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#3

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

**Volume 50**

Held: February 3, 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

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Counsel for Donald Marshall, Jr.

X 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. A. 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 Sgt. J. Carroll

Messrs. S. Bruce Outhouse, Q.C. and Thomas M. Macdonald: Counsel  
for Staff 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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JUDGE ANDERSON, EXAM. BY MR. ORSBORN

1 FEBRUARY 3, 1988 - 9:30 a.m.

2 MR. CHAIRMAN

3 Mr. Orsborn?

4 MR. ORSBORN

5 Thank you, My Lord. The first witness this morning will be  
6 His Honour Judge Robert Anderson.

7  
8  
9 JUDGE ROBERT ANDERSON, duly called and sworn, testified as  
10 follows:

11  
12 EXAMINATION BY MR. ORSBORN

13  
14 Q. Judge Anderson, I understand that you are a judge of the  
15 County Court here in Halifax?

16 A. That's correct.

17 Q. Do I understand correctly that in your capacity as a judge,  
18 you have had no involvement in any of the judicial  
19 proceedings involving either Donald Marshall, Jr. or Roy  
20 Ebsary?

21 A. None whatever.

22 Q. When were you appointed to the bench, Your Honour?

23 A. 1971, December 16th, '71.

24 Q. What position did you hold immediately prior to your  
25 appointment to the bench?

- 1 A. Director of Criminal, Department of Attorney General.
- 2 Q. How long had you been in that position, sir?
- 3 A. Since 1970, when Mr. Justice Malachi Jones went to the bench.
- 4 Q. Since 1970?
- 5 A. Yes.
- 6 Q. So had you been in that position for approximately two
- 7 years?
- 8 A. A year and a half, probably.
- 9 Q. When did you join the Department of Attorney General?
- 10 A. '65, '66. I'm just not sure, I forget.
- 11 Q. In what capacity, sir?
- 12 A. As just a solicitor.
- 13 Q. So your total tenure then with the Department of Attorney
- 14 General would have been some five, six years?
- 15 A. Yes.
- 16 Q. Did you hold any other positions in that department other
- 17 than senior solicitor and Director of Criminal?
- 18 A. I went in as a solicitor and then went to senior solicitor and
- 19 then Director of Criminal.
- 20 Q. I see. I'd like to ask you, Your Honour, some general
- 21 questions about the department and I would ask if you could
- 22 relate your answers to the, around the time you left, in late
- 23 1971. Where were the offices of the department located?
- 24 A. Third floor, Provincial Building.
- 25 Q. How many lawyers were on staff at the time you left?



- 1 A. I suppose seven or eight.
- 2 Q. Who was the Attorney General at the time you left?
- 3 A. When I left the department?
- 4 Q. Yes, sir.
- 5 A. Leonard Pace.
- 6 Q. Who was the Deputy Attorney General?
- 7 A. Innis MacLeod.
- 8 Q. And you were Director of Criminal?
- 9 A. Yes.
- 10 Q. Was there a Director of Civil?
- 11 A. Yes.
- 12 Q. Who was that?
- 13 A. Gerald Kavanaugh.
- 14 Q. Gerald Kavanaugh, yes.
- 15 A. And there was a Director of Administration, which is Jerry  
16 Conrad.
- 17 Q. I see. And was Mr. Gale, Gordon Gale in the department at  
18 the time?
- 19 A. Yes, he was. He was probably a senior solicitor at that time.
- 20 Q. Mr. Herschorn?
- 21 A. Yes.
- 22 Q. Mr. Veniot?
- 23 A. Yes, I think he was, he had articulated there and I don't know  
24 whether he was still articling or he was...
- 25 Q. I think our records indicates that he was admitted.

1 A. He was there.

2 Q. At that time. What about William MacDonald?

3 A. I can't say for sure.

4 Q. Any other lawyers that you can recall?

5 A. Who were in the department?

6 Q. Yes, at that time, in the offices that you've mentioned.

7 A. Perhaps you'd repeat that question. What offices are you  
8 referring to?

9 Q. You said third floor of the Provincial Building?

10 A. Oh, oh, the offices, not the senior. Bruce Davison was there.  
11 Graham Walker.

12 Q. Is it fair to say that all in all, it was a fairly small localized...

13 A. Small, compact unit.

14 Q. Department, thank you. Who was your immediate superior,  
15 sir?

16 A. The Deputy Attorney General.

17 Q. And what, if any, reporting relationships existed between  
18 yourself and the Deputy?

19 A. Nothing formal but constant daily contact.

20 Q. Would you seek his advice and opinion on occasion?

21 A. Daily.

22 Q. Mr. MacLeod's?

23 A. Daily. The system changed. When I went there first, John A.  
24 Y. MacDonald was the Deputy and all correspondence coming  
25 in or going out of the department went through the deputy.

1           And then that varied over the years and the senior solicitors  
2           acquired more autonomy or more authority and only matters  
3           that they, certain matters went before the, through the  
4           Attorney, Deputy Attorney General before going out or  
5           coming in.

6           Q. So that I understand, there would be appointments of  
7           directors of criminal and directors of civil that some of  
8           paperwork shifted from the Deputy's office to those offices?

9           A. Yes.

10          Q. I see. How did you regard Mr. MacLeod's advice to you and  
11          his opinions?

12          A. In what respect?

13          Q. Did you think generally it was good advice? Did you respect  
14          his opinion?

15          A. Always good advice.

16          Q. Always good advice?

17          A. Always good advice.

18          Q. In your position, sir, as Director of Criminal, did you have  
19          direct access to the Attorney General?

20          A. Yes.

21          Q. And would you exercise that direct access on occasion?

22          A. Yes. It wasn't quite so formal as that. During coffee break in  
23          the morning, oftentimes the counsel, the lawyers would get  
24          together in one office or one space and the Attorney General  
25          would come in and matters that were department policy or

1           whatever would be discussed with the Attorney General and  
2           the Deputy Attorney General and staff.

3       Q. Was this sort of a tradition that you would have these...

4       A. Yes.

5       Q. Coffee break discussions?

6       A. Yes.

7       Q. Would the Attorney General invariably be present?

8       A. No, no, no. He was often sitting in the House or whatever and  
9           not invariably but frequently he would come in.

10      Q. Would these discussions involve generally the other solicitors  
11         in the offices?

12      A. Whoever had a problem or something to discuss, it would be  
13         raised and everybody would have input.

14      Q. Could you describe for us, Your Honour, your responsibilities  
15         as Director of Criminal?

16      A. Well, we would receive...Well, the RCMP, primarily, were  
17         under, involved with our department in areas where there  
18         weren't municipal police forces and we would receive reports  
19         from them daily of their operations in the province and we  
20         would...

21      Q. When you say "we," are you referring to...

22      A. The department and myself as director and Gordon Gale as  
23         senior solicitor, he was working with me in the criminal area  
24         and we would look at these reports and if there were matters  
25         that had to be discussed, we would call the readers or we

1 would have, we usually had a weekly meeting with the CIB  
2 officer to discuss any problems that arose during the week or  
3 directions or things that should be done.

4 Q. Would these meetings be attended by both yourself as  
5 director and Mr. Gale as senior solicitor?

6 A. Not always, no, usually myself and the CIB officer.

7 Q. You mentioned the receipt of RCMP reports. Would RCMP  
8 reports coming in be directed as a matter of course to  
9 yourself as director, or would it be optional, say, to go to  
10 yourself or Mr. Gale?

11 A. Usually to myself always, I would say directly to myself,  
12 except in the area of when the contract for manpower and  
13 things like that was to be renewed between the province and  
14 the RCMP, that would be done at the deputy attorney general  
15 level and the attorney general.

16 Q. I understand, sir. Would you then describe it as a matter of  
17 practice that reports coming in from the RCMP would go to  
18 the Director of Criminal?

19 A. Yes. And that varied over the years. Initially when I went  
20 there first, I think every report came to the Attorney  
21 General's Department. Subsequently, the paper shuffle  
22 became so great that certain reports were not being sent to  
23 the Attorney General's Department, unless there was a  
24 problem. Primarily, they would be a matter of accidents  
25 causing death or unexplained deaths and things like that.

1       Those reports would all come through.

2       Q. And you say the practise changed over the years.

3       A. Yes.

4       Q. Could you clarify for us what the practice was at the time you  
5       left?

6       A. Well, at the time I left, there was selected reports that came  
7       through. As I said the ones, I can't remember exactly now  
8       what the categories are but they were, I know for a fact that  
9       all motor vehicle accidents causing death, all unexplained  
10      deaths or things of that nature, serious offences or serious  
11      happenings would be reported. But a simple motor vehicle  
12      accident that was reported to us when I first went there, that  
13      was no longer done.

14      Q. I understand, sir. And to whom would they be reported in  
15      the Department of Attorney General at the time you left?

16      A. The?

17      Q. The reports that were forwarded, they would be forwarded to  
18      the Director Criminal?

19      A. Yes.

20      Q. Would you on occasion, Your Honour, receive these reports as  
21      Director of Criminal during your weekly meetings?

22      A. That's possible.

23      Q. As Director of Criminal, did you appear in court yourself on  
24      occasion?

25      A. No. No, that practice was stopped after a few years.

1 Q. Sorry?

2 A. Initially, I understand, the Attorney General himself or the  
3 Deputy Attorney General would appear throughout the  
4 province in different areas as a prosecutor of cases. But that,  
5 initially when I went there, I first went to City Court when  
6 the prosecutor wasn't available or something of that nature.  
7 But that practice, when prosecutors became hired by the  
8 province full-time, then that practice stopped.

9 Q. We understand, sir, from the evidence already given that, as a  
10 matter of practice, criminal appeals going to the Nova Scotia  
11 Court of Appeal were handled by the Halifax office regardless  
12 of where the trial was...

13 A. That's correct.

14 Q. Taking place. Would you be involved in the assignment of  
15 work regarding such appeals within the office?

16 A. Yes.

17 Q. Would you receive, you yourself as director, receive all the  
18 notices of appeal?

19 A. Yes.

20 Q. And it would then be your job to determine who was going to  
21 handle the appeal?

22 A. Yes, I suspect that was the way it worked.

23 Q. Do you recall how you did distribute such work, on what  
24 basis?

25 A. I shouldn't say all appeals, all criminal appeals would come to

1 the...

2 Q. Yes, I'm sorry.

3 A. No, I think sometimes the Deputy Attorney General would  
4 have some say in matters of who appeared on what appeals  
5 and it would be... depend on, I suppose, the factors, who was  
6 available, who perhaps did the research initially, things of  
7 that nature.

8 Q. I see. Again, sir, is it fair to say that as a matter of practice,  
9 (1) a notice of appeal was filed and that notice contains the  
10 notation that was forwarded to the Department of Attorney  
11 General, that it would come to your attention as Director of  
12 Criminal?

13 A. I would think so, yes.

14 Q. As Director of Criminal, how if at all did you keep track of the  
15 matters that you assigned to you various staff? If you  
16 assigned Lawyer "A" to a particular appeal, would you require  
17 any reporting from him on the matter?

18 A. Not really because we were in daily contact and, as I said,  
19 matters were discussed all the time in the department, all  
20 things on an ongoing basis.

21 Q. I'd like to discuss with you for a moment, Your Honour, two or  
22 three matters of departmental policies as you understood  
23 them to be at the time and particularly as they relate to your  
24 relationships with the police and the RCMP. With respect to  
25 the initiation, the commencement of a police investigation at



1 the time you left the department, whose responsibility did  
2 you understand that was?

3 A. I don't understand the question, I'm sorry, Mr. Orsborn.

4 Q. Sorry, a little bit convoluted. I just want to make sure that  
5 we are speaking only of the, you know, approximate time  
6 you did leave the department in late '71. Whose  
7 responsibility was it to initiate a police investigation?

8 A. Well, in most cases, it would be the police.

9 Q. Could the Department of Attorney General direct that an  
10 investigation be started?

11 A. They would request, I suspect. I don't know if "direct" is the  
12 right word. As I recall it, the police were, the RCMP at least  
13 were very independent, which was, in my opinion, a good  
14 thing. They weren't under the control of the Attorney  
15 General but if there was a problem, if some, say, municipal  
16 police force requested assistance, I as director would either  
17 speak to the CIB officer, call the reader, or speak to the C/O  
18 and say such-and-such a police force has a problem. Would  
19 you go in and give them or something of that nature. In that  
20 way, we would sort of initiate an investigation.

21 Q. Could the Department of Attorney General prevent a police  
22 investigation or stop a police investigation?

23 A. I don't know.

24 Q. You don't know if they...

25 A. I don't know if they could.

1 Q. I see.

2 A. I don't know if they ever tried. In my experience, I certainly  
3 had no experience of stopping a police investigation.

4 Q. Was there any type of police investigation where, to your  
5 knowledge, the permission of the Department of Attorney  
6 General was required before it would be started?

7 A. No, I can't say that I do.

8 Q. We've had evidence, albeit of more recent years, from at least  
9 one officer of the RCMP who indicated that before an  
10 investigation of, say, a police chief would be undertaken, that  
11 the permission or consent or direction of the Department of  
12 Attorney General would be required. Would that have  
13 reflected the prevailing view in your time?

14 A. It has never occurred to me, happened, so I couldn't really  
15 answer that. It never arose in my experience.

16 Q. With respect, Your Honour, to the laying of charges, and I'm  
17 not speaking of the prosecution as such, but the actual laying  
18 of the charge, what was your view of the responsibility for  
19 the laying of the charge in 1971?

20 A. Well, as I understood the process, the police did the  
21 investigation. They would recommend to the prosecuting  
22 officer what charge should be laid and it was up to the  
23 prosecuting officer to make the decision.

24 Q. So it was your view that the prosecuting officer would make  
25 the decision on whether or not a charge should be laid?

1 A. Yes.

2 Q. We've had evidence from Mr. Veniot, who I think he  
3 described himself as a junior solicitor in the department back  
4 in...

5 A. He articulated in the department under me, as I recall, and  
6 worked there.

7 Q. He testified that there was some green-striped files to which  
8 some lawyers in the department did not have access. Do you  
9 have any knowledge of green-striped or confidential or secret  
10 files in the department?

11 A. No.

12 Q. You have not.

13 COMMISSIONER EVANS

14 What was...

15 MR. ORSBORN

16 I believe, My Lord, the answer was he had no knowledge of  
17 any such files.

18 BY MR. ORSBORN

19 Q. I'd like to turn now, Your Honour, to the incident involving  
20 Mr. Seale and Mr. Marshall. As of May/June, 1971 when the  
21 stabbing took place in Sydney, did you have any knowledge  
22 of the incident?

23 A. Oh, I probably had knowledge of it but that's about all.

24 Q. How many murders would occur in Nova Scotia per year in  
25 1971?

1 A. I can't even hazard a guess.

2 Q. Is it fair to say that there would be a daily occurrence?

3 A. I hope not, even today.

4 Q. Is it fair to say, then, that from your general knowledge you  
5 would know that a murder had been in Sydney?

6 A. Oh, yes, yes. Usually the municipal police forces were rather,  
7 acted on their own pretty much, without direction from the  
8 Attorney General's Department, unless they requested  
9 assistance.

10 Q. Would you have known from your general knowledge that  
11 Mr. "X" had been arrested and charged?

12 A. Probably not unless I read it in the papers or the prosecuting  
13 officer contacted the department for some reason or other  
14 and gave the information to the department.

15 Q. Had you spent any time in Sydney?

16 A. No.

17 Q. During 1971?

18 A. No.

19 Q. Any knowledge of the racial mix in Sydney?

20 A. No.

21 Q. Do you recall whether or not you had any discussions with  
22 either Mr. MacNeil or Mr. Matheson concerning the  
23 prosecution of Mr. Marshall prior to trial?

24 A. No.

25 Q. Would you expect that they would contact you?

1 A. Not unless they had a problem, no.

2 Q. Do you recall if you were aware of Mr. Marshall's conviction  
3 at the time it was entered?

4 A. I'm not, I can't recall it. I probably was. Probably when the  
5 Notice of Appeal came in, anyway.

6 Q. Do you recall receiving Notice of Appeal?

7 A. No, I don't recall that.

8 Q. Following the trial, we've had evidence that Mr. Matheson  
9 received information that Jimmy MacNeil had come forward  
10 and that as a result of that, he contacted you at home on the  
11 night of November 15th, 1971. Do you remember being  
12 contacted by Mr. Matheson?

13 A. Mr. Orsborn, my recollection of the events is as follows: I  
14 remember getting a call from Sydney. I thought it was  
15 MacNeil, indicating that someone had committed, had  
16 confessed to the murder after the conviction and was in quite  
17 a state.

18 Q. Sorry, who was in quite a state?

19 A. Whoever called me, and I thought it was Donnie MacNeil.  
20 Now naturally I would think the circumstances would be  
21 clearer in Judge Matheson's mind than in mine because he  
22 was on the scene and had some responsibility for the  
23 situation. So I will certainly not dispute his recollection of the  
24 facts because I just remember who I thought was Donnie  
25 MacNeil calling about this matter.

1 Q. When you say "he was in quite a state," what led you to that  
2 conclusion?

3 A. Well, they were upset because they had one man convicted of  
4 the murder and somebody else saying he did it. That was my  
5 recollection.

6 10:00 a.m. \*

7 Q. Do you get many calls from Crown Prosecutors at home?

8 A. No, not too often, but it has happened.

9 Q. Do you get many calls saying that somebody has confessed  
10 after you've got a murder conviction?

11 A. No, no, it was the only time.

12 Q. Do you recall any more of the substance of the discussion  
13 between yourself and the gentleman in Sydney?

14 A. No, they asked for some help as I understood it.

15 Q. Asked for some help.

16 A. Yeah. What were they going to do and we discussed the  
17 matter and I would suspect, though I don't recall, I would go  
18 the next day and discuss the matter with the Deputy Attorney  
19 General and...

20 Q. Uh-hum.

21 A. And decide on a course of action.

22 Q. Do you recall in your discussions, and let's assume it was Mr.  
23 Matheson, any discussion of the use of a polygraph?

24 A. No, I don't recall discussing that with Mr. Matheson, but it  
25 was probably an option.

1 Q Any discussion of bringing in the RCMP?

2 A. Oh, I think that was a definite possibility at that stage,  
3 because Sydney, I don't think there was a polygraph in Nova  
4 Scotia.

5 Q Uh-hum.

6 A. And certainly the municipal police forces wouldn't have one,  
7 and if that was the route to go then it would have to be the  
8 RCMP.

9 Q Did you take Mr. Matheson's concern seriously?

10 A. Yes.

11 Q If you're asked whether or not this development, this  
12 information that Mr. Matheson gave you, was startling on a  
13 scale of one to ten, with ten being the most startling and one  
14 being not startling at all, how would you rate it?

15 A. I don't think I could answer that question, Mr. Orsborn.

16 Q Well, did you regard it as a startling development?

17 A. I regarded it as a serious development.

18 Q Do you remember now doing anything with that information  
19 the next day?

20 A. No.

21 Q The evidence from Mr. MacLeod is that he himself has no  
22 recollection of it being brought to his attention. Are you able  
23 to say, given that you have no independent recollection, what  
24 you believe your normal practise might have been?

25 A. Well, the normal practise when a situation like this would

1           arise, I would discuss it with the Deputy Attorney General if  
2           not the Attorney General, probably both. And if I raised it  
3           with the Deputy, he would undoubtedly raise it with the  
4           Attorney General if he was available.

5       Q. Are you able to say, Your Honour, whether it was more likely  
6           than not that you discussed it with the Deputy Attorney  
7           General?

8       A. If he were there and available I would think more likely than  
9           not I certainly did.

10      Q. Are you able to say, sir, if it's more likely than not that you  
11           raised it with the Attorney General?

12      A. I can't say that.

13      Q. I see. Are you able to say if it's more likely than not that you  
14           discussed this development at one or other of these sort of  
15           morning coffee meetings?

16      A. I would think it very possible, probable actually.

17      Q. Do you recall, sir, having any contact then with the RCMP?

18      A. I have no recollection of that, having contact with them but...

19      Q. In order to bring in the RCMP to conduct an investigation,  
20           review or polygraph or whatever, would you have required  
21           authorization from someone such as the Deputy?

22      A. I shouldn't think so.

23      Q. You could do it on your own account.

24      A. I would say so, yes.

25      Q. Can you tell us how you believe you would have



1           communicated to the RCMP by telephone, by letter?

2       A.   Well, it would depend on what day it was, I would think.  If it  
3           was a day preceding the...our usual weekly meetings it might  
4           be that route.  Ordinarily I'd call Don Burgess or his  
5           predecessor.

6       Q.   November 15th, I believe, was a Monday, so the 16th would  
7           be a Tuesday.

8       A.   Well, then it would probably be by phone.

9       Q.   Is this your normal pattern of communicating with the RCMP  
10          by telephone?

11      A.   Uh-hum.  Yes.

12      Q.   Even in a matter as serious as this?

13      A.   Yes, someone might have come over.  I have no idea now.

14      Q.   I see.  And, you suggest that you may have called Mr.  
15          Burgess, who was a reader.

16      A.   Uh-hum.  He was the senior reader, I think, at that stage,  
17          Sergeant Burgess.  That was my usual contact.  If I had a  
18          question about reports, with the charges that were laid or  
19          something that we felt was...should be done that wasn't done  
20          or that was done that shouldn't be done, that was my contact  
21          usually, except with our weekly meetings with the CIB officer.

22      Q.   I understand, sir.  What did you want the RCMP to do?

23      A.   Well, my recollection is that they wanted to find out whether  
24          this person who was making this admission was telling the  
25          truth.  There was some question about his stability and I

1 don't know whether...it seems to me I recall that there might  
2 have been a case a couple of years prior to that where  
3 someone had done something similar and it proved to be  
4 someone trying to...seeking attention and they were  
5 wondering if this was the same sort of thing. That's my  
6 recollection of it. And the RCMP were requested to do a  
7 polygraph.

8 Q. They were requested by.

9 A. The Attorney General's Department.

10 Q. To do a polygraph.

11 A. And I thought that the...it's my recollection, as faint as it may  
12 be, is that the...that was discussed with the prosecutor and it  
13 was one of his, you know, it was his idea too.

14 Q. Discussed with the prosecutor during your earlier telephone  
15 conversations.

16 A. Well, sometime before the police were requested to do it.

17 Q. Did you request the RCMP to do anything more than a  
18 polygraph?

19 A. Not that I can recall.

20 Q. Is it fair to say, Your Honour, and please correct me if I'm  
21 wrong, that the Department of Attorney General was simply  
22 then asking the RCMP to do no more than assess Mr. MacNeil?

23 A. Yes. Well, to investigate the possibility of his telling the truth  
24 or not telling the truth.

25 Q. Following your calling in the RCMP, did you advise anyone

- 1           what you had done, either the Deputy or the Attorney?
- 2   A.   I have no idea. I can only go by what was the usual practise  
3       in the department. I can't...I have no recollection of what  
4       happened at that stage. The only other recol...the next  
5       recollection I have is that we received word from Sydney,  
6       either via the prosecutor or the RCMP, I'm not too sure, that  
7       this person, as you say now, was Jimmy MacNeil, I have no...I  
8       had no idea who it was.
- 9   Q.   Yes.
- 10  A.   Was unstable, mentally, and that in their opinion that he was  
11       not telling the truth.
- 12  Q.   I see. Before we get to that, Your Honour, is it fair to say that  
13       the fact that the RCMP had been called in to look at this was  
14       common knowledge within your department?
- 15  A.   I would say so, yes.
- 16  Q.   Did you...
- 17  A.   I don't know if it was common knowledge within the whole  
18       department or not.
- 19  Q.   I'm sorry. Within this group that you have described before.
- 20  A.   Yes, yes, I would say so.
- 21  Q.   I'm sorry. Did you make any notes of your conversation with  
22       Mr. Matheson?
- 23  A.   No.
- 24  Q.   Open a file on the matter when you called in the RCMP?
- 25  A.   I wouldn't think so. There would be a file when the report

1           came in. I don't know if they would send us a report  
2           indicating that it had been a request to have a polygraph  
3           operator come and to go to Sydney and do this work. They  
4           might have sent us a report on that.

5       Q. The notice of appeal for Mr. Marshall's conviction is dated  
6       November 16th, and I would assume that it would be...that it  
7       would arrive in the Department sometime shortly thereafter.  
8       Is that a fair assumption?

9       A. I would say so, yes.

10      Q. And would that notice then come to your attention?

11      A. Yes.

12      Q. So, would I understand that Mr. Marshall's notice of appeal  
13      would come to your attention within a few days of your  
14      conversation with the Sydney Prosecutor?

15      A. That's probably true, yes.

16      Q. The evidence indicates that Mr. Veniot was given the  
17      responsibility of handling the appeal in Halifax. Do you have  
18      any recollection of discussing with Mr. Veniot when he was  
19      given the file the fact that Mr. MacNeil had come forward?

20      A. I have no recollection of it, but it would be the logical thing,  
21      you know. If I had a request from Sydney and the notice of  
22      appeal came in, it would seem most unlikely that we wouldn't  
23      discuss it.

24      Q. Yes.

25      A. Did you know who the defence counsel was in Mr. Marshall's

1 appeal?

2 A. I probably did. I can't say for sure. It would certainly be on  
3 the notice of appeal.

4 Q. Once you were aware, sir, that somebody down in Sydney had  
5 come forward and, as you say, confessed or basically said,  
6 "You got the wrong man," what obligation, if any, do you think  
7 existed to disclose that fact to defence counsel?

8 A. By who?

9 Q. By those in the Department of Attorney General who were  
10 aware of that fact.

11 A. I wouldn't think there would be any responsibility with the  
12 Department of Attorney General except through their agent  
13 the prosecutor.

14 Q. I'm sorry.

15 A. Except through their agent, the prosecutor, who was dealing  
16 with the matter.

17 Q. I see. Mr. MacLeod, when he testified at this Inquiry, agreed  
18 that once the Halifax office of the Department of Attorney  
19 General was seized with that information that there then  
20 evolved upon the Halifax office an obligation to disclose that  
21 to defence counsel. Do I understand that you do not share  
22 that opinion?

23 A. It depends on what you mean. I take it that Mr. Donnie  
24 MacNeil, the prosecuting officer, is an arm of the Attorney  
25 General.

1 Q. Yes.

2 A. And the Department and he was aware of this matter and see,  
3 you have to remember, Mr. Orsborn, that Mr. Donnie MacNeil  
4 was a senior member of the bar and he had been prosecutor  
5 under the former government and was one of the few that  
6 wasn't removed when the government changed. He had a  
7 very high standing at the, as I understood at the...in the Cape  
8 Breton bar, and we had the...probably one of the best defence  
9 counsels in Nova Scotia on the other side, and it would just be  
10 normal for me to think that everything was handled properly.

11 Q. I see. So, if I understand you, your evidence is that while you  
12 believe there would be an obligation to disclose that fact to  
13 defence counsel, you would rely on Mr. MacNeil to carry out  
14 that obligation.

15 A. Yes. It's very seldom in my experience that the Department  
16 of Attorney General had very much to do with defence  
17 counsel when there was a prosecutor involved.

18 Q. I understand. Now, would that be...

19 A. Unless they came to the Department suggesting that they  
20 were not being given sufficient cooperation by the prosecutor  
21 or something and then...

22 Q. Once the notice of appeal had been filed and received by the  
23 Attorney General, Department of Attorney General, what  
24 responsibilities, if any, did Mr. MacNeil in Sydney retain with  
25 respect to that file?

1 A. He was still the prosecutor, still...he was the one that initiated  
2 and requested, through him or Mr. Matheson, requested this  
3 matter be dealt with. So, I...he still retained quite a bit of  
4 responsibility, I think.

5 Q. We've had evidence, sir, that once the matter entered the  
6 appeal arena, if you will, that the responsibility for pursuing  
7 it then shifted to the Halifax office of the Department. Is that  
8 accurate?

9 A. That sounds good in theory, but it probably doesn't work. It  
10 just means that the prosecutor doesn't proceed with the  
11 appeal before the Court of Appeal.

12 Q. Yes.

13 A. That doesn't mean that in this...in the particular case like this  
14 where there was something going on, ongoing, with a  
15 prosecution that had commenced that Mr. Mac...that Donnie  
16 MacNeil wouldn't still have a responsibility or interest in the  
17 matter.

18 Q. If there are to be communications between Crown and  
19 defence counsel in respect to the appeal who communicates  
20 on behalf of the Crown, the Halifax office or the local Crown?

21 A. In matters of appeal.

22 Q. Yes.

23 A. I'm trying to think of what communications transpired other  
24 than written communications between...when an appeal is  
25 launched between counsel.

1 Q. Well, let me put it a little more bluntly.

2 A. Okay.

3 Q. You have in the Halifax office of the Department Crown  
4 counsel, Mr. Veniot, charged with the responsibility of  
5 handling the appeal. You have in the office of the Halifax  
6 department knowledge concerning Mr. MacNeil's coming  
7 forward. Is there or was there, in your opinion, any  
8 obligation on either Mr. Veniot or yourself to communicate  
9 that fact to Mr. Rosenblum?

10 A. I don't know if I ever put the problem to mind as a matter of  
11 fact. I don't know if I even thought about it.

12 Q. It may be hypothetical, if you had thought about it what...do  
13 you think you would have...

14 A. Probably would have, yes, in retrospect.

15 Q. So, are you telling us that the reason Mr. Rosenblum was not  
16 advised was simply because nobody thought about it?

17 A. Or probably thought that he had been.

18 Q. Were any enquiries made to see if Mr. Rosenblum knew?

19 A. Not to my knowledge.

20 Q. Now, you mentioned, Your Honour, receiving information that  
21 the polygraph had, in fact, been conducted.

22 A. Uh-hum.

23 Q. Sorry, your answer is yes.

24 A. Yes, I'm sorry.

25 Q. And was it you that received that information?



1 A. Did I receive it?

2 Q. Yes, directly.

3 A. I can't tell you that. I don't know if I received it. I probably  
4 received it directly from the police at a...from the RCMP at a  
5 meeting, but it seems to me I was aware of it prior to that.

6 Q. We've had some evidence, Your Honour, from Inspector  
7 Marshall, who was the RCMP officer in charge of the  
8 investigation, that on the evening November 23rd after  
9 this...the polygraphs were conducted that Mr. MacNeil, Donnie  
10 MacNeil, phoned somebody in the Halifax office of the  
11 Department of Attorney General to advise them of the results.  
12 Is it possible that Mr. MacNeil phoned yourself?

13 A. It's possible.

14 Q. And what, to your knowledge was the results of the  
15 polygraph?

16 A. My recollection is that they...they didn't...that Mr. MacNeil was  
17 not telling the truth.

18 Q. Did that finish the matter insofar as you were concerned?

19 A. Well, at that stage, yes.

20 Q. Did you anticipate receiving a written report from the RCMP?

21 A. I would suspect so, yes.

22 Q. Would that be the normal practise?

23 A. The normal practise.

24 Q. Do you know if the matter of the investigation and the  
25 polygraphs was discussed at your weekly meetings with the

1 RCMP?

2 A. It's highly likely it would be.

3 Q. I'm sorry.

4 A. Most probable.

5 Q. Most probably.

6 A. Yes.

7 Q. If I could ask you to look at Volume 18, Your Honour, which I  
8 believe you have there, and just ask you to turn to page 7,  
9 and look at pages 7 through 10.

10 A. Where are the page numbers?

11 Q. Sorry, Your Honour, at the top of the page.

12 A. All right.

13 Q. Those two or three pages, Your Honour, represent Inspector  
14 Marshall's report on his review. Did you ever see that report?

15 A. I can't say that I ever did.

16 Q. In fairness, I should point out that...

17 A. It's dated the 21st of December and I was gone from the  
18 department on the 16th.

19 Q. Yes, I understand. Have you seen it since?

20 A. Yes, it was shown to me.

21 Q. I see. In preparation for this Inquiry?

22 A. Yes.

23 Q. But prior to that?

24 A. No.

25 Q. You mentioned that you left the Department of Attorney

JUDGE ANDERSON, EXAM. BY MR. ORSBORN

1 General on December 16th?

2 A. Yes.

3 Q. Did you physically leave that day and never to be seen again?

4 A. I probably went back to pick up my stuff in the office but, as  
5 I recall, the call came at five o'clock or so when we were just  
6 leaving the office and I picked up the phone and it was the  
7 Minister of Justice himself and that ended the matter.

8 Q. Good thing you were still in the office.

9 A. Yes, it pays to work late sometimes.

10 Q. There are some benefits to working late, yes, I must try that.

11 Who succeeded you in the position of Director of Criminal?

12 A. I would suspect Gordon Gale did.

13 Q. I see. What, if any, briefing did you provide your successor  
14 and, indeed, anybody in the department as to matters that  
15 were ongoing that you had knowledge of?

16 A. I have no recollection of that, Mr. Orsborn. It was just that, I  
17 don't know if it would require briefing, because we not so  
18 departmentalized, that I would probably talk to Gordon Gale  
19 three or four times a day about different things.

20 Q. While you were there or after you left?

21 A. While I was there.

22 Q. I see. Do I understand then that at the time you left,  
23 December 16th, from your evidence, there was nothing in  
24 writing regarding the RCMP review being done in Sydney?

25 A. Not to my knowledge.

JUDGE ANDERSON, EXAM. BY MR. ORSBORN

- 1 Q. And is it your evidence that it was nonetheless common  
2 knowledge within the department that this review was being  
3 conducted?
- 4 A. I can't say that from recollection but it just seems to me that  
5 a polygraph was not a day-to-day occurrence and if  
6 something like that took place, it would be discussed in the  
7 department at our coffee breaks and among ourselves.
- 8 Q. The report that is in front of you, Your Honour, dated  
9 December 21st, I believe, in the normal course of events,  
10 would you expect that report to be received by your  
11 department?
- 12 A. Oh, yes.
- 13 Q. And in the normal course of events, how would you expect  
14 that report to be received by your department?
- 15 A. It would come from the readers.
- 16 Q. To whom?
- 17 A. To myself. Ordinarily, it was just addressed to the  
18 Department of Attorney General from the RCMP and it would  
19 be put on my desk.
- 20 Q. And after your departure, to whom would that report have  
21 gone in the normal course of events?
- 22 A. It would have gone to Gordon Gale.
- 23 Q. Now since leaving the Department of Attorney General, have  
24 you on any occasion had any, on any occasion discussed  
25 anything relating to Donald Marshall, Jr. with Mr. MacLeod?

JUDGE ANDERSON, EXAM. BY MR. ORSBORN

- 1 A. No.
- 2 Q. With Mr. Gale?
- 3 A. No.
- 4 Q. With Mr. Coles?
- 5 A. No.
- 6 Q. Mr. Justice Pace?
- 7 A. No.
- 8 Q. Any member of the RCMP?
- 9 A. No.
- 10 Q. Mr. Aronson?
- 11 A. No.
- 12 Q. Mr. Cacchione?
- 13 A. It seems that I did to Judge Cacchione.
- 14 Q. As he is now?
- 15 A. As he is now.
- 16 Q. Not as he then was when you spoke to him?
- 17 A. No. I forget, it was after he left Legal Aid and was in private  
18 practice, we, he got very involved in the matter somehow or  
19 other. I forget the sequences of events. I think Aronson was  
20 the lawyer for Marshall and then...
- 21 Q. Yes.
- 22 A. And then that was terminated and...
- 23 Q. In May of '83.
- 24 A. And Judge Cacchione took over.
- 25 Q. Yes.

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1 A. I think. And in an informal conversation, I don't know  
2 whether he asked me a question or something about it and  
3 we discussed it.

4 Q. You do recall then having a discussion with Judge Cacchione?

5 A. I do because he brought it to my attention recently.

6 Q. I see. Do you recall where that conversation took place?

7 A. It would be in the courthouse, I think in the office of the,  
8 probably in the office of the secretary of the Court of Appeal.

9 Q. Was there anybody else present other than yourself and  
10 Judge Cacchione?

11 A. I would expect Ruth Carmody was there, or perhaps the other  
12 secretary.

13 Q. I anticipate, Your Honour, that Judge Cacchione will testify  
14 that in very early 1984 when he was acting for Mr. Marshall  
15 and when he was pursuing his claim for compensation and his  
16 claim for malicious prosecution, that he visited you for the  
17 purpose of inquiring whether or not when you were in the  
18 Department of Attorney General, you received this report.

19 A. Uh-huh.

20 Q. To which we've just referred. Do you recall that?

21 A. No, I don't recall the specifics. I just remember talking to  
22 him.

23 Q. Assuming that that is the substance of Judge Cacchione's  
24 testimony, anticipated testimony, I believe it will be, do you  
25 have any basis for suggesting that he is mistaken?

JUDGE ANDERSON, EXAM. BY MR. ORSBORN

1 A. No.

2 Q. I anticipate also, sir, that he will testify that in response to  
3 his response, you said, "Well, I went to the bench on  
4 December 16th. I didn't see it."

5 A. That's very possible. I have no recollection of the  
6 conversation particularly.

7 Q. Would you have any basis for suggesting that his testimony  
8 on that point is mistaken?

9 A. No. No, no. I'd say right now that he had reason to  
10 remember these things and I didn't have particular reason to  
11 remember, that his recollection of the events is accurate.

12 Q. You indicated to us that your impression was that he was, the  
13 words you used "very involved" in the case. What did you  
14 mean by that?

15 A. Well, he might be upset by this comment, but he has a  
16 tendency to get involved with causes and I thought that he  
17 just started a new practice on his own and he was very  
18 involved in this and I thought that perhaps he was overly  
19 involved in one aspect or one small sphere where he should  
20 be practicing law in a wider range if he was going to build up  
21 a practice.

22 Q. Sorry, when you say "one small sphere," what do you mean?

23 A. Well, he spent so much time on this particular issue.

24 Q. I see. Which issue?

25 A. The one you're referring to, the Marshall matter.

JUDGE ANDERSON, EXAM. BY MR. ORSBORN

1 Q. Oh, okay. So he spent an, you believed he was spending too  
2 much time on this one client.

3 A. Yes, he was getting overly involved, emotionally and  
4 otherwise.

5 Q. I see. Now, sir, I anticipate again that Judge Cacchione will  
6 testify that he has a vivid recollection of your saying during  
7 the course of his meeting with you, and I apologize, My Lords,  
8 if the quotation is a little indelicate.

9 A. Well, I would think, Mr. Orsborn, that My Lords are not that  
10 indelicate that it will bother them.

11 Q. Maybe. The quotation attributed to you, sir, the vivid  
12 recollection is, "Felix, don't get your balls caught in the vice of  
13 an Indian." Do you have any recollection of making that  
14 comment, sir?

15 A. I have no recollection of making it.

16 Q. Can you offer any basis for suggesting that Judge Cacchione is  
17 mistaken in that quotation?

18 A. No, it sounds like something I might say.

19 Q. I see. Would you, therefore, accept his testimony to that  
20 effect as being truthful and accurate?

21 A. Yes.

22 Q. What does that comment mean to you, sir?

23 A. As I explained to you previously, it just means that I thought  
24 he was getting far too involved in one particular matter to the  
25 detriment of his practice.



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1 Q. Why would you then not say, "Don't get too involved in one  
2 matter." Why would you pick on the word "Indian"?

3 A. Well, it was my understanding that Mr. Marshall was an  
4 Indian.

5 Q. Yes. Are you suggesting that it would have been acceptable  
6 for Mr. Cacchione to be involved if his client were white?

7 A. Not if it was the same type of person, no.

8 Q. Are you..

9 A. It had nothing to do with his race. It had to do with his  
10 person...his personality and his...

11 Q. I'm sorry, whose personality?

12 A. Reputation.

13 Q. Whose personality?

14 A. Mr. Marshall's.

15 Q. I see.

16 A. As I then knew it.

17 Q. Do I then construe that advice, sir, as meaning that the  
18 lawyer's obligation should vary with the reputation of his  
19 client?

20 A. Yes, perhaps. Not his reputation but I think perhaps someone  
21 with no record, shall we say, as perhaps one might spend  
22 more energies.

23 Q. To your knowledge, sir, are those sentiments shared by  
24 anybody else charged with the administration of justice in  
25 this province?

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1 A. I have no idea.

2 MR. ORSBORN

3 Thank you, My Lord.

4 MR. CHAIRMAN

5 Ms. Derrick?

6 MS. DERRICK

7 Thank you, My Lord.

8

9

EXAMINATION BY MS. DERRICK

10 Q. Judge Anderson, my name is Anne Derrick, as you know, and  
11 I represent Donald Marshall, Jr. You've now had an  
12 opportunity to look at Inspector Marshall's report, which is in  
13 Volume 18. That's correct, is it?

14 A. Yes.

15 Q. And would I be correct in saying that this is the type of  
16 report that would have been discussed within the Attorney  
17 General's Department. And I appreciate that you say you  
18 never saw it, but is it the type of report that would have been  
19 discussed in the normal course of things?

20 A. Well, all reports weren't discussed, Ms. Derrick, no.

21 Q. So there'd be nothing that would distinguish this one as being  
22 the type of report that wouldn't be discussed.

23 A. No.

24 Q. Now you mentioned that there might be occasions if there  
25 was a problem with a municipal police force that assistance

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1           might be requested and that the RCMP might render some  
2           assistance, perhaps with, at the request of the Attorney  
3           General's Department. Is that correct?

4           A. Uh-huh.

5           Q. And I take it that the municipal police forces were and are  
6           under the Attorney General's jurisdiction? They are the  
7           concern of the Attorney General's Department.

8           A. Yes.

9           Q. So...

10          A. It has concern for the administration of justice in the  
11          province.

12          Q. So a report as a result of such assistance rendered by the  
13          RCMP would then find its way back to the Attorney General's  
14          Department, is that correct?

15          A. If the RCMP were involved, yes.

16          Q. And if such a request was made by the Attorney General's  
17          Department to have the RCMP assist, then I take it that the  
18          AG's Department would expect a report to come back. And if  
19          one didn't come back, there would be some inquiries made as  
20          to its whereabouts?

21          A. Yes.

22          Q. And the matter wouldn't just be let go.

23          A. No, no, I wouldn't think so.

24          Q. Now with respect to this particular matter, which I  
25          understand the matter of Mr. Matheson, as we understand his

JUDGE ANDERSON, EXAM. BY MS. DERRICK

1 evidence, calling you from Sydney concerning Mr. MacNeil  
2 coming forward. I understand that you don't have any clear  
3 recollection of that contact.

4 A. No, I just remember there was a call.

5 Q. And you don't remember doing anything as a result of that  
6 call. You don't remember discussing it with anybody within  
7 the department?

8 A. No.

9 Q. And I take it that you would agree that not to have discussed  
10 it with anyone would have been a dereliction of your duty as  
11 the Director of the Criminal Prosecutions.

12 A. I would suggest also that if I didn't discuss it with anyone,  
13 that the RCMP would never have sent a polygraph operator  
14 there.

15 Q. And would it be fair to say that, given that we understand  
16 that the RCMP did go and administer a polygraph, that their  
17 assistance that was rendered with respect to Mr. MacNeil  
18 coming forward, that it would have been, that the Attorney  
19 General's Department would have relied on the RCMP to have  
20 done any review or to have rendered any assistance in  
21 accordance with their policies and procedures?

22 A. Perhaps you'd run that by me again?

23 Q. Sure. In the instance when the Attorney General's  
24 Department requested the assistance of the RCMP with  
25 respect to a municipal police force, would it be fair to say that

JUDGE ANDERSON, EXAM. BY MS. DERRICK

1 the Attorney General's Department would have relied on the  
2 RCMP to have rendered that assistance in accordance with  
3 their policies and procedures?

4 A. Yes. Their policies and procedures being those of the  
5 Attorney General's Department or the RCMP.

6 Q. Of the RCMP.

7 A. Yes.

8 Q. And would there have been any directives provided by the  
9 Attorney General's Department to assist the RCMP?

10 A. Not normally. It's not an investig...The Attorney General's  
11 Department isn't an investigative body.

12 Q. I appreciate that, but given that this must have happened  
13 from time to time, that some assistance would have been  
14 rendered, would the Attorney General's Department have  
15 developed any directives or policies to assist?

16 A. No, they would just indicate the problem and ask them to go  
17 in and...

18 Q. And deal with it.

19 A. Deal with it.

20 Q. And I believe you said that you don't know whether the  
21 Attorney General was advised of what was being done with  
22 respect to Mr. Matheson's inquiry?

23 A. No, I can't say that I do.

24 Q. Would it have been the normal practice, however, to have  
25 advised the Attorney General of what was happening, keep

JUDGE ANDERSON, EXAM. BY MS. DERRICK

1           him up to date?

2       A.   It depended on the circumstances of the events, you know.

3           Where he was, what was going on.

4       Q.   Now I think you've said that this was a particularly unusual  
5           set of circumstances.

6       A.   Yes.

7       Q.   A man convicted and someone else coming forth and saying...

8       A.   Yeah, yeah.

9       Q.   "I can tell you who the real murderer is."

10      A.   I would suspect he would be aware but I don't know.

11      Q.   But it would be a normal sort of thing to advise him of.

12      A.   Yes.

13      Q.   You have no recollection, I take it, of advising Mr. Matheson  
14           or Mr. MacNeil to disclose the information that they had to...

15      A.   No.

16      Q.   Mr. Marshall's defence counsel.   Do you feel that you had an  
17           obligation to provide that advice?

18      A.   No.

19      Q.   You feel that they should have known that on their own?

20      A.   Yes.

21      Q.   You expect that this would have been the kind of thing  
22           discussed within the department, is that correct?

23      A.   Uh-huh.

24      Q.   So it would have, in your view, undoubtedly have come to the  
25           attention of Mr. Veniot?

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1 A. Oh, I would think so, yes.

2 Q. Would you have expected that he, as an employee of the  
3 department, would have had an obligation to advise Mr.  
4 Marshall's defence counsel? Or to at least find out whether  
5 they had been advised by some other source?

6 A. I don't think so. You know, you would expect these things to  
7 be done. Mr. Veniot was just a, if not just an articled clerk,  
8 just one step beyond it and for him to advise someone like  
9 Donnie MacNeil what his responsibilities were, I think would  
10 be a little bit...

11 Q. I guess my point, Judge Anderson, is that Mr. Veniot was the  
12 person put in charge on behalf of the Attorney General's  
13 Department of Mr. Marshall's appeal.

14 A. Yes.

15 Q. And in that capacity, do you not feel that he would have had  
16 an obligation to tell Mr. Rosenblum about the information that  
17 had come to the attention of the Attorney General's  
18 Department?

19 A. Yes, he probably did.

20 Q. I believe his evidence is that he didn't. I'm asking whether  
21 you feel he should have.

22 A. I suspect he should have, yes.

23 Q. When a person left the Attorney General's Department, and  
24 let's say a solicitor, and perhaps a senior solicitor, left the  
25 Attorney General's Department such as you did, was there

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1           some normal practice for transferring of files, of handing over  
2           responsibilities?

3           A. I don't think so, no.

4           Q. And I realize...

5           A. It just happened.

6           Q. So in this particular instance, you had received a  
7           communication, a request from Mr. Matheson for some  
8           assistance with respect to Mr. MacNeil coming forward. The  
9           RCMP had been dispatched to go and administer a polygraph  
10          test. And then in the midst of this, in a sense, you were  
11          appointed to the bench.

12          A. Uh-huh.

13          Q. Would it not have been a normal practice to say to your  
14          successor within the department, "There should be some  
15          follow-up with respect to this. I'm expecting a report. I am  
16          hoping to hear back from so-and-on."

17          A. We had already heard back.

18          Q. Well, I believe the report itself, Mr. Marshall's report is dated  
19          December 21st, 1971.

20          A. Yes, but the department was aware of the general content of  
21          it before it came, I would think.

22          Q. So is what you're saying is that in your view there wasn't  
23          really a need to have a briefing session because Mr. Gale  
24          would have known what to expect.

25          A. Yes.



JUDGE ANDERSON, EXAM. BY MS. DERRICK

1 Q. In early 1984, Judge Anderson, when you spoke to Mr.  
2 Cacchione, at that time you knew that Mr. Marshall had been  
3 acquitted by the Court of Appeal.

4 A. Yes.

5 Q. Is that correct? And you knew that Mr. Ebsary was before  
6 the courts charged with Mr. Seale's murder.

7 A. Yes.

8 Q. Is that correct?

9 A. Probably, yes.

10 Q. So you knew at that time that Mr. Marshall was an innocent  
11 man.

12 A. Yes.

13 MS. DERRICK

14 Thank you. Those are all my questions.

15 MR. CHAIRMAN

16 Mr. Pugsley?

17 MR. PUGSLEY

18 I have no questions of Judge Anderson. Thank you, My Lord.

19 MR. BARRETT

20 No questions.

21 MR. CHAIRMAN

22 Counsel for the RCMP?

23 MR. BISSELL

24 If I just might have a moment.

25

JUDGE ANDERSON, EXAM. BY MR. BISSELLEXAMINATION BY MR. BISSELL

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Q. Your Honour, I just have one question. In the Province of Nova Scotia, the municipal police departments generally administer, look after law enforcement within their jurisdiction, is that correct?

A. Yes.

Q. And other than serious crimes such as murder, they initiate investigations within their own territory?

A. That's correct.

Q. And I gather also it's your evidence that to the best of your belief, Mr. Gale would have been well aware of the fact that the RCMP had been requested to do the polygraph on Mr. MacNeil?

A. I would think so.

Q. As well as the results.

A. Yes.

Q. And one other question, you indicated that in the normal course of events, you would have expected the report such as Al Marshall prepared to have come over via the readers to your office. Would it also be a possibility that a report such as that might be handed over at a Thursday morning meeting?

A. That's a possibility.

JUDGE ANDERSON, EXAM. BY MR. BISSELL

1 Q Reports that came in like that, did they go into a general  
2 police report file that the AG's Department had?

3 A. I'm afraid, Mr. Bissell, I wasn't aware of the filing system or  
4 didn't do filing. If I wanted a file or something, I would ask  
5 the secretary for it and she'd bring it. The filing system I  
6 wasn't aware of.

MR. BISSELL

8 Thank you very much, Your Honour.

MR. MACDONALD

10 No questions for Judge Anderson.

MR. CHAIRMAN

12 Mr. Ross?

MR. ROSS

14 Thank you, My Lord.

EXAMINATION BY MR. ROSS

18 Q Judge Anderson, my name is Anthony Ross. I think we know  
19 each other.

20 A. Yes.

21 Q Would you agree with me that this investigation goes far  
22 beyond just the Marshall matter and really addresses the  
23 administration of justice as it infringes on minority groups?  
24 Is this your understanding?

25 A. Of this Inquiry?

JUDGE ANDERSON, EXAM. BY MR. ROSS

1 Q. Of this Inquiry, yes.

2 A. Well, it would appear that way.

3 Q. And would you agree further that in this regard it is  
4 important, especially from the view of the black community,  
5 to understand judicial thinking and racism if it exists at the  
6 bench level?

7 A. Ask that again, Mr. Ross?

8 Q. Would you agree that as far as the black community is  
9 concerned, it would be important to understand whether or  
10 not racism exists or extends to the bench in Nova Scotia?

11 A. Important to whom?

12 Q. To the black community.

13 MR. ORSBORN

14 My Lord, I hesitate to rise but the question as framed gives  
15 me a little concern insofar as it discusses or seems to approach  
16 judicial thinking. The ambit of our inquiry into judicial thinking  
17 is the subject of some degree of dispute at the present time and it  
18 may be that the line of questioning is not particularly appropriate  
19 right now.

20 MR. ROSS

21 In that regard, My Lord...

22 MR. CHAIRMAN

23 I guess we all watched the CBC program last night.

24 MR. ROSS

25 Pardon me?

JUDGE ANDERSON, EXAM. BY MR. ROSS

1 MR. CHAIRMAN

2 I guess we watched the CBC program last night.

3 MR. ROSS

4 Very, very good.

5 MR. CHAIRMAN

6 The question of the interpretation of this Commission's  
7 mandate, I would suspect, subject to any matters outside, fall  
8 within the exclusive jurisdiction of this Commission itself. If you  
9 want to avail of the opportunity to ask Judge Anderson if he  
10 would like to, based on his years at the bar and his years on the  
11 bench, if he has seen any evidence of discrimination against  
12 minority groups, that's an appropriate question. How Judge  
13 Anderson can comment on judicial thinking, I would think would  
14 be a challenge that for centuries others have tried to face without  
15 success.

16 MR. ROSS

17 Well, that might very well be true, My Lord, but I think we  
18 can...

19 MR. CHAIRMAN

20 Can you try it the other way. What you're getting at is, what  
21 you are, if what you are asking Judge Anderson, if he is aware of  
22 or has he seen any evidence of any bias towards minority groups,  
23 I will allow it. The phrasing of your question causes me some  
24 concern, Mr. Ross. The intent is all right.

25

JUDGE ANDERSON, EXAM. BY MR. ROSS

1 MR. ROSS

2 It is quite broad. I recognize that, My Lord, but I can only  
3 look back at the recent decision of the Supreme Court of Canada in  
4 the Morgentaler abortion case and...

5 MR. CHAIRMAN

6 Don't get us into abortions.

7 MR. ROSS

8 No, I'm not getting into that.

9 MR. CHAIRMAN

10 It has enough problems as it is.

11 MR. ROSS

12 I'm not getting into that. But what I'd like to point out is that  
13 for years, the courts have been grappling with one problem and it  
14 is to recognize that it was the presence of Madame Justice Wilson  
15 on that bench who took this problem much beyond where the  
16 men, the male members of the bench took it from time to time...

17 MR. CHAIRMAN

18 Oh, Mr. Ross.

19 MR. ROSS

20 My Lord, My Lord, please, just hear me out, just hear me out.

21 MR. CHAIRMAN

22 I won't...

23 MR. ROSS

24 Just hear me, please, what I'm saying is that in the same  
25 weight, if we're going to be addressing the question of racism, we

JUDGE ANDERSON, EXAM. BY MR. ROSS

1 cannot just address it for white eyes, and that's the point that I'm  
2 trying to make. And that's why I would like some latitude in  
3 questioning this witness with respect to this whole question of  
4 racism.

5 MR. CHAIRMAN

6 I repeat...

7 MR. SAUNDERS

8 My Lord, I would like to be heard on that, if I may. His  
9 Honour Judge Anderson is here to speak to matters relating to his  
10 role as an official within the Attorney General's Department prior  
11 to his elevation to the bench on December 16th, 1971. And I say  
12 with the greatest of deference to the Commission that it would be  
13 inappropriate to permit questions to be posed of this witness at  
14 this time on his experiences, if any, while a member of the bench.

15 And I take exception to the suggestion by my friend behind  
16 that he wishes a great broad latitude in the manner of questioning  
17 that he can pose to this witness. This judge is here to speak to his  
18 knowledge of this case while an official, a senior official within  
19 that department. He is not before your commissioners with  
20 respect to his experience over the last 17 odd years as a member  
21 of the bench.

22 And as my friend, Mr. Orsborn, has said, that whole notion  
23 raises very important questions that are presently before the  
24 court and I understand will be dealt with in April and thereafter.

25 And I have grave concerns that my friend is about to embark

JUDGE ANDERSON, EXAM. BY MR. ROSS

1 on questioning of this witness qua his position as a judge and I  
2 say that that is inappropriate before this tribunal.

MR. CHAIRMAN

3  
4 Well, firstly, let me deal with the objection raised by Mr.  
5 Saunders. It is correct that Judge Anderson is here to testify with  
6 respect to matters that may have arisen during, that did arise  
7 during his term as an official with the Department of the Attorney  
8 General. And that is the only evidence that has been led and I  
9 suspect is the only evidence that anyone here is aware of that, of  
10 his involvement. The question of, the broad question of his work  
11 as a judge is clearly not a matter that is within the terms of  
12 reference of this Commission. What I had hoped was that not the  
13 general broad question put by Mr. Ross, that's clearly not an  
14 appropriate question, but simply if Judge Anderson, while he's  
15 here, wants to let this Commission have the benefit of his advice,  
16 not his advice, his observations with respect to racism, we would  
17 be pleased to hear it. But it is not within the ambit, I'm not  
18 prepared to say it is not within the ambit of this Commission, it is  
19 not within the evidence that has been led from this witness to  
20 allow that kind of broad line of questioning.

MR. SAUNDERS

21  
22 I'm concerned, My Lords, if even one question is asked of this  
23 or any other judicial witness as to his or her observations while on  
24 the bench as to bias perceived or actual, that there is no limit to  
25 the exploration of those issues and that it's grossly unfair to



1 expect a member of the bench to have to give responses to those  
2 types of questions.

3 MR. CHAIRMAN

4 That's right. In...you will recall that there were some  
5 questions put other, to at least one other member of the judiciary  
6 on that question, namely Judge Matheson, on his observations,  
7 albeit in response to a direct allegation that had been made a  
8 previous witness, Mr. Francis. I...if Judge Anderson says that he is  
9 not a position to answer that question, that's the end of it, Mr.  
10 Ross.

11 MR. ROSS

12 Thank-you, very kindly, My Lord. But before I get onto the  
13 question perhaps I could get some...a response from my learned  
14 friend Mr. Saunders. It's my understanding he's suggesting that  
15 Judge Anderson is here to speak about his involvement when he  
16 was with the Attorney General, and I would take it that he goes a  
17 little further, because there is also the discussion with Judge  
18 Cacchione to which the response was given, "Felix, don't get your  
19 balls caught in the vice of an Indian."

20 MR. CHAIRMAN

21 We'll come to that, but that was not the question you put to  
22 him.

23 MR. ROSS

24 Okay, fine. But if we adopt what Mr. Saunders said, it would  
25 put an unfair limitation on...anyway I'll go on to the question.

1 Q. Judge Anderson, when you were in your direct testimony you  
2 indicated to Mr. Orsborn, with respect to the involvement of  
3 Felix Cacchione's practise, that things that should be  
4 considered is something like that personality of the  
5 individual, the reputation and so on. Do you recall that  
6 evidence?

7 A. Uh-hum.

8 Q. Yes?

9 A. Yes.

10 Q. Statistics have demonstrated that there's a substantial  
11 number of black people who wind up before the Court and  
12 they wind with criminal records. Is that consistent with your  
13 understanding and your experience as a Judge?

14 A. I have no...I can't answer that, Mr. Ross.

15 Q. I see. But you are aware that there are some black people  
16 who wind up before the court from time to time and with  
17 criminal records.

18 A. As there are white people.

19 Q. Well, I'm just speaking about the blacks for the time...

20 A. Yes.

21 Q. ...being.

22 A. Yes, yes.

23 Q. And would you be then be suggesting that when these black  
24 people with criminal records are to be...are going before the  
25 court, the lawyer should consider their personality and their

JUDGE ANDERSON, EXAM. BY MR. ROSS

1 reputation as far as doing his job?

2 A. No, no.

3 Q. Well, is this a special case just then for Judge Cacchione and  
4 Marshall?

5 A. I was more concerned with...at the time Judge Cacchione and I  
6 had become friends when he was a solicitor with Legal Aid,  
7 and I was trying to give him some advice how he should  
8 conduct his practise...

9 Q. Would that be...

10 A. ...not to get too involved.

11 Q. Would that be reflective of your thinking when...in general as  
12 minority groups are concerned?

13 A. No. It had nothing to do with minority groups.

14 Q. Did you ever review the report by Ed Renner, the study by Ed  
15 Renner on the...on the court system and an assessment of  
16 sentences of black people as opposed to white people?

17 MR. SAUNDERS

18 May I ask my friend the date of that report.

19 MR. ROSS

20 The date of his report, it is written in 19...

21 MR. SAUNDERS

22 Well, if it's subsequent to December 16, 1971, then I object to  
23 the question being put to this witness by my friend.

24 MR. ROSS

25 Well, it is subsequent to that time, My Lord, but it is a report

1 published in Rights and Freedoms the winter of 1980.

2 MR. CHAIRMAN

3 That would be clearly not...that's clearly outside the scope of  
4 the questions you can put to this witness.

5 MR. ROSS

6 But I just asked him whether or not he reviewed it. Is that  
7 an improper question, My Lord?

8 MR. CHAIRMAN

9 Yes. I mean what concern is it to us whether he has read a  
10 report. I haven't read it. I never heard of it until last night.

11 MR. ROSS

12 That...well, then I think that's strange, My Lord, because it  
13 accompanied the application for standing put forward by the  
14 Black United Front.

15 MR. CHAIRMAN

16 Well, I haven't read it.

17 MR. ROSS

18 Okay, fine, My Lord.

19 MR. CHAIRMAN

20 This is the one that was on CBC last night.

21 MR. ROSS

22 No, My Lord. Nothing to do with CBC. Oh, as a matter of fact,  
23 it might have been, yes.

24 MR. CHAIRMAN

25 I thought so. No, that question is not properly put. That's not

1 a proper question to put to this witness.

2 MR. ROSS

3 Thank-you, My Lord.

4 Q Perhaps just one question to clear up something here. You  
5 indicated then when Mr. Veniot was handed the appeal file  
6 for Marshall that he was just an articled clerk or shortly  
7 thereafter.

8 A. I can't remember actually the sequence of events, Mr. Ross,  
9 but he had articled in the Department and he became a  
10 solicitor there.

11 Q And was still a junior at the time of handling the Marshall  
12 appeal.

13 A. I would say so, yes.

14 Q Yes.

15 A. I would think so.

16 Q And you were the person who passed that file over to him.

17 A. I can't say...

18 Q You would have been...

19 A. I can't say that.

20 Q Well, you were director of criminal.

21 A. Yes. But I don't know when the file was passed to him.

22 Q It would be passed shortly after the notice of appeal, wouldn't  
23 it?

24 A. Not necessarily, no.

25 Q I see. Well, his evidence was that it was passed to him quite

JUDGE ANDERSON, EXAM. BY MR. ROSS

1 early and what I want to find out from you is whether or not  
2 you would have expected the junior member handling this  
3 appeal to also review the trial aspect and advise defence  
4 counsel of the apparent deficiency resulting from the  
5 polygraph testing?

6 A. I didn't follow your question.

7 Q. Would you have expected Mr. Veniot, the junior man handling  
8 the appeal, to contact Moe Rosenblum about the results of the  
9 polygraph test?

10 A. I can't anticipate what Mr. Veniot might do, Mr. Ross.

11 Q. I know you can't anticipate, but would you have expected him  
12 to as your junior?

13 A. Very possibly, that's the best...as far as I'll go.

MR. ROSS

14  
15 Thank-you, very much.

EXAMINATION BY MR. WILDSMITH

16  
17 Q. Judge Anderson, my name is Bruce Wildsmith and we've met  
18 before.

19 A. Yes, Mr. Wildsmith.

20 Q. Just a couple of points of detail, Judge Anderson. First of all, I  
21 was interested in the question of requests being made by you  
22 in your capacity as director of criminal of the RCMP to do  
23 certain things, for example in this case to engage in the  
24 investigation of the allegations of Jimmy MacNeil. Now, my  
25 understanding is that the RCMP work as the provincial police

1 force under contract. That's correct, is it?

2 A. Yes.

3 Q. Yes. Are there any financial consequences to the province  
4 when a request is made to review the work of a municipal  
5 police force or to look into Jimmy MacNeil's allegations?

6 A. I really can't say, Mr. Wildsmith, whether there is or not. I  
7 would suspect from my recollection of the contract, if there  
8 were additional men required to be brought in from some  
9 place else to do certain things, there is additional costs. I  
10 don't know in staffing people if there's additional financial  
11 costs or not.

12 Q. If people are brought in from outside the province to assist  
13 with the investigation, is that what you're referring to?

14 A. With, with...for any particular reason.

15 Q. I see. What about when exhibits are sent outside the  
16 province for evaluation at the Sackville Crime Laboratory?

17 A. I have no idea.

18 Q. Now, with respect to the investigation in to the allegations of  
19 Jimmy MacNeil, I take it from your evidence that when it  
20 came to your attention you made a request of the RCMP that  
21 they look at Jimmy MacNeil's allegations.

22 A. That's my...I don't recall it, Mr. Wildsmith, but that's..

23 Q. What you expect.

24 A. I suspect did happen.

25 Q. Okay. Well, let me deal with the question of not recalling for

1 a moment. I take it that part of the reason you don't recall is  
2 because there is no documentation that emanated from you.

3 A. Not necessarily, no. If there is documentation probably, I  
4 wouldn't recall it.

5 Q. Okay. Well, let me put it to you...

6 A. Unless I read it and that wouldn't be recall.

7 Q. Yes. Well, nobody has brought any documentation to your  
8 attention that came from you.

9 A. No.

10 Q. All right. Well, you made this request of the RCMP you  
11 received back verbally, I think it's your evidence, the results  
12 of the polygraph test and the results of the RCMP  
13 investigation.

14 A. That's my recollection, yes.

15 Q. And you expected a written report to follow.

16 A. Yes.

17 Q. Which you didn't see yourself at that time?

18 A. No.

19 Q. Well, here's my real point to you, I have a sense that you  
20 expected documentation to flow from the RCMP to the  
21 Attorney General's Department, is that correct?

22 A. Yes.

23 Q. What would your expectation be about documentation from  
24 the Attorney General's Department that would flow to the  
25 RCMP providing them with instructions?



1 A. I don't recall having done it, Mr. Wildsmith.

2 Q. Is it fair for me to think that as a matter of practise the  
3 Attorney General's Department was not in the habit of  
4 sending...

5 A. Yes.

6 Q. Directions to the RCMP.

7 A. That's correct.

8 Q. So that any requests or directions or instructions would, by  
9 and large, be verbal?

10 A. Yes. It would probably show up on the report coming back,  
11 as requested by telephone.

12 Q. Yes.

13 A. Or as requested this done or that done.

14 Q. But, for example, if you didn't receive back a report from the  
15 RCMP, you would only have your memories to go on.

16 A. Yeah, uh-hum.

17 Q. As to what you were expecting and when you were expecting  
18 it and from whom you were expecting it.

19 A. Yes.

20 Q. Okay.

21 MR. WILDSMITH

22 Thank-you. That's all the questions I have.

23 MR. CHAIRMAN

24 Mr. Saunders.

25

1 MR. SAUNDERS

2 No re-examination of the Judge.

3 MR. CHAIRMAN

4 Mr. Orsborn.

5 MR. ORSBORN

6 Nothing, My Lord.

7 MR. CHAIRMAN

8 Just a couple of questions, Judge Anderson arising out of your  
9 employment with the Department of the Attorney General.

10 EXAMINATION BY MR. CHAIRMAN

11  
12 Q. Were...at that time were municipal police forces under any  
13 obligation to report investigations being carried on by them  
14 or police work to the Department of the Attorney General?

15 A. No, not that I'm ...not that I'm aware of.

16 Q. If, and say in this particular case, when the Sydney Police  
17 Force embarked upon their investigation into the death of  
18 Sandy Seale would they...was there any obligation or any  
19 practise even which would require them to report to the  
20 Attorney General?

21 A. No.

22 Q. The Crown Prosecutor or Prosecutors in Cape Breton at that  
23 time were not on the staff of the Attorney General, I gather,  
24 Department of the Attorney General, Mr. MacNeil and Mr.  
25 Matheson.

- 1 A. Yeah, well, he was paid by the...
- 2 Q. Were they full-time prosecutors?
- 3 A. I don't remember, Mr. Chairman, when they became full time  
4 and when they were just sort of part time agents as they  
5 were called.
- 6 Q. Agents.
- 7 A. There was a time that that changed and I'm not just sure of  
8 when. I was of the impression that Donnie MacNeil was  
9 pretty full time. I don't recall him sending in bills or such  
10 like that. I think he got paid a salary or something.
- 11 Q. Would he have been a public servant or a civil servant within  
12 the meaning of the term as we know it?
- 13 A. I can't say for sure. But they did become eventually civil  
14 servants with the benefits and things arising therefrom.
- 15 Q. You say you cannot recall the person who telephoned you  
16 advising of the information that Jimmy MacNeil had given but  
17 it was one of the prosecutors, I take it.
- 18 A. Oh, yes, yes, yes. I thought it was Donnie MacNeil.
- 19 Q. And we subsequently know that shortly thereafter Inspector  
20 Marshall of the RCMP went to Sydney to carry out some  
21 reinvestigation work? Are...is the Commission entitled to  
22 assume that either you or someone in the Department of the  
23 Attorney General must have asked or instructed the RCMP to  
24 go to Sydney?
- 25 A. Yes, yes, yes.

JUDGE ANDERSON, EXAM. BY MR. CHAIRMAN

1 Q. You also indicated that shortly...that after the polygraph test  
2 had been carried out in Sydney a Prosecutor advised you of  
3 the outcome of that...these tests.

4 A. Someone advised, yes.

5 Q. Someone. So that even though you did not see the Inspector  
6 Marshall report, you knew the results of at least that part of  
7 the investigation.

8 A. Yes, yes.

9 Q. When the...I take when ...when any police...any municipal  
10 police officer lays a charge he or she is doing so as agent of  
11 the Attorney General say under the Criminal Code?

12 A. Yes.

13 COMMISSIONER POITRAS

14 One or two questions, Judge Anderson.

15 EXAMINATION BY COMMISSIONER POITRAS

16 Q. At least back in 1971 when an offence was committed in a  
17 municipality, be it a town or a city, was it necessarily the  
18 police department of that town or city that investigated a  
19 crime?

20 A. Pardon me?

21 Q. Was it necessarily the police department of that city or of that  
22 town, that is to say in which the offence was committed, that  
23 investigated the offence?

24 A. It would depend, I think. Not all municipal bodies had their  
25 own...the RCMP policed a lot of the province. It was only

JUDGE ANDERSON, EXAM. BY COMMISSIONER POITRAS

1 some of the larger towns, and if they had a serious ... they  
2 would frequently request the RCMP to assist them.

3 Q. But were they free, if they so intended, to conduct their own  
4 investigation without looking to the RCMP via the Attorney  
5 General's Department?

6 A. Yes.

7 Q. So, it was up to the police force to decide whether they  
8 required the assistance of the RCMP?

9 A. It seems to me there might have been a policy at one time  
10 and I don't know just when and how it reflected that. In  
11 cases of murder, the RCMP were required to...or it was  
12 understood the RCMP would move in. But certainly wasn't in  
13 the City of Halifax or Dartmouth or Sydney, I don't think, in  
14 those larger centres.

15 Q. I see. Would the RCMP have had exclusive jurisdiction with  
16 respect to certain offences such as treason, let us say, or drugs  
17 or any other offence that might come to mind?

18 A. No.

19 Q. Including Halifax or Sydney.

20 A. No. Halifax on their own, had jurisdiction in those areas.

21 Q. I see.

22 A. Halifax Police Force.

23 Q. Thank-you.

24 COMMISSIONER EVANS

25 Judge Anderson, I wouldn't want you to leave without feeling

JUDGE ANDERSON, EXAM. BY COMMISSIONER POITRAS

1       that I should ask you a couple of questions.

2       JUDGE ANDERSON

3       I'd be deeply hurt, Justice Evans.

4                       EXAMINATION BY COMMISSIONER EVANS

5       Q. When were you called to the bar? I did not hear that.

6       A. 1957.

7       Q. 1957. And you joined the Department of the Attorney  
8       General when?

9       A. '65 or '66, I'm not just sure which.

10      Q. Now, during that interval from your call to the bar, were you  
11      engaged in a criminal practise of criminal law?

12      A. I was in private practise.

13      Q. Doing criminal law?

14      A. Very little of criminal law.

15      Q. Well, during the...

16      A. We had very few criminals where I was living.

17      Q. That forces one to get into civil law, doesn't it?

18      A. Very few civil people too.

19      Q. I can understand why you joined the A.G.'s Department. But  
20      during the period of time that you were with the, either  
21      practising as a lawyer or having joined the A.G.'s office in  
22      1965, were you aware of any guidelines or rules set out by  
23      the Attorney General's office with respect to disclosure to  
24      defence counsel by Crown counsel?

25      A. No.

1 Q And was, in your experience, was there any rapport between  
2 Crown counsel and defence counsel whereby certain  
3 knowledge would be passed back and forth?

4 A. Yes.

5 Q And I suppose...

6 A. It would depend on counsel.

7 Q Yes.

8 A. If they were affable and...

9 Q Reliable.

10 A. You know, there would be information passed freely. If there  
11 was not, then it wasn't.

12 Q Now, when it came down to an appeal and the...once the  
13 appeal was launched was the...and received by the A.G.'s  
14 office, was the local Crown attorney did he sort of disappear  
15 from the picture?

16 A. Yes, yes.

17 Q And at that time then would there be an obligation on the  
18 Crown counsel handling the appeal to indicate, in this case to  
19 defence counsel, the fact that MacNeil had made a statement  
20 and that there was a polygraph? Would there be any  
21 obligation for him to divulge that information to the defence  
22 counsel handling the appeal?

23 A. There probably is an obligation, but I think you...one has to  
24 look at in the terms of the time and the place. A senior  
25 prosecuting officer, polygraph going on Sydney, one would

1           assume that Rosenblum would have been aware of what was  
2           going on. That was always an assumption I had.

3       Q. So, that you feel then there would have been an obligation on  
4           Donnie MacNeil, for example, to advise Mr. Rosenblum that  
5           MacNeil had made a statement and that might affect the guilt  
6           of...

7       A. Yes.

8       Q. ...Marshall and that, in fact, a polygraph had been taken.

9       A. Yes, yes.

10      Q. So, at that time you assumed the defence would have that  
11           knowledge.

12      A. Yes.

13      Q. Therefore, if I understand you, there would be no obligation  
14           on Mr. Veniot, for example, to communicate that to whoever  
15           took the appeal.

16      A. Yes.

17      COMMISSIONER EVANS

18           Thank-you.

19      MR. CHAIRMAN

20           Arising out of that, Judge Anderson, supposing the counsel in  
21           the Department of the Attorney General upon being assigned the  
22           responsibility to act for the Attorney General on an appeal by a  
23           convicted person, ascertained as a result of his or her review of  
24           the transcript from the trial that there was an error on the part of  
25           the trial judge that has not been raised by counsel for the



1 | appellant. Was it the practise of the Crown attorney or, in your  
2 | view, an obligation to bring that to the attention of the Appeal  
3 | Court?

4 | JUDGE ANDERSON

5 | No, I wouldn't think so. The Court of Appeal would have  
6 | the...have the transcript. They'd be well aware if there was an  
7 | errors. The Crown counsel, as I would understand it, would be  
8 | prepared to discuss the matter or argue the matter before the  
9 | Court of Appeal.

10 | MR. CHAIRMAN

11 | You feel that their responsibility would be to respond to the...

12 | JUDGE ANDERSON

13 | Respond to the grounds of appeal raised by the appellant.

14 | COMMISSIONER EVANS

15 | What if it was not in the appellant's factum and on the face of  
16 | the record there is a bare-faced error.

17 | JUDGE ANDERSON

18 | Let's assume for a moment...well, I would suspect, Mr. Justice  
19 | Evans, that there's sufficient face in the Court of Appeal to pick it  
20 | up.

21 | COMMISSIONER EVANS

22 | And let's assume they missed it or didn't refer to it, would  
23 | there then be an obligation on the Crown counsel to do something?

24 | JUDGE ANDERSON

25 | Possibly, yes.

1 COMMISSIONER EVANS

2 In the interest of a...of justice isn't there an obligation to seek  
3 for the truth as best one can...

4 JUDGE ANDERSON

5 Yes, yes.

6 COMMISSIONER EVANS

7 ...no matter what level.

8 JUDGE ANDERSON

9 Yes.

10 COMMISSIONER EVANS

11 And not to be bound strictly by the factum that is presented.  
12 I understand your position was that if it was brought up by the  
13 Court of Appeal then the...you would expect the Crown counsel to  
14 make a contribution and say, "Yes, this is an error."

15 JUDGE EVANS

16 Yes. Yes. And even then there would be occasions when the  
17 Crown has indicated that something was missed in the factum or  
18 the appellant's grounds of appeal, that there's another ground that  
19 they would address before the court.

20 COMMISSIONER EVANS

21 Yes.

22 JUDGE ANDERSON

23 Because they know the court would see it and want to talk  
24 about it anyway.

25

JUDGE ANDERSON, EXAM. BY COMMISSIONER EVANSCOMMISSIONER EVANS

1  
2 And I suggest that in your experience of cases coming to you  
3 by way of an appellant and by way of appeal that when there has  
4 been an error made in the lower court that Crown counsel have  
5 indicated to you that, "Yes, there was an error."

JUDGE ANDERSON

7 Yes, yes.

COMMISSIONER EVANS

8  
9 And that they stand up and say, "Well, I cannot justify this  
10 conviction."

JUDGE ANDERSON

12 Uh-hum

COMMISSIONER EVANS

14 That has happened, has it not?

JUDGE ANDERSON

16 Yes, yes, yes.

COMMISSIONER EVANS

18 Thank-you.

MR. CHAIRMAN

20 Thank-you, very much, Judge Anderson.

21 BREAK - 11:15 a.m.

22 INQUIRY RESUMES - 11:31 a.m.

23

24

25