someone pointing
19 out differently, the prosecutors in those days, even in the City
20 of Halifax, were part-time practitioners. For example, when I
21 was there I think there were 15 Crown prosecutors, or
22 something like that, in the Halifax office now, operating in the
23 courts. When I was there there was John Connors, who was
24 blind and Elmer MacDonald, who came down in the afternoon.
25

1
2 And Bill MacDonald worked for them for a while and then we
3 used to get called up. But that was what would happen
4 around, like full-time prosecuting officers were a rarity in
5 Nova Scotia. They were almost always private practitioners
6 and I guess with that kind of a mix you're going to get a kind
7 of a checkerboard pattern in terms of your question. I mean
8 I think some of them were good and I think some of them
9 were bad. And I don't think there was any pattern.

10 MR. PINK

11 Thank you.

12 EXAMINATION BY THE CHAIRMAN

13 Q. Mr. Veniot, if I could address your, direct your attention to
14 page 173 of Volume 2.

15 A. I have that reference, sir.

16 Q. The last paragraph. You say,

17 With respect to Pratico, it is submitted that there
18 was ample evidence tendered to substantiate
19 Pratico's fears.

20 You were referring there to the, I presume, to the discussion
21 which had transpired outside the court room.

22 A. I think there was, and I guess the record would show this, but
23 I believe there's material on the record where some names,
24 the names were mentioned. Mr. Christmas, I think, and Mr.
25 Paul's name were mentioned on the record. And also the

1 name of Donald Marshall, Sr. ...

2 Q Yes. No, I'm not, I'm only, just want to be certain that your
3 reference there relates to the evidence that
4 the trial judge ruled to be inadmissible.

5 A. Gosh, I'm not sure that it does. Let me...

6 Q Because you say, "...the trial judge refused to permit these
7 questions." Do you see that?

8 A. Yes. All right.

9 Q The last sentence is the one that I, that attracts my attention.
10 You say,

11
12 The Appeal Division has the entire record before
13 it and comes to its conclusion on the whole of the
14 record.

15 Is that sort of a basket-thing you'd say to the Court of Appeal.

16 "You have it all, do what you like with it." Or, "Read it all."

17 A. That argument, sir, was made in relation to two specific
18 grounds of appeal which are of the basket nature, if I may
19 say so. They deal with the weight of the evidence and its
20 sufficiency. And it was against those two grounds, grounds
21 four and five, four and eight, in a notice of appeal, that I think
22 those remarks have to be weighed. I think that's the way I
23 would have intended the meaning to convey by that sentence.
24 That the Court of Appeal can look at the whole of the
25 evidence and the whole of the record and make its own

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determination as to whether or not the evidence is capable of
meeting the reasonable doubt test and whether it's of
sufficient weight to make a conviction safe in the
circumstances and not make it unsafe to convict on such
evidence. That was the way I intended it.

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MR. SPICER

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Scared testimony, I think, at page 206 of Volume 1 is the
reference to being scared by Pratico.

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CHAIRMAN

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206?

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MR. SPICER

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206 of Volume 1. About halfway down the page. 19 and 20.

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COMMISSIONER POITRAS

25
You mean as opposed to pages 163 to 165 of the case? As
referred to the in (section?)...

MR. SPICER

And that's voir dire at that point, 163 to 165 and then...

A. I guess what I was referring to was the remark by Mr. Justice
Dubinsky at the bottom of page 208 following a discussion
that appears to have taken place at the bench between
counsel and Mr. Justice Dubinsky mentioned the name Tom
Christmas, then Mr. Rosenblum mentioned the name Mary
Theresa Paul and the witness said Arty Paul and I guess
that's what I was referring to. I think that was said in the

MR. VENIOT, EXAM. BY MR. CHAIRMAN

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presence of the jury.

CHAIRMAN

Thank you very much.

WITNESS WITHDREW

ADJOURNMENT - 12:30 - 2 p.m.

