

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

Volume 53

- Held: March 8, 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. 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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1 March 8, 1988 - 9:30 a.m.

2 MR. CHAIRMAN

3 Good Morning.

4 MR. MACDONALD

5 Good Morning. My Lords, the witness this morning is going
6 to be Douglas Rutherford, who is a senior member of the
7 Department of Justice. For the record, I'd like to note that the
8 department has been very cooperative with Commission counsel
9 throughout this Inquiry, while at all times guarding their
10 jurisdiction in federal matters. And we have agreed with Mr.
11 Rutherford that his giving evidence here today, and being
12 prepared to give fairly extensive evidence, would in no way
13 prejudice the right of the department at a subsequent date or in
14 some other form, taking the position that the Commission may be,
15 the jurisdiction of the Commission may be limited. So in giving
16 evidence here, he doesn't want to, anyone to suggest at a later
17 time that the Department may have waived its right to question
18 the jurisdiction of the Commission in particular areas. And on
19 behalf of the Counsel for the Commission, I have agreed to that.

20

21 DOUGLAS RUTHERFORD, duly called and sworn, testified as
22 follows:

23

EXAMINATION BY MR. MACDONALD

24

25 Q For the record, sir, your name is?

1 A. Douglas Rutherford.

2 Q. And your position with the Department of Justice, Mr.
3 Rutherford?

4 A. I'm presently Associate Deputy Minister of Justice.

5 Q. My Lords, I've marked several exhibits, and for the record,
6 I'll identify those and have placed in front of you copies.
7 EXHIBIT 122 are copies of the relevant, or some relevant
8 portions of the Criminal Code of Canada. EXHIBIT 123 is
9 Volume 30 of the documents. EXHIBIT 124 is Volume 31.
10 EXHIBIT 125 is Volume 32 of the documents. And EXHIBIT
11 126 is a copy of a letter dated May 10, 1983 from the Chief
12 Justice of Nova Scotia to the Minister of Justice in Ottawa.

13 EXHIBIT 122 - COPIES OF PORTIONS OF CRIMINAL CODE OF

14 CANADA.

15 EXHIBIT 123 - VOLUME 30 OF MARSHALL INQUIRY DOCUMENTS.

16 EXHIBIT 124 - VOLUME 31 OF MARSHALL INQUIRY DOCUMENTS.

17 EXHIBIT 125 - VOLUME 32 OF MARSHALL INQUIRY DOCUMENTS.

18 EXHIBIT 126 - COPY OF LETTER DATED MAY 10, 1983 FROM THE

19 CHIEF JUSTICE OF NOVA SCOTIA TO MINISTER OF JUSTICE.

20 Q. How long have you been with the Department, Mr.
21 Rutherford?

22 A. I joined the Department of Justice in September of 1969.

23 Q. And just briefly, if you would, trace your role, your
24 experience with the Department?

25 A. Yes, I started in the Justice Department in its Toronto Regional

1 Office and engaged for a number of years in criminal
2 prosecutions federally. I spent some time doing tax and civil
3 litigation and in 1973 was appointed director of the Winnipeg
4 Regional Office and spent two or three years in Winnipeg
5 directing our regional office there. In 1976, I went to Ottawa
6 as general counsel to the Department of Consumer and
7 Corporate Affairs. That's a legal advisory position in the
8 Justice Department but serving a particular department. In
9 1978, I was directed Director of Criminal Law in the Justice
10 Department. In 1980, I was appointed Assistant Deputy
11 Attorney General for Criminal Law, a position I held
12 throughout the period of time that the Department was
13 engaged in the Marshall matter. And in 1986, I was
14 appointed to my present position as Associate Deputy
15 Minister of Justice.

16 Q. What's the relationship on a practical level between the
17 Department and the Minister of Justice?

18 A. Well, the Department is a creature of statute, the Department
19 of Justice Act. The Minister is the head of the department
20 and is responsible for the jurisdiction of the department as
21 set out in the Act. The Minister has a Deputy Minister who is
22 Deputy head of the department and two Associate Deputies
23 and a number of Assistant Deputy Minister, Assistant Deputy
24 Attorney Generals and a total of about 750 lawyers at the
25 present time and another eight or nine hundred staff of other

1 ranks and professions and callings.

2 Q. Now you yourself, Mr. Rutherford, had direct involvement
3 with the Donald Marshall case on behalf of the Department, is
4 that correct?

5 A. Yes, I was, as I said, Assistant Deputy Attorney General,
6 Criminal Law, and the matter of the Donald Marshall case
7 came within the framework of the responsibilities I had.
8 There's a section called "The Criminal Law Section" in Ottawa
9 and it deals with applications under Section 617 of for other
10 prerogative remedies falling within the Criminal Law field, as
11 well as other thins.

12 Q. And at that time, from a reporting point of view, where would
13 you fit in the structure?

14 A. My immediate reporting relationship above me was to the
15 Associate Deputy Minister, the position I now hold. The
16 Associate Deputy Minister under the statute is a Deputy of the
17 Minister but I think the words are "under the Deputy
18 Minister" so that there is a line in effect through the Deputy
19 Minister of Justice to the Minister.

20 Q. We've seen the name in the documents, Ron Fainstein. Who is
21 he?

22 A. Ron Fainstein is a lawyer in the Department of Justice. He
23 came out of our Winnipeg Regional Office, works in Ottawa
24 and did during the years of the Marshall case. Our
25 involvement in it, that is, and he is a senior, now called

MR. RUTHERFORD, EXAM. BY MR. G. MacDONALD

1 "General Counsel". At that time, I think he was called a
2 "Senior Counsel" in the Criminal Law Section. His duties
3 involved appeals, appeals in the Supreme Court of Canada,
4 and he was and always has been actively involved in a lot of
5 the Sec. 617 applications and he was directly involved in a
6 substantial way in the review of the Marshall case.

7 Q. Mr. Fainstein reported to you at that time?

8 A. Yes, he reported to me through the Director of the Criminal
9 Law Section.

10 Q. And in preparing yourself to give evidence before this
11 Commission, you have discussed the matter with Mr.
12 Fainstein, reviewed his notes, and are prepared to speak to
13 his involvement as well, is that correct?

14 A. To the extent that's appropriate, I have, and I am.

MR. MACDONALD

16 To limit the number of witnesses, My Lord, we intend to just
17 call Mr. Rutherford. If anyone takes any objection with any
18 evidence. Obviously he'll be giving some hearsay evidence
19 but...He won't be the first one, that's correct.

MR. CHAIRMAN

21 Anything that can be accomplished to speed up these
22 proceedings will be gratefully received.

MR. MACDONALD

24 That's what we're attempting to do with Mr. Rutherford, My
25 Lord. Thank you.

BY MR. MACDONALD

1
2 Q. Now, Mr. Rutherford, you've made reference a couple of times
3 this morning to a 617 application. I handed, I've introduced
4 as an exhibit portions of the Criminal Code of Canada. I think
5 they may be taken from the 1986 Code, but I don't believe
6 that those particular sections have changed. There is
7 portions, or all of 617 is in that document, Exhibit 122. Just
8 explain briefly, would you, for the Commission and others
9 what 617 deals with?

10 A. Sec. 617 of the Criminal Code is a provision that gives to the
11 Minister of Justice a discretion referred to as the mercy,
12 relating to the mercy of the Crown. It, in effect, provides the
13 Minister with a discretion to return a matter, a criminal
14 matter where there has been a conviction on proceedings by
15 indictment or a preventive detention matter, to refer the
16 matter back to the courts, either for a new trial in appropriate
17 cases or to the Court of Appeal as if it were an appeal by an
18 accused or to refer a question to a Court of Appeal for its
19 opinion. It sort of provides that array of ways in which the
20 Minister of Justice may take an indictable criminal matter
21 that has, in effect, been disposed of in the courts and refer it
22 back to the courts for further consideration.

23 Q. It's an application then on behalf of a convicted person to the
24 Minister to exercise mercy.

25 A. Yes, although mercy is, I think, more often thought of in

1 terms of the nonstatutory notion of prerogative of the Crown.
2 There is, I think in Canada, still a full range of prerogative
3 power in this area of Criminal Law because the Criminal Code
4 makes reference in Sec. 686 to the provisions in that part of
5 the Code not affecting the prerogative of mercy. But this is a
6 statutory version or a portion of that mercy-like prerogative.
7 It's very specific. It describes the people and in what
8 circumstances that are amenable to make an application
9 under this section.

10 Q. There are three options available to the Minister then under
11 617. One is to order a new trial?

12 A. Ordering a new trial, ordering an appeal as if it were an
13 appeal by the accused, or referring a question for the opinion
14 of a Court of Appeal.

15 Q. Are applications under this section received on a regular basis
16 by the Minister?

17 A. Yes, I think, if I can speak without being responsible for total
18 precision in numbers, in recent years, in the last four, five, or
19 six years, I think the Department has received in the
20 neighbourhood of 35 such applications a year and those
21 applications vary in terms of the amount of consideration
22 required in terms of the amount of discernible merit after
23 they're worked through. But they're all considered and
24 they're all examined. Some of them such as the Marshall case
25 examined in a great deal of detail; that is, all the transcripts, a

1 lot of police reports. Others are able to be dealt with in a
2 slightly less detailed fashion, simply on it being ascertained
3 that there is not a basis for a detailed consideration.

4 Q. When such applications are received, is it the practice that
5 they are reviewed by someone in the Department of Justice,
6 some of the lawyers?

7 A. Yes, the applications are received and dealt with, I think it's
8 fair to say, exclusively in the Criminal Law section by lawyers
9 who have experience in criminal litigation. They are
10 reviewed to the extent considered necessary to provide the
11 Minister with advice, both as to the factual circumstances and
12 as to the application of the law. And they're referred then to
13 the Minister for final disposition in every case.

14 Q. Does the Department involve members of any police force in
15 determining whether to advise the Minister to exercise his
16 discretion in a particular way?

17 A. Yes, in any case that's examined in any detail, it's inevitable I
18 think to say that the police are involved. There is always an
19 investigating police force, be it a municipal force, a provincial
20 force, or the R.C.M. Police in their federal capacity so that the
21 original investigation is usually reviewed at least in some
22 detail and where there is additional investigation to be
23 undertaken, it's sometimes appropriate to ask the force of
24 original jurisdiction to do it and it, in some instances, is
25 appropriate for us to ask the federal R.C.M. Police in their

1 federal capacity to act and carry out inquiries on behalf of the
2 Minister directly.

3 Q. Of the approximate 35 a year applications that are made, in
4 your experience how often does the Minister exercise his
5 discretion to order a new trial or to refer it to the Appeal
6 Division?

7 A. I think the precise figure on that is that since 1960 on 14
8 occasions there have been remedies, the Minister has made a
9 positive reference of one sort or another under 617.
10 Numerically speaking, it's rare.

11 Q. Has there been occasions in those 14 where a new trial has
12 been ordered?

13 A. Yes, there have been new trials ordered on occasion. I think
14 of the Shatford case in Ontario as an example of that.

15 Q. Has there been occasions where the matter has been referred
16 to the Court of Appeal, just a question to the Court of Appeal
17 for its opinion?

18 A. Yes, I think the most recent and one of the few instances of
19 that is a case called Gorecki in 1976, I think. It's an Ontario
20 Court of Appeal case and it's reported in the Canadian
21 Criminal cases.

22 Q. What would be the type of, what was the question?

23 A. In Gorecki, as I recall it, and there are two stages to that case,
24 but the original question referred related to whether or not
25 the accused was capable of instructing counsel and fit to stand

1 trial at the time of his trial.

2 Q. In those circumstances where a Court of Appeal is asked to
3 give its opinion on a particular question, after receiving that
4 answer, the Minister decides then to exercise his discretion, is
5 that correct?

6 A. Well, that would certainly be open to the Minister. In fact,
7 the Gorecki case, which is the one I do recall because of its
8 relative recency,[sic] the case ended up being disposed of
9 completely in the courts. There are other proceedings, or
10 have been, and I mention simply because they're well known
11 cases, the Wilbur Coffin case in the mid-fifties and the more
12 recent case of Steven Truscott in the, I have trouble putting a
13 year on that, in the...

14 Q. Sixties, I think.

15 A. Well, I think in the fifties as well. I think of the Supreme
16 Court Report versions about 1957. Those cases were
17 references to the Supreme Court of Canada under the
18 reference power in the Supreme Court Act, but the reason I
19 mention them is they resemble the use of Subsection C in 617
20 where, in effect, a question is referred to the highest
21 Appellate Court and it's possible, depending on the way the
22 question is answered, that the Minister of Justice or the
23 Cabinet would have to exercise some further statutory or
24 prerogative power.

25

1 MR. CHAIRMAN

2 Would the 14 cases include the Coffin case?

3 MR. RUTHERFORD

4 No, they don't, My Lord.

5 BY MR. MACDONALD

6 Q. Under 617 then the power given to the Minister is really to
7 refer it to a court, isn't that correct?

8 A. That's correct.

9 Q. Now there's another provision of the Code, Section 683?

10 A. Yes.

11 Q. And I've put a copy of that in front of you as well, Mr.
12 Rutherford. What is that section dealing with?

13 A. It's headed "Pardon" and it provides a statutory basis, again,
14 the words are "to extend the royal mercy to a person
15 sentenced to imprisonment under the authority of an Act of
16 Parliament" and provides for the Governor-in-Council to grant
17 either a free or a conditional pardon to any person convicted
18 of an offence. I think it's worth noting that Subsection 3 of
19 the section provides, and this gives the best insight into the
20 distinction between a free and a conditional pardon, that
21 where a free pardon is granted, the person is deemed never
22 to have committed the offence. I presume the implication is
23 that where a conditional pardon is granted, the person has
24 committed the offence but has been given a pardon for
25 whatever reasons and upon whatever conditions.

1 Q. In your experience with the department, have there been
2 applications for pardon under this section?

3 9:55 a.m. *

4 A. Uh, yes, in fact, I think that many, and I can't be precise on
5 numbers, but I think in many cases applicants under 617 also
6 make reference to Section 683. Many applicants would be
7 quite content with a remedy under either section.

8 Q. Yes.

9 A. And, in fact, in the Marshall case I think the documentation
10 will reveal that Mr. Marshall's counsel made reference to both
11 sections in originally applying to the Minister of Justice.

12 Q. Yes, we'll come to that. In your experience has a pardon ever
13 been granted under 683?

14 A. Again, I am not able to give exhaustive or precise information
15 on that, but to my knowledge after an examination of files in
16 the Department I'm only aware of one free pardon under
17 Section 683. I understand that the use of conditional pardons
18 can be found in recent years at the instance of the Solicitor
19 General of Canada and that conditional pardons may have
20 been used, I'd hate to say frequently, but on one or more
21 occasions in, for instance in the last decade, in fact, I believe
22 there was a case this past summer, but the Justice
23 Department has not had any involvement in these, where a
24 conditional pardon has been used as the mechanism to deal
25 with a person convicted and serving a prison sentence to

MR. RUTHERFORD, EXAM. BY MR. G. MacDONALD

1 bring the imprisonment to an end, where otherwise the
2 statute might provide that it would continue for a certain
3 number of years.

COMMISSIONER EVANS

4
5 You had one back about 1953, Regina v Konawalchuk where
6 it was held that the provisions of the highgrading section of the
7 Code, I think it was 424(C) at that time, had not been brought
8 into force, and several who had been convicted and were still
9 imprisoned. I had one myself. I don't know about any others.
10 And they were granted a pardon. He had a very fancy document
11 with seals and lots of ribbons on it, but it is a free...that one was a
12 free pardon, a complete pardon rather.

MR. RUTHERFORD

13
14 Well, I'm glad I endeavoured to qualify the precision of my
15 answers because my institutional memory is not long enough
16 unfortunately to speak to pardons' history.

COMMISSIONER EVANS

17
18 I remember that case because I...got paid for it.

MR. RUTHERFORD

19
20 I should simply say that the Governor-in-Council exercising
21 the pardon power in 683 may do so at the instance of ministers
22 other than the justice minister and that's why I don't think it's
23 fair to say that the Department of Justice has any exclusive license
24 on the precise numbers.
25

1 MR. MacDONALD

2 Q. It's a cabinet decision under 683, would it be?

3 A. That's...it's tantamount to a cabinet decision, that's correct.

4 Q. The options then available to a person who is convicted of a
5 crime who considers that he's been wrongly convicted are to
6 apply for ministerial exercise of discretion under 617 or to
7 the cabinet under 683 for a pardon.

8 A. Those are the options under the Criminal Code.

9 Q. Under the Criminal Code, yes.

10 A. That's correct.

11 Q. And, in your experience the practise would be in all cases, at
12 least that you're aware of, it would be referred to the
13 Department of Justice of a...to carry out its, whatever
14 investigation it deems necessary.

15 A. To review the matter and provide...serve it up to the minister
16 in a form that is appreciable.

17 Q. Okay. And recommendations to the minister by your
18 department.

19 A. In most cases there is a recommendation of some specificity.

20 Q. Thank-you. Let's deal then with the Donald Marshall, Jr., case.
21 I've put in front of you, Mr. Rutherford, certain volumes that
22 I've had marked as exhibits and I'm going to refer you first of
23 all to some documents in Volume 31. If you have your own
24 copy there feel free to use it.

25 A. Well, I have some of my own copies, but I'll use the exhibit

1 book primarily I think. Volume 31.

2 Q. Yes, from your own independent recollection what was the
3 first involvement the Department had with the Donald
4 Marshall, Jr., matter?

5 A. From my own independent recollection somewhere around
6 March 30th of 1982 Mr. Fainstein, who you've already asked
7 about, came and spoke to me about the case. What had
8 happened was that Mr. Stephen Aronson, counsel for Marshall
9 at the time, had written to the Department of Justice, I
10 believe, a letter dated March 26th, 1982, and it's probably an
11 exhibit in...

12 Q. That's in volume seven...or 31 page 17.

13 A. Page 17. And it was a letter that, as I recall it, told the
14 minister that he was going to be making a more formal... yes,
15 the bottom of the first page of that letter, Mr. Aronson says,
16 "It is my intention within the next month to make application
17 on behalf of Marshall under one of the available sections," and
18 he cites 617, 683, 686. He followed that up, as I recall, with a
19 meeting. He came into the Justice Building. He saw Mr.
20 Fainstein, to whom this letter had been referred, on, I think,
21 March 30th, because I do remember Mr. Fainstein bringing
22 Mr. Aronson to meet me after he had met with him and had
23 some considerable discussion about the case. If it's not
24 March...actually I have a note here that he met with Mr.
25 Fainstein on April 1st, 1982, so I think that's probably the

1 accurate date.

2 Q In the letter from Mr. Aronson to the Minister, which was on
3 page 17.

4 A. Yes.

5 Q And continuing on to page 18, Mr. Aronson was asking for the
6 opportunity to meet with officials of the department to
7 discuss the appropriate procedure, and that's what he did
8 with Mr. Fainstein, is that correct?

9 A. That's correct.

10 Q He goes on to talk in the next paragraph about a report by the
11 R.C.M.P. and asking that the Minister obtain a copy. Are you
12 aware of whether the department did obtain copies of the
13 R.C.M.P. report?

14 A. Yes, my own records indicate that I phoned Mr. Gordon Gale,
15 in the Department of the Attorney General here in Nova
16 Scotia, about that report and I phoned the R.C.M.P., both in
17 Ottawa and the local...the division here in Nova Scotia, to
18 make enquiries about how most speedily that report could be
19 obtained, and as I recall it the position of the R.C.M.P. was that
20 as long as the Attorney General of Nova Scotia, for whom that
21 report had been prepared, was satisfied that we should have
22 it, we were going to get it, and I think we got it within a
23 matter of days.

24 Q And those are the reports that were done by a Staff Sergeant
25 Wheaton, are they?

1 A. I can only assume so. I've seen them. I don't have them
2 here, but we received a large volume of material from the
3 R.C.M.P. and we received material over a period of a month or
4 so because subsequently there was further material I've
5 noted on April the 30th, 1987, further R.C.M.P. material came
6 in and, indeed, as late as May 7th of 1982 additional material
7 was received. I think the last material was photographic
8 evidence dealing with the knives and the fibres and that sort
9 of thing.

10 Q. Was it unusual for your department that a report or an
11 investigation by a R.C.M.P. officer had been carried out before
12 the application for pardon was made?

13 A. No, not unusual particularly in a province where the R.C.M.
14 Police is deployed as a provincial and, in many instances, a
15 municipal police force.

16 Q. I can refer you to the R.C.M.P. reports if you like, but can I
17 suggest to you that what they were saying in the report was
18 that as a result of their reinvestigation the R.C.M.P. were
19 satisfied that Donald Marshall, Jr., did not kill Sandy Seale?

20 A. Well, I'll accept that as a fair summary of the conclusion of
21 the reports. I'm not sure whether their stated conclusion is
22 did not kill or whether somebody else did kill or whether
23 there is now a whole lot of doubt about a whole lot of aspects,
24 but it certainly was one or other of those. If you want to
25 refer me to some part of it, I will certainly agree with

1 whatever it says in that report.

2 Q. Okay. Just let me see if I can quickly turn up something here.
3 I'll just show you my copy if that's all right. It's Volume 34,
4 and that's not in front of you, so...

5 A. Okay.

6 Q. This is a report that is dated, I think it starts on February the
7 25th of 1982 on page 9, and that's when it starts. I'm not
8 sure...it continues on for many pages and I wanted to refer
9 you to page 19 which is a postscript that's added to the report
10 by Inspector Scott. And I want to direct you to the paragraph
11 where he says, "After reviewing this case I feel that Marshall
12 is innocent of the offence and that we presently have enough
13 evidence to support a prima facie case against Ebsary for the
14 murder of Seale."

15 A. Yes.

16 Q. And you would have had that report.

17 A. Yes. I'm quite confident that we had that as well as other
18 materials.

19 Q. Thank-you. From your discussions with the Attorney
20 General's Department was there any view that you may have
21 ascertained from the department as to their conclusions?

22 A. Well, I can certainly go so far as to say that the discussions I
23 had, and I should say I had discussions with none other than I
24 can recall, other than Gordon Gale and on at least one
25 occasions Mr. Frank Edwards, a prosecutor from the Sydney

1 area. I can certainly go so far as to say that their...the
2 discussions I had with them indicated to me that they
3 believed that the conviction of Donald Marshall was fraught
4 with doubt, I say that to say the least, and that some remedy
5 was required.

6 Q. Let me ask you to turn to page 20, Mr. Rutherford, of Volume
7 31.

8 A. Yes.

9 Q. These are handwritten notes, I believe, of Mr. Gale or is it
10 your handwriting?

11 A. No, I believe this is a handwritten note, and I say this only
12 because I've looked at some of these documents, that these
13 are Mr. Aronson's handwritten notes.

14 Q. Okay. You may be right.

15 A. I think that refers to a conversation he had with Mr. Gale. I
16 see my name in it, but I have no recollection of any
17 conversation on March 31st with either of those gentlemen.

18 Q. Okay. But you did have discussions with Mr. Gale.

19 A. Yes.

20 Q. At our about this time.

21 A. My notes show that I called him on March 30th for the
22 purpose of getting the police reports, later in May I had
23 substantial discussions with him about a...the remedy under
24 617 of the Code.

25 Q. Let me refer you to one comment on...if we assume these are

1 Mr. Aronson's notes and, he'll be able to confirm that next
2 week, the second-last line on that page 20 where it says
3 "R.C.M.P. and Gale believe that Junior did not commit the
4 crime." Would that be consistent with your understanding of
5 Gale's position?

6 A. Well, I think he thought that. I can't remember any specific
7 words that I would quote him, but he certainly, I say at the
8 very least, thought that it had to go to some remedial action
9 to deal with it.

10 Q. All right. Let me take you to page 38 of that Volume 31.

11 A. Yes.

12 Q. That's a letter of April the 13th, 1982, from Mr. Aronson to
13 the Department.

14 A. That's correct. This is a letter that we received from Mr.
15 Aronson that was addressed to the attention of Mr. Fainstein
16 and it conveyed, as had been discussed with Mr. Aronson
17 when he had been up in the department on April 1st, it
18 conveyed a lot of the material that we felt would have to be
19 reviewed, including the transcripts of the trial, the appellate
20 materials and his correspondence of the same date, he sent to
21 us his correspondence to the Attorney General for Nova
22 Scotia.

23 Q. Yes. That's numbered 4, he shows on page 1, a copy of his
24 letter to the Attorney General of the same date. That letter is
25 contained on page 36.

1 A. Yes, and I believe it shows a copy going to Mr....going to the
2 Department of Justice, it says, "c.c.", yes

3 Q. Let me just take you to page 36 and ask for your comments
4 on a couple of things in that letter. In the second paragraph it
5 says,

6
7 As you are aware it is the Minister of
8 Justice who has the powers provided for in
9 Section 617 of Criminal Code, in addition a
10 very real possibility exists that Marshall
11 will be granted a free pardon. A free
12 pardon is given on when the innocence of a
13 convicted person is established and it may
14 be granted under the Royal Prerogative of
15 Mercy contained in the Letters Patent
16 constituting the office of Governor-General
17 of Canada.

18 Is that your understanding and is that a correct statement of
19 when a free pardon would be granted?

20 A. With so little precedent I can only say I expect that would be
21 the only occasion and only when, I suppose, a great deal of
22 certainty about that is achieved that a free pardon, which
23 deems the person never to have committed the offence.

24 Q. Yes.

25 A. Would be granted. I note that Mr. Aronson does refer there
to a different source of prerogative power than the Criminal
Code, referring to the real Royal Prerogative or its...what's left
of it in Canada, which was passed to Canada through the
Letters Patent the Queen issued authorizing or constituting

1 our office of Governor-General.

2 Q. In the next paragraph of that letter Mr. Aronson says, "It is
3 my understanding that both the Attorney General and myself
4 will be asked for our views by the Minister of Justice." Would
5 that be the normal practise?

6 A. It would certainly be the normal practise to consult as widely
7 as was thought useful, in 617 reviews our Department
8 normally consults counsel on both sides of the original case,
9 police forces involved in the case and, to say that the
10 Attorney General of Nova Scotia and defence counsel would
11 be asked for their views would be a very normal thing
12 to...and I'm sure he's reflecting the discussion he had with Mr.
13 Fainstein and probably with myself in saying that.

14 Q. Okay. Do you know if the department, at this time when it
15 was considering what route to take or what route to
16 recommend the minister, had a copy of the R.C.M.P.
17 reinvestigation that was done in November of 1971?

18 A. I'm not sure. I think so. I would have to verify that with
19 reference to the files. I think so.

20 Q. You had certainly seen it at some time then.

21 A. It certainly has become...it's come to our attention in the
22 course of this case. Whether we had it at that precise point or
23 not I'm not sure.

24 Q. On page 37, the first full paragraph, Mr. Aronson is expressing
25 his concern over the leaks that are being made to the press,

1 and the fact that they appear to be coming from the Sydney
2 City Police and the Attorney General's Department. Did you
3 have any discussion with the Attorney General's Department
4 about that particular matter?

5 A. Not that I can recall.

6 Q. Did you have any discussion with the department about Mr.
7 Aronson's request that payment of his fees be sought or made
8 by the department?

9 A. Yes. I can't tell you exactly when. It was probably much
10 later in the history of this case than the spring of 1982. I
11 think the discussion that I was involved would have been
12 more likely to have occurred after the case had been
13 determined in the Nova Scotia Court of Appeal, and after Mr.
14 Aronson had provided legal services throughout that
15 appellate reference process.

16 Q. Is the question of the fee, the expense to be incurred by a
17 prisoner, something that's considered by the department
18 when determining whether to refer it to the Court as opposed
19 to giving a pardon or recommending a pardon?

20 A. I can't say that it might not be a factor that at least would be
21 given some consideration, but I think the determination of
22 whether a case is appropriately referred back to a Court is
23 made on...largely on other grounds than whether...than
24 whether or not there will be fees incurred. The Department
25 of Justice, as I'm sure you're aware, cost shares legal aid

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1 throughout the country with each of the provinces, and I do
2 recall, in fact, the more I think about your earlier question,
3 I'm not sure that I didn't have at least some conversation
4 with Mr. Gale about the level of legal aid funding for a person
5 in Mr. Aronson's position going into a reference and what he
6 would be paid.

7 Q. You know it's pretty small.

8 A. It was not the most impressive tariff in the country at that
9 time.

10 10:15 a.m.

11 Q. By referring the matter to the Court, necessarily that requires
12 the prisoner to incur fairly substantial legal fees if they're not
13 paid by someone else, is that correct?

14 A. That's correct.

15 Q. Mr. Aronson also refers in his letter to the Department in the
16 second last paragraph to the question of compensation.

17 A. I'm sorry, this is the letter to the Nova Scotia Attorney
18 General?

19 Q. Yes, it's on page 37.

20 A. Yes.

21 Q. Second last paragraph, where he raises the question of
22 compensation to be paid to Mr. Marshall for having spent
23 eleven years in prison for a crime he didn't commit. Was that
24 matter discussed with the Attorney General's Department?

25 A. Yes, that was the subject of some consideration. When we

1 had reviewed the case and got close to the point of making a
2 formal reference of it to the Minister of Justice with advice, I
3 was asked, in fact you'll be aware of the exchange of the
4 correspondence in May of 1982 between the Attorney
5 General Mr. How here in Nova Scotia and Mr. Chrétien, who
6 was Minister of Justice at the time. The suggestion was when
7 you put those two pieces of correspondence or exchange
8 together that both ministers were in agreement that probably
9 a reference to the Court of Appeal of one sort or another was
10 an appropriate remedy and it was suggested that I meet with
11 Mr. Gale and discuss possible format and fine detail of how
12 that would work. The reason for that kind of discussion is
13 that although the Minister of Justice federally refers a case
14 back to the courts, where it's a prosecution under the Criminal
15 Code, the counsel for the Attorney General of the province is
16 then committed to a proceeding and we certainly have to and
17 do try and take into account the degree to which the counsel
18 are then going to be launched into reference proceedings, are
19 prepared to do that and are going to be content or able to
20 work with that type of a reference. And so we had
21 discussions, Mr. Gale and I, I referred to a meeting earlier
22 with Mr. Frank Edwards, and he was involved in that. In fact,
23 it was June the 9th of 1982. John Bentley, who at that time
24 was the Director of our Regional Office here in Halifax and I
25 met Mr. Gale and Mr. Edwards. We discussed specific

1 language of a reference and one of the issues that was
2 discussed at that time was whether or not the issue of
3 compensation was going to be inextricably bound up in those
4 proceedings or dealt with in some other way.

5 Q. We'll come to that in a moment, I guess when we come to
6 that letter. Let me take you back to the letter starting on
7 page 38 from Mr. Aronson to the Department and I would just
8 ask you to comment on a few things in that letter. On page
9 3...on page 40 of the document.

10 A. Yes.

11 Q. That paragraph on the top of the page talks about the
12 investigation being carried out by the R.C.M.P. It says:

13
14 Both witnesses indicate the reason why
15 they told the story they did at the
16 preliminary and trial was as a result of
17 police pressure. It would appear that
18 these pressures were exerted on the two
19 witnesses by Detective Sergeant John
20 MacIntyre of the Sydney Police
21 Department, who is now Chief.

22 Now that comes out of the R.C.M.P. investigation, does it not?

23 A. Yes, I believe so.

24 Q. Now would that not be an indication to the Minister that, in
25 fact, there may have been some crime committed by the
members of the Sydney Police?

A. It certainly could be a suggestion of that sort.

Q. Would that not be an indication that there should be some

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1 sort of an investigation carried out as to whether or not those
2 suggestions by the R.C.M.P. are, in fact, true?

3 A. It could be.

4 Q. Would that be something that the Department would be
5 interested in or would that be left to the Province?

6 A. Well, it would be both. I think it's impossible to say that the
7 Federal Department of Justice isn't interested in the
8 enforcement of the Criminal Code but it is largely enforced
9 under the jurisdiction of provincial attorneys general.

10 Q. Was there any discussion to your knowledge between the
11 Minister, between the Department of Justice federally and the
12 provincial department concerning looking into those
13 allegations to determine whether charges should be laid
14 against members of the Sydney Police?

15 A. There was, at least that was a feature of the case to which
16 provincial officials were alive, in my recollection, but I cannot
17 tell you specifically what Mr. Gale or Mr. Edwards might have
18 said about that. I think, as I recall it, it's reflected somewhere
19 else in the documentation that some consideration would
20 have to be given to whether or not some action was taken in
21 that regard. But I think it's fair to say that at this particular
22 point in time, my concern and the concern of the Justice
23 Department was getting the first layer of problem dealt with,
24 namely Mr. Marshall's problem and the question of his
25 conviction and imprisonment.

1 Q. And can I take it that you were satisfied that the Attorney
2 General's Department was on top of that other matter and
3 would look into it?

4 A. Satisfied that it was properly his area of primary
5 responsibility, yes.

6 Q. And that it would be looked into by the Department of the
7 Attorney General?

8 A. Well, I don't remember ever being concerned that it wouldn't
9 be. It was not the most prominent layer of the onion in my
10 eyes at that time, I have to tell you.

11 Q. Let me take you then again on page 40. I guess it's the
12 paragraph just before that subtitle "Submission". Indeed the
13 sentence before that where Mr. Aronson says:

14
15 Based on the information I have provided
16 to you along with other facts contained in
17 the R.C.M.P. investigation, Staff Sgt. Harry
18 Wheaton of the R.C.M.P. and Gordon Gale,
19 Deputy Attorney General of Nova Scotia
20 had indicated to me that they believe
21 Marshall to be innocent of the murder of
22 Sandy Seale.

23 Would you agree with that?

24 A. Well, I agree that's what he wrote.

25 Q. Would you agree that that's what the documents support and
that's, in fact, what Mr. Gale had told you?

A. Well, I really can't put those words in his mouth. He may
well have believed innocence. The documents certainly

1 support the proposition that the evidence is terribly
2 unreliable. There were statements that were totally
3 contradictory and it led to the inevitable conclusion that the
4 thing had to be reconsidered in some proper form.

5 Q. What I'm trying to lead to, and I'm sure you're aware, Mr.
6 Rutherford, is when I keep seeing the word "innocence" being
7 put around, why the exercise of a pardon wasn't
8 recommended, as if he had never committed the crime. If the
9 conclusion of the R.C.M.P. and the Deputy Attorney General of
10 Nova Scotia are that this man is innocent, why isn't he just
11 pardoned?

12 A. Well, I guess that's why I'm being rather cautious. This is
13 what Mr. Aronson says others concluded and you've pointed
14 me to Inspector Scott's statement on that point.

15 Q. And I can, if you like, I can show you Wheaton's statement as
16 well or show you volumes of evidence that he's given here.

17 A. There may be lots of people who said that they came to the
18 conclusion as a paper review of a complicated episode that
19 somebody was not guilty or, indeed, to go further, was
20 innocent, for my own part and I think the actions of the
21 Minister reflect a slightly less fully developed approach to it.
22 It was that there was such substantial doubt about the
23 correctness or the sustainability of the conviction that some
24 remedy had to be granted to deal with the matter. But where
25 a court, a Trial Court, and Appeal Court, and leave refused by

1 the Supreme Court had all dealt with the question of guilt, in
2 the normal way at one era, and now primary witnesses,
3 several of them, I refer to Chant and Pratico and Harriss, the
4 Ebsary information, all indicated that the evidence on which
5 that conviction was found by the courts and upheld was
6 terribly, terribly doubtful and a lot of statements now of the
7 sort referred to by Aronson that people had said they were
8 pressured into saying one thing, now they've said another. To
9 read that and say "I know who's innocent or who's guilty," is
10 just going farther than I think we were prepared to in the
11 Department of Justice. It needed the forum that we have
12 humanly devised best to assess those things, a court.

13 Q. Was it your expectation that the court would look at all of
14 those issues, whether or not, for example, Chant and Pratico
15 had been pressured by the Sydney Police into telling a
16 particular story?

17 A. Yes, I think that was certainly part of my anticipation and the
18 options we considered and the reference that was ultimately
19 directed by the Minister tended to be very open-ended and
20 leave to the discretion of the court who it wanted to hear,
21 what evidence it was prepared to consider, and what remedy
22 it was prepared to grant, albeit within the powers it had.

23 Q. But the anticipation being that the court would look at all of
24 these issues.

25 A. Well, I guess it depends whose anticipation you're talking

1 about.

2 Q. Yours.

3 A. Speaking for myself, I anticipated that until the totally
4 contradictory positions of important witnesses had been
5 reassessed in a court subject to, hopefully, intensive cross-
6 examination, and the best that our process can bring to that
7 dealing with evidence of witnesses, it was very dangerous to
8 decide anything and only after the court had dealt with it,
9 depending on what they found and said, people could
10 determine where they went with such things as any executive
11 action that was required, any further police investigation that
12 was required, any further charges or civil proceedings. That
13 one thing had to be dealt with before you could really
14 confidently decide what next to do.

15 Q. Just continue on then if we can on page 40, under the
16 submissions that are made by Mr. Aronson, that paragraph on
17 the bottom of the page, he says:

18
19 On behalf of my client, I should like you to
20 consider this letter as an application for a
21 free pardon. It is my understanding that a
22 free pardon is given only when the
23 innocence of a convicted person is
24 established and is, in fact, is a recognition
25 of his innocence.

That was Mr. Aronson's prime position, wasn't it, that he
wanted for his client a pardon.

1 A. That's what he says in his letter.

2 Q. On the basis that he was innocent. And relying on the
3 conclusions of Wheaton, Gale, Scott, and others. In any event,
4 he does go on in the next page to say: "In the alternative for
5 relief under Sec. 617."

6 A. That's correct.

7 Q. On page 41 where Mr. Aronson talks about the alternatives,
8 he says:

9
10 With respect to Sec. 617(a), Mr. Gordon
11 Gale has advised me that he would be
12 reluctant to lay a charge of murder against
13 Donald Marshall, Jr. as there is no reliable
14 information which would support such a
15 charge.

16 Would you agree with that that Sec. 617(a) really wasn't a
17 viable option in this case?

18 A. Well, I think that's implicit in the way it was dealt with. To
19 refer it back for a trial at this point was jumping further
20 ahead, and perhaps uselessly so, to a conclusion that there
21 was a triable case.

22 Q. If the Minister had ordered under 617(a) a new trial, the
23 burden then would be on the Attorney General's Department
24 to decide whether they would lay the charge, isn't that
25 correct?

A. Well, I think the charge has already been laid. It would be a
new trial on the charge as originally laid but it's correct to say

1 that the burden would be on the Attorney General to then
2 conduct a prosecution.

3 Q. Or to decide whether to call any evidence?

4 A. I'm sorry, to decide?

5 Q. Whether to call any evidence at all?

6 A. That's correct. And that was a consideration even when it
7 came to the reference to the Court of Appeal. I'm sure you're
8 coming to that stage of it and so I'll comment more perhaps in
9 that regard. But whether the Court of Appeal would direct a
10 new trial was a matter we had some discussion about.

11 Q. Yes. Was it discussed with the Attorney General's Department
12 whether or not they would proceed if a new trial was ordered
13 under 617 (a)? Was that discussed at all?

14 A. If it was, it was not discussed seriously. We never gave
15 serious consideration to a Subsection (a) reference to directing
16 a new trial, at least I didn't.

17 Q. Was serious consideration in your view always given to
18 617(b)?

19 A. It was...

20 Q. (b) or (c)?

21 A. (b) or (c) and one of the features of whether it should be (b)
22 or (c) was what the result in the court might be. I think I
23 recall with some clarity one of Mr. Gale's expressed concerns
24 was that if the Court of Appeal ordered a new trial, it might
25 place the Department of the Attorney General in an awkward

1 position because, and as Mr. Aronson had stated, Gale did not
2 think there was a reliable case or basis for a new trial. And if
3 the Court of Appeal ordered it, would the Attorney General be
4 in an awkward position in deciding not to proceed or would
5 he, in fact, be forced to proceed with a trial which in ordinary
6 prosecutor's parlance "wasn't a proper case". There wasn't a
7 basis, a responsible basis for proceeding. That was one of the
8 worries that we talked about.

9 Q. Okay, Mr. Aronson concludes his letter by saying?

10
11 I look forward to being in close contact
with you in your deliberations.

12 Was Mr. Aronson kept involved and did he have any input
13 into the ultimate recommendations that went to the Minister?

14 A. Yes. We had, I think it's fair to say he had as much as he
15 appeared to want by way of input. We met with him and
16 talked to him at any time at his own instance and before a
17 decision was made, I discussed with Mr. Aronson on the
18 telephone the discussions I had had with Mr. Gale and the
19 thoughts we now had crystalizing about what we would
20 recommend to the Minister.

21 Q. Now you've provided me with a copy of notes that were made
22 by Mr. Fainstein.

23 A. Yes.

24 Q. And I believe they were circulated yesterday. I have not had
25

1 those marked. Let me take you then to page 54 of Volume
2 31, Mr. Rutherford.

3 A. Yes.

4 Q This is a letter from the Attorney General of Nova Scotia to
5 the Minister of Justice, from Harry How to Jean Chrétien?

6 A. That's correct.

7 Q And would that have been given to your staff to use in its
8 deliberations?

9 A. Yes, it was. That letter was received in the Department as
10 dated May 17th. I'm sorry I can't tell you what date it was
11 received. Probably within a few days of that and certainly
12 considered. I think it sets out a number if not all of the major
13 concerns that we were thinking about and discussing both
14 within the department and with Mr. Gale about whether this
15 should be a reference or, indeed, whether there was a basis
16 for a free pardon.

17 Q Do you know if the Attorney General of Nova Scotia was asked
18 to submit his views by the Department?

19 A. I'm not sure that I can give a positive to that. There was
20 certainly no discouragement registered or expressed that I'm
21 aware of from his doing that and I believe in the context of
22 Mr. Fainstein's notes they reflect discussion with Mr. Gale,
23 between Gale and Fainstein in which it was suggested that
24 there would be input of the sort that this letter from Mr. How
25 dated May 17th, 1982 embodies.

1 Q. Now let me...

2 A. I'm sorry, I'll be very specific. You asked whether we
3 invited that. One of Mr. Fainstein's notes is, "I asked him,"
4 which means Gale, " to write me to advise if they feel a
5 remedy is warranted and if so, which they would
6 recommend."

7 Q. When we get to his notes, then we'll...

8 A. There was a specific invitation then in those terms.

9 Q. In any event, is that something that the Department would
10 want to get in arriving at its decision?

11 A. Yes, normally, for the reasons that I expressed earlier, that
12 it's the provincial Attorney General in a case such as this that
13 has to go forward and conduct whatever proceedings, if there
14 are proceedings, to be undertaken and a reluctant prosecutor
15 isn't going to do much of a job and if they're arguing strongly
16 on it for a free pardon, we'd want to know that.

17 Q. Let me take you then to the comments of Mr. How. In
18 Paragraph 2 in that letter on page 54, he notes he has had the
19 benefit of receiving of receiving final reports from the
20 R.C.M.P. about their reinvestigation and he says, this is in the
21 second paragraph:

22
23 And both the police and the prosecutor are
24 satisfied that on the basis of the
25 information now known, Mr. Marshall
should not have been charged with the
murder and certainly that the jury would

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1 not have convicted him. In fact, the
2 evidence would now support a charge
3 against Roy Newman Ebsary. Thus, it
4 would appear from the comments of the
R.C.M.P. and the prosecutor that the
application should be granted.

5 Now do you not take that to be a further statement that, in
6 fact, the Attorney General of the province that Marshall
7 should never have been charged with this murder?

8 A. Well, no, I'd be a little more precise about it that on the basis
9 of the evidence now known, he would not be charged.

10 Q. Oh, yes.

11 A. And if you had known it at the time, he should not have been
12 charged.

13 Q. Given that, but if we now know that the evidence is such that
14 he never should have been charged, again I come back to the
15 fact, to the question, why then don't we say, "Well, let's let
16 him out on the basis that he never..." What's the word of
17 Section 683?

18 A. "Deemed never to have committed the offence."

19 Q. "Deemed never to have committed the offence."

20 A. Well, I don't really relish the job of trying to interpret
21 somebody else's letter but I do note that he falls short of
22 saying was innocent. I don't draw any significance to that but
23 he is not saying is innocent and the letter then goes on to
24 canvass some of the real difficulties associated with going
25 through a further court process and also with a free pardon

1 where there was no ability to deal with these contradictory
2 pieces of evidence and I think quite aptly paints some of the
3 problems, leaving it up to poor old Mr. Chrétien to sort out
4 which one of the remedies is the least odious or the most
5 desirable.

6 Q On page, still on page 54, on that paragraph that spans page
7 54 and 55, in the third sentence he says:

8
9 If the matter is proceeded with by the
10 granting of a pardon, there will not be any
11 airing of the facts of the case and there
12 may be some lingering doubt as to whether
13 or not Mr. Marshall was innocent of the
14 offence of murder.

15 Did you take that to be an expression of some concern for Mr.
16 Marshall, that it would be better for him to have all of the
17 facts aired so that everyone would know he was innocent?

18 A. I would read that into that.

19 Q On the top of page 55, the last sentence in that paragraph:

20
21 If there was no court hearing on the
22 matter of Marshall, then there is unlikely
23 to be any public material which I can rely
24 on to indicate why charges of perjury may
25 not be proceeded with.

What did you understand that to be referring to?

26 A. Well, I understand that to be an oblique reference to the
27 possible subsequent criminal proceedings against those who
28 may have committed or been a party to perjury in the

1 original sworn evidence based on which Marshall was
2 convicted.

3 Q. Was that of any interest to your Department that the
4 evidence to be given, if the matter were referred to court as
5 opposed to a pardon being recommended, there may indeed
6 be some evidence available then to support charges of
7 perjury?

8 A. Well, it's all wrapped up in part of the same problem.
9 Assume in the circumstances that prevailed then that Cabinet
10 had granted a free pardon. One had to ask the questions
11 where does that leave the detectives impugned as the story at
12 that point sought to impugn them? Where does it leave the
13 witnesses? Does it create some kind of a presumption and, if
14 so, might it be a prejudicial one that Cabinet believed one set
15 of facts and disbelieved others, to the point of deeming
16 somebody never to have committed the offence. It was all
17 part of the problem of proceedings in which some ministers
18 and the Governor General, in private, would come to some
19 absolute conclusion about a matter in relation to which there
20 was absolute lack of certainty, other than that a lot of people
21 expressing them on paper thought that the conviction either
22 was in part or totally unreliable and some of them went so far
23 as to express claims that some, that Marshall himself was
24 innocent. But that's the point I guess I'm trying to make, that
25 to go that far and to say, "Now that I've read all this, I know

1 exactly who is telling the truth and who isn't and I know how
2 to sort this out." The best we've been able to do is create
3 courts that do that in public, and that's the way this one went.

4 Q Let me take you down to the second last paragraph on Mr.
5 How's letter.

6 A. If I can just add one other thing, I'm sorry, before we go to
7 the next part. Not only courts that are able to do that but
8 with rules of evidence and representations so that all parties
9 from whom or to whom the shadow of guilt may pass are able
10 to sort of deal with themselves and protect themselves at
11 least within the limits of law.

12 Q Do I take it from that that, again, at this stage, you aren't
13 thinking and your intention would be that everyone would
14 give evidence before the Appeal Division, including the police
15 whose reputations are being impugned?

16 A. Well, certainly it was anticipation that if this thing were going
17 to be reconsidered on a 617(b) or (c) reference, in addition to
18 the civilian witnesses, police evidence would have to be
19 reviewed and new evidence given or questions asked.

20 Q Let me take you then to that second last paragraph, in the
21 middle of that paragraph, Mr. How says:

22
23 There is no doubt from our examination of
24 the report that relief should be granted to
25 Marshall. The most expedient route would
appear to be a pardon, but there is much to
recommend proceeding under 617(b) in

MR. RUTHERFORD, EXAM. BY MR. G. MACDONALD

1 the interest of giving some public hearing
2 to the matter, particularly where the
3 charge against Ebsary may never be
4 proceeded with.

5 Would you agree that, at least from Mr. Marshall's point of
6 view, the most, the best route to proceed would be to have
7 granted a free pardon?

8 A. I really don't know how to answer that. I think he would be
9 the one that would have to answer that. Best, in what sense, I
10 don't know. It would have been the fastest.

11 Q. It would have eliminated the requirement for him to appear
12 in court again and be subject to the publicity that it
13 necessarily entailed.

14 A. And might well have led to a great onslaught of questions
15 about just how this conclusion had been arrived at and led
16 more quickly than it did to a Commission of this sort sifting
17 through every aspect of the case, probably.

18 Q. That wouldn't necessarily be bad.

19 A. As I say, I don't think I'm the one to evaluate that.

MR. BISSELL

20 My Lord, I think the witness has explained it as best he can.
21 It was a decision, after all, a decision of the Minister of Justice, not
22 of this particular witness. I think it goes as well beyond what the
23 input was of provincial officials in the decision-making process.

COMMISSIONER POITRAS

24 Mr. MacDonald, what bothers me a bit is that despite the
25

MR. RUTHERFORD, EXAM. BY MR. G. MACDONALD

1 definition of a "free pardon", surely included in the concept of a
2 pardon is the actual commission of something that ought not to
3 have been committed. What you're trying to look for is an excuse
4 or a pardon for that commission, again forgetting the definition of
5 the expression "free pardon". I wonder whether that would have
6 been the better course or not in the circumstances. I'm looking at
7 it from Mr. Marshall's viewpoint alone. He gets, let us say, a free
8 pardon, but in the minds of the public, he's being pardoned from
9 what? Now this is the question that I have in my mind.

MR. MACDONALD

11 Thank you, My Lord. We'll ask Mr. Marshall what he would
12 have liked.

COMMISSIONER EVANS

14 The pardon, there is no proper airing of the whole
15 circumstances. The case I refer to is because the section of the
16 Code was never properly brought into force by an Order-in-
17 Council as required it when the Code was amended in 1927. So
18 there was no section. That's why the person who was improperly
19 jailed and, therefore, he was released on a pardon. But you don't
20 have any airing on a pardon.

MR. CHAIRMAN

22 Maybe before we leave that, Mr. Rutherford, you could tell us
23 in the rare cases where there have been free pardons granted,
24 accompanying that decision, is there any public comment
25 indicating the grounds upon which the free pardon has been

1 | granted, or is it a simple statement of fact?

2 | MR. RUTHERFORD

3 | Mr. Chairman, I'm only aware of one such case in recent
4 | history and that was an extremely difficult aspect of the
5 | implementation of the pardon, was what could you say? Certainly
6 | for the Minister to have decided to pardon Marshall in these
7 | circumstances it seems to me would have led to the need for a lot
8 | of answers to a lot of questions and they would have been sought
9 | either in civil proceedings that were outstanding or in some other
10 | proceedings or there would have been a great clamour for an
11 | inquiry immediately, it seems to me. But that's my personal view,
12 | as Mr. Bissell, I think, trying to come to my aid says, it was Mr.
13 | Chrétien who had to make the decision that he did.

14 | MR. CHAIRMAN

15 | We're not quarreling with your opinion. We simply want to
16 | take advantage of your knowledge and lengthy experience in this
17 | area, as opposed to ministers who come and go.

18 | MR. RUTHERFORD

19 | Well, as Your Lordships obviously appreciate, in these
20 | circumstances, as an example, if a pardon had been granted, a
21 | whole lot of questions arise about what does it say for this guy
22 | Ebsary, now the late Mr. Ebsary? What does it say for the police?
23 | What does it say for the likes of Pratico, Chant, and Harriss? It
24 | raises an awful lot of questions and that's why, and Mr.
25 | MacDonald says, "Wouldn't it have been best for Marshall?" I

MR. RUTHERFORD, EXAM. BY MR. G. MACDONALD

1 don't really know. Initially best, maybe. But that's only a
2 decision he could really evalu...or a question he could evaluate for
3 his own purposes, I think.

BY MR. MACDONALD

5 Q. We've had now brought down the exhibit, I believe, of Mr.
6 Fainstein's notes.

EXHIBIT 127 - NOTES OF MR. RON FAINSTEIN.

9 10:49 a.m. INQUIRY BREAKS UNTIL 11:08 a.m.

10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

1 11:08 a.m. *

2 MR. MacDONALD

3 Q We've had marked, Mr.Rutherford, Exhibit 127, which is a
4 compilation of the handwritten notes of Mr. Fainstein and the
5 typewritten copy of them, as well, that I understand were
6 prepared by Mr. Fainstein, the typewritten copies, is that
7 correct?

8 A. Yes, Mr. MacDonald, that is a transcript, I guess, of the much
9 less legible handwritten notes that my colleague, Ron
10 Fainstein made about three conversations he had in his
11 review of the case in the course of his review.

12 Q Just briefly then run through what the conversations are
13 dealing with and...

14 A. Yes, and I can't...I can't be precise about the dates but two of
15 the notes are...reflect to some degree a conversation he had or
16 two conversations he had with Mr. Gordon Gale. They were
17 telephone conversations, Ron Fainstein being in Ottawa. And
18 the third one is, the longest one is a telephone conversation
19 that he had with an R.C.M.Police fibre expert, hair and fibre
20 analyst it calls him, Mr. Adolphus Evers, who was involved in
21 the...that aspect of that reinvestigation and I believe gave
22 evidence before the Court of Appeal.

23 Q Okay. Let's go to the notes of the conversations with Mr. Gale.
24 One of them are noted to have been taken...to have occurred
25 on April...probably on or about April 23.

1 A. Yes.

2 Q. You've discussed these with Mr. Fainstein and has he told you
3 that those are notes he made during the conversation with
4 Mr. Gale?

5 A. Yes. He told me and I spoke to him as recently as two days
6 ago about these notes, and he said that they are notes he
7 made as he was talking. They tend to be very spotty. They
8 remind him of those conversations and some aspects of them
9 certainly.

10 Q. Let me just refer you to a couple of things on the notes. I'll
11 have the opportunity to ask Mr. Gale about these in some
12 detail. The April 23 notes.

13 A. Yes.

14 Q. "AG has taken case from Sydney Police and given it R.C.M.P. .
15 Sydney Police playing games." Have you discussed with Mr.
16 Fainstein what...if that was an accurate reflection of what Mr.
17 Gale had said?

18 A. Yes, Mr. Fainstein has told me that what that causes him to
19 recollect is that Mr. Gale in that telephone conversation made
20 some sort of a statement to the effect that the Sydney Police
21 may be playing games in their dealings with him. What he
22 told me was that it had something, as he recalls it, to do with
23 the production to the Attorney General's Department of
24 statements and files after their original production. There
25 was sort of more information coming at a later date. That

1 Gale's phrase was...used this term "playing games".

2 Q. Okay.

3 A. He was not able to say that that was a conclusion or a
4 suggestion. That was just...there was conversation about that
5 at Gale's instance.

6 Q. And further down on that page there's a reference, "Aronson
7 referred by A.G. to Legal Aid." Can you help us on what that
8 means?

9 A. It pertains to some part of the discussion about the manner in
10 which Mr. Aronson would be funded in terms of any further
11 court proceedings.

12 Q. "Compensation not decided but may be given because of
13 Sydney Police." Any comment on that?

14 A. Not other than that there was a discussion of compensation.
15 The issue of whether or not and if there was to be
16 compensation how it would be assessed and dealt with was
17 something that was discussed with the Attorney General's
18 Department on more than one occasion. It was discussed with
19 Mr. Fainstein at that point. I think at that point there was
20 writ of summons, if that's the correct term in Nova Scotia civil
21 proceedings, there was a civil action at least commenced at
22 that point by Mr. Marshall naming at least one or other
23 members of the Sydney Police Force, probably Chief
24 MacIntyre as a defendant.

25 Q. All right. Toward the bottom of that page is the reference

1 you made...you referred to earlier where Mr. Fainstein
2 records that he asked him to write to advise if they feel a
3 remedy is warranted and if so which they would recommend.

4 A. Yes. Just to place this whole conversation in some context,
5 Mr. Fainstein's best recollection is about April 23rd and he
6 was really just at that point coming into possession of ample
7 materials. We had got the original police reports, but there
8 were further material to come and this comes about a week
9 after we had got the trial transcripts and all the material that
10 Mr. Aronson sent with his letter of April 13th which would
11 have arrived within a day or two of that date probably.

12 Q. Then on the next page it's noted, "Conversation with Gale
13 made," it says, "20/82," that's May 20, isn't it?

14 A. Yes, that's a...just a typo. I think the actual handwritten note
15 has the date on it.

16 Q. Yes, it does.

17 A. May 20th is the last page on the exhibit. "Made" should read
18 "May".

19 Q. Yes. And that refers to the fact that the letter, and that's the
20 letter we've referred to from Mr. How is on the way.

21 A. Yes, the May 17th letter from Mr. How I think would be
22 what's being referred to here. We hadn't obviously received
23 it by that time, at least Mr. Fainstein hadn't, it might have
24 arrived in the Minister's office by then.

25 Q. Now, let's go back to Volume 31 then, page 56.

1 A. Yes.

2 Q This is the memo, an internal memorandum of the
3 Department of the Attorney General, referring to a telex from
4 the Minister of Justice, and I'll point you to that in a moment.
5 The second paragraph notes that Mr. Gale is attempting to
6 reach you to inform you that the A.G. agrees with the action
7 and that you and Gale are to work out the procedure for
8 referring the case to the Court of Appeal.

9 A. Yes.

10 Q And that actually happened, did it, you and Mr. Gale met to
11 discuss the procedure?

12 A. Yes, we did.

13 Q Okay.

14 A. Do you want dates or any elaboration of that?

15 Q I'll come to that in a moment.

16 A. Okay.

17 Q I just wanted to refer to the letter or the telex from Mr.
18 Chrétien to the Attorney General. A copy of the telex is on
19 page 59.

20 A. Yes.

21 Q But then a better copy of it written in letter form I think is on
22 the following page, page 60.

23 A. Yes. I think the telex is a precise replication of the text of the
24 letter.

25 Q Yes.

1 A. I'd have to go back to what days were weekend days at that
2 time, but I think that the reason for the telex was simply to
3 get the message there faster than the letter dated May 31st
4 would probably have done in Her Majesty's mail.

5 Q. Now, I read this correspondence from Mr. Chrétien to How to
6 be asking for agreement on the method of proceeding. Is that
7 correct?

8 A. Yes, I think that's...well, "If you agree with this I propose..." is
9 the start of the last paragraph.

10 Q. Yes.

11 A. So, I'm not sure whether it asks or that's what it says.

12 Q. Okay. Let's go to page 62 then. These are notes, I believe,
13 of...again, I don't know if they are Mr. Aronson's, but I believe
14 they are.

15 A. I think so, I've read that.

16 Q. Did you speak with Mr. Aronson about the procedure to be
17 followed? If you note in the middle of that page there's a
18 telephone message from you to Steve.

19 A. Yes. I spoke to Mr. Aronson on June 14th and again on June
20 16th the day the actual reference was dated.

21 Q. Okay. And that phone call is note to be June 14, that slip on
22 page 62.

23 A. Yes, the slip is that's at the middle of the page.

24 Q. Over to the left-hand side of the page there is a note, I take it
25 from Mr. Aronson again. It says, "Fees. If not satisfactory

1 arrangement Justice will do what it can." Did you discuss with
2 Mr. Aronson the payment of his fees that would be incurred
3 as a result of a reference to the Appeal Division?

4 A. Well, it was certainly discussed with him and I know I wrote
5 to Mr. Aronson and got copies of his accounts, but again I
6 think, subject to finding that correspondence, that that was
7 after the reference. But there was some discussion as I
8 alluded to earlier about how he would be paid if there was a
9 reference and as I recall discussing that with Mr. Gale at some
10 point and finding out that the tariff was a pretty skinny one
11 for a pretty important court proceeding.

12 Q. Do you...

13 A. I don't recall...I don't recall ever, I should put that more
14 positively, I was never in a position to make any commitment
15 that Justice would pay anything. As I say, we're...our cost
16 sharing of Legal Aid in some ways militates against making
17 special agreements when somebody wants more than Legal
18 Aid can provide in a province. But I don't...I think it would be
19 fair to suggest that I at least went so far as to raise the matter
20 with Mr. Gale and say can't...can't... whatever is the most
21 suitable arrangement possible be made for Mr. Aronson.
22 After all this is a pretty major appellate proceedings we're
23 contemplating.

24 Q. Okay. Now, let me take you to the other notes on page 62.

25 And I take this to be notes of a conversation with you on June

1 the 16th.

2 A. I think so.

3 Q. "A classical 617(B) as if it were an appeal by Donald Marshall.
4 MacKeigan spoke to Rutherford on June 15, 1982." Did you
5 have conversations with Chief Justice MacKeigan about the
6 setting up of the reference?

7 A. Yes.

8 Q. What would be the purpose of those discussions?

9 A. On...after the exchange of correspondence, the page before
10 this, page 60, which has Mr. Chrétien writing back to Mr. How
11 and proposing that we get together, Rutherford and Gale, well,
12 "Rutherford work out with your officials," I in fact met on
13 June 9th, as I think I said earlier this morning, with Mr. Gale
14 and Mr. Edwards. We discussed options and potential
15 questions that could be asked of the Court, how to deal with
16 this, we discussed whether or not the compensation issue
17 could or should or could not or should not be wound into it in
18 one way or another. We discussed what would happen if the
19 Court of Appeal ordered a new trial. All those issues were
20 discussed. The conversation ended or the meeting ending
21 with Mr. Gale expressing the desire to be able to consult his
22 Minister on the things we had discussed and make final
23 comments. On Monday, June the 14th, I telephoned Gordon
24 Gale for those final comments and I then called Mr. Aronson
25 and told him, and I assume that phone call slip at the middle

1 of page 62, which is dated the 14th, is a reference to my
2 having called him. I did speak to him on that day and I told
3 him that as between the Nova Scotia Attorney General's
4 Department and officials in Justice we were of the view that
5 we would propose a reference as the right remedy to the
6 Minister for his ultimate decision, and that it would be a
7 reference under 617 (C) asking for the opinion of the Court.

8 Q. Two particular questions.

9 A. Two par...yeah, that's correct.

10 Q. Had you given any thought to the question that would be
11 put?

12 A. Yes, there was a lot of thought...there was a lot of thought to
13 put to a number of different questions and ultimately I think
14 it came down to probably one question.

15 Q. Yeah. What would that be?

16 A. I'm not sure whether I've got it. I may have a copy of what
17 we were working with at that time. I have a copy of what
18 has reference as a draft. There were several drafts, in fact.
19 One of the questions we were considering followed a
20 preambulatory sort of language that sounded like this, that it
21 asked the Court, referred the conviction to the Court for its
22 opinion and determination in the light of the existing record,
23 the evidence to be adduced by counsel for Donald Marshall,
24 for the Attorney General of Nova Scotia and any other
25 evidence which the Court in its discretion received and

1 consider, the question being, "Does the additional evidence
2 warrant any action being taken in relation to the conviction
3 and, if so, what in the opinion of the Court should be the
4 nature of that action?" That was one question and I think
5 that was one of the ones that we were thinking of most
6 seriously at that time. Other forms of the questions we
7 discussed were of this order "Does this additional evidence
8 warrant any action being taken in relation to the conviction
9 and if so should Donald Marshall, Jr., be granted, (a) a new
10 trial, (b) a free pardon, or (c) some other form of relief alone
11 or in conjunction with the above?" Those were the kind of
12 things we were discussing.

13 Q. Now, had that followed through, if you had proceeded under
14 617 (C) the Court is being asked really to assist the Minister,
15 to give the Minister some...its opinion so he can make a
16 decision, is that correct?

17 A. Yes. Under (C) it would have left, in all likelihood, some
18 executive action to be taken by the Minister, either to refer
19 the matter to a new trial or possibly a free pardon. It led
20 most likely to some further ministerial action. I should say
21 the significance at least to me at that time, and I think to Mr.
22 Gale, was also that it avoided the possible awkward situation
23 of a new trial being ordered, a trial which the Attorney
24 General of the province may have no desire to take at all.

25 Q. Was it then the, at that stage anyway, the preferred option of

1 the officials in the Ministry of Justice and the Attorney
2 General that the best way to proceed would be under 617 (C)?

3 A. That's correct.

4 Q. What...

5 A. And I specifically appreciate your term of preferred option,
6 that was...that's exactly what it was at that point.

7 Q. What changed that position?

8 A. After the final discussions on the telephone with Mr. Aronson
9 and Mr. Gale on Monday the 14th, the options including the
10 preferred option were put to Mr. Chrétien on Tuesday the
11 15th in the morning, 15th of June, 1982. Mr. Chrétien agreed
12 with the preferred option and gave us instructions to finalize
13 the paperwork, that is including letters of transmission to the
14 Court, to counsel, informing Mr. Marshall through his counsel,
15 the related paper work. It was and the best of my
16 recollection is that it was the executive assistant of the
17 Minister at that time suggested to me that it might be
18 appropriate, as a courtesy, to inform the Chief Justice of Nova
19 Scotia, to whom this case in all its public ramifications was
20 about to be referred, presumably later that afternoon, in
21 advance by telephone. In fact, the executive assistant, to the
22 best of my recollection, said to me, "Wouldn't it be a good idea
23 as a courtesy to advise the Chief Justice of what's coming?"
24 My reaction at the time was that that was a good idea. It
25 hadn't occurred to me. Minister's staffs think of those things

1 sometimes when their counsel doesn't. Later that morning I
2 recall being in some sort of a meeting and having either an
3 urgent hand message passed into me or a telephone call, I
4 can't recall, but the executive assistant to the Minister was
5 urgently trying to get in touch with me and when I spoke to
6 him, I believe in person, the Minister's office was just one
7 floor below the floor where I work in the Justice Building, he
8 said something to the effect that he had followed through and
9 telephoned Chief Justice MacKeigan, the Chief Justice here in
10 the province at the time, told him that the Minister was going
11 to refer the case under Section 617 to the Department of...to
12 the Court of Appeal and that it would probably happen that
13 after...could happen as early as that afternoon. Mr. Jacques
14 Demers is the name of the fellow, just to say exactly who it
15 was I was speaking to. Jacques Demers was quite concerned.
16 When I spoke to him he said, "The Chief Justice asked me if I
17 had a copy of the draft language and if I did would I read it
18 to him, which I did, and when I read him the question and
19 the preambulatory language in the question," which I think is
20 probably the first one I read to you a few minutes ago, Mr.
21 MacDonald, "he expressed some real concern over whether
22 that would work, and you better speak to him," was his
23 message to me. And, I can't recall whether Chief Justice
24 MacKeigan was holding on a line at that point or whether I
25 called him back, but very quickly thereafter I called him or

1 spoke to him on the telephone and the Chief Justice told me
2 that he had read the proposed question for the opinion of the
3 Court and he said, as an off...and I'm not sure whether these
4 were his exact words, but as an off-the-cuff or an immediate
5 reaction, an unstudied reaction, he wondered whether the
6 Court of Appeal had the power to hear fresh evidence or call
7 witnesses to be examined in front of it under Subsection C of
8 617, whereas, and if I can refer you specifically to the powers
9 of the Court of Appeal in the Criminal Code.

10 Q. Those are before in Exhibit 122.

11 A. Whereas the powers to hear witnesses are clearly there under
12 Section 610, sub B and sub C and sub D all referring to the
13 powers of a Court on an appeal itself from conviction to order
14 the attendance and compel witnesses to be examined and to
15 admit their evidence, to receive the evidence if tendered, and
16 Chief Justice MacKeigan simply raised this, he said, "I'm not
17 sure it will work. I'm not sure I can do what you people are
18 asking without those powers and I don't think I have those
19 powers sitting as a Court of Appeal Judge if it's referred for
20 an opinion as opposed to referred under Sub B as if it were an
21 appeal by the accused himself." My first reaction to that was
22 to refer him to the Gorecki case because we had examined our
23 precedents to some extent, and in Gorecki, number one, which
24 as I said earlier, I think, is cited in, to be specific, in Volume
25 32 of the Canadian Criminal Cases around 1976 era. The

1 Gorecki decision reflects the Ontario Court of Appeal on a Sub
2 B reference hearing new evidence and...

3 Q. Sub B or C?

4 A. I'm sorry, under Sub C, a reference for an opinion of the
5 Court. They received new evidence and heard examined in
6 front of them psychiatric evidence as I recall. And, I referred
7 the Chief Justice to that and I can't remember whether it was
8 all in the same conversation, there were at least two and
9 possibly three conversations in the course of that day because
10 I involved the person to whom I responded, the associate
11 deputy minister, in at least some of the consultation that
12 morning. This was all in the eleven to one o'clock in the
13 morning, eleven towards through noon hour era part of that
14 day. And I recall getting back to Chief Justice MacKeigan
15 after he had looked at the Gorecki case or apparently had
16 looked at it, and his view at that time that he still was
17 concerned. He said, "I'm not making any decision, don't get
18 me wrong, I'm not make any rulings, you can do whatever
19 you want, but I'm just raising this observation," and he said,
20 "The Court of Appeal in Ontario may have heard evidence, but
21 I'm not sure that we have the power to." And, in effect, left
22 us with that. And, at that point the minister, Mr. Chrétien,
23 was advised that what had appeared to be a decision in the
24 morning to go a certain route was now in jeopardy as to its
25 wisdom. We got his direction to put everything on hold and

1 to come back with fuller advice on what he should do. We
2 took a good hard look at Gorecki, the discussion in the Court of
3 Appeal of Ontario's judgement there reflects a discretion in
4 the Court to hear evidence even on a reference under Sub C,
5 but to put it in its simplest form I think we thought why tilt
6 with additional problems. If there may be problems, the
7 object of this thing is to get this case back before the Courts in
8 a way that the Court could look as broadly as it thought
9 appropriate at as much evidence as it thought was
10 appropriate and if Sub B clearly invoked the powers of the
11 Court of Appeal under 610 of the Code to do that, why didn't
12 we just alter it to a Sub B, and that was our...that was our
13 decision to advise the minister that maybe a quick redrafting
14 of that reference would be a good idea.

15 Q. Now, am I correct in my understanding of the difference
16 between Sub B and Sub C to be this, if you referred it under
17 Sub C would the Crown have the burden of presenting any
18 evidence required to the Appeal Court as opposed to Marshall,
19 in your opinion?

20 A. I must admit I'm not sure. I've heard that question asked
21 before. That was not a question that came to our minds at the
22 time at all. The case lay in a...sort of a state where everybody
23 wanted to put evidence before the Court it seemed.
24 Everybody recognized the need to. Whether there would be a
25 different burden under Sub C or not I really don't know. I

1 think it's arguable that it would make a difference. In fact,
2 it's arguable, I suppose, where the federal Minister of Justice
3 refers a question to the Court that maybe he's the one to get
4 in and call the evidence, although that was not the position
5 either our department or the Attorney General in the
6 province was taking in our discussions. It was assumed when
7 we had thought as a preferred option that we'd refer it under
8 C, it was well understood as between our department and Mr.
9 How's department that they would carry those proceedings
10 and that they would carry them in such a way as to
11 vigorously cross-examine witnesses whose testimony was in
12 doubt or had changed to give the Court the benefit of
13 evidence subjected to real and proper cross-examination.
14 And there was never any suggestion that Justice Department
15 counsel would have a lead role, if any role, in it at all.

16 Q. Would you agree with that a proceeding under C, in effect, is
17 having the Court play a role as part of the executive as
18 opposed to part of the judiciary?

19 A. No, I wouldn't adopt those words. The judicial branch is the
20 judicial branch and they're asked for their judicial opinion
21 and it may assist the executive branch or the legislative
22 branch in doing something, but...

23 Q. But it is...

24 A. I don't think it mutates them into part of the executive
25 branch area.

1 Q. But it is the Minister in deciding whether to exercise his
2 discretion asking for the assistance of the Court.

3 A. Correct.

4 Q. The Court's opinion would not necessarily, would not be
5 binding on the Minister.

6 A. No.

7 Q. It wouldn't be subject to appeal.

8 A. No. I hesitate now under the Charter to say anything is not
9 subject to appeal.

10 Q. Okay. In any event the decision was made to go under
11 617(B), is that correct?

12 A. The advice to...

13 Q. Or the advice to the Minister.

14 A. The conclusion we came to at the officials level by late in the
15 afternoon of the 15th was that to go under 617 (B) was the
16 preferable thing to do. Well, the discussion, the conversation
17 or conversations with Chief Justice MacKeigan were on
18 Tuesday, June the 15th. The reference as the Court ultimately
19 got it is dated the 16th and was actually signed by the
20 Minister the next day. It was...we came to our conclusions as
21 to what advice to give on Tuesday, the 15th and we prepared
22 and gave that advice the next morning on Wednesday, June
23 16th and the Minister agreed that that sounded like the right
24 thing to do, we presented him with a draft reference which he
25 then signed and it's the one that was before the Court and I'm

1 sure is somewhere in the proceedings before this Commission.
2 I should say that prior...perhaps after the Minister had signed
3 it or at least after he had on Wednesday the 16th agreed that
4 that's, in all the circumstances and the advice he had
5 received, now what he was prepared to do, and as I think
6 about it it was before, certainly before anything was sent out
7 or finalized, I called gain to Gordon Gale to tell him what had
8 transpired. He was not available. I forget whether he was
9 out of town or just what it was. I ended up not speaking to
10 him. I left him a message that we were changing the form of
11 the reference and it was now going to be a 617(B) and then I
12 called Stephen Aronson, Mr. Marshall's counsel, and I got
13 ahold of him and I told him, I think in virtually the detail I've
14 just told you gentlemen, exactly what had happened and why
15 we were changing it to a Sub B. Mr. Aronson reacted in a
16 way, a questioning way, certainly initially, wondered what
17 this was all about and I...as I say, I told him virtually exactly
18 what had happened. He then asked if I would read the new
19 proposed reference slowly so he could have a stenographer on
20 the other end of the line take it down, which was done, and
21 my own note was that he seemed content at the conclusion of
22 that that that was...that was okay. So, we then either had the
23 Minister sign it or if he had signed it by then completed the
24 letters, the necessary letters, and dispatched them by courier
25 to Halifax.

1 11:38 a.m.

2 Q. If you go to page 63 of Vol. 31 then, is that a letter that would
3 have been drafted by your Department or you yourself?

4 A. Yes, well, it was drafted somewhere in the Department and
5 the Minister would have signed it that day, the 16th.

6 Q. Okay, it's the second paragraph I'm interested in.

7
8 I have refrained from specifically raising
9 the issue of possible compensation to
10 Marshall at the request of your
11 Department on the grounds that the
12 question of whether compensation is
13 appropriate in this case and, if so, its
14 nature and quantum is a matter of you and
15 your government to decide.

16 There were discussions, were there, with the A.G.'s
17 Department whether the issue of compensation should be left
18 with the Court?

19 A. Yes, that possibility, as I indicated in one of the questions, the
20 draft questions we considered, raised the possibility of asking
21 the Court whether any other remedies in addition to a pardon,
22 a new trial, or whatever might be appropriate, and that was
23 the compensation issue. We had some discussion about that.

24 Q. Was it your view that the Court would be competent to take
25 that issue and make recommendations on compensation, if
asked to do so?

A. I think our view was that the "reference power", as I call it,
under 617(c), the asking for the opinion of the Court is broad

1 enough to encompass certainly a question of whether
2 compensation was appropriate in the circumstances and, if so,
3 what its quantum would be. I think that could have been
4 done. It was one of the possibilities we considered. I should
5 say that that paragraph in the letter from Mr. Chrétien to Mr.
6 How that you've referred to, the second paragraph, reflects as
7 best as I recall it what their departmental position was, that
8 they took that on as their responsibility and wanted to deal
9 with it separately from the Appellate reference.

10 Q. The fact that it was being considered when you were
11 contemplating going under Sec. 617(c), would the question of
12 compensation to Marshall be of any interest to the Minister of
13 Justice, the question of whether there should be compensation
14 and the amount of compensation?

15 A. To say that it was of no interest would be, I think, untenable.
16 It was a consequential matter that arose in the context of the
17 implementation of the criminal law. And even the fact that
18 provincial attorneys general are empowered by the terms of
19 the Criminal Code, exclusively to prosecute the criminal law
20 does not render those prosecutions of no interest to the
21 Minister of Justice. So, in that sense, the question of
22 compensation certainly was not of no interest or was of some
23 interest to the Federal Department.

24 Q. But it was decided to acquiesce in the request of the A.G.'s
25 Department and leave the question of the nature and the

MR. RUTHERFORD, EXAM. BY MR. G. MacDONALD

1 quantum for the Government of Nova Scotia to decide?

2 A. Yes, in the same sense that the Criminal Law is left to the
3 provincial Attorneys General to deal with in their discretion,
4 we felt that the compensation issue in this case prosecuted,
5 investigated, dealt with completely by provincial officials was
6 properly theirs to deal with.

7 Q. Let's look at the reference...

8 MR. CHAIRMAN

9 If you had gone under Sec. 617(c) with, under your draft
10 reference, the question of compensation would have been
11 included.

12 MR. RUTHERFORD

13 It was one of the, I guess when Mr. Chrétien proposed that I
14 go down and work out details with the officials here in the Nova
15 Scotia Attorney General's Department, my first telephone call to
16 Mr. Gale established that for the meeting, I would bring some
17 draft questions to look at and that question, one of the draft
18 questions I obviously prepared included having compensation
19 addressed specifically as part of the Sub (c) reference.

20 MR. CHAIRMAN

21 But when you returned to Ottawa and received instructions
22 from your Minister to prepare the final draft, this was before your
23 conversation...

24 MR. RUTHERFORD

25 Yes.

1 MR. CHAIRMAN

2 The Chief Justice of Nova Scotia, in that draft, were you
3 instructed to include in that reference under (c), the question of
4 compensation?

5 MR. RUTHERFORD

6 No, on the basis of the discussions I had had with Mr. Gale, it
7 was not part of the preferred option to address the question of
8 compensation. They had requested it not be addressed in that
9 matter.

10 COMMISSIONER EVANS

11 Following up on that, was the, did the A.G. for Nova Scotia
12 have any input in the decision of the Federal Government to
13 proceed under 617(b) instead of (c)?

14 MR. RUTHERFORD

15 Only to the extent that we were able...I'll answer it directly, I
16 think this way, sir, there was no further communication between
17 the conversations that I had with Chief Justice MacKeigan and the
18 actual signing of the reference. I read, I should say, into the
19 situation on the basis of the discussions I had that they would not
20 be opposed or terribly concerned about it, and in fact, when I
21 called on the morning of the 16th to Gordon Gale to tell him we
22 were changing our tack slightly, changing the style of the
23 reference, and was unable to get him, I was only mildly concerned
24 that I didn't have an actual discussions with him and I just left
25 the message saying we were doing it. I felt on the basis of the

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1 input to date that that would be okay with them.

2 COMMISSIONER EVANS

3 Well, not only okay with them, that would be preferable to
4 them, I take it?

5 MR. RUTHERFORD

6 Well, the concern was, and you'll note, Chief Justice, that in
7 the letter that Mr. How sent dated May 17th that we looked at a
8 little while ago, he actually refers to 617(b) as one of the options
9 to be considered. The only concern that I recall being expressed
10 on behalf of the Attorney General's Department was that if it was
11 a 617(b), the Court of Appeal might, as its remedy, grant a new
12 trial. And they really thought that that was going to be more
13 awkward than...

14 COMMISSIONER EVANS

15 A disaster.

16 MR. RUTHERFORD

17 Well, although there are two views. One is that a Court of
18 Appeal ordering a new trial is not a mandamus to hold a trial. It
19 orders a new trial within the context of an Attorney General's
20 discretion to prosecute. And we debated that and I think it was a
21 mild concern as opposed to a very serious concern. Hence when
22 we decided to go under Subsection (b) instead of (c), I didn't think
23 that there was going to be...If I had thought that the Attorney
24 General's Department would be terribly upset about it, I think we
25 would have waited until I had got Gale or we would have taken it

MR. RUTHERFORD, EXAM. BY MR. G. MacDONALD

1 No, that's right.

2 MR. CHAIRMAN

3 The options really that were open to the Court of Appeal of
4 Nova Scotia under 617(b) would be to dismiss the appeal, order a
5 new trial, or acquit Donald Marshall, is that...

6 MR. RUTHERFORD

7 I think that, and subject to Subsection 8, make any other
8 order in conjunction with one of those.

9 MR. CHAIRMAN

10 Presumably, they would have to direct that evidence be led
11 before they could arrive at a conclusion as to compensation.

12 MR. RUTHERFORD

13 I would think so. But 617(b), in effect, reverts with complete
14 appellate jurisdiction, the Court of Appeal, just as if the accused
15 had appeared from his conviction in the normal 30 days following
16 his conviction.

17 COMMISSIONER EVANS

18 Under 610.

19 MR. RUTHERFORD

20 Under 610. It just, in my view, turns on the jurisdiction as if
21 it were an appeal by the accused, and all the powers under 610,
22 613 apply. And I think that was Chief Justice MacKeigan's point
23 that he knew what he could do under 617 (b) and the proposition
24 that he was going to get a 617(c) caused him to make that
25 observation, albeit, and I say this to be quite clear on the point,

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1 his conversation with me made it very, very clear that he was not
2 threatening, he wasn't deciding, he wasn't ruling, he made what I
3 considered at the time to be a very helpful and timely suggestion
4 lest... although on a reading of the Gorecki decision, I think there
5 is authority for the proposition that a court under Subsection (c)
6 has discretion to hear new evidence. But he made a suggestion
7 that avoided a possible problem and we avoided it. We took his
8 advice, or took the advice of his observation.

MR. CHAIRMAN

9
10 In your opinion, if a reference under 617(b), is there an
11 appeal from the decision of the Court of Appeal to the Supreme
12 Court of Canada?

MR. RUTHERFORD

13
14 I've never crossed that.

MR. CHAIRMAN

15
16 ...charter, it wasn't around in these days.

MR. RUTHERFORD

17
18 Yeah. No, apart from that, this is not a studied opinion, Chief
19 Justice, when I say this, but I think if it's, as if it were an appeal,
20 you could argue, and I'd be prepared to argue, that it's as if it
21 were an appeal by the accused in all its resemblance to an appeal
22 and if from an appeal there's a further appeal to the Supreme
23 Court or possibility of leave, that that would follow as well. In
24 other words, it revitalizes all the legal jurisdiction as if the
25 accused had appealed. Now I'm not sure, I haven't gone back to

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1 look at the precedents in the 14 instances where there have been
2 appeals. There may well be some instance where a further appeal
3 has been taken, but I haven't reviewed that.

COMMISSIONER EVANS

5 But under (c), there would be no appeal.

MR. RUTHERFORD

7 I don't think so.

BY MR. MACDONALD

9 Q. While you have it there, Mr. Rutherford, let me take you to
10 Sec. 613, and that's in the handout I gave to you, Exhibit 122.
11 The result of proceeding under Sec. 617(b) is to confer on the
12 court the power set out in 613(1), is that correct?

13 A. I'm sorry, the powers of 613(1)?

14 Q. Yes.

15 A. I think so.

16 Q. And so that on the hearing of the appeal, the court is given
17 the option of allowing the appeal under 613(1)(a) if it
18 satisfied in its opinion that either one of three circumstances
19 exist, is that correct?

20 A. Unreasonable, cannot be supported by the evidence, or should
21 be set aside on the ground of a wrong decision on a question
22 of law, or, I think the fourth one is, or on Sub. 3, any ground
23 there was a miscarriage of justice.

24 Q. Sure. So if the court is of the opinion that the verdict cannot
25 now be supported by the evidence, it is to allow the appeal,

1 correct?

2 A. May.

3 Q. They may allow the appeal.

4 A. Correct.

5 Q. If it's of the view that it's, there's a wrong decision on a point
6 of law, it may allow the appeal.

7 A. That's correct.

8 Q. Or if it's of the opinion that there was a miscarriage of justice,
9 it may allow the appeal.

10 A. That's correct.

11 Q. And if it allows the appeal, you go to Subsection 2 where it
12 says:

13 Where a court allows an appeal under
14 Paragraph 1(a), it will quash the conviction
and do one of two things.

15 A. Yes.

16 Q. Either enter a verdict of acquittal or order a new trial.

17 A. That's correct.

18 Q. Those are the options the court has, subject to what you've
19 said about Subsection 8.

20 A. I believe so.

21 Q. Of the section, okay. Was there any contact between your
22 department and the Attorney General's Department or Mr.
23 Aronson as this reference proceeded toward the hearing?

24 A. I'm sorry, between our department and Mr. Aronson?

25 Q. Or your department and the Attorney General's Department?

1 A. There probably was but I don't remember anything of
2 significance. I think generally once the courts had been, had
3 had the matter referred to it, it became a matter between the
4 Attorney General of the province and Mr. Aronson. They
5 sought the directions of the Court of Appeal and the
6 procedure unfolded. I don't recall any significant
7 communication between our department and any of the
8 parties.

9 Q. Your contemplation, as you've expressed it a couple of times
10 this morning, I think, was that there would be a presentation
11 of all evidence to the court, "vigorous cross-examination", to
12 use your phrase, a true adversarial proceeding, is that
13 correct?

14 A. Yes, that was the subject of some discussion on at least two
15 occasions. It was a matter that I had brought up when I
16 discussed with Mr. Gale and Mr. Edwards on the 9th of June
17 the possible format of a reference. That if we were going to
18 refer it in such a way as to have the court hear evidence,
19 there couldn't be any just sort of falling over and letting the
20 apparent inconsistencies result in an answer. That the court
21 had to have the benefit of these witnesses being, all the
22 witnesses whose evidence was now in doubt in some way,
23 being really cross-examined. The reason that was discussed
24 was that it was a little difficult, and you've pointed to a
25 number of the places in the documentation where police and

1 Attorney General's people had gone a long way towards a
2 conclusion that this conviction was a rotten and
3 unsupportable piece of finding now in the light of all the
4 evidence. And we were concerned in Justice that no
5 premature conclusions about who was telling the truth and to
6 what extent they were be drawn. That if it was going back
7 for proceedings in front of a court, it be real proceedings and
8 that the court in evaluating evidence can only do its job
9 properly where there is full cross-examination. And that was
10 discussed on that instance on June the 9th and it was
11 discussed on another occasion in a telephone conversation
12 that I was a party to and the associate deputy minister who I
13 responded to was involved in that and he made that point
14 and, quite frankly, I don't really remember whether it was to
15 Mr. Gale or whether it was to Mr. Coles, but it was somebody
16 in the Attorney General's Department, the thing came up
17 again. And I point that out as a matter that we were
18 concerned with because when you read the judgement of the
19 Court of Appeal, at least in relation to one of the witnesses,
20 the Court of Appeal says his evidence wasn't really very
21 vigorously cross-examined.

22 Q. That's James MacNeil?

23 A. That's MacNeil's evidence and it simply registered when I
24 read that that was one of the things we were concerned about
25 that everybody's stories were accused of being either patent

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1 lies or incorrect on one point or another at some stage or
2 another by somebody or other and that this thing had to be
3 really hammered out in a full fashion in front of the Court of
4 Appeal.

COMMISSIONER EVANS

6 Well, then on that issue, I understand that MacIntyre was not,
7 did not testify in the reference.

MR. MACDONALD

9 Neither did Mr. Urquhart, neither did any Sydney Police.

MR. CHAIRMAN

11 But some of them hadn't testified as the trial, had they?

MR. MACDONALD

13 Did not at the trial and the only one who testified at the trial
14 was Mr. Maloney, or Cst. Maloney picked up the piece of Kleenex
15 and there may have been Walsh first on the scene or Mroz, one of
16 those men.

COMMISSIONER EVANS

18 But the fact that they didn't testify at a trial, wouldn't that
19 preclude them from testifying on this reference to the appeal?
20 And if there was going to be a vigorous prosecution and a true
21 adversarial approach, one might have expected that the two
22 detectives involved in this and in whose conduct was being
23 criticized might have been called.

BY MR. MACDONALD

25 Q. In fact, you did contemplate that. You told me that this

1 morning.

2 A. Well, we certainly contemplated that possibility, although
3 when it was an appeal, and the issue of guilt or innocence
4 became the focus, I suppose subject to their own direct
5 evidence about observations at the crime scene, which I
6 understand from my knowledge of the original trial which is
7 only what I've read, that there was some direct police
8 evidence. Really, it was the involvement of the police in
9 dealing with other witnesses, such as the Pratico, Chant and
10 Harriss witnesses and to get at the thing in a classic appellate
11 context, the parties considered it only necessary to put up
12 those witnesses. Not, and I think in examining them, there
13 was a great deal of attention paid to why they gave certain
14 statements. And indirectly the conduct of the police was in
15 issue but the parties considered it unnecessary to call the
16 police at that point.

17 Q. If you're going to comment on whether or not there's been a
18 miscarriage of justice and where the allegation is that the
19 police coerced witnesses to tell a story at trial that wasn't
20 true, surely you have to have that evidence before you can
21 determine if there's any miscarriage of justice.

22 A. Well, I mean I can't agree with that because there was a
23 determination here that there was a, and I hesitate to use the
24 word "miscarriage". Some people use it in one context and
25 others in another, to determine the complete extent of

1 whether justice miscarried. Obviously, you'd have to examine
2 every aspect of it. But the Court of Appeal was able to
3 determine that the conviction was no longer supportable and
4 whether that is a miscarriage or not, I think depends on how
5 you use that term. The way Sec. 613 puts it out, it's as if it
6 could lead you to the conclusion that a miscarriage of justice
7 is something other than a verdict that's unsupportable on the
8 evidence or wrong in law or any of the other three options.
9 And I guess I'm a little unwilling to venture an opinion as to
10 just precisely what "miscarriage" means other than in the lay
11 sense that justice did not carry itself to the objective sought,
12 namely the determination of the truth, and that was the
13 ultimate conclusion here and it wasn't necessary apparently
14 to call the police officers in that proceedings to reach the
15 conclusion that the conviction was no longer supportable.

16 Q. You read the decision, Mr. Rutherford?

17 A. Yes, I did.

18 Q. That's the decision of the Appeal Court on the reference?

19 A. Yes, I have.

20 Q. And you would have read it fairly soon after it was filed, I
21 take it?

22 A. As soon as we got on our hands on it.

23 Q. And you've read it recently.

24 A. Yes.

25 Q. Is it your view that, to share my view, that the Court of

1 Appeal is saying that there was no miscarriage of justice
2 here?

3 A. No.

4 Q. You don't?

5 A. No, the court says in or around the last two or three pages,
6 there is a line that I will struggle to the death to avoid
7 interpreting, because I don't want to interpret their words
8 particularly in the line that says "any miscarriage is more
9 apparent than real." And, quite frankly, I'm not sure what
10 the difference between real and apparent is. I thought they
11 tended to mean the same thing.

12 Q. Do you agree with me that the court is, in effect, saying that
13 Marshall in a large measure is the author of his own
14 misfortune?

15 A. Well, the only proper position for me to take is to say that the
16 court said what it said and everybody has dealt with it on
17 what they think is required in the light of that. It said what
18 it said there and I'll agree with any line you read out of it.

19 Q. But more than that, the department, and later we'll come to it,
20 in dealing with Marshall's request for compensation itself
21 referred to the comments of the court that, in effect, Marshall
22 caused it himself and he's not entitled to compensation.

23 A. Is the judgement in one of these books?

24 Q. Yes, in Volume 4 I've given to you.

25 A. I'm sorry.

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1 Q Volume 4, and it starts on page 80.

2 COMMISSIONER EVANS

3 Are you now asking this witness to interpret that judgement
4 of the Court of Appeal?

5 MR. MACDONALD

6 Not at the very moment, My Lord, but I might.

7 COMMISSIONER EVANS

8 I thought you were headed that way.

9 MR. MACDONALD

10 And I'll lay the context for the doing that, My Lord, because
11 there are letters from the Department of Justice in response to
12 request for compensation where portions of the decision are
13 quoted.

14 COMMISSIONER EVANS

15 I was just trying to anticipate the direction in which you were
16 going.

17 MR. MACDONALD

18 That's where I'm going.

19 BY MR. MACDONALD

20 Q I would like to start at page 143. Mr. Rutherford, on page
21 143, it's the only full paragraph where the Court states that:

22
23 However, the fact remains that Marshall's
24 new evidence, despite his evasions,
25 prevarications, and outright lies supports
the essence of James MacNeil's story,
mainly that Seale was not killed by

MR. RUTHERFORD, EXAM. BY MR. G. MacDONALD

1 Marshall but died at the hands of Roy
2 Ebsary in the course of a struggle during
3 the attempted robbery of Ebsary and
4 MacNeil by Marshall and Seale. In our
5 opinion, Marshall's evidence, old and new,
6 if it stood alone, would hardly be capable
7 of belief.

8 You've read the decision recently. Isn't it a fact that the Court
9 said the only evidence that is really new here is James
10 MacNeil, and given MacNeil's evidence, some of the other
11 evidence supports it but it's his evidence that's giving rise to
12 the Court's conclusions.

13 A. Well, you know, I really hesitate to say "aren't they really
14 saying". They say what they said. There was a lot of new
15 evidence or different evidence. Marshall told a different
16 story than he had before. The Court says, well, the Court says
17 that at some point, a page or two earlier, they point out that
18 even now, and as you read in the paragraph at the bottom of
19 page 143, they characterize his evidence of being replete with
20 evasions, prevarications, and outright lies. But it's a different
21 story than he told before, but they do tend to link what they
22 call "an unreliable story" to MacNeil's evidence which they
23 tend to think gives credence to the affair having happened
24 that way.

25 Q. Let me take you to page 125 and perhaps in a little more
26 detail. The bottom of 125,

In our opinion, the evidence of Donna

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1 Ebsary, Greg Ebsary, and A. J. Evers is
2 highly speculative and by itself would not
3 be of much force in determining the guilt
4 or innocence of the appellate. It is only to
5 the extent that it is consistent with the
6 evidence of James MacNeil that it has any
7 independent validity.

8 So that evidence by itself would be of no use. It's only
9 because of MacNeil. Same thing with Marshall, we've just
10 read that. On page 129:

11 Mr. Chant has now changed his story so
12 many times that, in our opinion, no weight
13 can be placed upon his evidence either at
14 trial or now.

15 Pratico didn't give evidence.

16 A. Well, there's no doubt that, and they come to the conclusion
17 that you've already referred to at the bottom of page 143:

18 In our opinion, Mr. Marshall's evidence, old
19 and new, if it stood alone, would hardly be
20 capable of belief.

21 Q. MacNeil has the evidence that convinced the Court to direct
22 an acquittal here.

23 A. Well, it seems to be the evidence that they place most
24 reliance on.

25 Q. The Court on page 144 says in the second full paragraph:

We must accordingly conclude that the
verdict of guilt is not now supported by
the evidence and is unreasonable and must

1 order the conviction quashed.

2 They go on then to say that "we take the course of taking a
3 judgement of acquittal rather than ordering a new trial."

4 A. And on a completely extraneous connection, I note the
5 Truscott case cited just before you started reading in 1967,
6 not '57. So one can be decades out on anything.

7 Q. Now that really is the end of it, isn't it? The Court at that
8 time had decided that they should allow the appeal and direct
9 a verdict of acquittal.

10 A. That's correct.

11 12:07 p.m. *

12 Q. In legal phrase the rest of this obiter, as we go on from there.

13 A. Well, I think one could characterize that way. As I say, there
14 it is. They've swung, the Court has swung from what appears
15 to be reliance on the parts of 613 that you referred to earlier
16 dismissing...allowing an appeal where, in the connection with
17 the unreasonableness of the evidence, a ground that's
18 unreasonable, and cannot be supported by the evidence, to
19 talking about miscarriages of justice on the next page.

20 Q. And don't you conclude from what they've said in the next
21 page and a half that they would not have allowed the appeal
22 on the basis that there had been a miscarriage of justice?

23 A. Well, I don't...I don't know what to conclude in that regard. I
24 would have thought that anywhere that a verdict is set aside
25 on the basis that it's unsupportable on the evidence that you

1 could say that justice has miscarried. I don't think that
2 miscarriage has to be reserved for cases where there is
3 particular...particular brutality involved in the way the law
4 was applied or malice of any sort. If justice miscarries, it
5 miscarries.

6 Q. Were you surprised that there's no evidence from the police
7 who were alleged to have coerced witnesses to tell untrue
8 stories at trial?

9 A. I don't think I ever reacted with any particular surprise.
10 There was at all times, I think here throughout the period of
11 this reference, there was a pending civil action, at least
12 commenced, against the police, which would have directed
13 itself, at least in part, at precisely their conduct. My
14 discussions with Mr. Gale made it very clear that the Attorney
15 General's Department understood with excruciating clarity
16 that there was a real problem that had to be examined and if
17 the Court of Appeal proceedings didn't get at the bottom of it
18 that wouldn't be the end of...end of things, and if to determine
19 this appeal it wasn't, strictly speaking, necessary to have the
20 police give evidence, that didn't surprise me.

21 Q. Were you surprised that the Court didn't comment on the fact
22 that Jim MacNeil's evidence, the evidence that they relied on,
23 had been in the hands of the Sydney police from two days
24 after, I'm sorry, ten days after Donald Marshall was
25 convicted?

MR. RUTHERFORD, EXAM. BY MR. G. MacDONALD

1 A. That they didn't comment on that.

2 Q. Um. The effect of that on whether there was a miscarriage of
3 justice.

4 A. Well, no, I can't...I can't say that I sat down and registered
5 any particular emotional reaction to what was done or not
6 done. We had...we got the judgement and it dealt with what it
7 dealt with. It didn't deal with what it didn't deal with. As I
8 say, there was a civil action and a lot more to be concerned
9 about than... this wasn't the end of it. But...

COMMISSIONER EVANS

11 Really what you...I'm sorry.

MR. RUTHERFORD

13 Sorry.

COMMISSIONER EVANS

15 What you were concerned about, I take it, was the release of
16 Donald Marshall and the acquittal of him on the charge which he
17 had faced.

MR. RUTHERFORD

19 Well, that was the primary...I mean that was the connection to
20 the Minister of Justice's direct role in it was to deal with what he
21 had to deal with, namely potential miscarriages or mistakes under
22 Section 617. He had exercised all the power he had and the Court
23 of Appeal had done the initial, I referred to it as sort of the layers
24 of problems, had dealt with the first layer by undoing the
25 conviction. And that certainly was one of the most immediate

1 | goals, to deal with whether or not that conviction was proper.

2 | And that had at least been dealt with by the time this judgement
3 | was released.

4 | MR. MacDONALD

5 | Q. Let me take you to Volume 30 of the evidence, which is
6 | Exhibit 123, and on page 26 of that volume.

7 | A. Yes.

8 | Q. That's a letter from Mr. Cacchione, who was now acting for
9 | Mr. Marshall, to the Minister of Justice, Mark McGuigan, and
10 | seeking compensation for Mr. Marshall on the basis of an
11 | international covenant of which Canada is a signatory or to
12 | which Canada is a signatory "To provide compensation to
13 | persons who have been wrongfully convicted or punished for
14 | a crime and who have later been exonerated." Was your
15 | department involved in the drafting of a response to this
16 | letter?

17 | A. Well, Mr. McGuigan did respond to this, I think a month later.

18 | Q. Yes. Was your department involved in that particular
19 | matter?

20 | A. Yes, I think there is no doubt that that letter was reviewed in
21 | the criminal law section and I'm sure I saw it before a
22 | response went out.

23 | Q. The response is on page 29.

24 | A. Yes.

25 | Q. Was that response drafted by your department?

1 A. It was drafted in the department. I can't be positive who
2 may have had what role in its preparation, but I see Mr.
3 McGuigan's signature and so it's his letter.

4 Q. Now, in the...in response to the request for compensation by
5 Mr. Marshall for having been wrongfully convicted, reference
6 is made to the comments of the Court of Appeal to which I've
7 just referred, in fact they're quoted in some detail, showing
8 that Mr. Marshall did not emerge untarnished. Is it not the
9 fact that the department placed great emphasis on those
10 comments by the Court of Appeal in denying Mr. Marshall's
11 request for compensation?

12 A. Well, I think it's undeniable that the judgement was there
13 and it had a conclusion from a five member bench of the
14 Court of Appeal of this province which reads, "There can be
15 no doubt that Donald Marshall's untruthfulness through this
16 whole affair contributed in a large measure to his conviction."
17 That was a judicial finding that was part of that judgement.
18 To say we placed great emphasis on it or not I guess is
19 debatable, but it's cited in this letter as one of the features in
20 the environment in which Mr. Cacchione is suggesting that the
21 compensation is...should be paid and that in recognition of
22 that the clause of the international covenant on civil and
23 political rights should be brought into play or brought into
24 view.

25 Q. But you also were aware that the two eyewitnesses at trial

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1 both testified that they had been coerced to lie at trial to say
2 that Donald Marshall had committed the murder. Now, in the
3 light of that, how can anything Donald Marshall said at trial
4 have convicted him or led to his conviction, if two
5 eyewitnesses say "I saw him do it." The fact that he didn't
6 tell them he was committing a robbery surely couldn't have
7 been the most pervasive reason for his conviction.

8 A. Well, I'm ...I don't know whether it was the most pervasive or
9 not. I'm just saying that a Court of Appeal who heard the
10 evidence they heard came to the conclusion that his
11 untruthfulness through the whole affair contributed in a large
12 measure to his conviction. Now, I'm not here to defend or
13 attack that. That's what was said.

14 Q. But you knew that the Court didn't hear the evidence of the
15 police. The Court had the evidence and you had the
16 evidence...

MR. BISSELL

18 I think the witness has already given his answer, and we're
19 getting into...getting a bit argumentative.

MR. CHAIRMAN

21 I don't treat that as being argumentative. I would like the
22 benefit of the...of Mr.Rutherford's reply on that. I have...we have
23 the letter in front of us but...his minister's letter, McGuigan of
24 September the 2nd, 1983, which certainly places...draws attention
25 to these findings.

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1 MR. RUTHERFORD

2 Well, if I may just pursue that, it draws attention to that
3 finding but what the letter then...sorry.

4 MR. CHAIRMAN

5 That's all right.

6 MR. RUTHERFORD

7 What it then goes on to say is on the one hand on the other
8 but in any case we...the position of the department or Mr.
9 McGuigan at that point was that compensation was an issue to be
10 dealt with as the provincial Attorney's General...Attorney General
11 Department had taken the position throughout. It was up to them
12 to deal with that. That's where that responsibility should
13 be...should be carried out.

14 MR. MacDONALD

15 But it's Canada.

16 A. At the bottom of page 2 of the letter refers to the covenant,
17 refers to one of the subclauses in it and the third last line
18 from the paragraph near the bottom of page 30 that starts
19 "Article 14" says, the last clause of that, "One might well
20 infer," might well infer, "That your client falls within the
21 exception and would have no entitlement to compensation."
22 And then it goes on, "It might well be argued, however, that
23 his conduct was not the only element which led to his
24 conviction, and that he's entitled to compensation on some
25 other legal or moral basis." This is the point of the letter at

1 this point, it seems to me that is, it says "In my view an issue
2 for the provincial and municipal authorities for although the
3 offence was alleged, alleged there was a contravention of
4 federal law, the original investigation was carried out by
5 provincial...by municipal police and the prosecution was
6 conducted by provincial officials." And that was the position
7 that Mr. McGuigan and the department was operating on
8 throughout and that I think we understood to be one with
9 which the Attorney General of the province was in complete
10 agreement, that there was an issue to be dealt with and it was
11 the province's responsibility to deal with it.

12 Q. It's Canada though that has signed the convention. It's not
13 the Province of Nova Scotia.

14 A. Oh, indeed I think the authority is clear that only the
15 Dominion government can enter into international treaties.

16 Q. And the covenant provides for compensation being paid to
17 people who are wrongfully convicted, yes.

18 A. In a nutshell.

19 Q. Yeah. And, is it not, at least in the first instance, the
20 department's position that that covenant doesn't give you any
21 right to payment but you may have right to payment from
22 the province for other reasons.

23 A. Well, I'm not...I'm not going to set myself up as any expert in
24 interpreting covenants or, indeed, as an international lawyer.
25 Mr. McGuigan was the international lawyer in the department

1 as Minister and, of course, that is his speciality and I don't
2 profess it, but I think we have always acted on the
3 assumption that to the extent there were obligations on the
4 country they could well be carried out at different levels of
5 government than the federal government. Indeed it doesn't
6 follow that every international obligation must be carried out
7 domestically by the federal government.

8 Q. Let me take you to that paragraph on page 30 that you've
9 referred to. It starts "Article 14(6) of the International
10 Covenant provides for compensation for a person whose
11 conviction has been reversed," and then, "On the ground that
12 a newly discovered fact shows conclusively that there has
13 been a miscarriage of justice unless the nondisclosure of the
14 unknown fact in time is wholly or partly attributable to him."
15 Now, what new-found fact, newly discovered fact showed
16 there was a miscarriage of justice and that would...had been
17 either wholly or partly attributable to Marshall?

18 A. Well, all I can do is point back to the record of the decision of
19 the Court of Appeal. I'm not sure precisely what fact or facts
20 in their entirety they're referring to, but they say that his
21 untruthfulness throughout the whole affair contributed in
22 large measure to his conviction. There is reference at page,
23 well, the middle of page 145 the Court says,

24
25 By lying he helped secure his own

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1 conviction. He misled his lawyers,
2 presented to the jury a version of the facts
3 that he now says is false, a version that
was so far fetched as to be incapable of
belief.

4 There is reference somewhere a little earlier than that to his
5 apparent unwillingness to admit, yes, the middle of page 143,
6 the court says, "He is obviously not prepared to admit at this
7 stage that he was engaged in a robbery." Now, whether the
8 Court had concluded there was robbery at the time of Sandy
9 Seale's murder or not, I really don't know. But I...without
10 wanting to interpret what the Court is saying it's clear that
11 they're saying that the facts and the true facts were not all
12 brought to the original trial court's attention and that in part,
13 and they use...the Court uses the term "in large measure his
14 untruthfulness through the whole affair contributed in large
15 measure to his conviction." But as the letter that Mr.
16 McGuigan sent indicates, at the bottom of page 30, "Marshall's
17 conduct it may be argued was not the only element that led to
18 his conviction," and indeed many would argue that, and
19 strenuously so. The point of the letter is really simply that
20 the compensation issue is to be dealt with by the province
21 and Mr. McGuigan can be traced through public statements in
22 the debates in the House of Commons, in Hansard and in the
23 press, and I'd be happy to refer you to dates on some of these
24 if you're interested, he maintained that position throughout
25 with increasing vigour that he expected the Province to deal

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1 with this issue of compensation. I think his position on the
2 public record was very clear. It wasn't that there shouldn't
3 be compensation. Quite the contrary, but that the province
4 had the duty to deal with it. And, he took increasingly
5 vigorous steps up to and including his discussions with the
6 Attorney General, who became Attorney General in the
7 province in or around the end of of 1984, Mr. Giffin. He spoke
8 to him the records shows on several occasions in an attempt
9 to urge him to get on with the dealing with this compensation
10 issue.

MR. CHAIRMAN

12 Mr. Rutherford, before we leave that, I'm having some
13 difficulty with that last part that you refer to, the letter of
14 September the 2nd, being the point of Mr. McGuigan's letter.
15 Without interpreting it I might, if I read it, be...treat that more as
16 an aside. If you...in looking at the letter from Felix A. Cacchione of
17 August the 2nd, 1983, he clearly argues under...in the second
18 paragraph or suggests that Canada as a signatory to the
19 International Covenant on Civil and Political Rights had an
20 obligation to pay compensation to Donald Marshall, Jr.. I think
21 that's a fair reading.

MR. RUTHERFORD

23 Canada undertakes the obligation in the terms of that
24 covenant.

MR. CHAIRMAN

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1 That's right. In the terms of that covenant. The implication
2 being that if you're not obligate under that provision it would
3 be...no other jurisdictional obligation is imposed upon you. But
4 then when I read the letter of September the 2nd, which recites
5 the findings of the Court of Appeal of Nova Scotia on the
6 reference, to which you have referred, followed then by the
7 paragraph, in reference to the International Covenant were I read
8 this, "Unless the non-disclosure of the unknown fact in time is
9 wholly or partially attributable to him, (emphasis added.)" It
10 seems to me that letter is in response to Mr. Cacchione's
11 suggestion that the Government of Canada may have some
12 obligation under that treaty. Would that be a fair...is that a fair
13 reading?

MR. RUTHERFORD

15 Well, I...again it puts me in the position of trying to say what
16 the Minister intended by this letter I take from it that in
17 response to the putting forward of this covenant as a focal point
18 and talk about when and where and who is going to compensate,
19 the response by Mr. McGuigan says, well, you've recited some of
20 the covenant, there is another part, it may be arguable or you
21 may infer from what the Court has said that the covenant is not
22 applicable. On the other, he...and so he simply opens up the issue
23 that there may be a problem in just how applicable that
24 thing...that covenant is, but in any case, he says, "This is a matter
25 that the province has got to deal with."

1 MR. CHAIRMAN

2 But it wouldn't be a matter for the province only if the
3 covenant applied, would it?

4 MR. RUTHERFORD

5 Well, I think that...I think that's a matter in which people of
6 greater expertise than I ought to...ought to profess. I think that a
7 covenant undertaken by Canada in an international context is
8 satisfied when the government and the laws of the country bring
9 about the obligations or satisfy the obligations. In that sense all
10 kinds of international obligations get into areas when domestically
11 implemented that are matters exclusively for provincial
12 legislation. That's one of the issue that arises whenever Canada in
13 its national identity enters into an international treaty of some
14 sort. The Migratory Birds Convention is something that in terms
15 of dealing with game and natural resources the provinces have to
16 largely support and deal with. And, it's no...it may be no answer
17 for the national government to say, ah, the provinces won't go
18 along with us on this, but on the other hand it's no...it's no...there's
19 no impropriety or problem it seems, in my understanding, for the
20 Government of Canada to say, yes, there is an obligation that
21 we've entered into and it's carried out fully by provincial action.
22 There are a number of other federations, the Swiss federation for
23 example, in which the state or cantons, equivalent to our
24 provinces, have very large powers of implementing criminal law.
25 And the federal structure in Canada, I think, allows great latitude

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1 for international obligations to be satisfied through the actions of
2 provincial and municipal officials. The problem arises where the
3 obligation isn't satisfied at all and then I think the national
4 government has a problem to deal with. But here I read Mr.
5 McGuigan as saying we're not really arguing about this, although
6 don't forget there is a subclause to that and I underline that with
7 emphasis so that you appreciate that you may...it may inferred
8 that your client doesn't necessarily fall under that umbrella of
9 that covenant. On the other hand the last paragraph on page 30
10 recognizing fully the argument that I think Mr. MacDonald is
11 putting to me that surely there was a lot more than Marshall's
12 own lack of candour that led to this miscarriage of justice. But the
13 whole thing is a matter that the province is going to deal with, it's
14 their responsibility, it's their obligation, says Mr. McGuigan. And
15 that's what I read the letter to say.

COMMISSIONER EVANS

17 Those problems arise, I would think, quite frequently or...in
18 environmental problems.

MR. RUTHERFORD

20 I think almost any area of international agreement,
21 commercial, free trade, all kinds of problems that involve our
22 federal structure, challenging as it is.

COMMISSIONER EVANS

24 Have we got you far enough off your track now?
25