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

Volume 39

Held: January 13, 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
Orsborn: 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 & Mr. Al Pringle: Counsel for the R.C.M.P.
and 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 H. Wildsmith and Graydon Nicholas: Counsel for
the Union of Nova Scotia Indians

Mr. E. Anthony Ross: Counsel for Oscar N. Seale

Mr. E. Anthony Ross and Jeremy Gay: Counsel for the Black
United Front

Court Reporting: Margaret E. Graham, OCR, RPR

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INDEX - VOLUME 39

Witness

Donald Burgess

Examination by Mr. Pugsley.....	7176
Examination by Mr. Pink.....	7186
Examination by Mr. Ross.....	7200
Examination by Mr. Wildsmith.....	7204
Examination by Mr. Pringle.....	7215
Examination by Mr. Spicer.....	7219

Eugene Cole

Examination by Mr. MacDonald.....	7225
Examination by Mr. Ruby.....	7234
Examination by Mr. Pugsley.....	7240

Melinda MacLean

Examination by Mr. Spicer.....	7241
Examination by Mr. Pugsley.....	7266
Examination by Mr. Barrett.....	7272
Examination by Mr. Saunders.....	7279
Examination by Mr. Ross.....	7292
Examination by Mr. Wildsmith.....	7297

Innis MacLeod

Examination by Mr. MacDonald.....	7313
Examination by Ms. Derrick.....	7352
Examination by Mr. Pugsley.....	7356
Examination by Mr. Bissell.....	7358

EXHIBIT LIST

<u>Exhibit</u>	<u>Description</u>	<u>Page</u>	<u>Volume</u>
92	Four pages of Mr. Smith's handwritten	6833	37
93	Mr. Smith's record of polygraph examinations	6833	37
94	Copy of Donald L. Burgess' job description dated 1983	7134	38
95	A-5 with related notes and RCMP correspondence	7150	38
96	Copies of pages of Sgt. Cole's notebook	7225	39
97	Copy of Melinda MacLean's file	7243	39

1 JANUARY 12, 1988 - 9:30 a.m.

2 BURGESS, DONALD L., still sworn, testified as follows:

3 EXAMINATION BY MR.. PUGSLEY

4 Q. Mr. Burgess, you first became a reader when? What year?

5 A. '58 or '59, sir.

6 Q. And how did one become a reader in 1958 or 1959? Did you
7 apply for the position?

8 A. No, just a vacancy come open and I was asked if I would be
9 interested and I said I would.

10 Q. At the time you were doing what? Highway work in Halifax?

11 A. No, sir, I was in Antigonish detachment.

12 Q. Doing highway work?

13 A. No, detachment work, sir.

14 Q. Detachment work right. Did you take any training at all
15 before you became a reader?

16 A. No, sir.

17 Q. And then at some point in time you received these guidelines
18 that were introduced yesterday as Exhibit #94.

19 A. Yes, they were published, they were in a book that...

20 Q. Do you have a manual, do you?

21 A. Yes.

22 Q. Were those guidelines in existence when you became a
23 reader?

24 A. I'm not sure, sir.
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Q. But if they did not, at some time prior to 1971, they came into existence and you read them.

A. The date is on the bottom of that, sir.

Q. The date on the bottom of this is 1983.

A. Well, they could have been out before '71 and they may not have. I'm not sure.

Q. Was there anything in these written guidelines that was different than your understanding of what your job was?

A. I'm not sure, sir.

Q. Well, in particular, Exhibit #94 under Function E, Item 3, "Checking that investigational reports are thorough and that they contain information needed to base a charge on or support a decision relevant to the charge." Was that, did you understand that was always one of your functions?

A. Yes, sir.

Q. You said yesterday that you have, as I understand it, you have no recollection of seeing Inspector Marshall's report in your capacity as a reader in 1971.

A. Yes, sir.

Q. Have you made any attempt to ask questions of those who were readers in 1971 whether any one of them had, in fact, read Marshall's report?

A. There's nobody else around now that was here then, sir.

Q. I see. You indicated, I think yesterday, there were five or six

1 readers in '71?

2 A. Yes, sir.

3 Q. Has any attempt been made to determine whether or not
4 those who were there in 1971, even though they may have
5 left the force, whether they in fact had read Marshall's
6 report?

7 A. Not by me, sir.

8 Q. Or by anyone else?

9 A. Well, I wouldn't say that. Now maybe Inspector Murphy or
10 Corporal Grant did.

11 Q. I wonder if we can at some point in time, our friends could
12 advise us as to whether or not that examination had been
13 made and, if so, what results it produced?

14 MR. PRINGLE

15 Certainly we've checked for persons with respect to the telex that
16 exists in Volume 16, page 90, and I've had no success there,
17 obviously. And I think some inquiries have been made to find
18 out where some of those readers are and we'll make further
19 inquiries.

20 MR. PUGSLEY

21 Thank you.

22 BY MR. PUGSLEY

23 Q. Turning to the report, which is found at page 204, and you
24 had an opportunity of reading this again last night, did you?
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A. Yes, I did, sir.

Q. If you would turn to page 204, which is the first page of Inspector Marshall's report. The report after the introductory comments in the first three paragraphs appears to be divided into work that he performed on or about the 17th of November until at page 207 he goes into work that was performed on the 23rd of November. Is that your understanding?

A. Yes, sir.

Q. And if one checks Eugene Smith's polygraph report, it's evident that he carried out that polygraph on the 23rd of November and that certainly is the inference one takes from Paragraph 8 of page 207 of Marshall's report.

A. Yes, sir.

Q. So that the work that was carried out up until Paragraph 8 was work carried out before Smith arrived on the scene.

A. I would assume that, sir, yes.

Q. That's the way I took as well.

A. Yeah.

Q. And under the heading "November 17, 1971," Paragraph 4, Inspector Marshall writes:

From the outset of our investigation, it was apparent the use of a polygraph would be extremely useful.

Did you note that comment?

1 A. Yes, sir.

2 Q. And then if one goes to page 205, apparently on or about the
3 17th of November and before Eugene Smith arrived on the
4 scene, Inspector Marshall, as he says in the second sentence
5 in Paragraph 5:

6 We interviewed MacNeil and it was obvious by
7 his demeanour and speech that he has
8 subnormal intelligence and is slightly mental.

9 When you read that for the first time, did it occur to you that
10 perhaps MacNeil would not be an appropriate subject for the
11 polygraph in view of those comments?

12 A. Yes, it did, sir.

13 Q. Yes, and indeed, when you read that, did it occur to you that
14 the comment that Inspector Marshall said that the use of the
15 polygraph would be extremely useful was not a comment that
16 applied to MacNeil?

17 MR. PRINGLE

18 Well, with respect, this witness is not trained in polygraph use
19 and I think he's testified to that effect and those questions were
20 put to the polygraph operator when he was on the stand the last
21 few days and I fail to see how it's relevant to put them to this
22 witness, who had detachment training and reading, reader
23 training.

24 MR. CHAIRMAN

25 Well, he has told us his, that under the terms of his employment,

1 he is required to check that investigational reports are thorough
2 and that they contain the information needed to base a charge or
3 support a decision.

4 MR. PRINGLE

5 Yes, My Lord.

6 MR. CHAIRMAN

7 It seems to me that the observation, and I take that as an
8 observation of this witness in his capacity as a reader, not as an
9 expert.

10 MR. PRINGLE

11 Fine, My Lord.

12 MR. CHAIRMAN

13 In that field.

14 MR. PUGSLEY

15 That's all I intended, My Lord, from the question.

16 BY MR. PUGSLEY

17 Q. So that Inspector Marshall's comments of the use of the
18 polygraph would be extremely useful would not appear to
19 apply to MacNeil.

20 A. Well, I really don't know what he meant, sir, but I see, we
21 usu...they usually leave it up to the polygraph examiner to
22 decide if a person is...

23 Q. Yes. A couple of sentences later in Paragraph 5, Inspector
24 Marshall goes on to say:
25

1
2 Because we were certain that MacNeil's account
3 of the altercation insofar as it concerned Ebsary
4 allegedly stabbing Marshall was a figment of his
5 imagination, we did not immediately question
6 him or take any further action with respect to
7 MacNeil at this time.

8 In view of that conclusion reached by Marshall before Smith
9 came on the scene some six days later, did you not consider it
10 rather odd that they proceeded with a polygraph examination
11 when Marshall had concluded that the stabbing was a figment
12 of his imagination?

13 MR. PRINGLE

14 Well, again, I hate to rise, but this witness had not read that
15 report in 1971.

16 MR. CHAIRMAN

17 It's not dated. Because I understand from this witness
18 he has not read the report or seen it until recently.

19 MR. PUGSLEY

20 Quite so, My Lord.

21 MR. CHAIRMAN

22 What you're looking for now, I gather is his opinion as a reader,
23 having read this last night and probably on one or two occasions
24 recently.

25 MR. PUGSLEY

That is all that I'm seeking, My Lord. That's quite right.

BY MR. PUGSLEY

1 Q I'll just rephrase the question, Mr. Burgess. Do you presently
2 not consider that it was unusual for the polygraph to proceed
3 at all in view of Marshall's conclusion that this story was just
4 a figment of MacNeil's imagination?

5 A. Yeah, I assume he was just trying to confirm his reasoning or
6 his thoughts.

7 Q. Through the polygraph.

8 A. Yes, sir.

9 Q. I see.

10 MR. CHAIRMAN

11 While you're still on that point, Mr. Pugsley. Mr. Burgess, if you
12 had been given this report in, when it was prepared by Inspector
13 Marshall in December '71, as it come to you in the normal
14 course of events as a reader, would you have made any
15 notations or made any inquiries with reference to the comments
16 of Inspector Marshall concerning the, what he, the demeanour and
17 level of intelligence of MacNeil?

18 MR. BURGESS

19 A. It's awful hard to say 16 years after the fact when now I
20 know that Marshall wasn't guilty and that witnesses lied as to
21 what I would think back in those days. I really don't know,
22 sir.

23 MR. CHAIRMAN

24 Well, forget the Marshall report for a second, Inspector Marshall's
25

1 report. In your capacity as a reader and now as a very senior
2 reader, is it part of your responsibility when reading a report of
3 this kind to query or point out any loose ends or ask for any
4 explanations that you feel are necessary to make the report
5 complete?

6 MR. BURGESS

7 A. Yes, it is, sir, but as far as polygraph, it's pretty well left to
8 the polygraph operator as to whether or not the person is
9 suitable for a polygraph examination. It's not something that
10 we go back and say...

11 BY MR. PUGSLEY

12 Q. In your capacity as a reader, did you not consider it unusual
13 that Inspector Marshall thought so little of MacNeil that he
14 didn't even question him or take a statement from him? A
15 man who says he saw another man commit a murder,
16 Inspector Marshall didn't even bother taking a statement
17 from him. Did you not consider that unusual?

18 A. Well, reading the report now, I do.

19 Q. Yes, quite. And if you had read this report in 1971 or if this
20 report had just come across your desk today, would you not
21 point this out as being a loose end or something unusual in
22 writing to the author of the report?

23 A. It's awful hard to say, sir. I know what happened in this case
24 now and it's difficult to read and figure out what you would
25

1 do in similar circumstances. I'm really trying to help and I'm
2 trying to be as honest as I can. I'm not trying to evade the
3 question. I just don't know.
4

5 Q I appreciate that. I guess my astonishment is that a man goes
6 down to Sydney to investigate or review a matter where an
7 independent witness comes forward and says, "The man who
8 was convicted of murder didn't do it all. Another man did it.
9 I was with the man in the park who did it." And that
10 investigator thinks so little of this independent witness that
11 he does not even question him, except to interview him,
12 whatever that may mean. But he does not even question him
13 or take...

14 MR. PRINGLE

15 I'm not sure if this is a statement of argument or a question.

16 MR. PUGSLEY

17 Well, it's a...

18 MR. CHAIRMAN

19 Well, it's a combination of both, I think, to help this witness
20 understand what Mr. Pugsley is leading to.

21 MR. PUGSLEY

22 Thank you, My Lord.

23 BY MR. PUGSLEY

24 Q Don't you think that's rather extraordinary?

25 A. I don't know, sir.

1 Q You say you don't or don't know?

2 A I do not know, no.

3 Q You do not know, I see, okay. Except for any
4 communications you've had with your solicitor, has this
5 report been the subject of discussion among the readers who
6 are presently employed by the RCMP in Halifax?

7 A Not in the recent past, anyway, sir.

8 Q You haven't reviewed this matter with the other readers and
9 say, "Look it, here's a report that a reader should make a
10 comment on if it was presented to him afresh."

11 A No, I didn't, sir.

12 Q Or, to the best of your knowledge, that has not been done in
13 the department.

14 A I don't know, sir. I just, I didn't find out I was coming until
15 yesterday.

16 MR. PUGSLEY

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

18 MR. MURRAY

19 No questions on behalf of William Urquhart.

20 MR. BARRETT

21 No questions.

22
23 EXAMINATION BY MR. PINK

24 Q Sergeant Burgess, my name is Darrel Pink and I represent the
25

1 Attorney General's Department and I'd just like to ask you
2 some questions about the procedures relating to transmittal
3 of reports to the A.G.'s department. What type of reports
4 were forwarded to the Attorney General's Department in the
5 late sixties, early seventies?

6 A. Anything of interest that, newsworthy, anything that the
7 Attorney General's Department may have been contacted on,
8 all fatal accidents, any murders, of course, or serious rapes,
9 more serious types of offences.

10 Q. At that time, the RCMP was doing serious crime investigation
11 in all of the province except the cities of Halifax/Dartmouth
12 and Sydney, am I correct?

13 A. That's correct.

14 Q. And serious crime investigations would include murder,
15 attempted murder, rape, attempted rape, and that type of
16 offence?

17 A. Yes, sir.

18 Q. So all those reports would go to the Attorney General's
19 Department.

20 A. Yes, except now there's always the odd one that is reported
21 that when we get it, it sounds like a serious offence when it
22 begins and it turns out that there was nothing to it, we
23 wouldn't bother sending that over to them.

24 Q. Sure. So reports regarding serious offences and serious crime
25

1 investigation went to the Attorney General's Department.

2 What other types of reports went to the Attorney General's
3 Department?

4 A. It's hard for me to recall then but I'm just saying what goes
5 now and that's just what it says. All fatal accidents go, for
6 example. Anything that the Attorney General's Department
7 has been contacted on and they request us to look into it.
8 Anything that's newsworthy that may, or come before the
9 house or anything like this, we send that over.

10 Q. And now you're talking about criminal matters.

11 A. Oh, yes, that's all we deal with.

12 Q. And you had no involvement and the readers had no
13 involvement in the administrative matters of the RCMP.

14 A. No, sir.

15 Q. Was there any decision-making as to what report went to the
16 Attorney General's Department. In other words, did
17 somebody say, "Send this report over or don't send this one."

18 A. Yes, well, the individual reader would make that decision or if
19 he couldn't, he would go to his superior. There was a staff
20 sergeant in charge. And if he couldn't, he would go to the
21 criminal investigation branch officer.

22 Q. Were relations with the Attorney General's Department solely
23 through "H" Division in Halifax or would the individual
24 subdivisions also communicate with the A.G.'s Department?
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A. No, all through...

Q. All through...

A. 99% through, there may be something, but...

Q. So when; you were a reader...

A. But basically through "H" Division.

Q. So when you were a reader in Truro, you didn't communicate directly with the Attorney General's Department.

A. No, sir.

Q. That would all be funnelled through "H" Division.

A. Yes, sir.

Q. And was there any policy or criteria which determined what report went? You said that somebody made a decision but what was the basis for that decision?

A. Just the contents of the report, sir.

Q. Now you told Mr. Pugsley yesterday afternoon that there was a review process, and I just didn't quite follow you. Let's assume that there is a report completed by an investigator, a sergeant in the field who is carrying out an investigation. What happens to that report?

A. Now things have changed a bit over the years. You want me to back...

Q. I'd like to try and...

A. To '71?

Q. I'd like to try as best you can to identify it in 1971?

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A. Well, the investigator would, a lot of times was a constable or a corporal with a sergeant in charge or staff sergeant in charge, it depends on the size of the detachment. The investigator would put in his report the man in charge of the detachment or unit would review it and then he would, I'm not sure if subdivision readers were there at that time or not. But if they were, they'd send it into the subdivision. They would review it and then send it in to division headquarters.

Q. And when they sent it to division headquarters, who was it directed to?

A. Well, the officer in charge, the criminal investigation branch officer.

Q. So it would go to the C.I.B. officer.

A. Not really.

Q. Okay, that's my next question. In reality, although it was directed to the C.I.B. officer, whose desk did it land on?

A. Okay, first it would come into our records management section. They keep all our files. And if it was a new report, they would open a file and then send it up to the readers. If it was an old report, they'd put the new correspondence on the file and send it up to the readers.

Q. The record department, that was also in the RCMP headquarters on Hollis Street?

A. Yes, sir.

1 Q. So it would come to them, they would send it to the readers.

2 A. Yes, sir.

3 Q. And what did the readers do with it?

4 A. Well, they would read it to see, peruse it to see if it followed
5 policy and if the investigation was done properly.

6 Q. Assume that it did not comply with the policy in terms of, in
7 the thoroughness or the content didn't quite comply with
8 your rules and regulations, what was done with it then?

9 A. A memo was written back to the unit asking why it wasn't
10 done or if it was done and they forget to mention or...

11 Q. That memo was generated by the reader?

12 A. Yes, sir.

13 Q. Without the C.I.B. officer seeing it?

14 A. It would be under his signature and would go into him for
15 signature.

16 Q. Okay, but he probably wouldn't review the report. He would
17 reply on the reader to do that.

18 A. Yes, except in very serious cases or if we asked a lot of
19 questions, he would likely go through the report to make sure
20 that what we said was right. I really don't know.

21 Q. So if it wasn't satisfactory, that memo was generated and it
22 was sent back to the field?

23 A. Yes, sir.

24 Q. They would follow up, I would assume they would follow up
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and then it would come, follow the same route back?

A. Yes, sir.

Q. Now assume that the report is satisfactory, it does comply with the policies and procedures, what then happens to it?

A. Well, if it was one that supposed to go to another department, we would prepare correspondence and send it or we would stamp it, like we send stuff to the Motor Vehicle Branch on accidents. We used to send correspondence to the Liquor Commission. We don't very often now. And, of course, a lot of material goes to the Attorney General's Department.

Q. The procedures that you've just described for me as they were in place in 1971, have they changed appreciably between then and now?

A. The way we handle the files are done a little different, yes.

Q. Again, focusing on the 1971 period, the stamp that you've referred to, can you explain that to us? What was that stamp and where would it go?

A. Well, for example, the Attorney General, it would say "Deputy Attorney General forwarded" and then a place for the date and then a place at the bottom for the officer in charge's signature.

Q. And did that go on the original and on all the copies or just on a copy?

A. No, it would go on the copy that was going to the Attorney

1
2 General Department, and if that's the only place it was going,
3 we'd put the other copy on the file and put a stamp on the
4 file, on the file copy.

5 Q. So the filed copy, the copy that remained in the permanent
6 record of the RCMP would show the distribution of that
7 report.

8 A. Yes, sir.

9 Q. And if it went to the Motor Vehicle Branch or the Attorney
10 General's Department or the Liquor Commission, it would
11 show that on the original in your file.

12 A. Yes, sir.

13 Q. And it was the readers who were responsible for actually
14 doing that.

15 A. Yes, sir.

16 Q. Now you also said yesterday, I believe, that sometimes it
17 wouldn't just be the stamp, there would sometimes be a
18 memo or a covering letter generated.

19 A. Yes, sir.

20 Q. What determined when it was just a stamp or when a letter
21 was generated?

22 A. Routine matters were more, were stamped more often than
23 something that was a little more serious than, when it was a
24 little more serious, we usually put a little forwarding memo
25 on with a comment.

1 Q. So there might be some explanation or commentary in that
2 letter.

3 A. Yes, sir.

4 Q. "The forwarding memo" you call it.

5 A. Yes, sir.

6 Q. And is that on a separate piece of paper or is it just attached
7 to the bottom of the report or could it be either?

8 A. Mostly it would be a separate sheet of paper. Occasionally if a
9 report stopped quarter way down, it would be put on the
10 bottom. But that would be unusual.

11 Q. And, again, a permanent copy of that forwarding memo would
12 remain in the file of the RCMP.

13 A. Yes, sir.

14 9:50 a.m.

15 Q. That's the process. Was there any other way that documents
16 would be forwarded from the readers other than one of those
17 two methods?

18 A. I don't think so, sir.

19 Q. So can we assume that if Inspector Marshall's report had
20 come to the readers and was forwarded by the readers to the
21 Attorney General's Department that one of these two paper-
22 trail indicators would exist?

23 A. Yes, that's right, sir.

24 Q. Now, we heard some evidence yesterday or earlier in the
25

1 week, pardon me, from Mr. Wardrop, who indicated that he
2 may have delivered the report personally to the Attorney
3 General's Department.
4

5 MR. PRINGLE

6 That was his best recollection.

7 MR. PINK

8 Sorry, I didn't mean to misstate the evidence.

9 Q. But it was his best recollection that he personally took the
10 report to the Attorney General's Department. Would that
11 sometimes happen?

12 A. Yes, sir.

13 Q. I believe his evidence was, as well, that even though he might
14 have done that it would still fall into the normal procedure
15 for the readers to then transmit it appropriately. Is that your
16 understanding of what the...what would happen?

17 A. I would be surprised, sir, that we'd do that.

18 Q. Now, let me just refer you to what he said. And, I'm...it's one
19 question on page 6784 from Inspector Wardrop's testimony.

20 Q. Yes. But your evidence also was that even if
21 you delivered it by hand you would still expect
22 the readers to put it through the normal
23 distribution network.

24 A. Exactly.

25 Do you disagree with that?

1 A. Yes, I do, sir.

2 Q. So, the...is it a fair inference from your testimony that because
3 there is no record of transmittal the report of Inspector
4 Marshall was not forwarded by the readers to the Attorney
5 General's Department?
6

7 A. Yes, sir.

8 Q. Sergeant Burgess, a couple of questions about timing. The
9 report would come to the readers from the record
10 department. How long would the readers have to review the
11 report?

12 A. Only as long as it took them. They would have, you know,
13 they would get fifty or sixty files and they'd just go through
14 them as they could.

15 Q. Okay. Would a report ever go directly from the records
16 department to the CIB officer?

17 A. Oh, yes, certainly.

18 Q. What kind of situations would...in what kind of situations
19 would that occur?

20 A. Maybe somebody would ask about something and he was
21 curious about a certain case that he wanted and he could tell
22 him "When that report comes in, may I see it?"

23 Q. And how would he know that it had arrived?

24 A. Oh, you know, he would tell the records that, "When that
25 report comes in I want to see it."

1 Q. Okay. I'd like to ask you then about the report that was
2 prepared by Mr. Marshall, by Superintendent Marshall, in this
3 particular situation, or SubInspector Marshall in this situation.
4 I believe you indicated yesterday that his office was also in
5 the same general area.

6 A. My recollection it was somewhere in the same building, yes.

7 Q. And, would the report that he prepared, the investigative
8 report that he prepared, follow a similar route to the one
9 you've already described?

10 A. I don't know. I saw a transmittal slip from Inspector
11 Marshall to the CIB officer so that would go to...would go to
12 the CIB officer I would think.

13 Q. Now, just make sure...look at page 201 in Volume 16. Is that
14 the transmittal you're referring to, because that's from the
15 polygraph?

16 A. No, no, that's not the one I was thinking...

17 Q. Sir, can you just look through those pages and see if you can
18 identify that transmittal that you think you saw?

19 A. I'm sure I saw it, sir, but I can't...I can't locate it here.

20 Q. If anybody could assist me I'd appreciate, because I'm not
21 sure that there is such a thing. There is on the top of
22 Inspector Marshall's report just a direction to the CIB, but I
23 don't see anything that directs it to the CIB officer.

24 A. I must have been mistaken, sir, I thought I saw one
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somewhere but I guess I didn't.

Q. Okay. So, my question then was what would the normal routing for an investigative report prepared by Inspector Marshall be?

A. I'm not sure. He didn't do an awful lot of investigations if my recollection... He may have taken into the CIB officer by hand and to discuss it with him or he may have sent it down to records. He could have done it either way.

Q. Would you expect that an investigative report by somebody like Inspector Marshall would still be reviewed by the readers?

A. Oh, yes.

Q. So, that you would expect the routing that you've already described to be followed.

A. Yes, I would think so unless it was taken direct into the CIB officer and he just kept it and took it by hand like he said.

Q. But it's your view that there would still be a function for the readers even for an investigative report prepared by somebody of the seniority and stature of Inspector Marshall.

A. Normally all reports or ninety-five to ninety, you know, a very high percentage of all...of reports go through us.

Q. Now, that was...I wanted to come back to the question of timing again. You say you might have fifty or sixty reports on your desk and how long would it take you to go through, can

1 you give any indication of how long it would take for a report
2 to arrive on your desk until it left your desk?

3
4 A. Well, again it depends on the seriousness of some of them,
5 like...which are very straightforward it would only take ten or
6 fifteen minutes. Some you may have to spend a few hours on.

7 Q. Okay. And what time lag would there be from the arrival
8 until you got to spend the ten or fifteen minutes?

9 A. Well, you go to work in the morning and you start working on
10 your files and...

11 Q. My question probably wasn't clear enough. I'm trying to
12 understand how long it would take from the time a report
13 arrived in the readers' office until it left the readers' office
14 and went to the CIBO?

15 A. Oh, normally the same day or the following day.

16 Q. So, one could...

17 A. Within one or two days.

18 Q. ...expect that if Inspector Marshall's report is dated the 21st
19 of December, if it came to the readers can you give any
20 approximation of when it might...might be ready to leave the
21 readers?

22 A. That's a rather awkward time, 21st, right around Christmas
23 and that could have been...it may have been after Christmas, I
24 don't know, before... By the time, if it went to records
25 management and they opened the file and by the time they

MR. BURGESS, EXAM. BY MR. PINK

1 opened the file and sent it up to us because of the particular
2 time it could have been after Christmas.

3
4 Q. The...am I correct in assuming that the problem of the
5 Christmas-New Year's period is the same in the RCMP as
6 everywhere else, that things just kind of slow down and
7 everything takes a little longer to get through the system?

8 A. Yes, sir.

9 Q. And that one wouldn't necessarily expect that if Inspector
10 Marshall's report was dated and prepared on the 21st of
11 December that it arrived on Mr. Wardrop's desk on the same
12 or the next day.

13 A. It may or may not have, yes.

14 Q. But simply because it's dated the 21st doesn't mean it would.

15 A. No, that's right, sir.

MR. PINK

16 Those are my questions, thank-you.

MR. CHAIRMAN

17
18 Mr. Ross.

EXAMINATION BY MR. ROSS

19
20 Q. Just one or two questions, please, Mr. Burgess. My name is
21 Anthony Ross. I'm going to ask you some questions on behalf
22 of Oscar Seale. Now, I take it you had an opportunity to quite
23 closely review the report of Sub Inspector Marshall.

24 A. Yes, sir.
25

1
2 Q. And, I'm asking you to turn please to page 207. I'm referring
3 to paragraph 9 in the conclusions. Consistent with the terms
4 of reference of your job description and, in particular,
5 function number 3 checking that investigations or reports are
6 thorough or that they contain information needed to base a
7 charge on or support a decision relevant to the charge. With
8 respect to that function would you agree with me that from
9 the reading of the report there is nothing, absolutely nothing
10 in the report, to sustain the conclusion that "Marshall and
11 Seale entered Wentworth shortly before midnight intent on
12 rolling somebody."?

13 A. I don't know why he came to that conclusion.

14 Q. But it's not supported in the report, is it?

15 A. Not...no, I guess not, sir.

16 Q. Sure. And further "That Ebsary and MacNeil somewhat
17 intoxicated happened to walk through the park and were
18 accosted by Marshall and Seale." Again, there is nothing to
19 support that conclusion, is there?

20 A. No, I assumed he got that from the city police, sir.

21 Q. Yeah, but from the reading...you see I'm looking at it through
22 your eyes as a reader.

23 A. Yes.

24 Q. I recognize your job function.

25 A. Okay.

1 Q. And my understanding is that you will read this report and
2 the conclusions would be consistent with the...whatever else is
3 in the report.

4 A. Yes, sir.

5 Q. Yeah. And further,

6
7 "That their attempts were not successful and
8 following the altercation a violent argument
9 ensued between the two attackers culminating in
10 Marshall stabbing Seale and then inflicting a
11 superficial wound on his own forearm to divert
12 suspicion from himself before he made the
13 pretence of summoning aid for Seale."

14 There's nothing in the body of the report to support that
15 conclusion, is there?

16 A. I think maybe he'd get that from...from...from Pratico's
17 evidence.

18 Q. Just from...just taking directly out of Pratico's evidence before
19 the Court.

20 A. Yes, sir.

21 Q. And as a reader recognizing that this, according to Sub
22 Inspector Marshall, as given on page 1, the concluding line of
23 paragraph number 3 that this was "a thorough review of the
24 case" wouldn't you agree that a thorough review requires
25 more than just relying on something that has already been
before the court?

A. Oh, every investigation certainly you...if he was doing a

1 reinvestigation he certainly should have interviewed all the
2 witnesses and done a lot more.

3
4 Q. And you would agree with me that back in 1971 attempted
5 robbery was classified as a serious crime.

6 A. Yes, sir.

7 Q. And as such if there was a conclusion that there was
8 attempted robbery there should have been something to be
9 referred to the prosecutor to determine whether or not
10 charges should be laid for attempted robbery, wouldn't you
11 agree with me there?

12 A. Well, sir, it happened in the City of Sydney. I don't know,
13 they likely maybe mentioned it to the city...Sydney City
14 Police.

15 Q. But it should have been mentioned to somebody.

16 A. I don't know.

17 MR. PRINGLE

18 Just in fairness to the witness there is a reference on page
19 204 in paragraph 3 to something about a robbery. Just too look at
20 the question in context, in MacNeil's evidence.

21 MR. ROSS

22 I don't understand the nature of your objection. I was just
23 stating...

24 MR. PRINGLE

25 I just think the question should be put forward to the

MR. BURGESS, EXAM. BY MR. ROSS

1 witness. We all know that there's been lots of comment and about
2 this sort of thing and Inspector Marshall testified and so on, so I
3 don't think it's a big point. But in fairness to the witness if you're
4 going to say to him there's nothing in the report to indicate that
5 there was a robbery, you should look to paragraph 3 on page 204
6 where indeed there is a reference to Jimmy MacNeil and Ebsary's
7 statements in the reference to an altercation and a robbery.
8

MR. ROSS

9 I note what you say and I thank-you.
10

11 Q. However, Mr. Burgess, you'd agree with me that a substantial
12 amount more work should have been done to support these
13 conclusions?
14

15 A. Well, certainly.
16

MR. ROSS

17 Very good. Thank-you kindly, sir. No more questions.
18

MR. CHAIRMAN

19 Mr. Wildsmith.
20

EXAMINATION BY MR. WILDSMITH

21 Q. Just a couple of questions. My name is Bruce Wildsmith. I'm
22 here on behalf of the Union of Nova Scotia Indians. I noted
23 yesterday in your testimony, Mr. Burgess, you indicated that
24 the thoroughness of the review could be affected by a variety
25 of factors, is that a fair statement?

A. I don't recall saying that but there...there is, yes.

1 Q. Well, for example, there was some discussion about whether
2 if you are working the work of the RCM as opposed to the
3 Sydney Police Department a more thorough review might
4 have been undertaken. Is that a fair statement?
5

6 A. I...I don't know, sir.

7 Q. Well, I'm just reading from the transcript yesterday at page a
8 hundred, sorry, 7173, and you say something like if
9 something happens in your area you do put a little more
10 attention to it than you do when you're assisting somebody
11 else.

12 A. I think what I was trying to impart there, sir, was that if
13 this...if this murder had been investigated by us initially then
14 when it came in to us in a report we would expect complete
15 statements, autopsy reports, scenes of the accident...of the
16 thing, photographs and everything.

17 Q. Perhaps I'm misunderstanding you, but is it fair to conclude
18 that you would have expected the report from Inspector
19 Marshall to have been more thorough.

20 A. Well, from reading that report I assume, now I'm just
21 assuming, that he was...he went down to Sydney and did what
22 he was told to do and no more. If he was told to reinvestigate
23 he certainly didn't.

24 Q. Yes.

25 A. I understand now that he was, but I didn't know that and you

1 can't determine that from the report.

2 Q. Well, part of your function as a reader is to check the
3 thoroughness of the report that is done, is that correct?

4 A. That's correct.

5 Q. And, I also understood you to say yesterday that in
6 evaluating the thoroughness of the report one of the factors
7 you might take into account is how serious the offence was
8 that the report relates to. For example, if it was murder you
9 might pay more attention to it.

10 A. Well, it would take longer and you would expect more
11 information in it, yes.

12 Q. Yes. So, my point to you is that the thoroughness that you
13 would expect as a reader is a relative concept.

14 A. Yes. Yes.

15 Q. And there are a variety of factors that you might take into
16 account in deciding whether the report had really been
17 thorough enough.

18 A. Yeah, I guess.

19 Q. Yes.

20 A. Yes, sir.

21 Q. And the seriousness of the offence, you indicated yesterday
22 and you're indicating again today, would be one such factor.
23 Yes.

24 A. Yeah.

25

1 Q. And would the sentence of the person whose alleged crime
2 was being investigated would that be a factor as well?

3 A. I'm sorry, I didn't get the first of...

4 Q. The length of time that somebody was sentenced to spend in
5 prison and if somebody was sentence to life, if somebody was
6 sentenced to ten years, somebody was sentenced to one
7 month, would that make a difference in how thorough you
8 would expect the investigation to be?

9 A. Well, I suppose that would...that would...if somebody was
10 sentenced for life would be committing a much more serious
11 offence than somebody committing a...

12 Q. Yes, the two are certainly linked.

13 A. ...month. Yes.

14 Q. What about if the request for the reinvestigation had resulted
15 from an Inquiry by your own Minister.

16 A. Who do you mean by that, sir?

17 Q. The Solicitor General of Canada.

18 A. Ah...

19 MR. PRINGLE

20 I wonder if this is going to be relevant, My Lord. It is in the
21 area of hypothetical and...

22 MR. CHAIRMAN

23 There's certainly no evidence. Maybe you have evidence or
24 something you're aware of that Solicitor General...

25

MR. BURGESS, EXAM. BY MR. WILDSMITH

1 MR. WILDSMITH

2 No, I certainly don't. I certainly don't. And my...the point
3 that I'm interested in are what sorts of factors might influence
4 how thorough the report was that he would be reviewing. What
5 standards of expectations he would have...
6

7 MR. CHAIRMAN

8 Well, again there is some evidence that we...there is a memo
9 that indicated that Solicitor General Caplan.

10 MR. WILDSMITH

11 Yes. Not at the time of the Marshall report.

12 MR. CHAIRMAN

13 Not at this time, but asked for a comment and there seemed
14 to be some activities as a result thereof.

15 MR. WILDSMITH

16 Yes, My Lord. In Exhibit 95 there is a reference to Solicitor
17 General Caplan enquiring.

18 MR. CHAIRMAN

19 That's a fair question. How it relates to client is what's
20 causing me some concern.

21 MR. WILDSMITH

22 I'm coming around to that.

23 MR. CHAIRMAN

24 All right.

25 MR. WILDSMITH

1 Q. So, if the Inquiry had been initiated by the Solicitor General
2 of Canada might you have held to a higher standard of
3 thoroughness?
4

5 A. I...excuse me, I really don't know, sir. It depends what...if the
6 Solicitor General of Canada come down and said you are to
7 reinvestigate that murder I'm sure we would have done so, a
8 reinvestigation rather than...

9 Q. Yes.

10 A. ...what was done as a review. And I...

11 Q. Would the reader have ensured that a more thorough report
12 had been done than Inspector Marshall's in this case?

13 A. Well, if he knew that he was...Inspector Marshall was asked to
14 do a reinvestigation. But if the reader was satisfied that the
15 Attorney General asked Inspector Marshall to do a
16 reinvestigation he would also have queried him about
17 statements and...

18 Q. Okay. What about the degree of confidence that you would
19 have in the report writer? Would that influence how
20 thoroughly you reviewed the report?

21 A. I...it may, sir, I don't know. It shouldn't. You should take the
22 report as it is.

23 Q. I see. What about media attention to the issue that's under
24 reinvestigation?

25 A. Well, that...I don't know what the media...they don't get copies

1 of our report is what I'm trying to say.

2 Q. Yes.

3 A. It may put...may place a little higher priority on the
4 investigation than we would expect.

5 Q. Yes.

6 A. If it was more fully covered.

7 Q. Okay. And, for example, in Exhibit 95, which I believe is
8 under your signature concerning Solicitor General Caplan's
9 Inquiry this was initiated as a result of an interview on TV.

10 A. Yes, sir, yeah.

11 Q. Yes. And so media attention to an issue is something that
12 would influence your actions.

13 A. Yes, sir.

14 Q. You will agree with me that it's fair to say that if there was a
15 lot of media attention to an issue, the thoroughness that you
16 would expect would be of a higher standard.

17 A. I suppose that's fair to say.

18 Q. And is it also fair to say...

19 MR. CHAIRMAN

20 I defer to your expertise in Constitutional Law. Would the
21 Solicitor General have the authority to order reinvestigation of
22 a crime committed in the province, breach the Criminal Code of
23 Canada?

24 MR. WILDSMITH

25

1 Well, my question was really more about whether the Solicitor
2 General had expressed an interest in it. Now whether he had...

3 MR. CHAIRMAN

4 We'll leave that question for you and your students.

5 MR. WILDSMITH

6 Thank you.

7 BY MR. WILDSMITH

8 Q. So I think you're agreeing with me that there are external
9 factors that might influence how thorough the standard of
10 reinvestigation is that you would expect as a reader.

11 A. Yes, sir.

12 Q. Okay. And would you also agree with me that if the person
13 who was alleged to have committed this offence, the person
14 who was sitting in jail in this case, had been the son of some
15 high profile person in Nova Scotia that that might have
16 influenced how thorough your investigation was?

17 A. That's speculation but I suppose there would have been more
18 pressure put on us to.

19 Q. Thank you. And, therefore, you would have reviewed the
20 report a little more thoroughly?

21 A. Well, I don't know if I even saw the report, sir.

22 Q. Yes, but you would expect to review it a little more
23 thoroughly if the person was the son of a high profile Nova
24 Scotian?
25

1 A. Well, if he was, I'm sure if he was a son of a high profile Nova
2 Scotian, it would have had great media attention and...

3 Q. The two may have been linked.

4 A. And, yes, likely there would have been a more thorough
5 investigation on it.

6 Q. Thank you. Now in evaluating the thoroughness of the report,
7 do you think that racial factors should be taken into account?

8 A. In what way, sir?

9 Q. Well, for example, if the report was containing information on
10 somebody who is, shall we say, a French Canadian that some
11 concern might be paid to whether the investigating officer
12 was familiar with French and whether the discourse was in
13 French and had been properly translated.

14 A. Well, if he couldn't speak English, yes, it would have to be.

15 Q. So language could be an important factor.

16 A. Yes.

17 Q. And, indeed, in your Exhibit 94 dealing with special
18 requirements for readers, there's a reference to bilingualism
19 in Divisions A, C, and J.

20 A. Yes, sir.

21 Q. So if, for example, you were obtaining a statement or the
22 report was based on a statement from an Indian now, you
23 would expect to pay some attention to whether the Indian
24 properly understood English.
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A. Oh, yes, sir.

Q. And you would evaluate that in the report?

A. I don't know if it would come up in the report.

Q. Okay.

A. I think the investigator would, you know, if a person can't speak English, then he would get an interpreter.

Q. Well, if you were evaluating a report that was based on statements that were given by a variety of people, most of whom were Indians, would that not be the kind of question that ought to pop into your mind as a reader, whether the Indians giving the statements had properly understood what was going on?

A. From my knowledge of the Indians of Nova Scotia, I, any dealings, I understand they all speak English.

Q. I see. So you were satisfied that language isn't a problem.

A. Not to my knowledge, sir.

Q. Okay. I note under Exhibit 94, the first item under "Functions" is "Reviewing the reports to see if they're consistent with force policy." Could you tell us whether there is anything in the force policy then or now relating to taking racial factors into account?

A. I'm not really sure, sir. There is certainly something there about getting an interpreter if people don't understand English or don't understand what your question is.

1 Q. What about whether prejudice is a factor in the subject being
2 investigated?

3 A. How do you mean, sir?

4 Q. Well, for example, whether somebody may be making up a
5 story or somebody may be not coming forward and not being
6 truthful because of prejudice of a racial nature on the part of
7 that person. Is there any way that you can take that into
8 account?

9 A. I don't know how, I really can't follow you. I'm not too sure
10 of just what you mean.

11 Q. Okay, let me put it to you a different way. This
12 reinvestigation concerned a crime alleged by an Indian. Now
13 would you not think it appropriate to take into account in re-
14 examining the events that happened whether racial prejudice
15 played any role?

16 A. In the investigation?

17 Q. Yes.

18 A. I, I...

19 Q. The original investigation and the original conviction.

20 A. I don't think that even, you know, there was nothing in the
21 report to indicate that there was any prejudice, or I didn't see
22 anything.

23 Q. My point to you is that shouldn't somebody like yourself, a
24 reader, have that factor in mind in evaluating the
25

1 thoroughness of the review of the original investigation and
2 conviction?

3 A. I don't know, sir.

4 Q. I take it from that that it wasn't the kind of thing that you
5 would have thought of and that you would have done.

6 A. No, sir, not in 1971.

7 Q. Is there any reason to think that it's different today?

8 A. No, we, that is more or less left up to the investigators, not
9 something that we as readers go back and say, "Were you
10 prejudiced against this person?"

11 Q. So, to the best of your knowledge, there's no way that this is
12 taken into account today.

13 A. Not by the readers. It should be done by the individual.

14 Q. And not as a result of directions by the RCMP.

15 A. I'm not too sure just what their policy says, if it says anything
16 on that, sir.

17 Q. And if there is, it hasn't reached your attention.

18 A. Well, if it has, it may have reached my attention, I forgot
19 but, you know, it's just, we've got loads of books.

20 MR. WILDSMITH

21 Fine. Those are my questions. Thank you.
22

23 EXAMINATION BY MR. PRINGLE

24 Q. Staff Burgess, you spoke yesterday in your evidence about
25

1 the review procedures in Exhibit 94 that a reader performs of
2 investigative reports, correct?

3 A. Yes, sir.

4 Q. And you also gave evidence and in response to questions by
5 Mr. Spicer that there are audits performed with respect to
6 investigations in the field at least three times a year, correct?

7 A. More so now, but in those days, yes, sir.

8 Q. And there are more now.

9 A. Yes.

10 Q. More audits.

11 A. Yes, sir.

12 Q. In addition to that, sir, would there not be a review function
13 with respect to investigations at the detachment level by the
14 individual detachment commanders and so on?

15 A. Oh, yes, certainly, they, they're supposed to review all
16 investigations.

17 Q. And that would be ongoing?

18 A. Oh, yes, sir.

19 Q. You answered questions from Mr. Pink with respect to the
20 paper flow and so on. Do you understand, sir, that the paper
21 flow in this case with respect to the 1971 Al Marshall
22 reinvestigation review, wasn't the paper flow, in fact, at
23 initiation, it started with a phone call from the Attorney
24 General's Department?
25

1 A. Yes, sir.

2 Q. And do you understand, sir, that Inspector Marshall was then
3 directed verbally to go down to Sydney to look into the
4 matter?

5 A. That's my understanding of it now, sir, yes.

6 Q. And do you understand, sir, that it was in Mr. Wardrop's
7 evidence that he received the report from Al Marshall, that it
8 was handed to him.

9 A. Oh, I...

10 Q. Okay. Where in those circumstances would the opportunity
11 arise for the normal paper flow to come into existence?

12 A. Well, unless Superintendent Wardrop gave it to us or sent it
13 down to records, we wouldn't get it.

14 Q. I suggest, sir, that this was not a usual type investigation that
15 the readers would normally be involved in

16 A. Well, it's an unusual, yes, we don't go out and do
17 investigations like this.

18 Q. Would it have helped, sir, in your opinion, would it have
19 helped the whole procedure if the initial request from the
20 Attorney General's Department had been in writing?

21 A. It may, there would have been a paper flow then, that's...

22 Q. Exactly, there would have been a paper flow.

23 A. Yeah, and we would have a file.

24 Q. And a record kept.
25

1 A. Pardon me?

2 Q. Is it your testimony, sir, that you, as a reader in 1971, do not
3 recall receiving any requests from anyone in the Attorney
4 General's Department for a copy of Al Marshall's report or
5 anything about Al Marshall's report?

6 A. That's right, sir.

7 Q. And, to your knowledge, did any of the other readers receive
8 such a request?

9 A. Not to my knowledge.

10 Q. Now, sir, you've been here testifying for quite a period of
11 time and you've had a variety of questions put to you. When
12 did you first learn that you were going to appear at this
13 Commission?

14 A. I guess it was noon Monday they called and said that I'd
15 likely be called.

16 Q. Right. This may not be relevant to anything but your own
17 personal comfort, but I think it's important. How much time
18 did you have to be interviewed by a Commission counsellor or
19 anyone before you came on the stand yesterday?

20 A. Well, I talked to you...

21 Q. In the morning.

22 A. In the morning, and then I talked to Commission Counsel...

23 Q. At quarter to two yesterday afternoon.

24 A. Quarter to two for about 15 or 20 minutes or so.
25

1 MR. PRINGLE

2 Thank you very much.

3
4 EXAMINATION BY MR. SPICER

5 Q You indicated in a response to a question from Mr. Pringle
6 that a detachment officer would have responsibility for the
7 review of all investigations.

8 A. Yes, sir.

9 Q Would there be a detachment officer that would have had the
10 responsibility for reviewing Al Marshall's report?

11 A. No, sir.

12 Q You also indicated that it was your understanding that the
13 initiation of this whole process was by a phone call from the
14 Attorney General's office.

15 A. Yes, sir.

16 Q From where did you get that understanding?

17 A. Oh, I... just from hearing over the years. I can't say that I
18 knew that back then. I must have known back then because
19 I did some telex messages. I assume somebody told me that
20 he was going down.

21 Q Do you have any idea to whom the call was placed?

22 A. No idea, sir.

23 Q Bob Anderson, I think, has a recollection that he may have
24 called you to initiate that process, do you...
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A. I don't, certainly don't recall it.

Q. My friend asked you a question as to whether or not it would have been better if this process had started in writing from the A.G.'s Department as opposed to a phone call. And I think you indicated that it would have been, that there would have a paper trail.

A. Well, yes, but if a letter come, would come over from the Attorney General's Department asking for the investigation, we would have sent it down and we got it, and I presume we would, we would have sent it down for a file and then we would have delegated the file for the report.

Q. Would it not have been the practice that even if it came in by way of a phone call that somebody should have made a note of that and that would have started the same paper trail as if there had been a letter?

A. Well, I, normally when I get a phone call from the Attorney General's Department on anything, I make a note on the main file.

Q. And that would have started the same paper trail that a letter would have started.

A. That's right, sir.

Q. Would you have understood that to have been the practice of the other readers at the time?

A. I assume, I don't know.

1 MR. SPICER

2 Thank you.

3
4 EXAMINATION BY MR. CHAIRMAN

5 Q Staff Sergeant Burgess, I'm still having some difficulty in
6 understanding whether it is your opinion that the report of
7 Inspector Marshall is the kind of report which, in your view,
8 would have gone to a reader in 1971.

9 A. In normal circumstances, yes.

10 Q. In normal, but am I to conclude, then, that you are putting
11 this into a different category, that this was not a normal
12 circumstance?

13 A. Well, the difference being that Inspector Marshall, it's not like
14 coming from an outside detachment. He was right there in
15 the building and if, as Superintendent Wardrop said, he
16 delivered the report to him, then it bypassed us. It was a
17 little unusual.

18 Q. Ordinarily, would you have expected Superintendent Wardrop
19 to have left a copy of that report with a reader?

20 A. Yes.

21 Q. Even though it was handed to him by Subinspector Marshall?

22 A. Yes, sir, I would.

23 Q. Would you have, and even if that was not done, would you
24 have expected Superintendent Wardrop, regardless of what
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he did with the original report, to leave a copy in records?

A. Yes, well, it must have been left in records, sir.

Q. Are we entitled to assume that that is a firm irrevocable policy of the RCMP that everything you have eventually goes into records?

A. Yes.

Q. It is?

A. Yes.

Q. So we're therefore entitled to assume that a copy of this report did get into the hands of records?

A. Yes, sir.

Q. In your opinion, is this report of Subinspector Marshall of 1971 of the nature and kind which in your opinion would or should have been sent to the Department of the Attorney General of Nova Scotia?

A. Yes, sir, it is.

Q. Reading this report now, and I appreciate that you have not seen it until recently, and the reference to the thorough review that was required or conducted, would you have had any difficulty from reading this report in concluding that none of the persons referred to, and most of them, none of them except, had been interviewed by Subinspector Marshall?

A. Well, from what I know now, sir, certainly not.

- 1 Q. No, but from reading it? You're turning to it for the first time
2 and you'd never heard anything about it.
- 3 A. I would take it that he went down and did what he was told
4 to do and that's all he did. In other words, he was told to go
5 down and make a cursory review of the...
- 6 Q. Make a what?
- 7 A. A cursory, just a, not a detailed...
- 8 Q. But he uses the word "thorough".
- 9 A. Pardon me?
- 10 Q. He uses the word "thorough" here.
- 11 A. I know he does, but I think what he was saying, I can't know
12 what he was thinking, that he thought he did a thorough
13 review when he went over the evidence.
- 14 Q. Would you have accepted, as a reader, would you have
15 accepted that report upon reading it as a thorough review?
- 16 A. No, sir.
- 17 Q. Would you thereupon then have brought that to the attention
18 of your superior officer?
- 19 A. Taking that report just on itself and not knowing anything
20 else about it, like I say, I would have thought that he was told
21 to do just what he did and then, and that's all. And then if I
22 got the report, I would likely would have put a forwarding
23 memo on it or stamp on it to the Attorney General's
24 Department and sent it to, for signature to Superintendent
25

MR. BURGESS, EXAM. BY MR. CHAIRMAN

1 Wardrop and if he then read it and found out that it wasn't
2 what he had asked Inspector Marshall, then he would have
3 come back to us.

4 Q. But would there have been any comment from you when you
5 sent it along for forwarding.

6 A. Likely not, sir. I'm trying to put myself in this position, that
7 I've never saw it before an I didn't know anything about it.

8 Q. Would the fact that you, as a reader, had been asked, this is a
9 supposition, but a reader had been asked to review the
10 report of a senior officer made any difference in your
11 approach or your comment then to Superintendent Wardrop?

12 A. It may, sir, it may, because you're reading a report of
13 somebody that's very highly qualified. But I don't know.

14 Q. Would you have put this report and the request in a category
15 of one of a very serious nature?

16 A. Yes, sir.

17 MR. CHAIRMAN

18 Thank you very much. That's all.

19 MR. MACDONALD

20 The next witness is not particularly long, I don't believe. Eugene
21 Cole.
22
23
24
25

1 EUGENE COLE, duly called and sworn, testified as follows:

2
3 EXHIBIT 96 - COPIES OF PAGES OF SERGEANT COLE'S NOTEBOOK.

4
5 EXAMINATION BY MR. MACDONALD

6 Q Your name is Eugene Cole?

7 A Yes, sir, it is.

8 Q You are a member of the RCMP?

9 A Yes, sir, I am.

10 Q What is your present rank?

11 A Sergeant.

12 Q Where are you presently stationed?

13 A Pictou, Nova Scotia.

14 Q How long have you been in the RCMP?

15 A 26 years in April, sir.

16 Q If you would just briefly, Sergeant, tell us your career with
17 the department, with the force?

18 A I joined the force in 1962 and after training, I was stationed
19 for a short period of time in Halifax, transferred from Halifax
20 to Liverpool, Nova Scotia and served there on general
21 detachment duties and highway patrol duties. I transferred
22 from there to Chester, Nova Scotia and served there on
23 highway patrol duties and then general detachment duties.
24 In 1973, I transferred from there to Glace Bay detachment
25

1 and I served there until 1975, when I transferred from there
2 to Sydney, general investigation section, and I served there
3 until 1980, when I transferred from there to NCO in charge of
4 Pictou detachment.

5 Q. In 1975 when you transferred to Sydney GIS, who was in that
6 division, can you recall?

7 A. In 1975 when I transferred to Sydney GIS, there were three
8 of us, I guess, at the time, I think Sergeant Brooks, Constable
9 Eagen, and myself in the general investigation section itself.

10 Q. Would there be someone of that group, one person in charge?

11 A. At that time, Sergeant Brooks was in charge.

12 Q. Was your practice at that time, and perhaps even today, to
13 keep a notebook, is it?

14 A. Yes, sir.

15 Q. And to record in that notebook what sort of things?

16 A. Daily occurrences, things that I do on a day-to-day basis.
17 Things that come up throughout the day if I'm involved in a
18 particularly lengthy investigation, a chronological order of
19 things that occur throughout that investigation for court
20 purposes.

21 Q. You were asked to review your notes or files, was it, to
22 determine if you had any connection at all with the Donald
23 Marshall, Jr. matter?

24 A. Yes, sir, I was on a couple of occasions.
25

1 Q. And you were able to find some notes in your notebooks
2 concerning this matter, is that correct?

3 A. Yes, sir, I did.

4 Q. [To Mr. Chairman] I've introduced as Exhibit 96, My Lord,
5 copies of the relevant pages from Sergeant Cole's notebook.
6 [To Sergeant Cole] You have the original with you, do you
7 not?

8 A. Yes, I have them in my pocket here, sir.

9 Q. Do you have any recollection of the events recorded in these
10 notebooks independent of the notes?

11 A. Not other than what I have written in the notes, sir. As a
12 matter of fact when I was contacted initially on this, I didn't
13 recall being involved at all and felt that I had no notes on it
14 and wasn't until after, I think, about the third try, by
15 somebody, that I did look adamantly for the notes that I had
16 misplaced in a box in the basement after being moved and
17 went through them and determined that, in fact, I had made
18 some entries in my notebook.

19 Q. Well, let's look at the notes and perhaps you can get some,
20 any information from them. The first page are notes of
21 various items and I think there's something relevant under
22 the date September 29th of 1975, is that correct?

23 A. Yes, sir.

24 Q. Just read that into the record what it says that's relevant to
25

1 this particular matter.

2
3 A. It says:

4 Deputy Chief, Sydney CP interviewed and
5 advised that Roy Ebsary was given a lie detector
6 test and found to be cleared and not involved.
7 Inquiries conducted in the Seale murder case
8 five years old. Marshall presently serving time
9 for this murder.

10 Q. When were you transferred to GIS in Sydney in 1975, what
11 month, do you recall?

12 A. I believe it was in, the usual time at that time to be
13 transferred was around the end of June. I think it would be
14 around that period of time but I just got there and then I got
15 transferred temporarily for the summer to the Halifax area to
16 assist on a situation that was going on here and I was here
17 until September. So I didn't get back to Sydney GIS until
18 some time that fall.

19 Q. So this September 29, 1975 could have been virtually your
20 first, close to your first involvement in GIS in Sydney?

21 A. That's possible. Now I don't recall and I didn't...I would say it
22 was late August or September when I got back there.

23 Q. So it wasn't long after you got there, anyway.

24 A. No, it wasn't.

25 Q. Do you know who the deputy chief of the Sydney City Police
was?

A. Yes, sir.

- 1 Q. Who was that?
- 2 A. Deputy Chief MacIntyre.
- 3 Q. For some reason, you were interviewing him concerning Roy
- 4 Ebsary and the fact that he had passed a lie detector test.
- 5 A. I use the word "interview". I may have been talking to him, I
- 6 don't know.
- 7 Q. Well, it was significant enough to make a note in your
- 8 notebook.
- 9 A. Yes.
- 10 Q. Can I assume from that that it, you were directed from
- 11 somebody in GIS in Sydney to go do this. You just didn't do it
- 12 on your own out of the blue.
- 13 A. No, I don't suppose I did, sir.
- 14 Q. You have no independent recollection of the events.
- 15 A. I have no idea who may have asked me to do that or why I
- 16 was interviewing or talking to the chief about it.
- 17 Q. Were you present yesterday during the evidence of Corporal
- 18 Green?
- 19 A. Yes, sir, I was.
- 20 Q. My understanding of his evidence is that in late '74, he
- 21 brought to the attention of GIS the fact that Donna Ebsary
- 22 related to him having seen her father wash blood from a
- 23 knife on the night of the stabbing.
- 24 A. Yes, sir.
- 25

1 Q. Had you ever heard anything like that before?

2 A. Not that I recall, sir. That had been a year before I got there.

3 Q. Okay, or nine months, approximately.

4 A. Well...

5 Q. It could be a year.

6 A. Whatever.

7 Q. Okay. Let's go on to the next note then on page two, I believe.

8 MR. CHAIRMAN

9 Before you leave that, Mr. MacDonald, do you have any
10 recollection of interviewing Deputy Chief MacIntyre?

11 SERGEANT COLE

12 A. I don't recall talking to him or being down there at all, sir,
13 other than what's in my notes here.

14 BY MR. MACDONALD

15 Q. Under the next page then, Sergeant, what is on that page of
16 relevance?

17 A. On the first of October, "Interview and inquire into Seale
18 murder 1971 vintage re Inquiry re Ebsary." Also it goes on
19 to say other things that I did that day until six p.m. that day
20 and it goes into four or five different things that I did that
21 day.

22 Q. So the notation "9 a.m. - 12 N", is that 12 Noon?

23 A. Yes, sir.

24 Q. So on the morning of October 1st, you were doing various
25

1 things including "Interview and inquire into Seale murder in
2 1971 re Inquiry re Ebsary." What do you take that note to
3 mean?

4 A. I obviously talked to somebody about the Seale murder and
5 also about calculators that were in assistance to Ingonish
6 detachment.

7 Q. Do you have any recollection of who you might have
8 interviewed?

9 A. No, sir. It says that I was down at the, patrolled downtown
10 Sydney. So I don't know.

11 Q. Was it your practice in 1971 or was it a requirement that
12 when you carried out an inquiry or did something on
13 instructions from your superiors that you would report back
14 to them, you'd file reports?

15 A. Yes, sir, if somebody asked you to do an investigation into
16 something or whatever, then you would be required to put in
17 a report and the report would be submitted through channels
18 to headquarters.

19 Q. Would there have been a file in the GIS division in Sydney
20 concerning Roy Ebsary or Donald Marshall, Jr. on the Seale
21 stabbing?

22 A. Not that I recall.

23 Q. We are aware that a report was prepared by Inspector
24 Marshall in 1971.
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A. Yes, sir.

Q. A copy of which, I believe, went to Sydney. Are you aware of that?

A. I don't recall ever seeing that, sir.

Q. If such a thing had occurred, would that not have been filed in a file under that name in Sydney?

A. Well, it might very well be, sir. I don't recall ever seeing a file on this in Sydney GIS office.

Q. Okay, let's go on to the last page then of Exhibit 96, Sergeant. What is on that page?

A. "9 a.m. - 10 Message to Montreal. 10 a.m. Read Ebsary file re Seale murder." Also, "Read a report from Port Hawkesbury re Nova Scotia Steam failure."

Q. Now where would those files have been located?

A. It must have been at the Sydney City Police.

Q. Why do you say that?

A. Well, I say that I received information here further on "Re calculators theft from Ingonish from the Sydney City Police." So I obviously must have been there.

Q. You take it from reading the note that the file you reviewed was in the Sydney City Police protection.

A. I assume it was. I don't recall reading it.

Q. Sergeant MacIntyre has testified before this Commission that someone attended at his office one day and asked to review

1 the files and was given the entire City police files concerning
2 Donald Marshall, Jr. and had the opportunity to go through
3 them. I assume that was you. Do you recall actually sitting
4 down in the Sydney City Police Department and reviewing
5 files?

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

7 Q. Am I correct then in saying that your only recollection and
8 the only way you can assist this Commission is what's written
9 in these notes.

10 A. The only thing that I recall is what is written here, sir, in the
11 notes and I can only say that from the notes it appears that I
12 was doing several things on the days that these things were
13 going on and that may be the reason for the lack of recall.
14 There were, just to clarify that, there were three of us. One
15 person, I suppose, administratively in charge of the unit, and
16 two to do the other detachments on Cape Breton Island.

17 Q. You would only do what you were instructed to do, though, by
18 Sergeant, is it Brooks?

19 A. Yes, sir.

20 Q. So whatever you did, it was on the instructions you received
21 from the man in charge of GIS.

22 A. Either he or the OC of the subdivision, I would think.

23 Q. Where is Sergeant Brooks now, is he still around?

24 A. Yes, I think he's in Mississauga, Ontario.
25

1 MR. PUGSLEY

2 Those are all the questions I have.

3
4 EXAMINATION BY MR. RUBY

5 Q. You're quite a mystery to me and I'm not sure I'm going to be
6 able to do any better in clearing up the mystery than my
7 colleague did, but I take it that you're not sure what you were
8 doing at this point in time, in connection with these files.

9 A. I don't recall reading the file, sir, no.

10 Q. You don't know what you were doing there.

11 A. I didn't recall even having been involved in this thing to the
12 point where I had made notes on it and it wasn't until after
13 about the third inquiry was made that I dug into my
14 notebooks and ascertained that I had, in fact, been involved
15 in it, to the point where I made these notes.

16 Q. Do you know if you ever made a report, or was the matter not
17 considered sufficiently substantial that it would not...

18 A. I don't recall making...

19 Q. Require one?

20 A. I don't recall ever making any report on this thing, sir.

21 Q. So it may well have been that your superior and yourself at
22 the time didn't think this was a tremendously serious matter
23 at all.

24 A. Well, it may have also been at the time that since I was kind
25

1 of the new boy on campus there that they decided to tell me
2 to go read a serious murder file and do it when I had time.
3 And that was the general case on these general investigations
4 sections when a new person came to the unit, they wanted
5 them to read things that were of a serious nature that they
6 would be investigating from time to time, familiarize
7 themselves with what work they would be doing. Because I
8 came from a general investigation section and had no
9 particular serious investigational prowess at the time.

10 Q. We've heard also that the Attorney General's office put the
11 youngest guy on the ladder in charge of the case on the
12 appeal.

13 A. Well, I don't know what they do, sir.

14 Q. Did the same thing you did. Do you have any idea if
15 anything...

16 MR. PRINGLE

17 I didn't hear the last statement.

18 MR. RUBY

19 They did the same thing you did.

20 MR. PRINGLE

21 Well, that's not quite fair because it's his testimony that he doesn't
22 recall anything but those notes. I mean it's more an editorial
23 comment.

24 MR. RUBY

25

1 I'll try to avoid repeating them.

2 BY MR. RUBY

3 Q. At the end of the day, you have no idea what, if anything,
4 happened as a result of your work.

5 A. Not after 12 years, sir, no.

6 Q. Okay.

7 A. I suppose I did at the time.

8 Q. Assume for a moment that, and it may not be the case, but
9 assume for the purposes of answering this question that
10 information had come to the attention of your superiors that a
11 woman was coming forward and saying that she had personal
12 knowledge that Marshall was innocent and somebody else
13 was guilty, namely Ebsary, and that you were the detail to try
14 and determine whether this was true or not. Would you
15 agree with me that this does not appear to be an adequate
16 way of dealing with that problem?

17 A. Had I been there in '74 and somebody said that to me, I
18 imagine that the NCO that was in the charge of the section at
19 that time would have detailed somebody to investigate that
20 and would have demanded a very concise report.

21 Q. I agree. Assuming it's unlikely, but for the purposes of my
22 question, assume it's not so. Presume that that really was the
23 task at hand.

24 MR. PRINGLE

25

MR. COLE, EXAM. BY MR. RUBY

1 I'd just like to put an objection to the purely hypothetical question
2 in light of the fact that this witness has no recall.

3 MR. CHAIRMAN

4 It's hypothetical in one sense but Mr. Ruby is simply inquiring
5 and I think it is relevant as to what his practice would be under
6 this hypothetical circumstance.

7 MR. PRINGLE

8 Thank you, My Lord.

9 MR. CHAIRMAN

10 And treat it as such.

11 BY MR. RUBY

12 Q It may not have been you doing this but somebody did this
13 and I'm saying assuming for a moment that that was the task
14 at hand, do you agree with me that that would have been
15 inadequate?

16 A. What would have been inadequate, sir?

17 Q. To go down and read the files for a few hours?

18 A. Definitely.

19 MR. PRINGLE

20 I would think if someone is putting a hypothetic question, you put
21 the premises to him and we don't have any premise, just one basic
22 point and then the answer. Why don't you put the premises to
23 him about it, assuming you got this, assuming he got those
24 instructions and so on, and make it complete?
25

1 MR. CHAIRMAN

2 If you would like to put the premise over again so I could follow
3 it.

4 BY MR. RUBY

5 Q I would like to assume for the purposes of answering my
6 question that the task at hand, although it's not identified in
7 your notes, was to investigate information that had come to
8 the attention of your superiors that someone had firsthand
9 knowledge that not Mr. Marshall but someone named Ebsary
10 had commented this particular murder, Marshall being then
11 serving life in prison. That's the factual foundation I want
12 you to assume. Assume that that was your task, though I
13 know you don't remember. Would you agree with me that if
14 that was the task that this is an inadequate job?

15 A. If that had been the task, yes.

16 Q. That's what I thought. [To Mr. Pringle] Is that satisfactory to
17 you?

18 MR. PRINGLE

19 Well, no, I mean I put my objection on the record but...

20 MR. RUBY

21 Well, perhaps I'll be further enlightened when you cross-examine.

22 MR. CHAIRMAN

23 Mr. Pugsley?

24 MR. PUGLSEY

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No questions.

MR. MURRAY

No questions.

MR. BARRETT

No questions.

MR. SAUNDERS

No questions, My Lord.

MR. ROSS

No questions, My Lord.

MR. RUBY

Your turn.

MR. PRINGLE

No, I don't think I'll further bother the Commission with questions on this particular witness.

MR. CHAIRMAN

Mr. MacDonald?

MR. MACDONALD

No, My Lord, nothing.

10:50 INQUIRY RECESSED.

INQUIRY RESUMES - 11:15 a.m.MR. PUGSLEY

1 My Lord, there's a question I neglected to put to the last
2 witness. I would ask leave to have recalled so I could put the
3 question to him. I have spoken to my friends, Mr. Bissell and
4 Mr. Pringle.

MR. CHAIRMAN

5 Fine.

MR. PUGSLEY

6 And alerted them to the nature of the question.

MR. CHAIRMAN

7 Fine. Mr. Cole.

8 MR. EUGENE COLE, recalled and previously sworn, testified as
9 follows:
10

EXAMINATION BY MR. PUGSLEY

11 Q. Mr. Cole, it's my instruction that in 1982 after the
12 reinvestigation started by the RCM Police under Sergeant
13 Wheaton that you were on the Myra River during vacation
14 period with Sergeant Brooks who had been your superior at
15 GIS in Sydney in '75 and that you had a discussion with him
16 concerning the nature of your review in 1975 that you spoke
17 about earlier and that you discussed the nature of the review
18 with him and indicated to him that you were satisfied that
19 MacIntyre had not been guilty of any mistakes in his initial
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1 investigation. Do you have any recollection of that discussion
2 with Brooks.

3 A. I don't recall being on vacation with Inspector Brooks.

4 Q. I'm not suggesting that...

5 A. In 1982 or being on the Myra River with him.

6 Q. I'm not suggesting that you were...that you took a vacation
7 together but that you happened to meet him on the Myra
8 River in 1982 and had this discussion with him. Do you have
9 any recollection of that?
10

11 A. No, sir.

12 Q. Thank-you.

13 MR. PRINGLE

14 Is that the one question? I wonder if my friend is going to
15 call any evidence to establish the...anything in regard to that now
16 having made the assertion.

17 MR. PUGSLEY

18 This is an instruction I received from my client. I can recall
19 my client at a later time if Sergeant Brooks is not called by the
20 Commission. I guess perhaps I'll wait and see if Sergeant Brooks
21 is going to be called.

22 MS. MELINDA MacLEAN, duly called and sworn, testified as
23 follows:

24 EXAMINATION BY MR. SPICER

25 Q. What is your full name, please?

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A. Melinda J. MacLean.

Q. And you're a member of the Nova Scotia bar.

A. Yes.

Q. And you were admitted to practice in 1970 I believe.

A. Yes.

Q. And you then opened the legal aid office, Nova Scotia Legal Aid office in Sydney and worked there during the period of '71-72.

A. Yes.

Q. Did you work there later on, as well, or only '71-72?

A. I...actually I think I was there from early 1971 until I guess into '72, yes.

Q. Where did you go after that?

A. I came to or went to Truro and I've practised there since.

Q. Did you work with Legal Aid when you went to Truro?

A. Yes, I did.

Q. Until '76.

A. Yes, that's so.

Q. And in the interim between 1974 and 1978 you were a Provincial MLA.

A. Yes.

Q. In what riding?

A. The County of Colchester. It was a dual constituency. I was one of two members.

1 Q. And since 1976 you've been in private practice in Truro.

2 A. Yes.

3 Q. And you acted for Junior Marshall for a period from late '79
4 until about the fall of 1981.

5 A. Yes. I wouldn't say the fall of 1981. I think the file became
6 inactive early in 1981.

7 Q. And you've brought with your file.

8 A. Yes.

9 Q. And we've had a copy of that made and it's now become
10 Exhibit 97. It was handed that out to counsel yesterday
11 afternoon.

12 EXHIBIT 97 - COPY OF MELINDA MacLEAN'S FILE

13 Q. Now, before we get to your activities in connection with Mr.
14 Marshall I'd just like to ask you a few questions concerning
15 your experience in Sydney. In your capacity as a Legal Aid
16 lawyer in Sydney did you have occasion to run across Donald
17 C. MacNeil?

18 A. Yes, I did.

19 Q. And can you give us your impression of him as an advocate?

20 A. He was a crown prosecutor, of course, in Sydney at that time.
21 He was the crown prosecutor and he had took, I would
22 characterize it as an aggressive stance regarding prosecution.

23 Q. Did you have an opportunity to observe whether or not in
24 your view he treated natives any differently than whites in
25

1 the courtroom?

2 A. I would say so, yes, because the Nova Scotia Legal Aid office
3 represented a number of individuals from the lower end of
4 the income scale. Among them would be Indians, blacks,
5 whites.

6 Q. Right. And if you had that opportunity to observe him in the
7 courtroom dealing with natives and with whites, what can
8 you say as to whether or not you thought he treated the
9 whites any differently from the natives?

10 A. I don't think he treated them any different.

11 Q. Did you have occasion from time to time to seek disclosure of
12 material from Mr. MacNeil?

13 A. Yes.

14 Q. And what was your experience in that connection?

15 A. I would say that at that time, and this was, of course, 1971
16 and 1972, that there was no, so to speak, practise of
17 disclosure on the part of the Crown in Sydney and I can't
18 speak to other areas of the province or generally as of that
19 time. When I say "practise" it was not a process of disclosing
20 anything in particular to the defence. Instead the defence
21 had to organize itself and ask presumably the right questions
22 and hopefully get answers, sufficient answers in reply.

23 Q. Would you from time to time go through that process with
24 Mr. MacNeil?
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A. Oh, yes.

Q. And how would he deal with you in response to that sort of request?

A. Well, I...my recollection simply is that if I...I, of course, knew if the defendant had made...the defendant, the accused person would indicate to me that they had made the statement, I would seek the statement of the accused through the Crown, and I would get it. That's my recollection. I have no recollection of ever, I shouldn't say ever. I have no recollection that there was ever any practise to supply the defence with anything beyond what, at least in my case, I asked for or knew to ask for.

Q. Other than statements of the accused, would you ever ask for statements of witnesses?

A. My recollection, again, is that we expected, I shouldn't say expected, we wanted to know who would be called in support of a prosecution and if, I think by in large, we were informed who would be called, but that's as far as the exchange went.

Q. Was there ever an occasion when you would ask for a witness statement and not receive it or did you not bother asking?

A. Well, I haven't reviewed any files that would, of course, have been maintained by the Nova Scotia Legal Aid office in Sydney, and obviously they presumably...presumably would refresh my memory. I cannot say that there was an instance

1 where...that there was ever any issue made out of the fact
2 that material was not forthcoming. My recollection generally
3 was that, yes, we'd get the defendants, the accused's
4 statement not with or without difficulty. Sometimes it was
5 easier than on other occasions. We did not...it was not my
6 understanding in terms of state of that art defence work at
7 that time, and given my experience and what was transpiring
8 in Sydney. It was a new office. Nova Scotia Legal Aid had
9 just established itself in Nova Scotia I think in 1970-71, that
10 we were not...we didn't anticipate that we would get anything
11 more from the Crown than that.

12 Q. Did you ever ask for anything more?

13 A. Oh, I think so, yes. I think that I certainly would have been
14 most interested in knowing what was in other...statements of
15 other witnesses.

16 Q. Now, specifically are you able to tell us whether or not you
17 did ask for statements of witness from Mr. MacNeil?

18 A. I...I...in bringing my mind to it I believe that probably did
19 from time to time. That's about as far as I could go.

20 Q. Okay. And do you have a recollection as to whether or not
21 the statements of witnesses were produced in response to
22 those requests?

23 A. No, by in large we didn't...we didn't see it. It was not part of
24 any exchange or system of exchange or expectation I suppose.
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Q. And can I infer from that that the reason that you didn't get it was because you were told you couldn't have it?

A. I'm not so sure I was told I couldn't have it. I suppose if I was told I couldn't have it that would make me want it more. But on the other hand it didn't seem to be a practise at that time that this kind of material was exchanged.

Q. The reason I'm asking is because you indicated a minute ago that you probably did from time to time ask for statements of witnesses. I'm just wondering whether or not you were told by Mr. MacNeil, for instance, that you...in response to that request that you couldn't have them.

A. I don't recall being told that I couldn't have them, we didn't get them by in large.

Q. Well, if you weren't told that you couldn't have them and you didn't get them how was it that it was communicated to you that they weren't going to be forthcoming?

A. We didn't get them.

Q. They just didn't arrive. There was no response.

A. Well, I'm just saying it was not a part of...it was not a practise of this exchange of this...an exchange of this kind of material, at least as far as my practise extended.

Q. Do you ever remember having a discussion with Mr. MacNeil about whether or not he would give you witness statements?

A. I don't remember a discussion in that sense.

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Q. Art Mollon, with whom I believe you were prac...you were practising in the Legal Aid office with him at about the same time, '71-72.

A. Yes.

Q. He had indicated to us that he had a fairly, to paraphrase him, a fairly easygoing relationship with Mr. MacNeil in the sense that he would get pretty well everything he wanted. Was that your experience with Mr. MacNeil?

A. No, I thought he took a different stance.

Q. Can you give us any appreciation as to why the two of you might have been treated differently?

A. I'm not so sure we were treated differently, you know. Art Mollon, if my recollection serves me correctly, was from Sydney. He knew the Sydney people. I was not from Sydney. My family, my mother's family had come from Sydney, but that was the extent of my connection with Sydney to that point.

Q. And are you saying to us that the fact that he was from Sydney would mean to you or seem to you that maybe he'd get along better with Donald C. MacNeil than you could?

A. I don't know. I...

Q. Well, you indicated to me a minute ago that you didn't think you were treated differently. But it would seem from what you've been telling us that if you didn't get witness

1 statements or didn't get material from Mr. MacNeil, and Art
2 Mollon was telling us that he could get basically everything
3 that he wanted, that there was some kind of differentiation
4 going on. I'm just wondering if you can enlighten us at all as
5 to why you think that might have been the case?
6

7 A. I really don't know why that was. If there was a
8 difference...if Mr. Mollon got more material than I did I don't
9 think I was aware of it at that time.

10 Q. Did you from time to time have occasion to see Mr.
11 Rosenblum?

12 A. Yes.

13 Q. Moe Rosenblum. Can you give us your impression of him as a
14 lawyer?

15 A. Well, he was certainly an experienced counsel in Sydney at
16 that time and I would think probably one of the...he was
17 certainly one of the most senior and experienced and leading
18 counsel, I suppose I would say.

19 Q. And Mr. Simon Khattar.

20 A. I would say virtually the same thing.

21 Q. Did you have experience with the native court worker
22 program when you were working with Legal Aid in Sydney?

23 A. Yes.

24 Q. And what can you tell us about whether or not that native
25 court worker program was of assistance to you as a lawyer

1 working in Legal Aid at that time in Sydney?

2
3 A. Yes, my recollection is that the native court worker program
4 was probably active in Sydney sometime after I myself went
5 to Nova Scotia Legal Aid in Sydney. And, as time passed, yes,
6 I think it served a useful, a very useful function.

7 Q. What did you understand that function to be? What were
8 they
9 doing for you?

10 A. Well, they weren't doing anything for me. They were not
11 connected with the Nova Scotia Legal Aid office in any way. I
12 understood that their function was to more or less act as an
13 agent or big brother, a facilitator, for the native population.

14 Q. And would their ability to do that assist you in the conduct of
15 your own work?

16 A. No, not specifically in the practise of law, no. But in terms of
17 ensuring that people kept appointments and knew when they
18 were in court, yes, they were a supporter to the...to Indians
19 who were before the court.

20 Q. Did you know Bernie Francis?

21 A. Yes, I knew Bernie Francis.

22 Q. And, are you able...are you able to tell us what your
23 assessment of Bernie was at the time of working as a court
24 worker in that program?

25 A. I don't think I was in a position to make an assessment. I

1 knew...I had contact with him and I thought the contact with
2 him, as I understood what his job was, was helpful.

3 Q. Did you ever see him working in a courtroom as an
4 interpreter?

5 A. I don't have a recollection of that.

6 Q. Did you from time to time represent Indian defendants from
7 the Membertou Reserve?

8 A. I certainly...Nova Scotia Legal Aid, and I being a part of that
9 organization, we certainly did represent Indians in Cape
10 Breton. But in terms of Membertou Reserve I...

11 Q. Membertou as opposed to anywhere else you don't know.

12 A. I can't say that they were from Membertou or Eskasoni or
13 Whycocomagh. I don't remember that we did or didn't with
14 respect to Membertou.

15 Q. Are you able to tell us whether or not you sensed that the
16 native defendants were having any difficulties in the
17 courtroom in terms of what was going on?

18 A. Again speaking generally.

19 Q. Sure.

20 A. I didn't observe that there was any significant impediment or
21 problem. I certainly from time to time could see that the
22 native people were, you know, uncomfortable in the
23 courtroom setting, the formality of the setting, perhaps
24 tentative in their ways of dealing with the so-called business
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before the court. But in terms of language specifically I wouldn't say, no, it was not a problem in a generalized way.

Q. With reference to the factors that you just mentioned did you notice any difference in the degree of difficulty between the native defendants and any of the white defendants?

A. I would say, yes.

Q. What was the nature of the difference?

A. I think that the native population, by in large, was less comfortable than other defendants accused before the court.

Q. If I can just now direct your attention to Exhibit 97 that you have in front of you, which...on page 1 it's a letter to you from Roy Gould on October of 1979. Would that have been your first contact with the Donald Marshall situation?

A. Mr. Gould had...was writing to me at that time in furtherance to a telephone conversation that he and I had had. I would think that that telephone conversation was probably the first contact. Donald's father may have spoken to me about the matter shortly before this date.

Q. Did you know Donald Marshall, Sr.?

A. Yes, uh-hum.

Q. And where did you know him from, from your work in Sydney?

A. Yes, uh-hum.

Q. And what was your impression of Donald Marshall, Sr.?

1 A. I was...while I was in Sydney and after that I understood that
2 he was the Grand Chief and he had a position of...he was a
3 prominent Indian and a respected person is my
4 understanding.

5 Q. And did you share that respect for hm?

6 A. Yes, I did.

7 Q. And Roy Gould, did you know Roy Gould prior to the
8 telephone conversation and the letter of October 2nd?

9 A. Yes, I had come across Mr. Gould on perhaps several occasions
10 prior to the date of this letter.

11 Q. Subsequent to that letter on page 6 there's another letter
12 from Mr. Gould dated October 11th, which he is sending along
13 some press clippings which we haven't included in the
14 volume, concerning Donald Marshall. At that point in time, by
15 the time you received that second letter, had you started to
16 do any work in connection with Donald Marshall, Jr.?

17 A. No, I would say, not.

18 Q. Then on October 25th you're responding to Roy Gould and
19 asking Donald Marshall, Jr., or someone on his behalf to
20 provide you with a retainer in the amount of \$200. Are
21 you...can you tell us whether or not your request for a
22 retainer would have reflected your normal practise? That is
23 would you...would you do that for everybody?

24 A. Yes.
25

1 Q. And it wouldn't be influenced at all by the fact that Mr.
2 Marshall was in jail at the time and perhaps didn't have very
3 much money?

4 A. No. My recollection is that from my conversations with Roy
5 Gould that he was giving me to understand that certainly he
6 and others within the native population were concerned
7 about Donald Marshall being in custody in Springhill and were
8 giving me to understand that they would like someone to act
9 on a file and that in due course, presumably satisfactory
10 arrangements would be made for funding some work. That
11 was what I was given to understand. So my request for a
12 retainer at that time would be my standard practise. I would
13 be just speculating as to what would happen if I didn't
14 receive the retainer. But I know Donald's father and I had
15 respect for him and I was now learning of Donald's situation
16 at Springhill or Dorchester, Dorchester, wherever he was at
17 that time.

18 Q. At the time that you were...originally received this call and
19 letter from Roy Gould, were you in...did you have a
20 recollection for your experience in Sydney of Donald Marshall,
21 Jr., being tried and convicted?

22 A. No, I think that at the time that I went to Sydney it was
23 probably within a few months after that trial.

24 Q. That was all news to you at that point then, in '79.
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A. Yes, really, I had no...I had no earlier information of any specific nature at all about the case.

Q. You indicate in a letter on page 9 to Mr. Marshall that you've received \$100 and asking him to provide you with an additional hundred and then you say "I will make arrangements to meet with you in Springhill to take up your instructions," and the subsequent pages reveal that you did receive the other hundred dollars and a trip was made to speak to Mr. Marshall. Did you make that trip personally?

A. No, I did not make that trip.

Q. Who would have gone on your behalf?

A. I believe it was Lawrence O'Neill in January of 1980.

Q. Now, if we could just...

A. Some...a month or so later, perhaps four to six weeks later. Lawrence O'Neill was practising with me at that time, was with my office at that time and he interviewed Donald.

Q. Was he at that point in time admitted to the bar or was he articling?

A. I don't really recall.

Q. How long was he with your office?

A. Just a short period of time. Within a month he received a call from the Premier's office to work with him.

Q. And he went off and worked in the Premier's office.

A. Yes.

1 Q. The notes on page 12, 13 and 14 seem to be in the same
2 handwriting. Is that your handwriting?

3 A. No, it's not.

4 Q. Are you able to tell us whose it is? Seem to be on...on 12
5 seems to making arrangements to go up and see Mr. Marshall.

6 A. I would think that that's Lawrence O'Neill's.

7 Q. Okay.

8 A. Writing.

9 Q. And 13.

10 A. I would think again...I would think that again is Lawrence's
11 handwriting.

12 Q. And 14 outline of interview with Marshall.

13 A. Yes.

14 Q. Now, on page 14 there's a reference to, on the third line,
15 "Pratico page 194". By that point in time would you have
16 received the trial transcript of the trial?

17 A. Yes, I believe that that's what that relates to.

18 Q. And would you yourself have reviewed the trial transcript?

19 A. Yes, I would have...when the material came into the office I
20 would have reviewed in a way prior to requesting Lawrence
21 O'Neill to go and interview Donald.

22 Q. And would you then have asked Mr. O'Neill to also review it?

23 A. Yes.

24 Q. On page 15 you see a list of questions from Mr. Marshall. Is
25

1 that also somebody else's other than yourself's handwriting?

2 A. Yes.

3 Q. And again, do you think that's Mr. O'Neill's?

4 A. I think so.

5 Q. And did Mr. O'Neill, in fact, go up to the institution, meet with
6 Mr. Marshall and come back to you and report?

7 A. It's my understanding that he did.

8 Q. Okay. And the notes on the subsequent pages, 16, 17, 18, 19,
9 20, would it be your understanding that those are notes that
10 were kept by Mr. O'Neill of his meeting with Junior Marshall?

11 A. Yes, that is my understanding.

12 Q. Are you able to tell us what Mr. O'Neill told you when he
13 came back from that meeting as to what Mr. Marshall was
14 telling him?

15 A. No, I don't have any memo. I made no memo of our
16 discussions following the interview, so I don't recall.

17 Q. What was your sense of it?

18 A. My sense of it was, as related to me by Mr. O'Neill, was that
19 there was something to pursue, something worthy of pursuit.

20 Q. Did he indicate to you what it was that was worthy of
21 pursuing?

22 A. No. I had read the transcripts to a degree. I wouldn't say at
23 all before Mr. O'Neill went to Springhill that I was fully
24 conversant with the evidence at trial. I'm not suggesting that
25

1 at all. But I certainly reviewed the transcripts. I gave him
2 the direction I thought that he ought to have to conduct such
3 an interview. So I...

4 Q. If I can just stop you there for a sec. What was the direction
5 that you thought he ought to have to conduct that interview?
6

7 A. Well, the...the, just the direction. I don't recall what direction
8 I asked him specifically to take. I requested him to review
9 the transcripts and I believe that he did, and I believe I
10 brought, you know, to his attention my impression, certainly,
11 that there was serious...some serious problems with the
12 Crown evidence, particularly from Chant and Pratico, and I
13 did not know anything from Donald directly at that time,
14 apart from what's disclosed from the file, and I would
15 probably have been alerting Mr. O'Neill to see exactly what it
16 is that Donald could say with regard to these...what appeared
17 to me a serious problems with that evidence.

18 Q. Was your impression that there were serious problems,
19 particularly with the testimony of Chant and Pratico, was
20 that gleaned merely from your review of the transcript?

21 A. Yes, yeah.

22 Q. Are you able to tell us today what you thought...what did the
23 transcript tell you that indicated that there were problems
24 with that transcript?

25 A. I really can't respond to that at the... I haven't had the

1 transcripts for some considerable period of time and haven't
2 refreshed my memory from anything that would allow me to
3 respond.

4 Q. Mr. O'Neill goes up and sees Mr. Marshall. Did you at any
5 time see Junior Marshall at all?

6 A. I don't think I did, certainly not at Dorchester. I didn't
7 interview him. I believe I had some telephone conversations
8 with him.

9 Q. Did you see him at any time then, you didn't see him at any
10 time then during the currency of your retention by...

11 A. No.

12 Q. Now, Mr. Marshall writes to you on March the 2nd of 1980 at
13 page 22 and then you respond, and then on page 24 there's a
14 ...which I think is only a draft, because the final version of
15 that letter then appears on page 27. You're writing to Reg
16 Maloney at the...the Chief of the Shubie Band Council and the
17 final version of that letter is on page 27. And you say
18 towards the bottom of that page, page 27,

19 "Donald, Jr., has apprised us of certain new evidence which, if
20 it can be substantiated, is material to the issue of his
21 involvement in the death of the victim Sandy Seale." Can you
22 tell us what that new evidence was?

23 A. I...in simply rereading the letter, when we met a number of
24 days ago, didn't recall, I didn't have a recollection of what
25

1 that referred to but I did look at the balance of my file and I
2 think that what that relates to is Donald's instructions to Mr.
3 O'Neill in the January interview regarding a Michael Flynn, if
4 I recall.

5 Q. And the fact that that individual might have been the person
6 who, in his view, carried out the murder at that point.

7 A. Yes, there seemed to be...this was the sense of it, I guess.

8 Q. And now reconstructing, from having looked at your file then
9 is that...is that the substance of what you think that certain
10 new evidence was?

11 A. I think it was.

12 Q. Yeah. That's in April of 1980, and then you then write to
13 Junior on June 23rd saying, "We'd be pleased to hear further
14 from you at your convenience. " In the meantime you had
15 received a letter from Mr. Marshall dated April 24 responding
16 to the letter you wrote to Mr. Maloney. And, you indicate at
17 the bottom of page...or Mr. Marshall indicates, rather, at the
18 bottom of page 29, "I intend to have a blood sample to find
19 out my blood type. I believe it would be important." Are you
20 able to tell us whether or not that was a result of a
21 suggestion of yours?

22 A. No, I don't have memory of suggesting that. Again, my
23 contact with Donald was limited, and by...limited and it was
24 by telephone. There may have been some discussion
25

1 regarding a blood sample between Lawrence O'Neill and
2 Donald. I don't recall it coming up in the very limited and
3 sort of contained context of a telephone call from the
4 penitentiary to me.

5 Q. And then in...

6 A. From me to him.

7 Q. There's then a bit of lapse and you write on June 23rd on
8 page 31, and then Roy Gould writes you again towards the
9 end of October. Did anything happen in your work for Mr.
10 Marshall in the summer of 1980?

11 A. There's nothing that would indicate any activity of the file
12 during that summer.

13 Q. Do you remember whether or not you did any work for him
14 during the summer of 1980, further review of the transcript
15 or discussions?

16 A. I don't recall.

17 Q. Then on November 7, page 36, you're writing to Mr. Gould
18 indicating that you really haven't heard from Mr. Marshall for
19 some time. Then there's a handwritten note at the bottom.
20 Can you tell us what that's about?

21 A. This is in my handwriting and it appears to be a note dated
22 November the 26th, 1980. It's a reference to Donald's father,
23 Donald Marshall, Sr., having come in to see me.

24 Q. What does it say? "Was in re file for..." I can't read your
25

1 writing.

2
3 A. I have a little difficulty myself. That reads, "Donald Marshall,
4 Sr., was in re file." I think that reads, "For his band council
5 chief Alex Christmas. It seems that they are going to fund
6 this." And, then I make a comment there, I think it reads, I
7 make a reference to two thousand, twenty-five hundred
8 dollars plus disbursements as an estimate, and then a
9 reference to a rate.

10 Q. And would that perhaps have been in response to the
11 comment in your letter to Mr. Maloney in April on page 28
12 and the end of the last paragraph before the end, "Before
13 proceeding further we would require that suitable
14 arrangements be made with us to assure that this substantial
15 undertaking can be satisfactorily financed."?

16 A. Yes. Again, throughout this 1980 period from January, when
17 Mr. O'Neill interviewed Donald at Dorchester or Springhill, I
18 think it was Springhill, through that spring I certainly
19 anticipated that something would materialize in terms of this
20 retainer that I had been given to understand would be sort of
21 formalized.

22 Q. Right.

23 A. And that's what I was anticipating.

24 Q. And I take it from the comment in your letter of April 15 or
25 17 that by that point in time you had concluded that if

1 anything was to be done to get Mr. Marshall out of jail it was
2 going to require a substantial amount of work.

3 A. Yes, that's...I certainly believed that.

4 Q. And you at that time, indeed, adverted to the possibility of
5 Section 617 of the Criminal Code.

6 A. Yes. I see two references there. 610 and 617.

7 Q. 610 and 617.

8 A. I would say that I...we...I, I knew nothing of the Roy Ebsary
9 involvement at any time throughout this period.

10 Q. The name was never mentioned to you at all.

11 A. No.

12 Q. No.

13 A. It was certainly never mentioned to me and I didn't hear of it
14 through Lawrence O'Neill. I have no reason to think that he
15 ever heard that name. There is nothing in the file to indicate
16 that.

17 Q. You write again to Mr. Marshall in November 25th responding
18 to a letter of his November 13 and then asked to be advised
19 of further developments, and following your file nothing
20 happens then between then and August of 1981, at which
21 time you send your account along to Mr. Marshall. Did
22 anything occur between November of 1980 and August of
23 1981?

24 A. No. Donald was giving me to understand by his letter of
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November the 13th, which is on page 37 that he anticipated
that this work would be funded and he was expressing some
disappointment that this had not materialized and he gave me
to understand that he was going to pursue it in his fashion
with his contacts and his people.

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Q. And between the date of his letter and the following summer
nothing happened, the summer of '81, August, at least as far
as you were aware in terms of getting money for your
continued retainer.

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A. Yes, there's nothing on the file to indicate that anything
transpired. I wrote to him in November and said I looked
forward to hearing from him and I didn't hear from him and
that following summer, eight months or so later I just wrote
him a letter.

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Q. Right, and then and finally on September 11, 1981, you get a
letter from Steve Aronson, at page 42.

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A. Yes.

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Q. Mr. Aronson is asking in the last paragraph of his letter, "I
look forward to receiving the requested transcripts at your
earliest convenience." You write back to Mr. Aronson on the
18th of September, 1981, and say that you'll gather the
materials together and once the account is paid forward the
material on to him. Was that material, in fact, forwarded on
by you to Mr. Aronson?

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A. Yes.

Q. And that's the end of your involvement with Donald Marshall, Jr.?

A. Yes.

Q. Did you have a sense from your discussions with Mr. Marshall and what you might have been told by Mr. O'Neill, did you believe that there was something there?

A. Sorry, would you just put the question again.

Q. From your discussions with Junior Marshall and from what you may have gathered from Mr. O'Neill, did you have a feeling yourself that there may be something there?

A. Yes. I didn't have any substantive discussions with Donald. It was by telephone but I...certainly there was a kind of significance and not urgency but commitment in my...it was apparent to me when I dealt with Donald that he was pursuing something that he firmly believed in and as a consequence of my reviewing of the transcripts and subsequently discussing it with Mr. O'Neill, who conducted the interview, I did feel that there was something there. It's apparent, I think, now that it wasn't...the something significant wasn't Roy Ebsary the person, but certainly that there was something there.

1 Q. Subsequent to the end of your direct involvement with Mr.
2 Marshall, were you ever contacted by any of the RCMP
3 officers who conducted the reinvestigation in 1982, Sergeant
4 Wheaton or Carroll?

5 A. I don't have a recollection of being contacted.

6 Q. Were you contacted by anybody else subsequent to 1981 in
7 connection with this matter? With the RCMP or with the
8 Attorney General's Department?

9 A. I don't have a recollection of it.

10 MR. SPICER

11 Thank you.

12 MR. RUBY

13 I have no questions of Ms. MacLean but I wanted to express my
14 thanks for the efforts you've put in and for coming here today.
15 Thank you.

16
17 EXAMINATION BY MR. PUGSLEY

18 Q. Ms. MacLean, I'm Ron Pugsley and I'm acting for John
19 MacIntyre. You have your original file material with you
20 today, do you?

21 A. Yes.

22 Q. Could I take a look at the letter from Donald Marshall, Jr. to
23 Shelley that is found on pages three, four, and five? The
24 photostatic copy we have in our files is not very good and if
25

1 you have a better copy. Thank you. You've indicated that
2 you never met with Donald Marshall, Jr.

3 A. Yes.

4 Q. That is correct.

5 A. I think so.

6 Q. And that an associate in your office by the name of O'Neill
7 went to Dorchester to meet with him.

8 A. Yes.

9 Q. And that was Lawrence O'Neill?

10 A. Yes.

11 Q. Where is he now?

12 A. I believe he's an MP for, what is it, Cape Breton, The
13 Highlands, in Ottawa, presumably.

14 Q. The notes that he made consequent upon his interview with
15 Mr. Marshall are found in pages 15 to 19, I guess, in Exhibit
16 #97. Is that correct?

17 A. Yes, those were on my file. I believe those to be his notes.

18 Q. And just having had a brief opportunity to examine these
19 notes and not in any detail suggests to me that Mr. Marshall
20 was under the impression that the person who attacked him
21 and stabbed Seale was a D. Mickey Flinn of Sydney. The
22 reference is at the top of page 16. Is that your
23 understanding of these notes? At the top of the page, top of
24 page 16 it appears to say, "D. Mickey Flinn of Sydney may be
25 dead," I think that word is "dead", "About 50," or something...

1 Pardon?

2 MS. DEFERRICK

3 Non-Indian.

4 MR. PUGSLEY

5 Q Oh, Non-Indian, I'm sorry. "He was trying to protect himself,
6 thought Marshall was going to rob him." And then about half
7 a dozen lines down or so, it says, "Flinn stabbed Marshall.
8 Marshall ran. Flinn ran." And then about two-thirds of the
9 way down page 16 after No. 3, "Flinn wasn't poor. Met him in
10 Sydney jail after murder," it looks like," Flinn in there for
11 stealing coal. Flinn was in line-up but did not wear glasses in
12 line-up but had them with him in Sydney jail. Not sure of
13 after or before trial Flinn was living with Pratico's mother."
14 Now is it your understanding from your conversation with
15 Mr. O'Neill from reading these notes that this chap, Flinn, who
16 is referred to in this page is the person who Marshall fingered
17 is the fellow who stabbed Seale?

18 A. From my looking at the notes again now, that seemed to be so.

19 Q. And then the next page, page 17, after the heading No 7,
20 "Flinn had just got out or prison for murder. Dorchester
21 income from jewelry hobby in prison. Was Flinn's...:" I don't
22 know if that's "modus" or something...And then at the bottom
23 of page 17, at the bottom of page 17 after Point No. 17,
24 "Became suspicious of Flinn when I met him in Dorchester for
25 parole violation '72." And that, presumably, would be

1 Marshall became suspicious of Flinn when he, Marshall, met
2 Flinn in Dorchester for parole violation in 1972. It goes on to
3 say, "Spent two years there with him," indicating Marshall
4 spent two years with Flinn. "He was on protective floor since
5 he had ratted on an inmate who killed a guard." Again, do I,
6 is this, is my interpretation the same as yours, that Marshall
7 was under the impression in 1980 when he was interviewed
8 by Lawrence O'Neill in Dorchester that the fellow who stabbed
9 Seale was this chap, Flinn, who Marshall had been in prison
10 with for two years?

11 A. Presumably.

12 Q. Yes. And that is the...

13 A. I might say if perhaps I could.

14 Q. Yes.

15 A. The first suggestion, so to speak, of this Mickey Flinn,
16 whoever he was or wasn't, came through me as a consequence
17 of Lawrence O'Neill's interview. I did not know of this name
18 independently.

19 Q. No, but I guess the significance of it is that Marshall is not just
20 making a mistake about a name. He's not describing a Mickey
21 Flinn that he believes was the fellow who was in the park
22 that night, but he describes this fellow with some detail
23 because he had been in prison with Marshall for a couple of
24 years. Presumably someone that Marshall had seen in prison
25 not someone that he had only glimpsed in Wentworth Park on

1 the night of May 30th, 1971, but someone who he had some
2 continued association with.

3 A. I really can't respond.

4 Q. No.

5 A. The notes are there for what they mean.

6 Q. Of course. And perhaps Mr. O'Neill is the appropriate person
7 to address those questions to.

8 A. Yeah.

9 Q. But that is the person who you had in mind when you wrote
10 on April 15th, 1980, at page 24 of this Exhibit 97, and said,
11 "Donald, Jr., has apprised us of certain new evidence which, if
12 it can be substantiated is material to the issue of his
13 involvement in the death of the victim Sandy Seale." Flinn is
14 the guy you had in mind.

15 A. The new, the reference to "new", yes.

16 Q. Yes.

17 A. That's my recollection from the file.

18 Q. Uh-hum. If you'll just give me a moment, My Lord, until I
19 read this letter. Perhaps if I may just stand beside Miss
20 MacLean and read this letter along with you because, as I say,
21 my copy is not very good. This is found in Exhibit 97 and it's
22 the letter to Shelley which is found at pages 3, 4 and 5, and
23 in particular the second page which is page number 4 in the
24 book where Mr. Marshall writes. He said, and perhaps we can
25 read along together,

1 I knew who killed the guy that night and
2 everyone put the blame on me. I couldn't finger
3 this guy because I was fighting for my own life.
4 I hope this isn't too hard for you. I'm having a
5 hard... writing this down. I'm not a rat and I
6 can't take any more and I did seven years for
7 that bastard. I know, Shelley, I talked to this guy
8 when they put him in the county jail. He gave
9 me too many stories and he know that I knew
10 who he was and he got into...

11 something,

12 ...many details just to cover himself up. I even
13 asked him once but I kept it all to myself
14 because like I said if I could have gotten out on
15 appeal I was going to get him. This guy did me
16 wrong and I wanted him for myself; that's why I
17 didn't finger him.

18 Is that a fair reading of what would appear to be here?

19 A. Yes, it would seem so, yes.

20 Q "I'm not going to say any names, just one, until I get my
21 lawyer."

22 MR. PUGSLEY

23 Thank-you, very much, Miss MacLean. That's all the
24 questions I have.

25 MR. RUBY

Perhaps I can clarify this, My Lord, by indicating to you
that I'm advised that Mr. Flinn had nothing to do with this. Mr.
Flinn resembles Mr. Ebsary. I wouldn't want anyone to think that
Mr. Flinn has done anything wrong in the correspondence. Nor

MS. MacLEAN, EXAM. BY MR. PUGSLEY

1 | would I want my friend, if you look at page 16, one passage about
2 | Mr. Flinn that he didn't read, would not want my friend to think
3 | that Sergeant MacIntyre and Pratico really were talking about
4 | setting him up. That didn't happen either.

5 | MR. CHAIRMAN

6 | Page 16.

7 | MR. RUBY

8 | Yes, about the sixth last line. My friend read down to it and
9 | then stopped.

10 | MR. PUGSLEY

11 | I guess the significance is not so much that Flinn may or
12 | may not have been involved in it. I guess the significance is that
13 | Donald Marshall said that Flinn was the man. Donald Marshall.

14 | MR. CHAIRMAN

15 | At that time.

16 | MR. PUGSLEY

17 | That's right. Yes.

18 | MR. CHAIRMAN

19 | Mr. Barrett.

20 | EXAMINATION BY MR. BARRETT

21 | Q. Miss MacLean, my name is David Barrett. I represent the
22 | estate of Donald C. MacNeil, and I'll just ask you a few
23 | questions in respect to Crown procedure in Sydney while you
24 | were there. I believe you've indicated that it was the Crown
25 | procedure that if you requested a statement of an accused

1 that that statement would be provided to you by the Crown.

2 A. Yes.

3 Q. And you've indicated that the Crown, as well, would provide
4 you with a list of witnesses that they propose to call in any
5 case?

6 A. Not so much a list in the formal sense, in writing.

7 Q. But they would provide you with the names of these people.

8 A. By and large.

9 Q. And I'm just wondering...I'm just wondering at any time did
10 the Crown and, in particular, Donnie MacNeil ever tell you
11 that you couldn't speak with any of these witnesses?

12 A. It was certainly my belief at the time that the Crown didn't
13 have any property and any particular individual, whether...

14 Q. So, he didn't.

15 A. ...the Crown or otherwise.

16 Q. So, he didn't instruct you that you couldn't speak with any of
17 these witnesses.

18 A. No, I don't believe so.

19 Q. Did you ever go to Donnie MacNeil's office requesting
20 particulars or statements and have Mr. MacNeil refuse to
21 speak with you?

22 A. No.

23 Q. And, I understand you're familiar then with Arthur Mollon.

24 A. Yes.

25 Q. And would he have been senior to you or...at that time?

1 A. I don't think so. I think...senior at the bar or senior with Nova
2 Scotia Legal Aid.

3 Q. Senior at the bar.

4 A. No, I think I was senior to him.

5 Q. But he had practised or had he practised longer in the Sydney
6 area than you?

7 A. I don't think so. I think...I don't recall what his practise was
8 before going with Nova Scotia Legal Aid.

9 Q. Had...do you know if he had articulated in Sydney?

10 A. I don't know.

11 Q. Do you know if Mr. Mollon shared your views in respect to
12 Donnie MacNeil's practise?

13 A. I don't know what has transpired at this...at this proceeding
14 and I haven't discussed any matters like this of this kind with
15 Mr. Mollon since. Cer...

16 Q. Okay. I'm sorry to cut you off. Finish.

17 A. At the time while in Sydney I think it came up from time to
18 time between us.

19 Q. Okay. So, you then did discuss some concerns you may have
20 had with him, with Mr. Mollon, some concerns you had with
21 the Crown procedure.

22 A. I think so, yes.

23 Q. Did you ever say to Mr. Mollon, "Art, will you come over and
24 discuss these problems with Donnie?"

25 A. No, I don't have a recollection of that.

1 Q. Perhaps I'll just refer you to volume 29. This is the evidence
2 that Mr. Mollon gave before the Commission here and perhaps
3 I can just get some comment from you on these.

4 A. Do you have a copy of that?

5 Q. It would be page 5420.

6 A. Page 5420.

7 Q. 5420, that's correct. And I'm referring to line 18 in which
8 Commission counsel, Mr. MacDonald, asked Mr. Mollon,

9
10 There has been some difference of opinion or
11 difference of perception anyway in the evidence
12 here by some people who practised in Sydney in
13 1971 as to what the practise was between the
14 defence bar and the prosecutor's with respect to
15 disclosure and the ability to find out what the
16 Crown case was about, you...was against your
17 client. Could you tell the Commission what your
18 experience was, please?

19 And he starts off about disclosure and I'll refer you to line 4.

20 My practise has been that anything that I
21 wanted from the Crown if I was defending
22 someone that I called the Crown prosecutor and
23 indicated to them that I was defending a person.
24 They would provide if they had the material
25 there they'd provide me with what they had.

And it goes on to say:

It was complete cooperation is what...how I
would describe it with the Crown.

In particular they refer to...Commission counsel refers to the

1 late Donald C. MacNeil and Mr. Mollon replies at line 16,

2 "And I'd go in and see Donnie and tell him who I
3 was defending. He'd tell me what...what the
4 Crown evidence they had, what witness they
5 were calling and as a result of those sometime
I'd go back to my client.

6 Then he goes on to indicate that he'd discuss it with his client.
7 I'll just refer you to one other section of Mr. Mollon's evidence
8 and then perhaps I can have your comment on it. At page
9 5422, line 18. Again, Commission counsel is referring to the
10 evidence of Mr. Khattar. Now, you weren't present or don't
11 know of that evidence. But Mr. Khattar seemed to think it
12 was not the practise to go and talk with the prosecutor. "Now
13 look what kind of case do you have against him?" This is the
14 evidence that Mr. Khattar gave. "I take it it was your practise
15 to go and ask that type of thing." Referring to whether Mr.
16 Mollon would go in and speak directly with Donnie MacNeil.
17 Now, page 5423, I'll refer you then to line 7.

18
19 I remember talking to Mr. MacNeil one day. I
20 said, we werere talking about it and I said, 'God,
21 I was embarrassed in that.' I said, 'I didn't know
22 that.' He said, 'Why in hell didn't you ask me?'
23 From then on I just used to call and I never felt
24 that my case would be prepared unless I knew
25 just what the Crown had against me, what I had
to meet and I always made it a practise to find
out from the Crown everything that I could find
out from them, and I had absolutely no problem
with Mr. MacNeil. If I called him up...now there

MS. MacLEAN, EXAM. BY MR. BARRETT

1 wasn't a situation where Mr. MacNeil would call
2 me and offered stuff, but any time I asked him
3 for anything or went to his office it was always
4 full cooperation.

5 And would you indicate that those were not the views that
6 you shared?

7 A. No, not at the time that I was in Sydney. Just to perhaps find
8 out again, the Nova Scotia Legal Aid office was just opened in
9 Sydney the spring of, I think it was, '71, and I was there in
10 that office for, I think, until late '71. I...piecing it together
11 now it seems to me I wasn't there in 197...pardon me. I don't
12 recall exactly what period of time now I was in Sydney. But
13 at that time the office was very newly established and I think
14 as time passed things became more formalized. I can recall
15 that Mr. Mollon and I were involved in two murder cases in
16 Baddeck very early on and Mr. MacNeil was prosecuting and
17 Mr. Crosby, Howard Crosby, who was the Executive Director of
18 Nova Scotia Legal Aid at that time, was...if I could characterize
19 it shocked and most disturbed that the conduct of the Crown's
20 case at that time. And, there was a very significant, I think,
21 conflict regarding the conduct of that matter. And, I think
22 things improved after that. By that time I was leaving Nova
23 Scotia Legal Aid in Sydney. Art Mollon stayed in that office
24 and I have no reason to think that what he says there in his
25 testimony was not the practise that was then taken up.

Q. Okay. But he seems to indicate from this very early in his

MS. MacLEAN, EXAM. BY MR. BARRETT

1 career he realized that he could go into the Crown and ask
2 them for the information that he wanted.

3 A. Uh-hum.

4 Q. You never progressed to that point while you were in Sydney.

5 A. Progressed to that point. The...

6 Q. Well, perhaps...

7 A. I would say that figuratively speaking the altercation which
8 transpired over the conduct of the murder cases in Baddeck
9 was a turning point for Nova Scotia Legal Aid and Mr.
10 MacNeil.

11 Q. And you've, perhaps you can just enlighten me a bit, Ms.
12 MacLean, how many women lawyers would there have been
13 in Sydney at the bar in the 1972?

14 A. I don't think there were any others at the time.

15 Q. So there were no others practicing criminal law?

16 A. I don't think so.

17 Q. And I take it at this time Mr. MacNeil would have been senior
18 or experienced counsel. He'd been the Crown prosecutor since
19 1968?

20 A. Yes.

21 Q. And you've indicated that in 1971 that you were new to the
22 Sydney area at that time?

23 A. Yes.

24 Q. And is it fair to suggest that you were probably one of the
25

MS. MacLEAN, EXAM. BY MR. BARRETT

1 junior lawyers at the criminal bar in Sydney at that time?

2 A. Well, yes, I was, had been admitted to practice in 1970 and
3 this was a year, year and a half later.

4 Q. Is it fair, then, to suggest that ...

5 A. I had no reason to believe that I was treated by Mr. MacNeil
6 and the prosecutor's office any differently than they treated
7 anybody else.

8 Q. In 1971, or '72.

9 MR. BARRETT

10 Those would be all my questions.

11 EXAMINATION BY MR. SAUNDERS

12 Q. Ms. MacLean, Jamie Saunders on behalf of the Attorney
13 General's Department. In the booklet of material from your
14 file, Mrs. MacLean, page 1 is the letter to you from Mr. Gould
15 dated October 2nd, 1979, and in the first paragraphs he refers
16 to a telephone conversation he had with you, obviously prior
17 to writing the letter to you. Do you recall when the
18 conversation was with Mr. Gould?

19 A. I would think it was shortly before that.

20 Q. Had you had discussions with Mr. Gould about becoming
21 involved in the Junior Marshall case prior to receiving
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MS. MacLEAN, EXAM. BY MR. SAUNDERS

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the letter of October 2nd?

A. In a very preliminary way. I would say.

Q. And is it the best of your recollection that those discussions with Mr. Gould would have been pretty close to the date of his letter, October 2nd?

A. I would think...

Q. Within weeks.

A. I would think it was probably within ten days or so.

Q. All right. He passes on to you in that letter, the letter from Junior Marshall to Shelly, dated April 24, 1978. Do you know, Mrs. MacLean, when it was that Mr. Gould received the copy of the letter from Marshall to Sarson?

A. Do I know when...

Q. Yes.

A. Mr. Gould received the letter from Mr., from Donald?

Q. Yes.

A. No.

Q. Do you know, Mrs. MacLean, if Mr. Gould showed the letter to anyone else besi-, before he passed the copy on to yourself?

A. I would have no way of knowing that.

Q. Mr. O'Neil, your associate, went to the institution and interviewed Junior and I take it before he went you and Mr. O'Neil discussed the line of questioning that Mr. O'Neil should pursue with Mr. Marshall?

MS. MacLEAN, EXAM. BY MR. SAUNDERS

1 A. Yes.

2 Q. All right. And at page 12, I believe Mr. O'Neil's notes begin.
3 And at page 13 of those notes there's reference to Marshall
4 being in the Air Cadets and that he recalls seeing an officer of
5 the Air Cadets in the park that evening and suggests that that
6 person in the park may have seen other people in the park
7 and I'm wondering, Mrs. MacLean, when Mr. O'Neil returned
8 from his interview with Junior Marshall did you and he
9 discuss this information about a person with Air Cadets
10 having been in Wentworth Park that night?

11 A. I don't recall the detail of our discussion.

12 Q. Do you recall any mention, either by Junior Marshall to you
13 directly, or passed on to you by Mr. O'Neil, about someone
14 from the Air Cadets being in the park that night who might be
15 able to shed information on the incident?

16 A. No, not in particular. I didn't receive any substantive
17 communication from Donald respecting his case.

18 Q. Yes.

19 A. Directly from him.

20 Q. Yes. And in the alternative, did you ever receive information
21 from Mr. O'Neil about someone from the Air Cadets being in
22 the park who might have useful information on the incident?

23 A. No, just what is disclosed in the notes.

24 Q. As far as you know there was no follow-up by your office as
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MS. MacLEAN, EXAM. BY MR. SAUNDERS

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to a potential witness having been associated with Mr. Marshall and the Air Cadets.

A. No, there wasn't any.

Q. Page 14 of the notes, my photocopy, the third line down, there's some word before meeting. What's the word?

A. I don't know. It's Mr. O'Neil's handwriting, I ...

Q. You can't decipher it for me?

A. I thought it read, I think it read "denies".

Q. Denies meeting?

A. That's what I think it is.

Q. Page 15, are obviously questions that, if it's Mr. O'Neil's writing, he prepared in advance of his interview with Junior Marshall. Do you have in your file the original of those notes, Mrs. MacLean?

A. I did at one time. I believe Mr. Ruby's office would have that now.

Q. The original of the notes.

A. Or Ms. Derrick's office. Pardon?

MR. SAUNDERS TO MS. DERRICK

Do you?

MS. DERRICK

Yeah.

A. The originals.

Q. I'm interested, Mrs. MacLean, that there are some check

MS. MacLEAN, EXAM. BY MR. SAUNDERS

1 marks after some of the questions and some answers
2 recorded after the questions as well. That is to some of the
3 questions, whereas in other questions no answers are given.
4 And it would be helpful, I think, to see the originals if they're
5 still available.*

6 Question number two in the notes of Mr. O'Neil is "Who did
7 it?" And then there's a check mark after the question, but no
8 answer is recorded, correct?

9 A. Yes.

10 Q. And question number three is, "You did lie at trial?" And the
11 word "no" is recorded with a check mark.

12 A. Yes.

13 Q. And number 15, well first of all 14, the question is, "Did you
14 tell your lawyers at trial who did it?" There's no answer
15 recorded after that question is there.

16 A. No, just a check.

17 Q. Just a check. And the fifteenth question is, "Did your lawyers
18 at trial know you were holding out?" And then after it
19 appears, "No, I wasn't then." Is that right.

20 A. That appears to be what it is, yes.

21 Q. Yeah. Did you ever review the answers given by Junior
22 Marshall to Mr. O'Neil when he returned from his trip to the
23 institution?

24 A. Yes, I believe we did.
25

MS. MacLEAN, EXAM. BY MR. SAUNDERS

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Q Did you ask him whether he answered Question number 2?
That is, "Who did it?"

A. Yes, I believe I did.

Q And did you ask him about the answer recorded to Question number 15, that is, "No, I wasn't then." Did you pursue that with Mr. O'Neil? That is, the holding back of information from his counsel at trial.

A. I don't have any specific recollection of the discussion that Lawrence O'Neil and I had following this.

Q Thank you. Did Junior Marshall ever tell you, Mrs. MacNeil, what it was he was doing in the park that night?

A. No, I had no substantive conversation with Donald at any time.

Q You refer to a telephone call...

A. Yeah.

Q Or telephone conversations, and I'm wondering if at any time Junior Marshall told you what he was doing in the park.

A. No, I didn't have any substantive conversations with Donald. I believe I talked with him by telephone on perhaps two or three occasions. I, no doubt, contacted him by telephone before Lawrence O'Neil went there to explain, you know, what we were going to do and how it was going to be handled and making arrangements. I believe I received a telephone call or two from Donald later on. But in terms of discussion of the

MS. MacLEAN, EXAM. BY MR. SAUNDERS

1 case there wouldn't be anyone to telephone.

2 Q. At any time did you...

3 A. There was...

4 Q. At any time did Junior Marshall tell you that he was in the
5 park intending to obtain money from people in some fashion
6 or another?

7 A. No, Donald never told me that.

8 Q. Never did. All right. At page 16 of the notes, again, presume
9 to be...

10 A. I have no recollection of Donald ever saying anything like
11 that. Anything substantive to me.

12 Q. At page 16 of the notes, presumably in Mr. O'Neil's writing, I
13 can read it.

14
15 It's reported Mickey Flynn...(and I'm reading at
16 the top) Mickey Flynn of Sydney may
17 be...(something about 50) non-Indians. He was
18 trying to protect himself, thought Marshall was
19 going to rob him...(and then on the line below
20 that)...asked them where they were going, called
21 them back and then he yelled names at Marshall.

22 And there's an arrow going down from the phrase, "Asked
23 where they were going" and then the arrow connects with,
24 "This made them think of robbery."

25 A. I'm, I don't know.

Q. Can you help me out at all with that?

MS. MacLEAN, EXAM. BY MR. SAUNDERS

1 A. No, I can't.

2 Q. I'll have to ask Mr. O'Neil.

3 A. I think you'd have to ask Mr O'Neil.

4 Q. All right. There's a comment towards the bottom of page 17,
5 Mrs. MacLean, line, which is number 12, reference to a Donald
6 Joe, 23, why he didn't testify, and then the comments,
7 "Lawyers were supposed to tell him to come." Do you see
8 that?

9 A. Yes.

10 Q. Did you ever have any contact with either Mr. Rosenblum or
11 Mr. Khattar about that reference to Donald Joe and whether
12 they were supposed to call Mr. Joe.

13 A. No, the file was not active in the office. We were, I was asked
14 to open a file. We interviewed him and we, I, thereafter,
15 awaited a retainer as I understood would be forthcoming or
16 formalized in some way.

17 Q. I understand.

18 A. And, consequently, no work was done on the file apart from
19 what is disclosed by the file.

20 Q. So there was no contact with Messrs. Rosenblum and Khattar
21 about that or anything else, correct?

22 A. Certainly not by me.

23 Q. All right. At page 18, five lines from the top, the comment is
24 made, "I am the second person to know..."(I presume that
25

MS. MacLEAN, EXAM. BY MR. SAUNDERS

- 1 means that O'Neil is recording that he's the second person to
2 know), did you ever ask Mr. O'Neil who the first person was?
3
4 A. No, I don't recall asking him that.
- 5 Q. The bottom of page 19, the last two lines, the comment,
6 "Elastic band on jacket was cut there because of pressure on
7 the wound." I take it that that was a comment recorded by
8 Mr. O'Neil during his conversation with Junior Marshall. Did
9 you or Mr. O'Neil ever pursue that with Mr. Marshall and find
10 out whether or not that was disclosed at trial?
- 11 A. I don't know. I didn't.
- 12 Q. All right. Page 20 of the notes, about halfway down, under
13 the heading "Chant" there's the phrase, "We stopped car." Do
14 you see that?
- 15 A. Yes.
- 16 Q. All right. Did you or Mr. O'Neil ever pursue with Junior
17 Marshall the information with respect to the car that was
18 stopped or the people in the vehicle and follow that up in any
19 way?
- 20 A. No. We weren't retained to do any of this unfortunately.
- 21 Q. In your experience at the Legal Aid office in Sydney, and just
22 so that I'm clear on the dates as best as we can recall them,
23 the trial involving Mr. Marshall was, of course, in November
24 of 1971 and at the beginning of your direct evidence you said
25 that you thought you started at the office in Sydney in early

MS. MacLEAN, EXAM. BY MR. SAUNDERS

1 1971 and went through till 1972. A little later on in your
2 evidence this morning you indicated that you thought you
3 started a few months after the Marshall case, which suggests
4 to me that you began sometime around February of 1972. Is
5 your recollection that you did start in Sydney, at the Legal
6 Aid office, around February of 1972 and continued there in
7 that that office until the latter part of 1972?

8 A. Yes, right. I think you're right, Mr. Saunders. My recollection
9 is it's a year later. I was with Nova Scotia Legal Aid for four
10 years, '72 to '76.

11 Q. But less than a year at the Sydney office.

12 A. Yes. Yes.

13 Q. And did you proceed directly from the Sydney office of Legal
14 Aid to open the Legal Aid office in Truro?

15 A. Yes.

16 Q. And during your term at the Legal Aid office in Sydney you
17 had occasion to represent Legal Aid candidates both white,
18 black and native persons?

19 A. Yes.

20 Q. And did you ever have difficulty understanding the
21 instructions you were being given by native person clients?

22 A. As a generalization, no. I think there are, were probably a
23 very few occasions were, that there were a few occasions,
24 when I say few, I do mean few as I recall it now, where
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MS. MacLEAN, EXAM. BY MR. SAUNDERS

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language was an impediment.

Q. Was there ever a time when you required a translator from MicMac to English or vice versa?

A. I don't have a specific recollection of requiring one but I, it was fairly common, as I recall it, when the, when meeting with clients, that they might have a, so to speak, a facilitator with them. It might be a family member. It might be somebody else who's more conversant with, you know, legal matters, so to speak.

Q. On matters in court, that is in-court proceedings.

A. Oh, in court.

Q. Do you remember a case that you required a translator?

A. I...I can't independently recall of one but...

Q. Thank you.

A. On the other hand I wouldn't be surprised if my memory could be refreshed and that there were an occasion or two or three where it may have occurred. Where it did occur, I mean.

Q. Was your experience as a defence counsel in Sydney that there wasn't automatic disclosure of information by the Crown office unsolicited...

A. That's right.

Q. In other words, you saw your task as defence counsel, I take it, to do your homework and to ask whatever questions of the

MS. MacLEAN, EXAM. BY MR. SAUNDERS

1 Crown you thought important to your case. Is that a fair
2 statement?

3
4 A. That would be a part of it, yes.

5 Q. Yes. And as you, as defence counsel you would seek out
6 whatever information from the Crown you thought was
7 important to the defence of your client.

8 A. Again, I refer to state-of-the-art, at that time, 15 years ago as
9 to what it would be now. I do believe that there was a need
10 for the establishment of a defence system such as Nova Scotia
11 Legal Aid, some kind of a legal aid program...

12 Q. Certainly.

13 A. In Nova Scotia. I would say that the practice at that time was
14 certainly much less formalized than it is now. Defence work
15 has moreso come of age, I would say, in Nova Scotia in the last
16 six or eight years. But we're talking 15 years ago and I would
17 say that there was no prac-, I would stand by my statement
18 that as far as my experience in Sydney was concerned, that
19 there was no practice of disclosure at that time.

20 Q. No, I'm not suggesting anything different than what you've
21 said. What I'm asking you is that as defence counsel
22 representing an accused, you would do your homework,
23 figure out to the best of your ability what information you
24 needed from the Crown and would go to the Crown asking for
25 it.

MS. MacLEAN, EXAM. BY MR. SAUNDERS

1 A. Yes, I would, I suppose one's expectations are significant in
2 determining what one would seek from the Crown.

3 Q. But that didn't restrain you from going to the Crown and
4 asking for information.

5 A. No.

6 Q. All right. In your experience with the Commission in Sydney
7 and acting for various accused, natives and whites and blacks,
8 did you perceive any difference in sentencing of those races?

9 A. No, I didn't. You speak in terms of the Commission I, what
10 you're referring to...

11 Q. Legal Aid Commission. Legal Aid office.

12 A. My work with Legal Aid. Legal Aid. Yes.

13 Q. Yes. And you did not.

14 A. No.

15 MR. SAUNDERS

16 Thank you, Ms. MacLean.

17 MR. PRINGLE

18 No questions.

19 MR. ROSS

20 I've got some questions, My Lord.
21
22
23
24
25

1 12:30 p.m.
2

3 EXAMINATION BY MR. ROSS

4 Q. Miss MacLean, my name is Anthony Ross. I'd ask you please
5 to refer to Exhibit 97 and turn to page 41. It appears as
6 though this is the total amount of time which was spent on
7 this file that you were invoicing was seven hours.

8 A. Yes.

9 Q. And I take it this would have included the time spent by Mr.
10 Lawrence O'Neill.

11 A. I believe so, yes.

12 Q. Is it fair to say that this...the contents of your file reflect more
13 the involvement of Mr. O'Neill than your involvement in this
14 matter?

15 A. I would say so, yes.

16 Q. Sure. And as a matter of fact when one takes a quick look
17 through the file and, for instance, on page 14 where there
18 appears to be a reference to a transcript page 217, this would
19 be as a result of Mr. O'Neill's review rather than your review.

20 A. These are Mr. O'Neill's notes so I would presume that would
21 be reflective of his review of the transcript at that time.

22 Q. I see. And as far as the seven hours that was being invoiced
23 for is concerned I'm returning again to page 41, there is two
24 hours for perusal of material and three hours for travel to,
25 and I would take that to be Springhill for the interview with

1 Donald Marshall. Would it be fair to say that of the seven
2 hours invoiced for at least five hours would have been spent
3 by Mr. O'Neill and something...and perhaps the other two
4 spent by you.

5 A. I think that's probably fair. But by the same token I guess
6 what I was suggesting at that time that the file reflect the
7 obvious work.

8 Q. Sure. And the person who is best able to talk to this file
9 would be Mr. O'Neill.

10 A. Yes, he was involved with Mr. Marshall, with Donald on it.

11 Q. Thank-you. Perhaps you'd just assist us as far as your
12 experience with Legal Aid is concerned. When you were in
13 Sydney...

14 A. Perhaps, Mr. Ross, if I could just go back to that for a moment.

15 Q. Sure.

16 A. The apparent, the obvious so-called work on the file was done
17 by Mr. O'Neill because it was he that traveled to see Donald.

18 Q. Sure.

19 A. So, the bill that was prepared at that time was, I think, was a
20 modest one.

21 Q. Absolutely.

22 A. And I was simply suggesting that the account reflect Mr.
23 O'Neill's work more so than my sort of...my overall
24 supervision of the matter.
25

1 Q. Sure.

2 MR. CHAIRMAN

3 I take it that rate still prevails for senior counsel in Nova
4 Scotia. [Laughter]

5 MS. MacLEAN

6 No.

7 MR. ROSS

8 My Lord, I almost fainted when you made that remark. Oh,
9 please don't, please don't.

10 Q. Miss MacLean, tell me about your time in Sydney for a
11 minute, please? Working for Legal Aid you would have been
12 representing people on the lower end of the so-called socio
13 economic scale.

14 A. Yes.

15 Q. Yes. And as far as the black people you represented is
16 concerned, was it ever disclosed to you that these people had
17 the perception that in going to court they expected something
18 less than fair treatment from the justice system? Was that
19 ever expressed to you?

20 A. I'm sorry, expressed by whom?

21 Q. By the black people that you represented.

22 A. Black people.

23 Q. Yes. I'm not asking for the fact. I'm asking about their
24 perception...
25

1 A. Yes.

2 Q ...as may have been disclosed to you.

3 A. At that time in Sydney, no, I don't recall that being advanced
4 to me as a perception.

5 Q Sure. And what about your time in Truro? Was there any
6 difference in attitude?

7 A. My recollection of Sydney was that at the time that I was
8 with Nova Scotia Legal Aid in Sydney, before I went to Truro,
9 that my work and our work was more so in relation to the
10 native population and white population and not so much in
11 relation to blacks in Sydney.

12 Q That is...

13 A. When I went to Truro there was a more... a larger black
14 population and a smaller Indian population, so to speak, that
15 went to that Truro office of Nova Scotia Legal Aid.

16 Q Sure. But with respect to your experiences in Sydney. That's
17 consistent with Mr. Mollon. And, I'm asking you again about
18 Truro. Did you find that the black people who came to Legal
19 Aid in Truro expressed any concerns about getting a fair
20 shake with the legal system?

21 A. I think that that was advanced, yes.

22 Q Sure. You also made reference to the native court worker
23 program that was in place in Sydney. In your experience
24 would you suggest...
25

1 A. Could I just deal with that Truro one for a moment?

2 Q. Sure.

3 A. I think that there...I think that in some quarters there was
4 that perception when I went to Truro. My experience,
5 however, in Truro would not substantiate that perception.

6 Q. Thank-you. Now, as far as the native court worker program
7 is concerned, recognizing that this Commission is going to be
8 making recommendations, and with your experience working
9 for Legal Aid, would you be prepared to go as far as to
10 suggest that a program, a similar program to the native court
11 worker program be instituted with respect to black people,
12 from your experience?

13 A. From my experience in Sydney.

14 Q. Perhaps Sydney and in Truro.

15 A. No, I don't think so.

16 Q. It isn't necessary. Thank-you very much. I have no more
17 questions.

18 A. From my experience I wouldn't draw that that was necessary.

19 MR. CHAIRMAN

20 Mr. Wildsmith, do you anticipate being very long.

21 MR. WILDSMITH

22 Ten to fifteen minutes I would expect, My Lord. Would you
23 like to do it now?

24 MR. CHAIRMAN

25

1 I suspect Miss MacLean would like to get back to her practise
2 in Truro.

3 MISS MacLEAN

4 If I could, My Lord, yes.

5 MR. CHAIRMAN

6 Fine.

7 MISS MacLEAN

8 Thank-you.

9 EXAMINATION BY MR. WILDSMITH

10 Q. Miss MacLean, my name is Bruce Wildsmith...

11 MR. RUBY

12 I'm going to abstain myself. Mr. Wildsmith for part of the
13 afternoon will represent our interests. Thank-you.

14 MR. WILDSMITH

15 Q. Miss MacLean, my name is Bruce Wildsmith and I'm here
16 representing the Union of Nova Scotia Indians. You indicated
17 that you represented Indians through your work in Nova
18 Scotia Legal Aid, both in Sydney and in Truro, is that correct?

19 A. Yes.

20 Q. And I believe you indicated that you knew Roy Gould prior to
21 the telephone conversation that initiated your work on behalf
22 of Junior Marshall. That's correct, is it?

23 A. Yes.

24 Q. And you also knew Grand Chief Marshall.
25

1 A. Yes.

2 Q. In what connection would you have come into contact with
3 those people or with other Indians outside of your work with
4 Nova Scotia Legal Aid?

5 A. I was with Nova Scotia Legal Aid again between 1972 and
6 1976 out...during that period of time I don't think I knew
7 either of those individuals outside my work with Nova Scotia
8 Legal Aid.

9 Q. I see.

10 A. After 1976 I think I did ...I did do some work for Mr. Gould
11 on an occasion or more than that.

12 Q. Fair enough. I guess my real question to you is whether you
13 had any contact with the native population in Sydney or
14 Truro outside of your official work with Nova Scotia Legal
15 Aid?

16 A. A contact, I don't know what...really.

17 Q. On a social basis for example, belonging to clubs or
18 organizations, businesses.

19 A. No, not when I was with Nova Scotia Legal Aid, I wouldn't say
20 so. I was a member of the legislature between '74 and '78
21 and I did come across a lot of people...a lot of ...a lot of people
22 while I was a member of the legislature.

23 Q. Including members of the native community.

24 A. Oh, yes.
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Q. Thank-you. Now, I'm wondering how it was that, at least to what extent you can help us, as to why Mr. Gould came to you originally after you had moved to Truro?

A. I had done some work for him and I thought that he had confidence in me and wanted me to get involved with this matter if it.

Q. All right.

A. ...was useful.

Q. Fair enough. In, I believe it's the second letter that he sent to you, it's in Volume 36, Exhibit 97, at page 6. He included in that letter some copies of press clippings. Is that correct?

A. Yes, he did.

Q. And the press clippings related to something called the National School Committee Conference. Do you understand that to be a national conference on Indian education that was...

A. I don't know, Mr. Wildsmith.

Q. I see. Well, if we go along in that sentence he indicates that this conference took place the same week as the Supreme Court trial and then he makes the remark "Which could have caused some tension and mixed feelings on the case." Can you help us out as to what you understood that to be a reference to?

A. No, not really beyond what's contained...contained in that

1 paragraph. I think the media that file that he sent on to me
2 contained clippings from both the trial and this conference
3 and I just understood the reference simply to be that matters
4 of this kind were very visible and prominent in Sydney at
5 that point.

6
7 Q. Would it be fair to suggest that this was an attempt to draw
8 to your attention the fact that racial considerations might
9 have been a factor in the original conviction of...

10 A. I think that that's what Mr. Gould was focusing his attention
11 on, yes.

12 Q. So, is it fair to say that you would have been sensitive to this
13 issue if your work had progressed?

14 A. Yes, yes.

15 Q. Thank-you. You talked about a discussion with Mr. O'Neill
16 prior to his trip to Dorchester Penitentiary to visit Junior.
17 Would you have drawn the racial factor to his attention prior
18 to visiting Junior?

19 A. I don't think per se. Lawrence O'Neill had the file, he could
20 see what was before us. I asked him to review it all. We
21 discussed it but as an item on the agenda, so to speak. I don't
22 recall asking him to consider that in a priority way.

23 Q. As I look at the notes that he made of his interview with Mr.
24 Marshall, at various point in these notes he refers to whether
25 somebody was an Indian or not an Indian. For example, in

1 relation to this chap, Mickey, and in relation to Donald Joe,
2 and indeed on page 15, question 9, about the two men that
3 were in the park. Would that assist you at all in whether
4 perhaps you had drawn this factor to Mr. O'Neill's attention?

5 A. No, I don't think on think...in thinking of the matter now, but
6 in virtue of your question, no, I don't think so. I would think
7 that Lawrence was simply trying to identify people for
8 himself. There were numerous parties called at trial. He had
9 read the transcript. He didn't know the Sydney territory to
10 the best of my understanding and he was simply finding out
11 who was who and identifying them as Donald described them.

12 Q. I see. So, you don't attach any particular significance to those
13 comments.

14 A. Not in terms of the legal matters and in terms of whether or
15 not there was something that was going to be pursued.

16 Q. Okay. Now, coming back to your experience in Nova Scotia
17 Legal Aid in Sydney, would you have come into contact with
18 any other prosecutors besides Donald MacNeil?

19 A. Yes.

20 Q. Lou Matheson.

21 A. yes.

22 Q. Anybody else.

23 A. It seems to me there was another assistant prosecutor.
24 Certainly we...oh, yes, there were others. I'm thinking in
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terms of Glace Bay, I believe in...

Q. I meant in Sydney itself.

A. In Sydney. I think there was a third in Sydney, but...

Q. Okay.

A. ...I don't recall who it was.

Q. You've described Mr. MacNeil as having an aggressive stance, I believe. Would you make any differentiation between Mr. Matheson and Mr. MacNeil in the way that they approached the role of being a prosecutor?

A. Yes. I found Mr. Matheson, as he then was, not as vigorous a personality.

Q. Yes. Anything with respect to the degree of disclosure?

A. No, I think it was more so in keeping with the practise as it then existed, as I knew it.

Q. Okay. You've indicated that at the time you came to the Sydney office of Nova Scotia Legal Aid you were reasonably new to the bar and the only woman barrister practising criminal law in the Sydney area. That's correct, is it?

A. I think I was.

Q. Yes. Do you feel there was any difference in the way that you were treated by Mr. MacNeil or any of the other prosecutors by virtue of the fact that you were a woman?

A. No, I don't think so. I had articulated in B.C. and was first admitted to the B.C. bar and as a junior at a large firm in

1 Vancouver I've had experience in the Vancouver criminal
2 courts, in the New Westminster criminal courts. I before
3 those courts in dealing with those individuals throughout that
4 year of articling. And, after I came back to Nova Scotia I was
5 in Shelburne and dealt with the prosecutor there and then to
6 Sydney. So, with that background I didn't...I didn't feel that I
7 was being dealt with any differently by Mr. MacNeil or other
8 prosecutors. I certainly didn't.

9
10 Q. Okay. So, you had no sense of that.

11 A. No.

12 Q. That's, I take it then, not an explanation as to why you may
13 have been...why you did not receive the same degree of
14 information as Mr. Mollon.

15 A. I believe Mr. Mollon, if the extent of the disclosure to him was
16 greater than to others I think it came later, because again I do
17 recall the notorious conflict. I would now characterize it as
18 notorious because in fairness to the episode it was notorious.
19 There was a great deal of strife and conflict between the
20 Executive Director of Nova Scotia Legal and the crown
21 prosecution in Sydney over these two Warren brothers
22 murder trials conducted in Baddeck.

23 Q. Was that...

24 A. And that was at a time after...after that office in Sydney was
25 established and I think some decks were cleared and

1
2 consequently flowed from that a greater disclosure as a
3 consequence of that...of that conflict. And it was...I left
4 Sydney several months later to come to Truro and I would
5 think that the disclosure to Mr. Mollon that he speaks of here
6 would have, I think, flowed from that, at least in part, a
7 significant part.

8 Q. The conflict in Baddeck you're speaking about was obviously
9 after the Junior Marshall then.

10 A. Yes. I...

11 Q. Okay. And was that conflict over the degree of disclosure by
12 the crown?

13 A. Generally the conduct of...of the trial, the crown's conduct of
14 the prosecution.

15 Q. And that was a prosecution by Mr. MacNeil.

16 A. Yes.

17 Q. Donald C. MacNeil. Did that result in...was there any
18 involvement of anybody besides the Nova Scotia Legal Aid
19 Commission and Mr. MacNeil over that issue?

20 A. I really can't say, Mr. Wildsmith. Mr. Crosby I think could
21 speak to that.

22 Q. You don't know anything about involvement of the Barristers'
23 Society or the Attorney General's Department at a higher
24 level.

25 A. I don't have a recollection that it became a formalized thing.

1 As I say, a few months later, it was later that fall, I think,
2 three or four months after the Baddeck prosecutions that I
3 then came...then went to Truro and with Nova Scotia Legal
4 Aid.

5
6 Q. Okay. And do you have any knowledge of any other changes
7 in Mr. MacNeil's practise that might have resulted from that
8 conflict?

9 A. No, I don't because I didn't have any experience with it.

10 Q. Okay. Do you have any knowledge of any racially-based
11 remarks that Mr. MacNeil or any other prosecutor may have
12 made in Court?

13 A. No, I don't have a recollection of that, of anything like that.

14 Q. And an earlier stage in your testimony I didn't quite catch the
15 thrust of what you said about any difference in the treatment
16 of Indians than white accused. I thought that initially you
17 said there was a difference and then to a subsequent question
18 you said there was not a difference. Could you now
19 elaborate...elaborate as to whether you thought Indians were
20 treated in any different way by the justice system, be it a
21 prosecutor, be it the police, or be it a judge?

22 A. I didn't have any sense of that when I was in Sydney.

23 Q. And what about in Truro?

24 A. I...I didn't observe any...any differences in coming to Truro.

25 Q. Now, you somewhat hesitated in your answer. Is there a

- 1 sense that you have but you can't put you finger on it?
- 2 A. No, I was simply thinking in terms of my answer to Mr. Ross
- 3 that there was a perception in some quarters when I came to
- 4 Truro that...that blacks were...
- 5 Q. Perceived that they wouldn't be treated fairly.
- 6 A. In some quarters that perception existed.
- 7 Q. Were you going to say...
- 8 A. Among blacks is what I mean.
- 9 Q. Yes. Were you going to say anything about a similar
- 10 perception on the part of Indians?
- 11 A. In Truro.
- 12 Q. Yeah.
- 13 A. No.
- 14 Q. Was there a court worker in place in Truro?
- 15 A. In relation to the...
- 16 Q. Native population.
- 17 A. I believe there was.
- 18 Q. Throughout your time with Nova Scotia...
- 19 A. I can't say with certainty. I haven't thought about these
- 20 matter.
- 21 Q. Okay.
- 22 A. That part for...at all since the last ten years.
- 23 Q. All right. You've indicated though that native people were
- 24 more uncomfortable and more tentative in dealing with a
- 25

1 court situation than other accused, is that correct??

2 A. Yes.

3 Q. Was anything done by judges or prosecutors to settle, shall
4 we say, the accused, make the accused feel more comfortable
5 to ensure that the accused had a good understanding of what
6 was happening?

7 A. I think...I think what I would say in relation to prosecutions
8 in Sydney in that period of time that I was with Nova Scotia
9 Legal Aid there weren't any...there wasn't any quarter, so to
10 speak, given because of any problem that may have existed.
11 I think on the part of the Court...

12 Q. This is no quarter you're saying on behalf of the prosecution.

13 A. Yeah. No special consideration.

14 Q. Yes.

15 A. Is what I'm saying. In relation to the Court itself I think
16 there was a...certainly a will to ensure that the defendant
17 understood, the accused understood what it was that was
18 transpiring, certainly.

19 Q. Can you recall any occasions when the accused did have
20 problems in...

21 A. Without refreshing my memory from those files I really can't
22 respond.

23 Q. Now, you indicated that in your view Indians received no
24 harsher sentence than a non-Indian from the courts. Do you
25

1 have an understanding that Indians, nevertheless, are
2 disproportionately represented in the jails in this province?

3 A. Do I now have?

4 Q. Yes.

5 A. I really don't practise in this area and haven't for some time.

6 Q. Did you have any impression about that back in '72 through
7 '76?

8 A. I think Indians had difficulty with the justice system. It was a
9 different culture. When I say "difficulties with the justice
10 system" I think that they...it was perhaps a clash of cultures.
11 I think that they were certainly a significant part of the
12 caseload that Nova Scotia Legal Aid had when I was with
13 them.

14 Q. Much more so than their numbers in the general population
15 would suggest?

16 A. I...that's what I'm suggesting, isn't it, but I haven't scrutinized
17 this and I have nothing to support what I'm saying other than
18 a general impression.

19 Q. Okay. One last question for you. When an Indian came to
20 Nova Scotia Legal Aid to seek Legal Aid assistance, did you
21 more or less automatically assume that the Indian required or
22 was eligible for the services of Nova Scotia Legal Aid or did
23 you go through the process that the last document in Volume
24 36 would suggest? This is at page 60.
25

1 A. No, I don't think any assumption was made by us at all.

2 Q. So, what...

3 A. It was a new program, new offices were opening up. We had
4 a...there was a practise as to how a person became entitled to
5 Nova Scotia Legal Aid services and individuals were required
6 to complete the application and then from there we'd go.

7 Q. Was any assistance provided in filling out or providing the
8 kind of information that is required on...

9 A. Yes.

10 Q. By whom was that provided?

11 A. Well, in the very early stages of my participation in the Nova
12 Scotia Legal Aid program the lawyers actually from time to
13 time would be involved in that.

14 Q. Yes. And so were you involved yourself?

15 A. Oh, I would think, yes.

16 Q. Okay.

17 A. Not always but what often happened was, as I recall, the
18 name would be at the top and the signature might be at the
19 bottom but there was very little information of a medium
20 order required by the application, and, you know, these forms
21 are forms. You have to work your way through them, and so
22 from time to time we would assist individuals, not necessarily
23 just Indians or whatever, but we would have to assist in
24 order to get this application completed.
25

1 Q. Is it fair to say that in the vast majority of cases Indians
2 would be unemployed?

3 A. The vast majority, I really can't react to that. I know that
4 they had...that they were frequently not employed, but a lot
5 of Indians work seasonally and they might be on
6 Unemployment Insurance in the wintertime but working in
7 the summertime or vice versa, and things of that order. But I
8 don't think we made any assump...I didn't make any
9 assumptions about this, that or the other thing because it was
10 a, for example, and Indian who was applying.

11 Q. Fair enough. With respect to the question of financing and
12 obtaining a retainer, did you think that it was any part of
13 your role to correspond with the Department of Indian
14 Affairs, for example, or communicate with Nova Scotia Legal
15 Aid as to whether there was some assistance that might be
16 provided to Mr. Marshall through those avenues?

17 A. When I was approached in '79 and '80?

18 Q. Yes.

19 A. No. As I indicated, I was given to understand that funding
20 existed in some quarter. I wasn't asked to concern myself
21 with that at all.

22 Q. Fair enough.

23 A. And I think my file would indicate some correspondence
24 from...from Donald himself who indicates that he considered it
25

1 his responsibility to get his forces mustered, so to speak.

2 Q. And from your experience with Nova Scotia Legal Aid you
3 know of no way in which he could have obtained assistance
4 through Nova Scotia Legal Aid?

5 A. I really don't know. That wasn't under consideration, that
6 was not on the basis that Mr. Gould approached me in the
7 first instance.

8 Q. But.

9 A. And of Mr. Gould, the Nova Scotia Legal Aid program was well
10 established by '79 or so I would...and he was well versed in
11 matters of this kind from...

12 Q. All right.

13 A. I...it wasn't a part of our...

14 Q. So, you don't have any background knowledge that would
15 suggest that he might have obtained Legal Aid assistance?

16 A. That Donald might have?

17 Q. Yes. From your knowledge of....

18 A. Well, no, I would have had the impression that Roy Gould was
19 probably correct, that funding probably was in place
20 somewhere to pursue this item.

21 Q. Okay. Did you have any other contact with this case
22 subsequent to the material that's disclosed in your file here,
23 all the way through say to the end of the compensation
24 issue?
25

1

A. I don't have any recollection of any subsequent contact.

2

Q. Okay. Thank-you those are my questions.

3

MR. CHAIRMAN

4

That's all, thank-you. Now, it's one o'clock. We should...two-
thirty.

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INQUIRY ADJOURNED TO 2:30 p.m.

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2:35 p.m.

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3 MR. G. MacDONALD

4 Innis MacLeod, please.

5 INNIS MacLEOD, duly called and sworn, testified as follows:

6 EXAMINATION BY MR. MacDONALD

7 Q. Now your name is Innis MacLeod?

8 A. Yes.

9 Q. And, Mr. MacLeod, you reside in Halifax, now, do you?

10 A. Dartmouth.

11 Q. Dartmouth. And at the present time I understand you're
12 retired.

13 A. Right.

14 Q. You're a graduate lawyer.

15 A. Yes.

16 Q. When did you obtain that qualification?

17 A. I graduated from law school in 1937 and was admitted to the
18 bar in 1938.

19 Q. And, generally, can you just hit the highlights of your career?
20 Where you practised and with whom, until you retired.

21 A. I practised in Sydney from 1938 to 1948, primarily with the
22 law firm of MacNeil and Morrison. And in 1948 I was
23 appointed solicitor for the Department of Mines and at that
24 time I moved to Dartmouth. I continued as solicitor in the
25 Department of Mines until 1950. In 1950 I was transferred

1 from the Department of Mines to the Department of the
2 Attorney General. And I continued there until October 1950,
3 and in 1950 I was appointed Civil Service Commissioner for
4 the province and I continued in that office, I haven't got the
5 exact date because I didn't have access to some of the records
6 but I believe that continued until about 1953. And in 1953 I
7 returned to the Attorney General's Department as senior
8 solicitor and continued there until 1956. In 1956 I was
9 appointed administrative assistant to the premier. I
10 continued in that position, along with several other minor
11 positions until June '69. And in July 1969 I was appointed
12 Deputy Attorney General and I continued in that post until
13 September 1972. If you want anything further I went from
14 that in '72 to Deputy Minister of the Executive Council Office
15 and continued in that office until July 1976 and I retired in
16 1976 and following that I was continued on a retainer as
17 general counsel to the Province until August 1979. So that's a
18 thumbnail sketch of my career.

19 Q. Thank you. While you were with the Civil Service
20 Commission would that be practising law in any way?

21 A. No, it was purely administrative. The Civil Service Act, I
22 believe, was passed about 1939 but it continued for quite a
23 long period of time. I was only a part-time commissioner and
24 things had got into a condition that was making it very
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difficult to run the Departments of the Province and then
premier, Angus L. Macdonald asked me if I would take over
as Civil Service Commissioner for some period of time. And I
said, yes, I would, if he would assure me that I could get out
of that position when I had done everything that I thought a
lawyer could do with it. And, so the, during the time that I
was Civil Service Commissioner I rewrote the Civil Service Act
and the Civil Service Regulations and generally upgraded the
payscales of all the employees of the Province coming under
the Civil Service Act.

12
13
Q. And from, did you say '56 till '69 you occupied the post of
administrative assistant to the premier?

14
A. Yes.

15
16
Q. And that would, there would be several premiers in that
period of time, would there?

17
A. Yes.

18
Q. Who would they be?

19
20
21
22
A. The first one would be, '56, the first one, I think, would be
Premier Stanfield. And the second one would be The
Honorable G.I. Smith. And the third one would be The
Honorable Gerald Regan. And that's about it, I guess.

23
24
Q. I understood, and your memory may be better than mine, but
did not Premier Regan, wasn't he elected in '70?

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A. I thought it was '69.

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Q Anyway, you did serve as his...

A. Yes, it doesn't matter...

Q Administrative assistant, in any event.

A. Yes.

Q And in those, in that position, Mr. MacLeod, would you be practising law in any way?

A. No, not really. Except in one respect. Through the years I had acted, together with John A.Y. MacDonald, the then Deputy Attorney General, I had acted on a series of Constitutional and financial conferences. And through the years, without regard to the position that I might fill at any particular time, I continued to act primarily along with John A.Y. MacDonald to act on Constitutional and financial conferences.

Q When you were appointed to the position of Deputy Attorney General, and that was in 1969, would that have been the result of a competition or would that have been an appointment by the premier?

A. No, unfortunately, John A.Y. MacDonald, who had been an outstanding Deputy Attorney General for a long period of time, died suddenly and there had to be a replacement and the, of course, the position of Deputy Attorney General is a Governor-in-Council appointment and I was simply appointed by the Governor-in-Council.

Q And at that time it would have been Premier Regan as

1 premier? If you were serving under him.

2 A. Let me see now until I get my dates straightened away. No, I
3 think in July '69 that the Honorable G.I.Smith was still in
4 office.

5 Q. I believe so. I'm just...

6 A. Yes.

7 Q. I...

8 A. So it was during the term of the Honorable G.I.Smith that I
9 was appointed Deputy Attorney General.

10 Q. Let me just go back for a moment, then. Did you ever serve
11 as administrative assistant to Premier Regan?

12 A. Yes, I certainly did.

13 Q. And that's where I'm having a little difficulty. I guess it's
14 history. I think the history is that was Stanfield, Smith and
15 Smith was defeated by Regan.

16 A. That's right.

17 Q. And never became premier again.

18 A. That's right.

19 Q. Did you serve as Deputy Attorney General and as
20 administrative assistant at the same time?

21 A. No, I did not. We must have some confusion here with
22 respect to dates but really the actual dates aren't really that
23 important.

24 Q. I agree, they're not important at all. When you then were
25

1 appointed to the position as Deputy Attorney General, you
2 had been, you had had service in that Department from 1953
3 to '56 and also a brief period of time in 1950.

4 A. That's right.

5 Q. What was the role, then, of the Deputy Attorney General as
6 you took it on? What would be your responsibility?

7 A. Actually, it's pretty broad responsibilities. The, of course the
8 primary responsibility of the Attorney General's Department,
9 of course, rests with the Attorney General, but as Deputy you
10 had pretty much day-by-day administration of the overall
11 Department and all the functions of the Department.

12 Q. How was the Department structured when you took it over?

13 A. It was a fairly loose structure and that was not particularly a
14 bad situation because you were dealing largely in the
15 Department proper with a professional staff and you assumed
16 that they were perfectly capable of performing their
17 professional duties and, to a degree, there was an assignment
18 of work functions, but generally, the, it was a pretty
19 cooperative group of people and work had a tendency to
20 move from one point to another and, without any rigid,
21 without any really rigid lines. Now, I found when I took over
22 that there was far too much correspondence crossing my
23 desk. There was so much correspondence crossing my desk,
24 both going in, coming in and going out that I had very little
25

1 time to devote to the other functions of the Department. So
2 very broadly, after I took over, I was able to arrange two
3 other Civil Service positions. One of them was Director,
4 Criminal and the other was Director, Civil. And from that time
5 on most of the criminal work went through the Director,
6 Criminal. On the other hand, the civil work was pretty
7 widespread. It covered such a wide spectrum of government
8 occupations in the government that the Director, Civil had sort
9 of a top control. But at the same time various solicitors were
10 assigned to various departments of the government and
11 various functions. So that the, a great deal of the
12 correspondence would come in to the Director, Civil but he, in
13 turn, would refer it out to the several solicitors servicing the
14 various departments.

15 Q. Now would these directors, then, report to you?

16 A. They would direct, they would report to me as needs be.

17 Q. It was not, then, a regular reporting function?

18 A. No.

19 Q. They were given autonomy to do their thing?

20 A. That's right.

21 Q. What about the reporting, if any, between yourself or the
22 directors and the Attorney General?

23 A. It was, again, it was pretty informal. The Attorney General, of
24 course, was sitting in the Department next to my office, or
25

1 perhaps it would be more appropriate to say that I was
2 sitting next to his office and we moved back and forth. There
3 was no great rigidity in the Department. The door would pop
4 open the Attorney General would walk in, or, on the other
5 hand, if it was going from me to the Attorney General, it was
6 a little more formal. I'd make an appointment with his
7 secretary to see the Attorney General, but generally the door,
8 it was an open door operation.

9
10 Q. Who was the Director, Criminal that was appointed by you?

11 A. My recollection is that it was the, Malachi Jones, who is now
12 The Honourable Malachi Jones. And he was appointed to the
13 bench, I haven't got the exact date, but he was appointed to
14 the bench. In any event, when he was appointed to the bench
15 then, I believe, Robert Anderson, who is now His Honor
16 Robert Anderson was appointed Director, Criminal. It seems
17 to be a stepping stone to higher, to greater things.

18 Q. And the, over the Deputy?

19 A. Yes, and over the Deputy, yes.

20 Q. And who succeeded Mr. Anderson? Judge Anderson.

21 A. I think Judge, or Robert Anderson was still there, I believe,
22 when I retired from that position.

23 Q. You retired in September '72?

24 A. I retired in September '72.

25 Q. From that position of Deputy Attorney General. I think the

1 record will show, Mr. MacLeod, that Judge Anderson was
2 appointed to the Court in December, December 15th of 1971, I
3 believe, is the date. So it would have been prior to your
4 retire-...

5 A. Yes.

6 Q. Prior to your leaving that post. You don't have any
7 recollection, then, of who succeeded him if my information is
8 correct?

9 A. My recollection is that it would be Gordon Gale.

10 Q. Thank you. Now when Judge Anderson occupied the position
11 of Director, Criminal would he have solicitors assigned to him
12 on the criminal side of things, if you will?

13 A. Not in any formal sense because the workload, of course, in a
14 department like that varies from time to time. But he would
15 have certain solicitors who did primarily civil work. But
16 although we tried to avoid having the young solicitors set
17 down into one branch of the department. We tried to give
18 them a certain variety of work so that they could move from
19 one side, civil to criminal.

20 Q. What about the more senior people? What about a person
21 like Gordon Gale? Would he be doing both criminal and civil?

22 A. I think Gordon Gale was doing both.

23 Q. Thank you. Was the Director of Criminal responsible to assign
24 work, the criminal work, to various people in the
25

1 Department?

2 A. Pretty much, yes.

3 Q. Now you say there was no formal reporting to you. How
4 would you, as the Deputy, keep your finger on the pulse of
5 the Department? How would you know what was happening?

6 A. Well, as I say, it was a fairly loose arrangement but almost
7 every morning at 10 o'clock we had a meeting in my office
8 and it was attended, certainly by the senior members of the
9 staff and some of the more junior ones and we had a cup of
10 coffee and the conversation flowed back and forth and if
11 anybody had any particular problem they raised it at that
12 meeting. We did not keep minutes.

13 Q. Would things of interest, unusual sorts of things going on in
14 the Department, would they be discussed at these daily
15 meetings?

16 A. They probably would.

17 Q. But there was no agenda as such.

18 A. No. No.

19 Q. There was no assignment to particular lawyers, "You come
20 tomorrow and tell us something."

21 A. No.

22 Q. What about the filing set up in the Department, Mr. MacLeod?
23 If a case, we're dealing with a criminal case that is involved
24 with the AG's Department, what files would exist? In your
25

1 time.

2 A. Just general files. I don't think there was anything peculiar
3 about the filing system.

4 Q. Would there be a central filing system or did each solicitor
5 keep his own files?

6 A. My recollection, and my recollection is pretty vague, is that
7 the various solicitors might have a filing, one, perhaps one
8 filing cabinet in their office, but generally, matters dealing
9 with criminal matters were kept pretty generally in a central
10 filing system. Now the reason I say that the various solicitors
11 might have filing cabinets in their office is that the, most of
12 the solicitors had certain departments assigned to them. And
13 there wasn't a great weight of correspondence, but there was
14 some correspondence back and forth, so that the
15 correspondence from some certain department that had been
16 assigned to a specified solicitor, he would probably keep that
17 in his own filing cabinet in his own office.

18 Q. Am I correct in assuming that would be almost exclusively
19 civil matters.

20 A. Pretty much civil, yes.

21 Q. And can I draw from that that with respect to criminal
22 matters there will be a central filing system.

23 A. Yes.

24 Q. What type of criminal matters would be handled by the
25

1 Attorney General's office itself?

2 A. That's a pretty broad question.

3 Q. Perhaps I can refine it a little bit. Was there a prosecuting
4 office in Halifax as well?

5 A. Yes.

6 Q. And there was a prosecuting office in the various...

7 A. Yes.

8 Q. Counties of Halifax[sic]?

9 A. Yes.

10 Q. Those people who do, then, the normal prosecutions.

11 A. Yes.

12 Q. Would there be prosecutions done out of the AG's Department
13 itself?

14 A. I can't recall of one during my term of office.

15 Q. And if a prosecution is taking place in Sydney, or in Halifax, (I
16 guess?), would the file be with the prosecutor's office or
17 would it be with the AG's office?

18 A. It would be pretty much with the prosecuting officer.

19 Q. Okay. So what I'm trying to determine then, sir, what type of
20 criminal files would be kept in the AG's office, if the
21 prosecutions are being done out in the field?

22 A. Well entirely apart, perhaps we have a little confusion here,
23 entirely apart from the matter of prosecutions there was a
24 general recording system from the RCMP to the Attorney
25

1 General's Department on a multitude of matters that related
2 to the enforcement of law and order in the province. And
3 with respect to the Crown prosecutors, the Crown prosecutors,
4 of course, would be acting in conjunction with the RCMP in
5 their own particular area, but the matters that related to the
6 whole province, of course, came directly to the Attorney
7 General's Department.

8 Q. During your tenure as Deputy Attorney General, were there
9 regular meetings between the RCMP and your Department?
10

11 A. Yes

12 Q. And with what frequency and who attended?

13 A. It was usually once a week and someone came over from the
14 Royal Canadian Mounted Police and they met with the
15 Director, Criminal, whoever he might be at any particular
16 time.

17 Q. Would you attend those meetings?

18 A. No.

19 3:00 p.m.

20 Q. Would you be advised what was taking place at those
21 meetings?

22 A. If anything out of the ordinary, anything out of the ordinary
23 arose, I would certainly be advised and I suspect that I would
24 also keep the Attorney General advised.

25 Q. Okay. Was Milton Veniot in the Department during your

1 tenure as Deputy Attorney General?

2 A. Yes, I believe he was.

3 Q. He has testified before this Commission yesterday, in fact, Mr.
4 MacLeod, and I'm referring to page 7023 of the transcript for
5 the record, but he said this,
6

7 That there was a large file room in which files
8 were kept. I know there were files to which
9 lawyers in the Department did not have access
10 and these would be files that would be sensitive
11 for, I think what you would call, political or
12 politically-related reasons. Files that I think
13 involved, I never got any of them, but files, they
14 used to have a green stripe on them and they
15 would be RCMP reports on sensitive matters.

16 And he repeated that a couple of times. Can you give us any
17 assistance with respect to the existence of such files?

18 A. I have no recollection of that at all. But Mr. Veniot's a lot
19 younger than I am and perhaps his memory is better than
20 mine but I must say that personally I have no recollection of
21 that.

22 Q. Without revealing, and I'm not trying to...

23 A. No, that's right.

24 Q. Find out what particular files may have been in existence but
25 were there files that you were involved with that you would
classify as sensitive for political or politically-related reasons
that the RCMP was looking into during your time as Deputy

1 Attorney General?

2 A. No, I have no recollection of such a situation.

3 Q. Now if the Directors, Civil, Directors, Criminal were looking
4 after the general flow of things and not reporting to you on a
5 structured basis in any event...

6 A. Yes.

7 Q. What would be your role in the Department, Mr. MacLeod?

8 A. Well, it was an overall administrative situation in the
9 Department. You have to keep in mind that in addition to the
10 enforcement of the Criminal Code of Canada, you had all the
11 penal statutes of the Province. You had the Prothonotary's
12 offices, the Registry of Deeds offices and the Registry of
13 Probate Offices. The administration, the formal
14 administration of courts, courthouses. As I mentioned before,
15 advice to the various departments of the government. Advice
16 to the, when requested, to the, all of the ministers, in fact, of
17 the government. Certain administration of the penal
18 institutions in the province and certain aspects of correctional
19 services in the province. So there was a broad variety of
20 activities going on all the time.

21 Q. And the Deputy is responsible, generally for all of those
22 things.

23 A. The overall, when I say that the, when I say that certain
24 things were delegated to certain people, the overall
25

1 administration of the Department remained with the Deputy.

2 Q. The local prosecutors, wherever they be, were they pretty all
3 autonomous to do what they liked?

4 A. Yes, they were. As you well know the Criminal Code of
5 Canada, I suppose the, as far as the Province is concerned, the
6 prime officer is the Attorney General. And the Crown
7 prosecutors are appointed by the Governor-in-Council. They
8 do not come under the Civil Service. So that you had this
9 array of Crown prosecutors who were actually primarily
10 answerable to the Attorney General spread across the
11 province, but in actual practice, they were sort of considered
12 as part of the Department. But if it came to actually
13 instructing them what they could or could not do, the final
14 word on that, if there was a question, would have to come
15 from the Attorney General.

16 Q. Would the prosecutors, then, and they, in fact, bypass the
17 Deputy and go directly to the Attorney General?

18 A. No, not really, I, offhand I can't think of a case where we had
19 a conflict with a Crown prosecutor where he wanted to, in
20 fact, bypass the whole Department and go direct to the
21 Attorney General.

22 Q. What was the contact between the Director of Criminal and
23 the various prosecutors? What would be the relationship
24 between those people?
25

1 A. I'm a little vague as to just how it worked at the time but my
2 feeling would be that the, as far as a Crown prosecutor is
3 concerned that he would not consider himself as being
4 answerable to the Director, Criminal, if he felt himself
5 responsible to anyone other than the Attorney General. He
6 would probably feel perhaps that he was responsible to the
7 Deputy.

8 Q. Was there a job description that was prepared for this
9 Director, Criminal by you? Or under your direction.

10 A. I don't recall. I would suspect that that would be because
11 that was generally required.

12 Q. And do I take it, then, from what you've just described to me
13 that that would not include the overall supervision or liaison
14 with the Crown prosecutor?

15 A. No.

16 Q. Thank you. Was there any type of a manual, procedural
17 directives, these sort of things available or produced by the
18 Department for use by Crown prosecutors?

19 A. No.

20 Q. Were there any policy directives of any kind that were given
21 out from time to time to Crown prosecutors?

22 A. Not that I'm aware of.

23 Q. I'm particularly concerned about what the Department's view
24 would be with respect to disclosure of information by the
25

1 Crown to defence? Was, do I understand that there was no
2 formal policy as such?

3
4 A. Perhaps I'm old enough now that I could back-up a few years.
5 When I started practising law it was like pulling teeth trying
6 to get any information from Crown prosecutors.

7 Q. Was that when you were practising in Sydney?

8 A. That's when I was practising in Sydney. It was difficult to get
9 information. Now, that started to loosen up through the years
10 and I think the Crown prosecutors began to be more aware of
11 the obligations that they owed to people of the province
12 generally in the enforcement of the law and by the time we
13 come up to the period when I was Deputy Attorney General,
14 generally I think that the, it had loosened up to the degree
15 that defence lawyers probably had very little difficulty in
16 getting pertinent information from Crown prosecutors. And,
17 now I don't say the Crown prosecutors went around
18 volunteering information, but I have a feeling that if they had
19 information in their possession and they received a request
20 from a defence lawyer, that they would make that
21 information available. At least I would hope so.

22 Q. Do I understand, though, Mr. MacLeod, there was no formal
23 policy in place within the Department that was imposed on
24 Crown prosecutors out in the field.

25 A. No.

Q. Was it left up to them?

A. Yes.

Q. What did you consider, as Deputy Attorney General, is the policy of disclosure that should be implemented by Crown prosecutors out in the field?

A. I felt that the, I felt and I still feel that the Crown prosecutors should make available to defence lawyers all the pertinent information that they need in order to give a proper defence to their client or the accused, yeah.

Q. What do you see the role of the Crown prosecutor to be?

A. Broad question. But I think it's the enforcement of the, primarily the enforcement of the Criminal Code of Canada.

Q. Is it to enforce, is it to get convictions or is it, to put in a cliché, is it to see that justice is done?

A. To see that justice is done.

Q. And when you say you would hope that prosecutors would make available pertinent information, can you be a little more precise as to what would be pertinent?

A. Well, it's little difficult to answer that because it changes so much with each case. But the, primarily, I suppose what I have in mind is that in a criminal case the defence should not suddenly be met in the middle of a trial with complete surprise. Of course where there's a preliminary hearing, of course the defence, I assume, knows what went on at the

1 preliminary hearing. But not infrequently in a criminal trial
2 witnesses will be called who did not appear at a preliminary
3 hearing.

4 Q. What do you, I took it from what you said earlier that your
5 impression when you were Deputy Attorney General was that
6 defence could get information, pertinent information, if they
7 asked for it.

8 A. Yes.

9 Q. Do I...

10 A. Yes.

11 Q. Do you consider, or did you consider that the burden would
12 be on the defence to seek out the information as opposed to a
13 burden on the Crown to seek out the defence and give them
14 information.

15 A. Well, certainly at the time I think it was generally regarded
16 in legal circles that the defence would have to take care of
17 themselves. But that if they looked for information, that the
18 information should not be withheld.

19 Q. And...

20 A. But it should not be simply handed to them and say, "Here's
21 all the information."

22 Q. And that may have been generally understood and can I take
23 it from that that if anyone had asked you as Deputy Attorney
24 General what the practice should be that that would have
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been the response they may have got?

A. Yes.

Q. Now you had indicated, Mr. MacLeod, that to your knowledge there was no policy directives as such in the Department. I've put in front of you, sir, to your right a file folder there that says "Exhibit 81" on it, I hope. This one here.

A. Yeah.

Q. Exhibit 81, Mr. MacLeod, is a document that was introduced, I believe, through Judge Lou Matheson and my recollection of his evidence is that this was sent to him by Malachi Jones once because he was being, for want of a better word, he was being chastised because he had turned over the entire police file to defence counsel and there was some complaint from the police that that was improper and my understanding is that in response to that, Mr. Jones sent this directive to Judge Matheson. And this directive, you'll see is quite old, it's March 23, 1961 and it's directed to the officer in charge of "H" Division, RCMP Halifax. I take it that Mr. Justice Jones would have written that in response to a request from the RCMP or something to that nature.

A. Um-hmm.

Q. Have you ever seen that before, sir?

A. No. It doesn't surprise me because perhaps as I intimated before, for a long period of time, and this is not peculiar to

1
2 Nova Scotia, it was a fact in the general administration of
3 criminal law wherever you went, the prosecution did not
4 volunteer information to defence counsel. So, I haven't read
5 these cases referred to here but I assume what they contain.
6 It doesn't really surprise me but...

7 Q. As Deputy Attorney General, though, just so I understand it,
8 you were not aware of any formal policy, as such, that was
9 given out to prosecutors saying here's the Department policy
10 with respect to disclosure.

11 A. I was not aware of any such...

12 Q. Thank you. I just want to direct you, sir, to a couple of the
13 comments in this letter and perhaps get your comments on
14 them if I could. On page 2, it's the second full paragraph that
15 starts, "In criminal proceedings ..."

16 A. Yes.

17 Q. In criminal proceedings additional considerations
18 apply because the Crown is a party and,
19 accordingly, has a greater duty to see that justice
20 is done.

21 And what they're talking about there is as opposed to civil
22 proceedings...

23 A. Yes.

24 Q. In criminal proceedings.

25 In some jurisdictions, such as Ontario and in
England, it is the practice in many courts for the

1 Crown to make copies of all statements made by
2 witnesses to the police available to defence
3 counsel.

4 I take it that if that's a correct statement of the practice in
5 Ontario, England and other places, that was not the practice in
6 Nova Scotia unless, at the very least, unless defence counsel
7 went and asked for them.

8 A. That's right.

9 Q. Is that correct?

10 A. I think that's correct.

11 Q. Thank you. And then if I can take you over to the next page
12 in that quotation from that book The Road to Justice from Sir
13 Alfred Denning...

14 A. Yes.

15 Q. Where he says,

16 The duty of counsel to see that justice is done is,
17 however, best shown by what is expected of
18 prosecuting counsel. If he knows of a credible
19 witness who can speak of facts which go to show
20 the prisoner's innocence he must, himself, call
21 that witness. Moreover, if he knows of a
22 material witness who can speak of relevant
23 matters but whose credibility is in doubt, then
24 although he need not call him himself he must
25 tell the prisoner's counsel about him so that he
can call him.

26 Would you agree with that statement of principle?

27 A. I certainly wouldn't disagree with it. It's a little startling,

1 perhaps, to a lot of us but...

2 Q. But that was not the practice in Nova Scotia during your
3 tenure as Deputy AG.

4 A. I think not. I think not.

5 Q. Thank you. What do you say should be done by a Crown
6 counsel in a situation where he has two statements from a
7 witness which are different? What's the duty of a Crown
8 counsel in those circumstances?

9 A. You mean at the actual trial level?

10 Q. Yes.

11 A. I suppose in terms of absolute justice the, in one way or
12 another, I'm not just sure how you'd go about it, but in one
13 way or another I think both of those statements should be
14 available.

15 Q. Available to whom?

16 A. To the court and to the defence.

17 Q. And would that depend on the defence coming and asking for
18 them?

19 A. As of today I would say it should not depend on the defence
20 asking for it.

21 Q. But in your time as Deputy Attorney General that would have
22 depended on that.

23 A. It probably would have, yes.

24 Q. Thank you. What was the role played by the RCMP in Nova
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Scotia during your time as Deputy Attorney General?

A. I don't quite understand the...

Q. What did they do in Nova Scotia from a policing point of view? For the province.

A. Well, actively they were provincial police force. They did the highway patrol work. I suppose practically, the major function would be the enforcement of criminal law and highway patrol.

Q. What about investigation of serious crimes? Do you have knowledge of what they would do in Nova Scotia in 1971 and '72, or '69 to '72 while you were the Deputy Attorney General?

A. Investigation, I don't quite follow the question.

Q. If there was a murder in Nova Scotia, a serious type of crime, what role, if any, was the RCMP expected to play?

A. Well, of course, they were, a large part of the province the, as I said the RCMP were, in fact, the provincial police force. And they would, in fact, investigate, let's say, a murder. But you get a situation, let's say in Sydney, where Sydney had its own police force, normally the RCMP would not investigate a murder in the City of Sydney.

Q. What would they do in a place like Louisbourg that had a one-man police force? If you had a murder in Louisbourg.

A. I really can't be sure but I suspect that if they got a murder

1
2 in a town where there was a very small police force that they
3 would probably request the Attorney General to direct them
4 to investigate that particular offence. But I don't think they
5 would go in simply because there had been a murder. They
6 would look for instruction from some source.

7 Q. Our understanding is, Mr. MacLeod, I think it's been inferred
8 by some witnesses, or talked about by some witnesses, and
9 it's our understanding, that in those days if there were what's
10 classified as serious crime, and in that category they put
11 murder, attempts, rapes, these sort of thing...

12 A. Yes.

13 Q. And if they occurred in jurisdictions other than Sydney,
14 Halifax or Dartmouth then, indeed, the RCMP was the force
15 that did the investigation.

16 A. Yes.

17 Q. Now, does that refresh your memory at all?

18 A. Yes, I think that's probably right.

19 Q. During your time in your position as Deputy Attorney General,
20 did you have any experience with the requirement to call in
21 the RCMP to investigate the work of another police force?

22 A. No, I did not.

23 Q. And would you consider such a request to be an unusual
24 request?

25 A. Yes, I suppose it would be.

1 Q. Would you consider it to be out of the ordinary?

2 A. Yes.

3 Q. And if such a request was made is that the sort of thing that
4 would be reported to you or should be reported to you by the
5 various people in the department?

6 A. Yes, I would think it would be referred to the Deputy
7 Attorney General.

8 Q. Did you have any experience, and I don't mean directly...

9 A. Yes.

10 Q. But did you have any experience with the use of polygraphs?

11 A. None whatever.

12 Q. Were you aware of their existence and the purpose for which
13 they could be used?

14 A. Oh, yes.

15 Q. And you were aware that at least their evidentiary value was
16 frowned on by the court.

17 A. Yes.

18 Q. Now, Mr. MacLeod, the evidence has been before this
19 Commission, sir, that in November of 1971, and I believe it's
20 around the 15th or so of November, the Sydney Police were
21 visited by a Jimmy MacNeil who told them he had knowledge
22 that Donald Marshall, Jr. did not stab Sandy Seale. First of all,
23 were you aware of the Marshall case? That is was going on in
24 Sydney, that Mr. Marshall had been convicted of murder.
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A. Only through the newspapers.

Q. There would be no...

A. And the radio and TV.

Q. So there would be no regular reporting from Mr. MacNeil in Sydney, Donnie MacNeil, up to your Department.

A. No.

Q. Now the evidence is, as I've just described, that Jimmy MacNeil approached the Sydney Police in November of 1971 and that that was relayed to the Crown in Sydney and that was Lou Matheson. You know Lou Matheson.

A. Yes

Q. And that Judge Matheson, in turn, passed that along to Robert Anderson in Halifax. Is that the type of information that should have been brought to your attention?

A. I would think so.

Q. That is, let me back up, would that type of information, forget the Marshall case, ever had come to your attention before. Having someone convicted of murder, a short time after someone comes forward and says, "It wasn't him, it was someone else."

A. No, I have no recollection of anything like that ever happening.

Q. No. And that would be, certainly, out of the ordinary.

A. That's right.

1 Q. The evidence also is that the RCMP were contacted and asked
2 to do at least something, there's some controversy, as to what
3 they were asked to do.
4

5 A. Um-hmm.

6 Q. But the Attorney General's Department in Halifax contacted
7 the RCMP to ask them to go to Sydney and look at this new
8 evidence. That would be out of the ordinary, as well,
9 wouldn't it.

10 A. I would think so.

11 Q. And that is the type of information that should have been
12 brought to the attention of the Deputy Attorney General.

13 A. I would think so.

14 Q. And if that information was brought to the attention of the
15 Deputy Attorney General, you should have brought that to the
16 attention of the Attorney General, wouldn't you.

17 A. Most certainly.

18 Q. Do you have any recollection of that happening?

19 A. No recollection at all.

20 Q. This type of event, and assuming it happened, I can only tell
21 you what the evidence has been, that would strike me as the
22 type of unusual or out of the ordinary circumstance that at
23 least should have been talked about during your coffee
24 breaks in the morning. Was it ever discussed there?

25 A. I'm almost sure it that it was not.

1 Q. Thank you. We are also advised that after the RCMP did get
2 involved an Inspector Marshall went to Sydney and he
3 carried out an investigation. He conducted some polygraph
4 examinations. He advised Donnie MacNeil, who in turn, the
5 evidence is, called Halifax and spoke with the Attorney
6 General or someone in the Department. Do you have any
7 knowledge about that?

8 A. None whatever.

9 Q. And there is some concern or controversy over whether the
10 ultimate report prepared by the RCMP reached the
11 Department of the Attorney General. Would you look at that
12 volume I have open there for you, Mr. MacLeod, it's Volume
13 16 at page 204. It's open to the page. That is a report that
14 was prepared by Inspector Marshall following his work in
15 Sydney. Have you ever seen that before, sir? 3:30 p.m.

16 Q. That is a report that was prepared by Inspector Marshall
17 following his work in Sydney. Have you ever seen that
18 before, sir?

19 A. I have no recollection of ever seeing this report. Although in
20 accordance with the standard practise at the time I wouldn't
21 really have expected to see. It would have gone to the...it
22 would have gone to the director...director of criminal.

23 Q. Would you not expect the director of criminal to bring such a
24 report to your attention given that it was dealing with what
25 we've described as unique and out of the ordinary

1 circumstances?

2 A. Well, I'm not sure. This is...this is the first I've seen of this
3 report, and I would think it...to a degree it would depend on
4 the...on the degree to which the...to which the director really
5 took the report seriously or not. I'm afraid if he considered
6 it...didn't consider it a very serious effort that he might
7 not...he might not bring it forward.

8 Q. Well, Mr. MacLeod, when you're dealing with a situation here
9 where a young man is in prison, having been convicted of
10 murder, and we have someone coming forth and saying "he
11 didn't do it, someone else did".

12 A. Yeah.

13 Q. And the RCMP is asked to go and do something.

14 A. That's right.

15 Q. I can't imagine anything more serious than that.

16 A. Yeah, uh-hum.

17 Q. And we've had the RCMP then coming back with their report.
18 Would that not necessarily be something that the director, if
19 he got it, would bring to your attention and that you in turn
20 would bring to the attention of the Attorney General?

21 A. I think you're probably right. The...as I say if he took the,
22 and I think you would have to consider it seriously, that he
23 would have brought it forward.

24 Q. Thank-you. Look at page 204 and can you just...

25 A. The reason I'm hesitating is I...I don't know what's in this

1 report.

2 Q. Okay. In fairness to you that's a difficult question...

3 A. Yes.

4 Q. ...to put to you.

5 A. I can't answer the question when I don't know...I don't know
6 what's here.

7 Q. So no one has shown you this report.

8 A. No.

9 Q. To read.

10 A. No.

11 Q. Let me just take you and give you a couple of highlights of it...

12 A. Yes.

13 Q. ...so that it can perhaps put in context. Look at page 204,
14 paragraph numbered 3.

15 A. Uh-hum.

16 Q. It says, "After sentence was passed, " and the sentence is on
17 Junior Marshall.

18 A. Yes.

19 Q. "One James William MacNeil came forward and said that he
20 was with a man by the name of Roy Ebsary during the
21 evening of 29 May '71 and that he, Ebsary, had in fact
22 murdered Sealed in Wentworth Park." Well, that is
23 information that was brought to the attention of the Sydney
24 police. Now, just go on. "MacNeil was interviewed by Sydney
25 City Police and the prosecuting officer for Cape Breton County,

1 Donald C. MacNeil, on Monday, 15 November 1971." The
2 evidence is, Mr. MacLeod, that in fact it was Lou Matheson
3 and not Donnie MacNeil. But certainly...

4 A. Yes.

5 Q. Someone from the Crown Prosecutor's office interviewed this
6 person.

7 A. Uh-hum.

8 Q. Now, with that information that a person has come forward
9 and said Marshall didn't do this, in fact, the murderer is a
10 man named Ebsary.

11 A. Uh-hum.

12 Q. Startling information, isn't it?

13 A. Yes.

14 Q. Information that should be brought to your attention. It's in
15 the hands of the local crown prosecutor and if you will accept
16 what I say, it was delivered orally by him to Halifax. It
17 should have come to your attention, and we've already...we've
18 already come to that, haven't we?

19 A. Yes.

20 Q. Should it have been brought to the attention of defence
21 counsel?

22 A. Are you asking me?

23 Q. Yes.

24 A. Oh, I would say most certainly.

25 Q. Thank-you. Now, at that time...

1 A. Now, this is on the assumption that this report, in fact,
2 reached the department.

3 Q. Yes. Now, if I can put it on a different set of facts, Mr.
4 MacLeod, that on November the 15th of 1971 the Department
5 of the Attorney General was aware...

6 A. Uh-hum.

7 Q. ...that MacNeil came forward and said it wasn't Marshall, the
8 murderer is Ebsary.

9 A. Uh-hum.

10 Q. Forget the report.

11 A. Okay.

12 Q. And Lou Matheson passed that along to Halifax.

13 A. Uh-hum.

14 Q. Should that information have been made available to the
15 defence?

16 A. Yes.

17 Q. Now, at that time, sir, the evidence is that a Notice of Appeal
18 had been filed from the conviction of Mr. Marshall.

19 A. Uh-hum.

20 Q. And the evidence further is that once a Notice of Appeal is
21 filed, the local office is out of it and it transfers to Halifax.

22 A. That's right.

23 Q. That's correct, isn't it?

24 A. That's correct.

25 Q. And that the local guy has nothing else to do with it.

1 A. Correct.

2 Q. Now, in those circumstances recognizing that the information
3 is in Halifax now.

4 A. Uh-hum.

5 Q. That it was MacNeil, I'm sorry, that it was Ebsary who
6 murdered Seale and not Marshall, wasn't it the obligation of
7 the Halifax office of the A.G. to pass that information along to
8 the defence?

9 A. I would think so.

10 Q. Thank-you. And, not to wait for the defence to come.
11 There's no way the defence could know this information.

12 A. I agree.

13 Q. Thank-you. You said in the ordinary course of things, if the
14 ordinary course was followed.

15 A. Yes.

16 Q. The report from the RCMP would get to the director.

17 A. Yes.

18 Q. And if you can accept again from me that the director of
19 criminal in November of 1971 was Robert Anderson, although
20 he was appointed to the...

21 A. Bench.

22 Q. ...on December the 15th of 1971. This report is dated
23 December the 21st, 1971. Who would it go to in the ordinary
24 course of things?

25 A. Now, this is dated December...

1 Q. It's dated...if you look up in the top of the...right under the
2 words, the numbers 2 0 4 on the top, Mr. MacLeod.

3 A. Yeah.

4 Q. 21 December '71.

5 A. Now, that's the date up there, but have you a date as to when
6 it reached the Department of the Attorney General?

7 Q. There is real controversy here as I understand it, Mr.
8 MacLeod, whether it ever did.

9 A. Yes. Yes, yes.

10 Q. And I don't want to put myself into that, but I'm saying that
11 if it...if it...if the ordinary course was followed and this
12 information did go to the Department of the Attorney General,
13 who would it have gone to given the fact that Anderson is
14 now sitting in the Court?

15 A. Uh-hum. Well, I assume it would still go to the director of
16 criminal.

17 Q. And would that appointment have been made that quickly,
18 the matter of a week?

19 A. I don't know.

20 Q. When Judge Anderson was appointed to the Court, what steps
21 were taken to turn over his work to somebody else so that
22 there would be a continuity, a flow of work?

23 A. Strange, I...I have no recollection of that period of time where
24 Judge Anderson left the Department and there was a
25 movement of personnel. I have no recollection at all of just

1 how we...how we handled that.

2 Q. As Deputy Attorney General.

3 A. Yes.

4 Q. As the administrative man in charge.

5 A. Yes.

6 Q. Would you agree that that would be your responsibility to
7 make certain there was...

8 A. Yes.

9 Q. ...a turnover of information?

10 A. Yes.

11 Q. But you have no recollection at this stage how that actually
12 was accomplished.

13 A. No.

14 Q. I understand...

15 A. Now, I would assume and this cannot be taken as a fact, I
16 would assume that the...Gordon Gale at the time was probably
17 the senior...the senior man on the criminal side and I would
18 assume that he would probably carry on with the function.

19 Q. Did Gordon Gale use to attend meetings with the RCMP when
20 Anderson would be director of the criminal?

21 A. I rather doubt that he would.

22 Q. So, it would be Anderson alone attending.

23 A. Yes.

24 Q. So, Anderson would know what was going on...

25 A. Yes.

1 Q With the RCMP.

2 A That's right.

3 Q But, in effect, he was the only one.

4 A Yes.

5 Q And would you agree with me that there was certainly a
6 necessity then that somehow his successor would understand
7 and be told what was current between the...

8 A Yes.

9 Q ...RCMP and the Department?

10 A Yes.

11 Q I understand the evidence of Judge Anderson will be that
12 there was no formal turning over at all. That in fact he was
13 appointed and except for cleaning out his desk there was no
14 formal process followed.

15 A Yeah.

16 Q Would that surprise you?

17 A I find it a little surprising, yes.

18 Q I take it that there would in any given period of time be
19 many things going on between the Department and the RCMP.

20 A Oh, yes.

21 Q And the only appointed person in the Department who would
22 have knowledge of this would be the director of criminal.

23 A Yes.

24 Q And it would be fundamentally important that he pass that
25 information along...

1 A. Yes.

2 Q ...to his successor. What...assuming that this report or
3 something like it, a report of this nature, came from the
4 Attorney General, I'm sorry, from the RCMP to the Attorney
5 General, where would they be kept? Would there be some
6 sort of a file create dealing with, in this case, Donald Marshall,
7 Jr.?

8 A. Oh, certainly there would be a file, but...

9 Q And who would create that, Mr. Anderson or the director of
10 criminal?

11 A. Director of criminal.

12 Q Yeah. Now, recognizing...

13 A. Now, the...on the first...in the first instance, of course, reports
14 would start...would start coming in from the RCMP if this was
15 something that involved the RCMP.

16 Q Yes.

17 A. And that would be the beginning. That would be the
18 beginning of the file.

19 Q At the same time as I've indicated to you, Mr. MacLeod, there
20 was an appeal taken by Mr. Marshall from his conviction and
21 that goes to Halifax. That must generate a file, as well, I
22 assume.

23 A. It would.

24 Q Would that be a separate file?

25 A. No, I would think it would be the same. I think it would be

1 the same file.

2 Q. Mr. Veniot has testified that he did the appeal. That he was
3 the solicitor assigned and that he would not expect a report
4 such as this to be contained in the appeal file, as such.

5 A. Uh-hum.

6 Q. But that it would be, his understanding, I think, is one of the
7 green striped files.

8 A. Oh.

9 Q. You have knowledge at all.

10 A. I have no knowledge.

11 Q. Have you discussed this case, Mr. MacLeod, with anyone after
12 the...after the whole thing blew up in 1982 when Mr. Marshall
13 was released from jail?

14 A. No.

15 Q. These early morning meetings of members of the Department,
16 would they be attended from time to time by the Attorney
17 Generals?

18 A. On occasion, but not usually.

19 Q. It wouldn't be an unusual thing for them to drop in and hear
20 what was going on?

21 A. No, not unusual, no.

22 MR. MACDONALD

23 Thank you, sir, that's all I have.

24 EXAMINATION BY MS. DERRICK

25 Q. Mr. MacLeod, just picking up on that last point with respect to

MR. MacLEOD, EXAM. BY MS. DERRICK

1 the Attorney General attending the meetings with the RCMP,
2 do you recollect if there was any formal mechanism by which
3 it was determined if the Attorney General would attend those
4 meetings?

MR. MACDONALD

5
6 I didn't suggest the Attorney General attended the meetings with
7 the RCMP. It would be forwarding copies.

MS. DERRICK

8
9 Oh, I'm sorry, o.k. I was confusing with...fine.

10 Q. Mr. MacLeod, when Mr. Anderson was appointed to the
11 County Court, did Mr. Gale succeed him directly from the
12 departmental ranks?

13 A. Well, certainly the reason I'm hesitating a bit is you'll realize
14 that the solicitor, senior solicitor or solicitor, was a civil
15 service appointment so that the...you might have somebody
16 moving into a position. I might direct somebody to move into
17 a position but it might be a matter of weeks or a month
18 before I was able to process that through the Civil Service
19 Commission and get an official acknowledgement and consent
20 from the Civil Service Commission. But as a matter of fact, the
21 most senior person in any particular division, you would
22 expect him to take over in the place of somebody who had
23 left the department.

24 Q. In this instance, was Mr. Gale the most senior lawyer within
25 the department?

MR. MacLEOD, EXAM. BY MS. DERRICK

1 A. Well, he would be the most senior one on the criminal side.

2 Q And therefore, would it have been it have been the natural
3 course of things that when Mr. Anderson was appointed to
4 the bench that even though perhaps the formal paperwork
5 hadn't been completed that Mr. Gale would in essence step
6 into the position of directorship?

7 A. Yes.

8 Q And I think you said that...although you don't recall anything
9 about the RCMP report in this case, but had that...in the
10 instance of those types of reports, they would go to the
11 director of criminal posecution?

12 A. Yes.

13 Q And so therefore in the normal course of things, would you
14 expect that it would be the director of criminal prosecutions
15 who would be the person to chase down the report if it wasn't
16 forthcoming from the RCMP?

17 A. I would think so.

18 Q Now you were deputy attorney general, Mr. MacLeod, there
19 was no formal departmental policy concerning Crown
20 disclosures to defence counsel, is that correct?

21 A. That is correct.

22 Q And would you agree with me that such policy directives are
23 in fact a good idea?

24 A. Generally, I think so.

25 Q Would you agree that lack of formal departmental policies

1 concerning disclosure could well result in variations of
2 practice of prosecutors throughout the province?

3 A. I don't follow that last question.

4 Q. I'm asking you whether you agree with me that the fact that
5 there were no such policies disseminated from the
6 department might result in different prosecutors in different
7 parts of the province having different practices with respect
8 to disclosure...

9 A. Yes, I agree.

10 Q. And in fact there might even be variations within the same
11 prosecutor depending on dealings with different defence
12 counsel or...

13 A. I agree.

14 Q. So that in fact it's possible that departmental policies might
15 result in uniformity or a greater degree of uniformity?

16 A. Yes. Although you must also keep in mind that with regard to
17 matters such as this, the practice developed over two or three
18 hundred years and they seemed to work reasonably well.
19 And perhaps it takes a certain case such as this to bring our
20 attention that changes had to be made.

21 Q. I guess we're part of that evolution.

22 A. Yes, yes.

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MS. DERRICK

Thank you, Mr. MacLeod, those are my questions.

EXAMINATION BY MR. PUGSLEY

Q. Mr. MacLeod, I want to explore for a moment the paper trail that might have been left as a consequence of this investigation that was carried on by Inspector Marshall of the RCMP in 1971 when apparently he received a directive from the Attorney General's Department, or at least the RCMP locally did, to investigate this new evidence that came out in Sydney. And I take it that generally the province of Nova Scotia pays someone, the RCMP or the federal government, for the enforcement of the laws in Nova Scotia. That's done on a yearly basis, is it?

A. On a contract basis.

Q. On a contract basis?

A. Yes.

Q. Is it negotiated each year? Is that how it's done?

A. I don't recall now. I'm almost certain it extends more than one year.

Q. Well, if the RCMP performs extraordinary services or unusual services, and I would think that this might fall into that category, would the province of Nova Scotia be billed separately or have to pay additional sums of money to the

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RCMP for these services?

A. I wouldn't think so although it's a long, long, time since I saw an RCMP contract. It's quite a detailed contract.

Q. Well, I was thinking that not only were people in the RCMP stationed in Nova Scotia involved in the reinvestigation, but Corporal Smith who was assigned, I believe, in the Province of Saskatchewan and who was with the force in Saskatchewan, flew to Nova Scotia, flew to Cape Breton, incurred hotel expense here and flew back to Saskatchewan, all of which would be initially incurred, I suppose, by the Saskatchewan branch of the RCMP. And I wondered in the normal course of events whether bills, at least for his travel expenses and his motel expenses would have been forwarded to the province of Nova Scotia and if those bills would have been reviewed by anyone in your department to ensure that they were appropriate accounts to be paid by the province.

A. It could happen, but I never heard of a case where they billed us for some particular separate function of the department. See, you also have to keep in mind that the RCMP is also a federal police force. And that we pay, in Nova Scotia, we pay for a certain number of RCMP officers to be in fact provincial police officers. But over and above the number that we pay for, there's a substantial number of RCMP officers in Nova

MR. MacLEOD, EXAM. BY MR. PUGSLEY

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Scotia who are in fact paid by the federal government because they are carrying on federal functions.

Q Yes. And is that true of every province? I know that Ontario...

A. Well, Ontario has its own...

Q Has its own provincial police.

A. It has its own provincial police.

Q And so the RCMP doesn't really function in that province.

A. Well, they function in that province as the federal police force insofar as it may necessary to enforce federal laws in Ontario.

Q So in response to my questioning, you don't ever recall seeing any bills submitted by the RCM Police for any unusual services rendered by out-of-province policemen?

A. No, I do not.

MR. PUGSLEY

Thank you, sir.

VOICE

No questions.

EXAMINATION BY MR. BISSELL

MR. BISSELL

Q Sir, my name is Jim Bissell and I'm acting for the RCMP.

A. Yes.

Q And I just have one question for you. It's really a follow-up

MR. MacLEOD, EXAM. BY MR. BISSELL

1
2 to a question that Ms. Derrick asked you. She asked you if it
3 would be the director of criminal who, in your opinion, would
4 have the responsibility to...would be the person who had the
5 responsibility to chase down a report that wasn't forthcoming
6 from the RCMP that was expected. And I guess, just a follow-
7 up to that or a corollary to that is, do you think that the
8 director of criminal or somebody within his office should go
9 after or chase down a report on such an important matter as
10 this that had been requested if it wasn't forthcoming in a
11 reasonable time?

12 A. I would think so.

13 MR. BISSELL

14 Those are all the questions that I have. Thank you, sir.

15 MR. CHAIRMAN

16 Mr. Wildsmith?

17 MR. WILDSMITH

18 We have no questions for Mr. MacLeod, thanks, My Lord.

19 VOICE

20 No questions.

21 CHAIRMAN

22 So thank you very much, Mr. MacLeod.

23 MR. MacDONALD

24 Those are all the witnesses we have for today, My Lord.

25 3:56 p.m. - ADJOURNED TO 9:30 a.m. 14 January 1988

REPORTER'S CERTIFICATE

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



Margaret E. Graham

DATED THIS 13th day of January , 1988, at Dartmouth,
Nova Scotia