

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

1 MR. MacDONALD

2 Oh, no, when I get on track I don't weave.

3 MR. RUTHERFORD

4 So, I've noticed.

5 MR. MacDONALD

6 Q. Just let me suggest this to you, Mr. Rutherford, that whatever
7 the conclusion one draws from Mr. McGuigan's letter, the
8 federal government did seize on those gratuitous remarks
9 from the Court of Appeal in Nova Scotia to deny any
10 compensation to Mr. Marshall.

11 A. No, I don't buy that at all.

12 Q. Thank-you. Would this be an appropriate place to break, My
13 Lord.

14 INQUIRY ADJOURNS - 12:30 p.m.

15 2:07 p.m. INQUIRY RESUMES

16 Q. I believe you said this morning, Mr. Rutherford, that you
17 didn't believe that the evidence of the police would be
18 required to make a determination whether there was guilt or
19 innocence on behalf of Junior Marshall. That's what you said,
20 isn't it?

21 A. I think my point perhaps better articulated than that might
22 have been that it didn't appear that their evidence was
23 required for the Court of Appeal to deal with the correctness
24 of the conviction.

25 Q. Yes, okay. But would you not agree that before you could

1 determine what contributed to the conviction either in large
2 measure or small measure, that indeed you would need all of
3 the evidence.

4 A. To decide everything, you've got to know everything, if that's
5 the point.

6 Q. Did you say this morning that you thought that the parties
7 had agreed not to have the police evidence adduced at the
8 Appeal Division?

9 A. Well, what I meant to articulate and perhaps didn't do
10 adequately was that the parties in putting this appeal, as if it
11 were an appeal to the Court of Appeal didn't see fit to call the
12 police evidence. I'm not sure whether there was any
13 agreement to do that.

14 Q. Have you had the opportunity to review the transcript of the
15 reference?

16 A. No, I don't think I ever have.

17 Q. Have you ever seen it?

18 A. No.

19 Q. The transcript discloses that, in fact, there was an application
20 to file the affidavits of Sgt. MacIntyre and Sgt. Urquhart, and
21 that was opposed by Mr. Aronson. Unless you could cross-
22 examine and the Court then wouldn't allow their evidence to
23 be called. That's what, in fact, happened.

24 A. I wasn't aware of that, I'm sorry.

25 Q. Thank you. Would you agree with me that with respect to the

1 | comments of the court that Mr. Marshall's untruthfulness
2 | contributed in large measure to his conviction and the
3 | miscarriage of justice is more apparent than real and these
4 | sort of things. Mr. Marshall could not appeal from those
5 | comments, could he?

6 | A. I can't think immediately of any way he could, no.

7 | Q. But he stuck with them once the Appeal Court made them.

8 | A. Yes.

9 | Q. Thank you. If you go back to Volume 30 on page 31, this is
10 | the response of Mr. McGuigan to the request for
11 | compensation. That last paragraph I'm interested in, Mr.
12 | Rutherford, where it says:

13 |
14 | The role played by the Federal Crown in
15 | this affair was for the R.C.M.P. to conduct
16 | the investigation which uncovered the
17 | fresh evidence and for the Minister of
18 | Justice to refer the matter for a second
19 | hearing by the Court of Appeal. In my
20 | respectful view, your client's bid for
21 | compensation from the Federal Crown is
22 | misdirected.

20 | You were aware, I think you said, that the R.C.M.P. had
21 | carried out an investigation in 1971.

22 | A. Yes.

23 | Q. Did you ever, to your knowledge, anyone in your department
24 | ever discuss with the R.C.M.P. the investigation that was
25 | carried out at that time?

1 A. Certainly not at that time, to my knowledge.

2 Q. The man who carried it out, Inspector Allan Marshall, has
3 testified before this Commission, and this is on page 5704 and
4 5705 of the transcript, My Lord, that in fact if he had done his
5 job properly, Mr. Marshall would have only been in jail for a
6 couple of weeks, and that's quoting from the evidence. Now
7 given that and the role of the R.C.M.P., do you still think that
8 Marshall's bid for compensations to the Federal Crown would
9 be misdirected?

10 A. Well, quite frankly, I have some difficulty agreeing precisely
11 with the inclusion of the R.C.M.P. role even in the later stages
12 in the 1982, '81/'82 era as being federal activity. I'd have to
13 have, I guess, a more intimate review of who asked them to
14 do what. But I had understood that the R.C.M. Police activity
15 was at the instance of the Attorney General of the province
16 and was conducted by the police under contract acting in
17 their capacity as provincial police. And I'm not sure that that
18 first half of that statement describes a federal role, quite
19 frankly.

20 Q. The first half of Mr. MacGuigan's statement.

21 A. That's right. Had you asked me what the federal role was, I
22 think all I would have mentioned was the exercise of
23 discretion under Section 617 by the Minister. But I say that
24 without having, if there is some record of the R.C.M.P. being
25 tasked in other than their provincial policing role, that might

1 alter the correctness of my observation.

2 Q. I believe you're right. I think the evidence is it was the
3 Attorney General's Department who asked for that to be done.

4 A. The reason that's been my impression, I mentioned this
5 morning, that I had to get, in effect, the consent or the
6 approval of the Attorney General's Department before the
7 R.C.M.P. would turn over their investigation report after Mr.
8 Aronson had brought the matter to our Department's
9 attention and it was treated as a provincial matter by the
10 R.C.M.P. at that point.

11 Q. And you would agree with that.

12 A. Yes. Yes, I think so.

13 Q. In case it arises later.

14 A. Which hat the R.C.M.P. is wearing at any one point is
15 sometimes a difficult thing to deal with.

16 Q. Okay, let me get you to go to page 33 of Volume 30.

17 A. Yes.

18 Q. This is a rather lengthy letter from Mr. Cacchione again to the
19 Minister, Mr. McGuigan, again seeking some assistance.
20 Would this letter have been brought to your attention?

21 A. Yes, I think I can recall seeing that. My recollection is being
22 struck at the time with it being an eloquent description of
23 exactly what had happened in letter form, or with what
24 appears to have happened. I'm pretty sure I saw it at the
25 time, it was a current letter.

1 Q Let me take you to just some comments in it and ask for your
2 views. Page 37?

3 A. Yes.

4 Q In the second paragraph, Mr. Cacchione is talking about
5 Article 14.6 of the Convention and he says, in part:

6
7 How can it be said then that the
8 nondisclosure of a fact is attributable to
9 Marshall since he was completely unaware
10 of the facts indicated in Points 1 to 5?

11 "1 to 5" are the facts about Patricia Harriss, Chant, Pratico, and
12 all these things, which I think is accepted he was unaware of.

13 A. Yes.

14 Q
15 These facts if they had been made known
16 to the defence would have most assuredly
17 have led to Marshall's acquittal in 1971.
18 Even if you did not agree with my
19 interpretation of this covenant, surely you
20 should reassess your position in light of the
21 contents of this letter and its enclosures.

22 Was any consideration given by the department to this plea
23 by Mr. Cacchione?

24 2:16 p.m.*

25 A. Well, I think it's reflected in the response that was sent some
time in January by Mr. McGuigan.

Q. The response being.

A. That essentially...

Q. That it was a provincial matter.

1 A. Well, that's essentially why, I think that's what is to be drawn
2 out of his earlier letter because his position was clear in so
3 many different ways whether...if it wasn't understood to be
4 what I think it was at one instance it may be...it may be clear
5 in another instance and it was not just letters. It was things
6 he said in the House of Commons, his answers to questions
7 and in the public forum where he was reported in the media.
8 And that's why I said in response to your last question this
9 morning that I do not agree...did not agree with the
10 proposition you put to me because I think the evidence shows
11 that at all times the Minister was sympathetic to their being
12 compensation, never...any understanding that compensation
13 wasn't a proper objective to be pursuing. It was a matter of
14 who to pursue it against.

15 Q. Okay. Again on page 37 at the bottom, Mr. Cacchione says,

16
17 I would further point out that even if Mr.
18 Marshall had testified in 1971 to
19 attempting to roll Ebsary and MacNeil this
20 would have made absolutely no difference
21 in the outcome of his trial since he was
22 being pointed out as the murderer by two
23 supposed eyewitnesses who were
24 perjuring themselves.

25 Would you agree that that's a reasonable conclusion?

23 A. Well, you know, I just don't want to be drawn in to evaluating
24 the appropriateness of his analysis as opposed to the Court of
25 Appeal. I think they are in opposition to each other. The

1 Court of Appeal by what it said seemed to think that had
2 Marshall told the truth even to the point of saying he was in
3 the midst of committing a robbery of some sort that the jury
4 might more likely have believed him. It's a little bit like
5 arguing about proximate cause and ultimate cause and I
6 appreciate what you're putting to me but I don't really feel
7 that it's my place to adjudicate it and say who is right.

8 Q. All right. The response to Mr. Cacchione is found on page 42,
9 is that correct?

10 A. Yes, I think the January 24th response refers to his letter that
11 you were...the long letter and one just before it at page 41.

12 Q. Yes, 41 is just seeking to get an answer to his earlier letter.

13 A. That's right.

14 Q. The result, the position taken by Mr. MacGuigan, as you've
15 articulated several times, is go to the province, the province is
16 your place to look for compensation.

17 A. And as we noted earlier in the morning, Mr. Chrétien
18 reflected in his letter in referring the case to the Court in his
19 letter to Harry How of May 31st, 1982, that that was their
20 position, as well, that this was a provincial responsibility.

21 Q. But that the federal government, through its Minister, was
22 sympathetic and thought compensation should be paid.

23 A. Well, the compensation issue was one that the province would
24 deal with. Later it becomes more and more apparent, I think,
25 that Mr. McGuigan was sympathetic. He uses that language in

1 this letter and I have a clipping very close to the same date,
2 the 2nd of March, I think it is, or it's the 3rd of February, it
3 depends which...the 2nd of the 3rd of '84, the Halifax Star,
4 Halifax Mail Star, attributes remarks to Mr. McGuigan at a
5 meeting he was at down here. I'm prepared to read it if
6 you're interested in it. I'm not trying to prove anything
7 except that this position was increasingly clear and was
8 consistent that the province had the obligation to deal with
9 the compensation issue but as the compensation issue was
10 pressed more and more he became more and more concerned
11 that something be done about it, that it not just be allowed to
12 hang in limbo. The headline of that story in the Halifax Star is
13 "McGuigan Shocked at Treatment of Marshall" and he
14 condemned the Buchanan government for "persistent
15 stonewalling" is the quote on that compensation issue.

16 Q. Let me...

17 A. Made remarks consistent with that in the House of Commons
18 at or about that same time.

19 Q. Okay. But consistently took the view and the position that
20 any compensation for Marshall was to be paid by the
21 provincial government.

22 A. That's right. That was part of that position that it was to
23 be...it was to be dealt with but not by the federal government.

24 Q. Yes. The province should pay.

25 A. That's right.

1 Q Let me take you to Volume 32, please.

2 A Yes, I have it here.

3 Q On page 285.

4 A Yes.

5 Q That's a memo from Mr. Gale to the Attorney General, Mr.
6 Giffin, and it looks...it's noted to be received on November the
7 29th of 1983.

8 A Yes.

9 Q And it refers to a call that Mr. Gale had received from you
10 advising that you had been asked by Mr. McGuigan to pass on
11 the message that the Attorney General's stance on Marshall
12 doesn't seem to be washing in public. "You may feel it
13 necessary to launch a Commission of Inquiry into the
14 enforcement of criminal law by police." Was the Minister of
15 Justice considering launching his own Commission of Inquiry
16 here, to your knowledge?

17 A Yes, he was considering it. I must confess I don't have any
18 recollection of using terms such as a position "washing in
19 public" but I do recall very distinctly being asked by Mr.
20 McGuigan to communicate to my contacts in the Nova Scotia
21 Attorney General's Department. I can just indicate that on the
22 day before that telephone call, November 28th, in answer to a
23 question about what was the government going to do about
24 this Marshall compensation question asked of him in the
25 House, Mr. Hnatyshyn, again put his position forward.

1 Q. Mr. Hnatyshyn.

2 A. I'm sorry, Mr. McGuigan, our present Minister is Mr.
3 Hnatyshyn. Mr. McGuigan said, and I'm reading from page
4 29244 of the House of Commons debate, November 28th,
5 1983. He said in part, "Nova Scotia, which of course..." sorry
6 that they, I better read the whole thing. Responding to a
7 question put by Mr. Chris Speyer of Cambridge riding, "As I
8 believe the Honourable Member may know," said Mr.
9 Hnatyshyn, Mr. MacGuigan,

10
11 Those precise questions were asked and
12 answered in this House last week. The fact
13 of the matter is Mr. Marshall was
14 prosecuted by a Crown Prosecutor in the
15 Province of Nova Scotia under the direction
16 of the Attorney General of Nova Scotia
17 after the investigation of a crime by the
18 police of the City of Sydney, Nova Scotia,
19 which of course falls under the jurisdiction
20 of the Province of Nova Scotia. There is no
21 federal involvement under the Department
22 of Justice in the investigation or trial of Mr.
23 Marshall. Although we certainly have no
24 responsibility to do anything, because I am
25 so concerned that the Province of Nova
26 Scotia has not yet assumed any
27 responsibility in this important case, I
28 have discussed the matter with the
29 Attorney General of Nova Scotia and asked
30 him to consider very seriously the
31 responsibilities I believe the province
32 should undertake.

33 Now, either later that day or some time the next morning, I

1 suspect it was after House had recessed on November 28th,
2 the Minister spoke to me and my telephone note of November
3 29th, 1983, is dated...or notated as 8:45 in the morning,
4 "Called Gordon Gale, told him Minister was considering a
5 federal inquiry in Marshall. He agreed that Cacchione would
6 probably welcome it, and not see it as an interference with
7 his civil action." And, that all brings back certainly some
8 recollection to me that there was at least a consideration
9 being given to whether or not if nobody else did anything the
10 federal government could, constitutionally and properly, get
11 involved in some kind of inquiry to deal with this matter of
12 compensation.

13 Q. That's the inquiry you're talking about, a compensation
14 inquiry.

15 A. That's right, yes. This is the end of 1983 at some six months
16 after the decision in May of that year by the Court of Appeal,
17 and the compensation issue still hasn't been addressed, it's
18 become a pressing matter, a lot of people concerned about it,
19 and the province has not made any visible signs to take steps
20 to resolve it at that point.

21 Q. It was also the position of the Minister, I understand, that the
22 fact that a civil action had been commenced by...on behalf of
23 Mr. Marshall against the City of Sydney and others really
24 should not be a bar to dealing with the compensation issue.

25 A. I think the context of that was, and I can't put my finger

1 immediately on anything in the public record to show this,
2 but I believe there are references in letters or public remarks
3 made here in the province that the compensation issue
4 couldn't really be dealt with as long as that civil suit was
5 pending.

6 Q. The province was taking that position.

7 A. I think that was the Province's position, and I put it to Gordon
8 Gale in that telephone conversation that I hadn't spoken to
9 Mr. Cacchione but I had re...I suspected he wouldn't mind
10 having an inquiry, even at the risk of it interfering with the
11 inquiry, sorry, with his civil action. I subsequently confirmed
12 that in a telephone conversation I had with Mr. Cacchione on
13 January 31st, a couple of...two days after this call to Gale.

14 Q. Okay. Turn if you would to page 330 in that same Volume 32.

15 A. Page.

16 Q. 30, 330, sorry.

17 A. Yes.

18 Q. The last page in the volume.

19 A. Yes.

20 Q. Now, that is noted to be February 23rd, '84, I don't know if
21 that's Mr. Gale's writing or Mr. Aronson's. I'm not...I'm not
22 sure, or Felix, now we're into Felix...that handwriting experts
23 are... Do you recall speaking with Mr. Cacchione on February
24 23rd?

25 A. I have not had any stimulus to go back and look at telephone

1 diaries or anything for that day. I have, as I said a minute
2 ago, a note of a ...that my handwriting starts out "Spoke at
3 length to Cacchione" and it's dated January 31st, '84. I may
4 well have had another conversation with him although the
5 January 31st one is the one that I recall as perhaps the most
6 extensive discussion.

7 Q. Well, let's deal with what it says here, "Substantial discussion
8 between two deputies, Coles and Tassé."

9 A. Roger Tassé was the Deputy Minister of Justice at that time.

10 Q. Do you know if there was a discussion, in fact, between those
11 two deputy ministers?

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

13 Q. I can't make out the next, "Not the..." something or other. "Not
14 the Minister." Okay. "MacGuigan prepared to contact Giffin if
15 necessary in Halifax next week." Were you aware of that?
16 What was the date of that quote from the newspaper that you
17 said again? It was either March the 3rd or February
18 the...March the 2nd or...

19 A. The 2nd of the 3rd. It's either the 2nd of March or the 3rd of
20 February.

21 Q. Okay.

22 A. Depending on whether you go by the R.C.M.P. date system or
23 everyone else's. I can't really say which it is.

24 Q. Okay. Down at the bottom he says, "Fed thinking is that even
25 if Inquiry presented difficulties what is the point of the

1 Inquiry? Isn't compensation the bottom line?" Do you recall
2 having any discussion to that effect with Mr. Cacchione?

3 A. Not specifically, but that was...that's part and parcel of the
4 whole subject matter that a lot of people were talking about.
5 If compensation was the bottom line, how were we going to
6 get at it.

7 Q. Okay. Now, eventually there was compensation paid to Mr.
8 Marshall, you're aware of that.

9 A. Yes.

10 Q. And you are aware that the federal government did pay one
11 half of the amount.

12 A. That's correct.

13 Q. Now, was that a change in position of the federal
14 government?

15 A. I would have a difficult time calling it other than a change. A
16 modification at least.

17 Q. Any event happen that changed...that modified the position?

18 A. In November of 1984 there was a meeting of federal...what
19 was called a Federal-Provincial Conference of Ministers
20 Responsible for Criminal Justice and Juvenile Justice. In short
21 a Minister of Justices meeting for the...and Attorneys General,
22 federal, provincial, held at St. John's, Newfoundland in
23 November of 1984. The Minister of Justice at that time was
24 The Honourable John Crosbie and he made the following
25 public statement following that conference, and compensation

1 of persons wrongfully convicted was one of the major topics
2 discussed at that meeting. His public statement was,

3
4 Ministers recognize the injustice committed
5 to those who are wrongfully convicted and
6 imprisoned. I believe the federal
7 government has a responsibility in this
8 area, a view welcomed by my provincial
9 colleagues. Ministers agreed to set up a
10 federal/provincial task force of officials to
11 review the matter and develop options for
12 ministerial consideration.

13 And that task force was set up and did consider the whole
14 area. As I say that statement was made in November of
15 1984. I think the payment by the Province of Nova Scotia to
16 Marshall of compensation in the amount of \$270,000 was
17 sometime in the spring of 1985, May or something in that
18 area. I'm not sure. And, I think the federal government
19 made, in effect, a contribution...I'd have to rely on someone
20 else to say whether it went directly to Mr. Marshall or
21 whether it was a...in effect a reimbursement of half of what
22 the province paid him by paying it to the province, sometime
23 in the spring of '85.

24 Q. I can get you that date if I can find...

25 A. I'm just trying to put the thing in the context that you said,
was there a change. There was certainly...the compensation
issue got dealt with, money was paid, federal and provincial
Ministers agreed that there was some kind of sharing of

1 responsibility, a task force was put in motion. It reported in
2 September of 1985 and, in fact, I hope you have a copy of the
3 report, it's not one that was published, but it has been in the
4 public domain. I think it was discussed at some meeting or
5 meetings of the Canadian Bar.

6 Q. This will be filed later, My Lord, but in Volume 33 at page
7 565(A), you don't have that, Mr. Rutherford, a federal
8 government cheque in the amount of \$135,000 was
9 forwarded to the Province of Nova Scotia, \$135,000 which is
10 one half the amount of the com...of the payment. That was
11 May 31, 1985. Now, this task force report that you're talking
12 about, yes, I do have a copy and I thank-you for that. I
13 understand you have no objection to it being filed as an
14 exhibit with this Commission.

15 A. No, I think the position of the department, although the
16 document is headed "Confidential" it was a document shared
17 in by at least seven provinces who worked on it, as well as
18 representatives of the federal government, and I think, as I
19 say, that it's in less than total distribution, but certainly in the
20 public domain, as I say I'm pretty sure it was discussed in
21 some measure in one of the national meetings of the Canadian
22 Bar.

23 Q. And this was...what's the exhibit number.

24 REGISTRAR

25 Number 128.

1 EXHIBIT 128 - REPORT OF FEDERAL PROVINCIAL TASK FORCE OF
2 SEPTEMBER, 1985

3 Q. Just briefly for the record then, Mr. Rutherford, explain again
4 what this is, a federal provincial task force report?

5 A. Yes, I think, as a matter of fact, rather than taking you all
6 through it, I'd just refer you to the first page after the index
7 which is a letter from the coordinator of the task force to the
8 Deputy Minister of Justice of the day Mr. Roger Tassé, dated
9 September 19th, 1985, and it essentially says what this is,
10 how the federal provincial task force came about and that this
11 is their report. The next page lists the province's delegates
12 that participated in the work.

13 Q. And Nova Scotia participated in the work of this task force.

14 A. Yes, it did.

15 Q. Do you know if the recommendation of this task force have
16 been adopted at any level?

17 A. The task force doesn't make specific recommendations. It
18 canvasses a lot of the issues and it makes what you might call
19 recommendations for ways of approaching this, but they're in
20 the alternative some of the positive and negative features of
21 some of the suggested possibilities are pointed out. But it's
22 really at best an options paper or a discussion paper. And it
23 has received a lot of attention. It's under...it is, I think the
24 only way to put it is under consideration in our department at
25 the present time still.

1 Q. Has your department, in particular you, been involved at all
2 in any cases actually negotiating or determining the amount
3 of compensation to be paid to a person who was wrongfully
4 convicted?

5 A. Not...I haven't and not to my knowledge has anyone else in
6 the department been involved in determining the amount. In
7 fact, the only other case that I'm aware of is also referred to
8 in this paper, it's the Fox case in British Columbia, and the
9 pattern followed there was very similar to what was followed
10 here in Nova Scotia. The province named a Judge, as I recall
11 it, to review and recommend on compensation and the federal
12 government paid the province fifty percent of the amount
13 that the Judge recommended or agreed to pay. I must admit
14 I'm not even sure of when that was paid. There was some
15 issue of whether some of it should be withheld as payment to
16 a victim of crime in the matter. It got a bit complex.

17 Q. The decision of the federal government to pay one-half of the
18 compensation here was...do you know if that was made prior
19 to the amount being negotiated with Mr. Marshall or did the
20 federal government have any input into the principles to be
21 applied or the negotiations to be carried out with Marshall's
22 counsel?

23 A. I don't think that there was any substantial, in fact I'm not
24 sure that there was any involvement of our department in
25 any negotiations or in the deliberations or proceedings before

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1 Mr. Justice, was it Mr. Justice Campbell?

2 Q. Campbell, yeah.

3 A. And without knowing when he made his recommendation, I
4 really don't know whether there was any agreement...it was
5 essentially, I think after the federal provincial meeting
6 referred to in November when Mr. Crosbie made his
7 statement that the federal commitment to pay half was made.
8 Now, just when the \$270,000 figure was arrived at I just
9 don't know.

10 2:36 p.m.

11 Q. It was in the fall of 1984. I believe it was around September
12 of 1984.

13 A. Yeah. Well, I'm just a little on thin ice because I wasn't
14 personally involved. I suspect that those discussions involved
15 Ministers face-to-face at that meeting and my, I think I'm
16 probably correct in thinking that the agreement to pay half
17 came after the determination of the amount.

18 MR. MacDONALD

19 That's all I have, thank you very much.

20 EXAMINATION BY MS. EDWARDH

21 Q. Mr. Rutherford, you've described the paper in question as
22 being, in essence, an options paper. Is that correct?

23 A. Yes, I, the compensation paper.

24 Q. Yes.

25 A. As opposed to one that one could take and say, "Now, here's a

1 recipe to follow." There are several possible recipes in it.

2 Q. But what is clear, if one turns to page 2 of the introduction, in
3 what is not described as an option, is the fact that,

4 Canada, as a signatory to the international
5 covenant on civil and political rights, is
6 obliged to pass some kind of statutory
7 regime dealing with the compensation of
8 those who have been wrongfully convicted
9 and imprisoned.

10 Is that a fair statement?

11 A. It's a little more precise than I think I would have made if
12 asked how to formulate that. I think it certainly leans in
13 favor of the implementation of that international obligation
14 should be by statute, although it raises that as one of the
15 questions. And I think it determines it in that fashion. But
16 probably it's a statutory recipe if it's going to be according to
17 law.

18 Q. Well that's certainly set out at the middle of page 2 when the
19 authors of the report say,

20 The expression shall be compensated
21 according to law would appear to lead to
22 the conclusion that entitlement to
23 compensation should be based on the
24 statute. This view is reinforced by the
25 general thrust of Article 2 of the
Covenant...

It goes on to state Article 2. So certainly the authors appear
to support the view that there ought to be a statutory scheme.

1 A. They think it appears to lead to that conclusion and the
2 phrase in the Covenant is "adopt legislative or other
3 measures".

4 Q. And it says, "should be based on a statute."

5 A. Yes.

6 Q. Yes. And if one were to take at least that as the view for the
7 moment what has been done, or is being done to create a
8 statutory framework for compensation for those wrongfully
9 convicted and imprisoned?

10 A. Well, as I said to Mr. MacDonald, this matter is under
11 consideration in the Department of Justice at the present time.

12 Q. When you say "under consideration", can you at least assist us
13 to determine whether or not a, it is as far as having a
14 proposed legislative package that people are reviewing?

15 A. I really can't assist you by going any more, into any more
16 precision. It's really a matter that I can only say is under
17 consideration.

18 Q. You have described a process of decision making by Mr.
19 MacGuigan whereby you've indicated that he asserted on
20 numerous occasions that it was a provincial matter, a
21 provincial responsibility for the Government of No-, and
22 therefore, the Government of Nova Scotia ought to deal with
23 the question of compensation for Mr. Marshall. Do I take it
24 from that, as well, that he was saying that there is now, or
25 was then some jurisdictional dispute as to who bore the

1 responsibility in cases where there was an allegation of
2 wrongful conviction and imprisonment?

3 A. Well, I don't know whether he was saying there was any
4 dispute. There wasn't in his mind.

5 Q. But he was saying it was provincial.

6 A. Yes.

7 Q. And I take it the view now, the question I'm posing to you, is
8 it now accepted that it is a joint responsibility?

9 A. Well I can only point you to what Ministers have said. He
10 took that position and he said what he said. Mr. Chrétien, in
11 his letter to Mr. How, May 31st, '82, said we haven't put it in
12 the reference to the court at your request because how to
13 determine it and how much you say is your responsibility.
14 And Mr. Crosbie's statement in November of 1984 is exactly
15 as set out in, and it's in this task force report, which I read a
16 few moments ago on page 1 of the introduction. And the
17 actual words of Mr. Crosbie are, "I believe the Federal
18 Government has a responsibility in this area."

19 Q. So, then, I take it at least today, as opposed to when Mr.
20 MacGuigan may have written the letter, there is at least the
21 view as represented in this paper that it is a joint
22 responsibility, or there is a portion of the responsibility that
23 the Federal Government bears.

24 A. There's no more current statement than that one of Mr.
25 Crosbie in '84 that I'm aware of, no.

1 Q. Okay. When the Federal Government paid, or agreed to pay
2 the 135,000 to the Nova Scotia Government, was there any
3 discussion that you are aware of as to the principles upon
4 which that settlement had been agreed to, or its propriety or
5 whether or not legal fees for Mr. Marshall's counsel should be
6 covered in that amount?

7 A. I was not involved at all in that. I do not believe anyone
8 from our department was involved in working out any of
9 those details. I think it was based on, it was recognition of
10 the federal role that Mr. Crosbie had spoken about but I think
11 it was important that it was a reimbursement or a payment to
12 the province who had worked out settlement arrangements
13 with the help of Mr. Justice Campbell.

14 Q. So to the best of your knowledge there was no federal
15 participation in determining either the principles or the
16 quantum.

17 A. To the best of my knowledge.

18 Q. I'd like to take you back to Sections 617 and 683 of The
19 Criminal Code if I could, for a moment. Would it be a fair
20 statement, sir, in examining these provisions to draw the
21 conclusion that really the onus is upon the convicted person
22 to come forward with new evidence in order to make a
23 showing to the Minister that some remedial action ought to be
24 taken?

25 A. Well, under 617 it's where the Minister is satisfied. I guess in

1 this legal system of ours, the way the government works, it's
2 fairly obvious that in the absence of some system of going out
3 and reviewing cases of his own motion, that the Minister is
4 likely to be triggered into an application like this at the
5 instigation of the accused person. And there's no doubt
6 experience shows that we look at these things mostly on the
7 basis of what is initially presented and pursue it then to the
8 extent that appears necessary...

9 Q. So if one...

10 A. But I don't look upon it as a real onus in the sense that
11 there's...

12 Q. It's a practical onus.

13 A. Yes.

14 Q. And of the, for example, 14 cases or 14 occasions when the
15 Minister has made a positive reference to the court, would it
16 be fair to say that in each of those the applicant who brought
17 the matter forward was the person who had been wrongfully
18 convicted or alleging he was wrongfully convicted?

19 A. Well I don't know of any case where it didn't happen that
20 way. I know the names, some of them are familiar.

21 Morgentaler in the '70s and Shatford and some of those cases.

22 I wouldn't be surprised if a review of each of those files
23 showed that they started by the applicant writing to the
24 Minister.

25 Q. Now it seems as though if one were to look at the facts of this

MR. RUTHERFORD, EXAM, BY MS. EDWARDH

1 case, it would be fairly easy to conclude that but for the
2 investigation conducted by the RCMP in 1982, Staff Sergeant
3 Wheaton, the Minister would not have had a basis upon which
4 he could have easily acted. Would you, or could have acted.
5 Would you agree with that? That that forms the basis...

6 A. As far as I know.

7 Q. And do you know, sir, whether there is any case where a
8 person who alleges that they have been wrongfully convicted
9 has come forward with small amounts of information and the
10 Minister of Justice has, himself, directed an investigation?

11 A. Well...

MR. BISSELL

13 I would object to that question on the basis of relevancy. I
14 wonder how relevant to this Inquiry that particular...

CHAIRMAN

16 I was more concerned, which Minister of Justice are you
17 referring to? The Province?

MS. EDWARDH

19 Well, I suppose, really, any of the ministers that Mr.
20 Rutherford...

CHAIRMAN

22 No, no. I don't mean the person. The Minister of Justice of
23 Canada or the Minister of Justice of the province?

MS. EDWARDH

25 No, of Canada. I'm interested really, and let me just

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1 And I don't think that's proper.

2 MS. EDWARDH

3 It's certainly the statutory regime that Mr. Rutherford has
4 been talking about all morning. I am interested in what
5 procedural mechanisms back the exercise of a Minister's power
6 under Section 617. There may be none or there may be some, but
7 certainly...

8 CHAIRMAN

9 I don't want to answer the question for him but it seems to
10 me it's set forth that somebody has to make an application by or
11 on behalf of a person that has been convicted. That's the
12 legislative or statutory procedure set forth in the Criminal, in the
13 Criminal Code. The province has responsibility for enforcing the
14 Criminal Code. I'm concerned about the objection taken on behalf
15 of the RCMP, or who's representing today...

16 MR. BISSELL

17 Today.

18 MR. RUTHERFORD

19 Mr. Bissell's my counsel, too, I understand.

20 CHAIRMAN

21 All right, Mr. Bissell's your counsel. All right. We have
22 difficulty in sorting out people as to who they represent.

23 MR. RUTHERFORD

24 I've always understood Mr. Bissell to be representing all the
25 Federal interests except those that, in fact, the Federal

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1 Government's interests.

2 CHAIRMAN

3 True.

4 MR. RUTHERFORD

5 Some RCM Policemen have private representation.

6 CHAIRMAN

7 I don't, this Commission has enough problems without getting
8 into Federal jurisdiction. And it would be outside of our mandate
9 anyway. I would like to hear as to any ram-, any amplification
10 that Mr. Rutherford can give me, can give us as to how you go
11 about making this application to the Minister. How does it come
12 to his attention. Obviously a Minister of Justice of Canada has no
13 way of knowing of his own volition if there's been a miscarriage of
14 justice or a suspected miscarriage of justice somewhere in Canada
15 unless it's brought to his attention. The Code says upon
16 application. And I think we can keep that within the bounds of
17 our mandate.

18 COMMISSIONER EVANS

19 What more do you want to know?

20 MS. EDWARDH

21 Well, I guess the fundamental...

22 COMMISSIONER EVANS

23 Anybody can write in that feels...

24 MS. EDWARDH

25 The fundamental issue is a very grassroots one.

DISCUSSION

1 COMMISSIONER EVANS

2 Is it?

3 MS. EDWARDH

4 But in many cases an accused person can say, "I have been
5 wrongfully convicted." But if you're sitting inside a penitentiary
6 you neither have the resources nor the capacity to go out and find
7 that evidence on your own. So the real issue becomes, and Mr.
8 Marshall sat inside prison for a very long time and acquired the
9 names of some, of Mr. Ebsary eventually, but the real issue for
10 people in his situation is how do you get someone to investigate
11 the matter once you make that allegation? Does it require, or can
12 the Minister of Justice request through the Attorney General of
13 the province, and has he done it, that an investigation be
14 conducted. Or is it up to the convicted person inside to somehow
15 acquire the capacity, either through good fortune or luck, to go out
16 and gather this evidence himself. And I think that whether there
17 is a reliable mechanism in place may be an issue that is of concern
18 when dealing with those individuals wrongfully convicted.

19 COMMISSIONER EVANS

20 Ms. Edwardh, considering the number of people in penal
21 institutions and the number of people who think they've been
22 unjustly convicted, you would need an army of investigators,
23 would you not? Or how do we get to a practical (manner?).

24 MS. EDWARDH

25 That's very interesting. When you read the introduction to

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1 the paper that was referred to by Mr. Rutherford, you see that it,
2 the statutory regimes that have been promulgated to deal with
3 unjust convictions have, in fact, over the years led to not a flood of
4 applications but fairly limited number of applications being made
5 and awards granted. And that it certainly has not been opening
6 the flood gates. It is an issue, I think Your Lordships, when you
7 have occasion to review the paper, will see that is of some
8 importance. What forum should adjudicate upon it? How does it
9 get before the forum? Is there anybody qualified or around or
10 available to investigate? And certainly my friend has answered
11 the question and I'll find the notation. Mr. MacDonald asked him,
12 "Could you have investigated the criminal, the possible criminal
13 charges arising from this?" And Mr. Rutherford's answer to him
14 was, "Well, I chose not to because I was satisfied that the
15 provincial government was going to do this." I'm certainly not
16 going, really any farther afield than to ask what investigative
17 resources he has to help people who bring an application under
18 the provision. This is not a matter of provincial jurisdiction, this is
19 a matter of Federal jurisdiction. And it's how the application
20 would work.

COMMISSIONER EVANS

22 Well isn't there a Federal ombudsman who looks into matters
23 of this kind?

MS. EDWARDH

25 I'm not sure, My Lord.

DISCUSSION

1 COMMISSIONER EVANS

2 Well, I think there is.

3 MS. EDWARDH

4 I don't know whether my friend has any objection to
5 answering that question, or his counsel has any objection.

6 MR. BISSELL

7 It seems to me the thrust of the question is going into the
8 (adequacy?) or the perceived inadequacy of the Criminal Code and
9 that's a long road to embark upon and I think a wrong road.

10 CHAIRMAN

11 Well, I don't quarrel with you on that. If what Mr. Edwardh's
12 is looking for is to simply find out from Mr. Rutherford what the
13 procedure is, that's usually followed, that seems to me to be
14 relevant. Whether or not the procedure is adequate, it would not
15 be appropriate to put to this witness.

16 MS. EDWARDH

17 No, I don't need to. That's an issue that, I'm sure, could also
18 be dealt with even under Provincial jurisdiction. There is no
19 exclusive Federal jurisdiction in this matter and all I'm really
20 interested in is how does a person who alleges they're wrongfully
21 convicted go about getting into a Section 617, especially if they
22 need assistance.

23 COMMISSIONER EVANS

24 I'd like to (add?), is there not a Federal ombudsman?

25 MR. RUTHERFORD

DISCUSSION

1 I don't think so, My Lord. We've talked about it a lot and I
2 don't think there is one yet. There are ombudspople in various
3 areas. Prison complaints, information, commissioners, things like
4 that. But I don't think, as such, a Federal ombudsman with total
5 jurisdiction...

COMMISSIONER EVANS

7 I meant, I really should have restricted it to penal
8 institutions. Is there not, at one time there was some lady in the...

CHAIRMAN

10 I used to play football...Mr. Stewart, isn't it? Davie Stewart.

MR. RUTHERFORD

12 Yeah, but you're right. It was, it was Miss Inger Hansen who
13 was the first...

COMMISSIONER EVANS

15 That's who I was thinking of.

MR. RUTHERFORD

17 One and Mr. Ron Stewart, is the Complaints Commissioner, I
18 think, would be one of the names he's called. Ombudsman in
19 penal matters. You know, I don't mind trying to address generally
20 and briefly what Ms. Edwardh is asking but I can't really describe
21 in relation to, in just a general way, how it works. It depends in
22 each case how the matter is raised what happens. Certainly an
23 applicant who writes in and says, "I was wrongfully convicted, do
24 something. " Or something a little more precise than that will
25 inevitably get a letter back saying, "You're going to have to do

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1 | more than that. In what sense, and give us details, provide
2 | particulars," and if those are forthcoming and it still makes sense
3 | he or his lawyer is going to be asked to provide the trial
4 | transcripts and any appellate materials and they're going to be
5 | read and then the provincial Attorney General that prosecuted the
6 | case is going to be consulted and pending on the facts the police
7 | reports will be reviewed and at each stage it involves looking
8 | more and more deeply at whether or not there seems to be
9 | anything to look at. And there are many, many cases that it
10 | seems at an early stage there is nothing that can be done and
11 | there are other cases that have involved a tremendous amount of
12 | legwork, either by the force of original investigating jurisdiction
13 | or at special instance of our department, the RCM Police
14 | interviewing witnesses, re-interviewing witnesses, investigating
15 | or conducting certain inquiries and in many instances the lawyers
16 | themselves in the department are dispatched to interview experts
17 | or new alibi witnesses. In the Marcotte case, which is one of the
18 | references in the record, this history of this thing, I know one of
19 | the lawyers went and interviewed the so-called "new" witness
20 | and there was an evaluation made. Ultimately it was put to the
21 | Court and the Court said, "No, this isn't fresh evidence." So it
22 | depends very much on each case, just how far one goes. But the
23 | more precise the complaint, the more founded in information the
24 | complaint is put forward, the faster and more precise the
25 | attention can be given to it. But I say that all in the context of

DISCUSSION

1 | there being two or three lawyers in the government of, the
2 | Department of Justice, who are responsible for other criminal law
3 | matters, too, that have the expertise and are regularly deployed
4 | on this kind of work. And in some, at some point, in some years
5 | we are very, very hard-pressed to keep up with the ones that
6 | require serious examination.

MS. EDWARDH

7 |
8 |
9 | Q. If I hear you, then, correctly, Mr. Rutherford, what you are
10 | saying is in theory you have the capacity to mobilize not only
11 | lawyers but also the RCMP, on occasion, to conduct interviews
12 | or ask questions of witnesses if you choose, and it's a question
13 | of allocating resources and having the time to do it, or it being
14 | the right case to do it in.

15 | A. A question of judgement in every case.

16 | Q. The question that Mr. MacDonald posed to you about pardons.
17 | I take it that you've indicated only one person has been
18 | granted a full pardon in Canada in recent years.

19 | A. In recent years and I stand subject to the additional
20 | information that others who know about other cases may
21 | bring, such as Chief Justice Evans' comment this morning.

22 | Q. And would it be fair to say that the reluctance to grant a
23 | pardon is in part viewed, in part based upon the fact that in
24 | many cases some public airing of the matter is preferable?

25 | A. I think it's a strongly held view in some quarters that a free

1 pardon should be granted only where it can be shown that it
2 is the only effective remedy. And the notions of public airing
3 that were in Mr. How's letter that we looked at this morning
4 are certainly an important part of it. But that's only one
5 aspect of it.
6

7 Q. Can you give me an example of a case of someone saying that
8 they're wrongfully convicted where a pardon would be the
9 only effective remedy?

10 A. Well I really don't want to get into an examination of the Fox
11 case because it requires a detailed knowledge of it that I'm
12 not sure I can bring forward at this point. But Fox, which is
13 cited in this Compensation Task Force report is a case where
14 free pardon was given. It did not go back to the Courts.
15 There are some people who thought that it was a great
16 mistake that it wasn't referred back to the Courts. I think it's
17 a matter of record in that case that the Provincial Attorney
18 General in British Columbia strongly opposed it going back to
19 the Courts and there were problems in resurrecting the
20 evidence in that case. The prime witness, who was the
21 victim in the offence, had suffered a very serious motor
22 vehicle injury and, in effect, could never be expected to be
23 able to give testimony again. So that a consideration of
24 whether it was the only effective remedy certainly arose.

25 Q. Okay. That just clarifies that kind of circumstances that it

1
2 can occur. Let me ask you to deal briefly with conditional
3 pardons. There is a notion that abounds both here and
4 elsewhere that the number of wrongfully convicted
5 individuals is very limited. Would you accept that as a
6 generally-held belief? It's a rare circumstance.

7 A. I guess it depends who you talk to. I know there are some
8 that hold that it's very rare and some that hold that the
9 penitentiaries are full of wrongfully convicted people.

10 Q. And so those of us who...

11 A. It's a view held widely in the penitentiaries.

12 Q. I'm not precisely speaking of that community. In the
13 community that, the legal community, would you agree that it
14 is generally of the view that individuals wrongfully convicted
15 constitute a very small group.

16 A. I suppose so.

17 Q. And would you also agree that with the advent of Charter
18 litigation and the increased possibility that laws could be
19 found to be unconstitutional after a substantial number of
20 individuals have been convicted, that there is a greater
21 likelihood for a growing group of "wrongfully convicted
22 individuals"?

23 A. That begs the legal question of whether a person convicted
24 under a statute found subsequently to be unconstitutional has
25 been wrongly convicted. I think the matter received

1 consideration. I'm just trying to think of the case in the
2 Supreme Court last May dealing with the issue of estoppel
3 and, essentially, saying that the Courts, that there is, that you
4 don't re-open cases in those circumstances.
5

6 Q. That may be an issue that's yet undetermined. For example, I
7 guess my question to you is, has the Department taken any
8 steps to open up avenues of redress for, let's say, the small
9 class, or the class of individuals that would be affected in a,
10 by the Vaillancourt decision, which is, of course, one dealing
11 with constructive murder. Or is that not an avenue that one
12 would go through conditional pardons for?

13 CHAIRMAN

14 I have to intervene here. This is totally beyond, outside the
15 scope of this Inquiry and, plus there may be some general
16 public interest in what the Government of Canada is looking
17 at with respect to that decision is not relevant to this Inquiry.

18 MS. EDWARDH

19 Well, may I pose the question generally, then, and get Your
20 Lordship to make a ruling.

21 It would seem that the need for a mechanism to be available
22 in circumstances where there may well be a growing body of
23 individuals or groups who are alleging wrongful conviction, is
24 very real, as a result of the Charter. And with, leaving aside
25 any decision, my friend mentioned, or Mr. Rutherford

1 described that the Solicitor General had used conditional
2 pardons in the past as a mechanism to deal with
3 imprisonment. That the Minister of Justice hadn't but that
4 was what it's use was. And I'm, I'd like to just pose the
5 question to him, "Has there been any expansion of that
6 mechanism as a result of Charter litigation?"
7

8 COMMISSIONER EVANS

9 If the Government moved that quickly I would be surprised.

10 MS. EDWARDH

11 Well, there's always hope. I think it's a simple question. It
12 doesn't...

13 COMMISSIONER EVANS

14 Well I'm not sure this witness is in a position to answer that,
15 is he?

16 MR. RUTHERFORD

17 I'm not aware of any, I think I understand what you're saying
18 Ms. Edwardh.

19 MR. EDWARDH

20 Q. You're not aware of anything, any steps taken.

21 A. Not aware of any use of this mechanism in a new expanded
22 way discernible at this point.

23 Q. Let me ask you to turn your mind to your description of why
24 there was a change of, or a decision taken to move from
25 617(c) to 617(b) as the appropriate section which to order the

1 reference. And I am rather puzzled by a number of
2 comments that you made. The first is, and I guess I'm trying
3 to figure out how seriously you want to put the position
4 forward, it's Section 610, subsection 8 of the Code would
5 permit the Ontario, would permit the Court of Appeal, Nova
6 Scotia Court of Appeal, to deal with the question of
7 compensation under an ordinary, on the basis of a reference
8 under 617(b). And if so, if I recall your evidence, let me start
9 and go through that. I gather your testimony, sir, was that if
10 a reference took place under 617(b) that the full powers of
11 the court of appeal were brought in and those powers are
12 enumerated in 610. Correct?

13 A. 610 and 613.

14 Q. Yes. And included in 610 is the general power to make any
15 order that justice requires. 610, subsection (8), correct?

16 A. Is that 610 or is it in 613? I'm sorry, I haven't got the full
17 text in front of me.

18 Q. I think it's 610. Let me just check.

19 A. I think it's...

20 Q. And in answer to Mr. MacDonald's question...

21 A. I think it's in 613.

22 Q. 613? Yes. In answer to Mr. MacDonald's question, you said
23 that the reference, a reference under 617(b) could give rise in
24 the court to consider the issue of compensation. And my
25

1 that such an independent claim could be considered by the
2 court under sub-section (8).

3 A. Not that I'm aware of. I made that remark in the context of
4 Chief Justice Evans' suggestion or question which, as I recall,
5 was by moving to 617(b) had you effectively foreclosed the
6 Court of Appeal from dealing with compensation. And I said,
7 well, subject to their use of sub-section (8). In other words,
8 I'm not sure that it forecloses it at all.

9 Q. Would you agree that in great probability it did? To hear the
10 issue of compensation one would have to hear independent
11 evidence. It would be evidence that there was no earlier
12 record in relation to. It would be entertaining a whole new
13 jurisdiction that would not traditionally be part of any appeal
14 for an indictable offence.

15 A. That's true.

16 Q. And in great probability the construction of that power in
17 sub-section (8) wouldn't extend to that new jurisdiction. It's
18 certainly an ancillary jurisdiction, is it not?

19 3:06 p.m.

20 A. Well, it's a legal issue. I'm not in a position to have to decide
21 one way or the other. I've never written an opinion on it.
22 I've never seen it argued but I raise it because that
23 section....Have you ever considered having a trial where
24 you're limited by the use of that section to one defence, even
25 though you might want to raise others? It's a section that

1 hasn't been widely used and I just didn't want to say that it
2 absolutely foreclosed the court from getting into it.

3 Q. Certainly you're not suggesting it's a clear-cut basis for the
4 Court to exercise that jurisdiction.

5 A. No, I'm not.

6 Q. Now in terms of Sec. 617(c), could you not have posed the
7 question, and let me see if I can word it this way. Could you
8 not have asked the Court of Appeal this question. Whether or
9 not given new evidence which they are requested to receive,
10 the verdict would be considered reasonable or still be
11 considered reasonable, or would it be an unsafe verdict?

12 A. I think that could have been asked, yes.

13 Q. So that if you had posed the question in that way under
14 617(c), then the issue of admission of evidence as being a
15 separate exercise of the court's power wouldn't have arisen.

16 A. I don't follow that.

17 Q. The issue you describe there as being the problem was the
18 fear in the Nova Scotia Court of Appeal that they might have
19 no power to receive evidence under 617(c), correct?

20 A. Notwithstanding that it was proposed in the reference to
21 invite them to do so. The statutory power to receive the
22 evidence is found in 613 where it's an appeal from conviction,
23 not an opinion requested by the Minister. That was, as I
24 understood Chief Justice MacKeigan, that was the concern he
25 saw that would arise if we went that way.

1 Q. So then I take it that his concern given applied to the
2 situation where within the question itself they were directed
3 to consider the effect of the evidence on the conviction.

4 A. And as I say, and I really hope to be fair of the position that
5 the Chief Justice was putting forward. He wasn't saying,
6 "Look, this is a problem." He said, "It seems to me and I see
7 this arising and I'm not at all sure. You'll have to decide." So
8 like your other question, there is nothing definitive about it,
9 but it was a cloud that he saw that could get in our way of
10 accomplishing what we were trying to do.

11 Q. I take it that when you weaved away from 617 Subsection (c)
12 into 617(b) that you had no occasion to consult with Mr.
13 Marshall's counsel as to the wisdom of that course of action or
14 the problems as he saw them.

15 A. Well, I talked to him about it but I wasn't in the position at
16 that time of having a lengthy consultation with him. I told
17 him that we had this conversation, this problem that had
18 emerged, and this is what we proposed to do. Had he
19 registered very serious objection, depending on what it was
20 based, it might have altered our thinking. It was a
21 consultation in that, to that extent.

22 Q. In the course of your consultation, do you recall what position
23 he took?

24 A. Yes, I think I said this morning that initially he seemed
25 concerned, possibly even upset. This was a last minute

1 change of plans. He wasn't sure exactly what was behind it
2 all. He hadn't had a chance to think of the ramifications. We
3 probably talked for 10 or 15 minutes. As I say, he had a
4 stenographer take the whole thing down and my note at the
5 end of the conversation, my note about it was that I thought
6 he seemed content with the arrangement at the end of the
7 conversation.

8 Q. Was the primary concern that Mr. Marshall would be
9 subjected to a new trial?

10 A. Not, I don't recall that being his primary concern. I think he
11 was more concerned of what's going on? A change? I
12 thought we had this all straightened out. I got used to
13 thinking we were doing it one way and now suddenly you've
14 changed. I think he just wanted to know what were the
15 implications.

16 Q. Now you also stated in an answer, I think, to a question from
17 Mr. MacDonald that it was your view that under 617(b) that
18 an appeal might well be taken. There was nothing to
19 preclude it when you read the statute. So it was different
20 from 617(c) in that regard.

21 A. Yes.

22 Q. And I take it although you put forward that view, there is no
23 authority that you are aware of where any reference has
24 resulted in an appeal going from, let's say, the Court of Appeal
25 to the Supreme Court of Canada?

- 1 A. I haven't examined the authorities. I know of none but I
2 haven't searched and found none. I haven't searched.
- 3 Q. Now other than the phone calls you've described as having
4 occurred to the Chief Justice of the Nova Scotia Court of
5 Appeal, did you have any other telephone calls with members
6 of the court in relation to this matter?
- 7 A. I have, I know Mr. Justice Hart responded in writing that the
8 reference had been received. I'm not sure that he might not
9 have called to say that it had been received, but I don't recall
10 any discussion, and I'm not even sure that he phoned to give
11 that message. But there were no, apart from that, I know of
12 no other conversations.
- 13 Q. No other telephone conversations in particular.
- 14 A. No.
- 15 Q. You became involved, at least in a minor way in Mr.
16 Aronson's discussion with the Department of Attorney
17 General here as to the possibility for assistance in paying his
18 fees.
- 19 A. Yes.
- 20 Q. And I take it that you also had some discussion with Mr.
21 Giffin, is that correct?
- 22 A. I personally didn't. I don't ever recall talking to Mr. Giffin.
- 23 Q. Do you recall whether or not you would have had occasion to
24 make representations on Mr. Aronson's behalf about the low
25 level of the tariff and the need for some extra assistance

1 being made available to him?

2 A. Yes, I have a nonspecific recollection of trying to see if, as I
3 think I put it this morning, whatever the best arrangement
4 that could properly be made in the province was made. I
5 think I spoke directly to Gordon Gale about it on one occasion.

6 Q. And what response did you get?

7 A. I don't recall any specific response other than he would get
8 what was available.

9 Q. Do you recall being told, sir, that there would certainly be no
10 money outside of what could be made available through Legal
11 Aid?

12 A. I might have been told that, I might well have been. I don't
13 specifically recall anything that precise but, on the other
14 hand, nobody ever suggested there would have been anything
15 other than what was involved in Legal Aid.

16 Q. Did you make any efforts to have discussions with any of
17 your colleagues in Ottawa or any other department with
18 respect to assistance for Mr. Aronson?

19 A. Mr. Aronson tried in a number of places in Ottawa to get
20 assistance. I think he tried the Indian Affairs Minister. He
21 may have tried others. I know at one point there was
22 attention being paid in the government in more than just the
23 Justice Department to what authority or what, with what
24 propriety it could pay the legal fees of, or the legal costs of
25 Marshall and his counsel.

1 Q. Would it be fair to say that from the federal perspective, as
2 you understand what happened, there was no authority that
3 could be found or no one was willing to pay, whichever way
4 you want to take it? There was no help forthcoming.

5 A. Yes. There is no appropriation with any reference to the
6 payment of legal fees other than the cost-sharing
7 contributions to the Legal Aid schemes. And, as I think I said
8 this morning, not just in this case, in other cases it becomes
9 very difficult to, and it sounds terribly bureaucratic, I know,
10 I'm almost embarrassed to talk in such bureaucratese, but
11 once you start running a Legal Aid scheme and having, and
12 grafting special cases on top, the special cases become their
13 own Legal Aid scheme. And I think our position in Justice
14 was that legal affairs in a province where the Legal Aid
15 scheme is a relatively low-funded effort or modest tariff,
16 that's the way legal affairs are done, Legal Aid is done in that
17 province, and that we really couldn't get in and richen the pot
18 in one particular case.

19 Q. And was there any view taken that the only discussion that
20 you recall the the Court could have ordered that the fees be
21 paid by the government?

22 A. That was...I don't recall any specific discussion of that but it
23 was part of the whole compensation issue, in my mind,
24 anyway, that the tremendous legal bill by the time the
25 reference was over had to be taken into account as part of the

MR. RUTHERFORD, EXAM. BY MS. EDWARDH

1 cost of that remedy.

2 Q. And to ask one last question, sir. Do you have any
3 information that the legal fees were, in fact, were a principle
4 that was considered in determining the quantum of
5 compensation?

6 A. When they were involved?

7 Q. Uh-huh.

8 A. I couldn't say. I don't think I've ever even read whatever
9 report Mr. Justice Campbell released on this matter.

10 MS. EDWARDH

11 Those are my questions. Thank you very much.

12 MR. PUGSLEY

13 I have no questions, My Lord. Thank you.

14 MR. MURRAY

15 Nothing, My Lord.

16 EXAMINATION BY MR. PINK

17
18 Q. Mr. Rutherford, you spoke this morning about the layers of
19 the onion. Do you recall making that reference?

20 A. An invidious metaphor, I'm sure.

21 Q. I believe you were talking about the primary concerns that
22 you had when you first became involved with this matter.

23 A. Yes.

24 Q. And, as I understood your evidence, your primary concern
25 was to arrange for a mechanism to deal with the innocence or

1 guilt of Donald Marshall, Jr.

2 A. That's correct.

3 Q. And other matters were secondary to that.

4 A. In my mind, they were, yes.

5 Q. And throughout that time that we're now talking about, the
6 period of April, 1982, you were carrying on fairly frequent
7 contact with the Attorney General's Department.

8 A. Well, I think I can document four or five points of contacts
9 over two months.

10 Q. And do I take from your evidence that the concern expressed
11 in the Attorney General's Department was similar to yours,
12 that the primary concern was to get a mechanism in place to
13 deal with the innocence or guilt of Donald Marshall, Jr.?

14 A. Yes.

15 Q. And other matters were take a secondary role to that.

16 A. Yes.

17 Q. And the people that you discussed that with or the person
18 that you primarily were dealing with was Gordon Gale.

19 A. That's correct.

20 Q. And that was the view that he was expressing.

21 A. Yes, I think that would be fair.

22 Q. In looking at the 617 procedure, you indicated this morning
23 that it was your view that it was for the court to decide what
24 evidence would be heard by it under the 617(b) reference.

25 A. Yes.

MR. RUTHERFORD, EXAM. BY MR. PINK

1 Q And, in fact, if you look at the reference document itself at
2 page 65 or 64 and 65 of Volume 31. Do you have the final
3 form in front of you?

4 A.
5 Refers the conviction for hearing and
6 determination in the light of the existing
7 judicial record and any other evidence
8 which the Court in its discretion receives
9 and considers as if it were an appeal by
10 Donald Marshall.

11 Q So it's pretty clear from the wording of that that the issue of
12 what issue was to be heard was for the Court itself to decide.

13 A. Yes, I think it invokes the same rules, the same jurisprudence
14 that that would apply on an appeal, perhaps modified on a
15 reference. I think there's some authority that the latitude is
16 even wider. I think the Court speaks of some of that
17 jurisprudence in its judgement. But it is up to the Court.

18 Q I just want to ask you a few questions about...

COMMISSIONER EVANS

19 I think what you're saying is that the Court can ask for
20 additional evidence if it sees fit, but it's not the Court's job to go
21 out and get it.

MR. RUTHERFORD

22 Oh, no, no. But what evidence is received would be decided
23 upon by the Court as to its admissibility and the rules of fresh
24 evidence, in other words, are in its hands.
25

MR. RUTHERFORD, EXAM. BY MR. PINK

1 BY MR. PINK

2 Q. And I take it that your second comment is that, as it's dealt
3 with in the decision, that the Supreme Court of Canada case of
4 Palmer may not be strictly or narrowly interpreted on this
5 type of application.

6 A. You'll have to treat me as a law student and run that one by
7 me again.

8 Q. It's not important.

9 A. I'm sorry.

10 Q. I won't pursue it any further.

11 MR. CHAIRMAN

12 Before we leave that, surely in the first instance, it's up to the
13 parties who are appearing before the Court of Appeal on the
14 reference to decide what evidence they are going to seek to lead.

15 MR. RUTHERFORD

16 Yes.

17 MR. CHAIRMAN

18 The Crown presumably would first be charged with the
19 responsibility of calling the evidence, I presume. Although I'm
20 not sure of that. It might be the...

21 MR. PINK

22 Yes, My Lord. I'm about to just deal with that in terms of the
23 onus and perhaps we can come at it from this perspective.

24 BY MR. PINK

25 Q. If you could go back to page 62 in Volume 31.

1 A. Yes.

2 Q. I understand that these are Mr. Aronson's notes and they
3 reflect a telephone conversation with you on the 16th of June.
4 I believe we've already spoken today about your talking to
5 him.

6 A. Yes.

7 Q. And he says, I can't make out the first word but it says "A
8 classical 617(b) as if it were an appeal by Donald Marshall."
9 He makes the reference that Mr. MacDonald referred you to
10 this morning about your telephone conference with Chief
11 Justice MacKeigan, and under that he says: "I take on just as
12 an appeal. Maybe even notice of an appeal." And then the
13 language in the next paragraph is exactly the quote from the
14 reference document itself. Was it your understanding that
15 the onus would be upon Mr. Aronson as counsel for Donald
16 Marshall, Jr. to carry the appeal?

17 A. Well, it's whatever is implied in "as if it were an appeal by
18 him". It was as if he took the appeal and he had the
19 circumstances as they were at that time. And indeed if that
20 includes or involves applying to introduce fresh evidence,
21 that would have been my understanding at the time that he
22 would have to make an application and, in that sense, the
23 Court had it in its discretion what rules, according to the
24 rules that it would apply, whether or not fresh evidence
25 would be received. And in that sense, he would be the

1 applicant. Marshall would be the applicant and would
2 conduct his appeal as an applicant and the Crown would be
3 responding. But as we know, and I think there was some
4 discussion, that the very first thing to do, because this was
5 somewhat novel, would be move for directions, I believe that
6 was done, and I think the Court of Appeal gave some fairly
7 detailed instructions on just how it thought this appeal should
8 be unrolled.

9 Q It's my understanding that there were, there was an initial
10 application on the 9th of July and then a subsequent hearing
11 on the 29th of July with regard to the calling of that new
12 evidence and that application itself, that was for leave to call
13 new evidence and the application to call new evidence, I
14 believe, was heard on the 5th of October.

15 A. We weren't a party to the appeal. We stood, I think, the
16 letters show that we were ready to assist in whatever the
17 Court might want us to but we didn't have any role.

18 Q On the issue or on the language that you describe in terms of
19 it being an adversarial process, I take it that you meant that
20 with Mr. Aronson or Donald Marshall, Jr. having the onus,
21 then it would be for the Crown to cross-examine the
22 witnesses that were presented after the Court allowed new
23 evidence to be called.

24

25

1 3:25 p.m. *

2 A. That's right.

3 Q. That's the understanding that you have.

4 A. That was my understanding.

5 COMMISSIONER EVANS

6 Following the directions how did it proceed or what were
7 directions were given by the Court of Appeal?

8 MR. PINK

9 I understand, My Lord, that leave was granted to call seven
10 witnesses and was reserved on the calling of ten other witnesses,
11 three of whom were police officers.

12 COMMISSIONER EVANS

13 Who presented...who presented the appeal?

14 MR. PINK

15 Mr. Aronson. I think I'm correct in that, My Lords.

16 MR. CHAIRMAN

17 Did the Crown oppose the application to call some of these
18 witnesses?

19 MR. PINK

20 Well, I think...

21 MS. EDWARDH

22 There's a lengthy discussion, if I am, about the propriety of
23 the evidence and whether it really is fresh evidence and what is
24 the scope of the Court's discretion to receive the evidence, as Your
25 Lordships will all be aware, whether or not something is or is not

MR. RUTHERFORD, EXAM. BY MR. PINK

1 fresh evidence depends on the due diligence of counsel and
2 whether it could have been made available at trial and all those
3 things. And they are canvassed by the Court in the hearing, at the
4 first hearing, and they make...and there is certainly argument as
5 to what should be done. The Crown did not just simply consent.

COMMISSIONER EVANS

7 And a decision made.

MS. EDWARDH

9 Yes.

MR. PINK

11 And evidence...both the Crown and the appellant applied to
12 adduce new evidence, and affidavits were tendered and I believe
13 Messrs. Aronson and Edwards will be speaking to that, I'm sure
14 they're be speaking to that in their testimony.

15 Q. Mr. Rutherford, to take you back slightly in time to the May
16 letter from Attorney General How, the May 17th letter. It's
17 my understanding that a very grave concern of the Attorney
18 General in terms of the procedure that was being
19 recommended was the fitness for trial of Roy Ebsary.

20 A. That was certainly mentioned.

21 Q. And if you look at the bottom of Attorney General's How's
22 letter on page 54 of that volume the last two sentence on the
23 bottom of page 54,

24
25 However, this would undoubtedly be

1 resolved by the fact that the police would
2 lay a charge of murder against Mr. Ebsary.
3 Unfortunately Mr. Ebsary was recently
4 before the courts in Sydney on a stabbing
5 charge and was found not fit to stand trial
6 and has been remanded to the Nova Scotia
7 Hospital to await the pleasure of His
8 Honour the Lieutenant Governor.

9 And so, in ensuring that the case had a complete airing one of
10 the options was that a prosecution against Roy Ebsary would
11 take place, correct?

12 A. Well, ensuring that which case had a complete airing?

13 Q. That the facts themselves, regardless of whether they were in
14 the context of an appeal by Donald Marshall or a new trial of
15 Donald Marshall, whatever mechanism ultimately came into
16 being.

17 A. Well, this was one of the environmental factors that just
18 confused the whole picture. If you have a complete airing
19 does it affect the rights of a guy like Ebsary to have a fair
20 trial after that. If he's unfit to stand trial and there's never
21 likely to be any prosecution of who then appeared to be the
22 more probable murderer of Sandy Seale, ah, does that militate
23 for or against having a hearing in Marshall. I mean they were
24 kind of countervailing problems. And, as I say, Mr. How did a
25 pretty good job, I thought, of pointing out the problems.

Q. And I suggest that the fact of Ebsary's unfitness at that point
militated against the pardon for Donald Marshall, Jr., because
that would not allow the facts to be aired in a subsequent

1 proceeding.

2 A. Well, that's...that's not far from the truth. I mean I think
3 that's a way of putting it, yes. But if he had been fit to stand
4 trial, different considerations apply.

5 Q. Sure.

6 A. There was no easy solution that everyone said, "That satisfies
7 everybody's best interests."

8 Q. Did Mr. Aronson, as counsel for Donald Marshall, Jr., after he
9 had discussions with you oppose the 617 procedure or
10 continue to prefer the pardon route?

11 A. I...my best recollection of how to describe Mr. Aronson's
12 approach was that he was most earnestly seeking to undo this
13 miscarriage and he really didn't press terribly hard to have it
14 one way or another as long as we got to the bottom of the
15 thing. It was...I think it's fair to say that he was relatively
16 content that the 617 be pursued, but I don't recall him taking
17 a position that it really should have been one or the other.
18 The remedy for his client ultimately to get him out from this
19 unjust conviction was what he pursued in any and every
20 possible way it seemed.

21 Q. The final issue I just want to ask you about briefly relates to
22 the compensation question. You read us an excerpt from
23 Hansard this morning which...in which Mr. MacGuigan said he
24 had spoken to Attorney General Giffin and then he spoke to
25 you and you made the call to Mr. Gale.

1 A. Yes.

2 Q. Do you know of any other contact that Mr. MacGuigan had
3 directly with Mr. Giffin?

4 A. No, in fact, I don't know the details of his contact with Mr.
5 Giffin, but my impression is that there was more than one
6 conversation, whether they were face to face or telephone,
7 I'm not sure.

8 Q. And your impression is from something that Mr. MacGuigan
9 told you or from looking at material?

10 A. I'd have to go back and look at the material to see why I have
11 that impression. I'm sorry, Mr. Pink.

12 Q. In Volume 30 at page 42 Mr. MacGuigan responds to
13 Mr. Cacchione. Page 42, My Lord. Mr. Cacchione had written
14 the lengthy letter that we looked at earlier and then Mr.
15 MacGuigan wrote and asked if he had...if Mr. Cacchione had
16 any objection to this letter, the lengthy letter, being provided
17 to the Attorney General of Nova Scotia. On page 43 Mr.
18 Cacchione responds to Mr. MacGuigan and indicates that, "I
19 have no objection to you providing Mr. Giffin with a copy of
20 my letter to you." Do your records indicate whether, in fact,
21 Mr. Cacchione's letter of December 13th, '83, was forwarded
22 to the Attorney General's Department of Nova Scotia?

23 A. I haven't the files to ascertain that with precision. I'd be very
24 surprised if that letter was not forwarded either by myself or
25 by Mr. MacGuigan or perhaps even in both...

MR. RUTHERFORD, EXAM. BY MR. PINK

1 Q. But you have no knowledge that, in fact, it was.

2 A. I can't say from the material I have here with me whether or
3 how that might have been transmitted.

4 Q. Those are all my questions, thank-you.

5 MR. CHAIRMAN

6 Is there anyone else left who have an interest in this?

7 EXAMINATION BY MR. ROSS

8 Q. Mr. Rutherford, my name is Anthony Ross and I'd like to ask
9 you a couple of questions, please. Is it fair to say that the
10 Department of Justice maintained a continuing interest in this
11 file since it was reopened in 1982?

12 A. I think so.

13 Q. And is it fair to say also that people at the Department of
14 Justice are kept fully informed on what has developed as far
15 as the Donald Marshall...as far as the Donald Marshall
16 reference is concerned and the trials which...which spun off
17 from that reference?

18 A. Well, I'm not sure. I certainly think I've been made aware of
19 most significant develops in it.

20 Q. And, is it also fair to say that as far as the reference is
21 concerned if the Department of Justice was not in itself
22 satisfied that there was some new evidence it would have
23 opposed it?

24 A. Opposed the reference.

25 Q. Opposed the reference, rather than...rather than

MR. RUTHERFORD, EXAM. BY MR. ROSS

1 recommending it.

2 A. Well, I'm sure the Minister wouldn't have referred it if he
3 didn't...if he wasn't satisfied that the grounds in 617 had been
4 met.

5 Q. Sure. And part of those grounds would be, and I'd ask you to
6 turn to Volume 31, please, part of those grounds would be the
7 new evidence section identified in Volume 31 at page 23.

8 A. I'm looking at a page 2 of a memorandum. Am I on the right
9 document?

10 Q. Yes.

11 A. Page 2 of a memorandum from Mr....

12 Q. I'm looking at roman numeral four.

13 A. Yes.

14 Q. "As far as the new evidence is concerned."

15 A. And I'm sorry, your question is?

16 Q. That these would be part of the grounds which would support
17 the referral of the matter.

18 A. There's no doubt that the conflicting statements of Chant and
19 Pratico and Harriss were very central to the consideration
20 that it should be reviewed by the Courts again.

21 Q. I see. Perhaps then you can tell me, what if any importance
22 did the ground (A), the robbery theory, play in the referring
23 of the matter for review?

24 MR. BISSELL

25 For clarification, I'm not sure the Department of Justice ever

MR. RUTHERFORD, EXAM. BY MR. ROSS

1 had this document, My Lord. This is an Attorney General's
2 document.

3 MR. CHAIRMAN

4 This is a memo...an internal memorandum within the
5 Provincial Department of the Attorney General.

6 MR. ROSS

7 Well, that is true. That is true, My Lord.

8 MR. CHAIRMAN

9 Maybe...did this document come to your attention?

10 MR. RUTHERFORD

11 I don't think I've ever seen this document before, Mr.
12 Chairman.

13 MR. ROSS

14 Q. I see. Well, perhaps I can get around it another way, sir. As
15 far as the robbery theory is concerned, do you know whether
16 or not this was a consideration...whether or not the robbery
17 theory was known to the Department of Justice before the
18 reference had been made?

19 A. I'm sorry, Mr. Ross, I'd have to go back and re-read the police
20 reports and the advisory material that went to the Minister.
21 My recollection on this point is that the robbery...the
22 suggestion that Donald Marshall and Sandy Seale were in the
23 park that night engaged in, as it's put here, "Rolling
24 strangers", I think was raised in that material. But to say
25 what one episode or allegation or set of circumstances played

1 by way of importance is very difficult to me in saying why
2 the Minister determined what he did. I mean I know what I
3 thought of it, but what counts is what the Minister thought of
4 it.

5 Q. Sure.

6 A. And again, the whole advice...review of the case with advice
7 served up to him, and I don't think I can say which things
8 stimulated what amount of his decision making.

9 Q. I see. This is not a situation where there was a departmental
10 decision that was passed up to the Minister for rubber
11 stamping. The Minister was actively involved, I take it.

12 A. The Minister of Justice is the man with the power under 617
13 of the Code. He makes the decision and he is accountable and
14 responsible for it.

15 Q. I appreciate that. But isn't it on recommendation from the
16 department?

17 A. Not according to the statute.

18 Q. I recognize what the statute...

19 A. It may well be contrary to the recommendation of the
20 department in some particular case.

21 Q. I see. I take it it was not contrary in this instance though.

22 A. Well, I just don't think it's relevant what advice was given to
23 him by which of his officials.

24 Q. Okay, thank-you.

25 A. I'd be happy to say Ministers always follow the advice I gave,

1 but I'd be twisting the truth seriously to say that.

2 Q. I see. Now, tell me something, Mr. Rutherford, is there still a
3 continuing review and updating of this case by the
4 Department of Justice?

5 A. Well, if you would call my and Mr. Fainstein's attempt to read
6 the continuing daily media accounts an updating, yes.

7 Q. Yes.

8 A. There is.

9 Q. And as far as the Ebsary trials were concerned, was it
10 followed by your department also?

11 A. I followed the steps on the mistrials and the new trials and
12 the convictions with some considerable interest myself.

13 Q. And in the third Ebsary trial the evidence of Donald Marshall
14 was to the effect that there was no robbery theory, did you
15 read that?

16 A. I can't...if you had asked me what his evidence was in that
17 trial, I could not have you told you that, Mr. Ross.

18 Q. Precisely, but I'm going to suggest to you that the evidence is
19 to the effect that there was no robbery and I'm asking if you
20 recall that.

21 A. I don't think I've ever read his evidence. I have not read his
22 evidence in that trial, no.

23 Q. I see. Tell me what about the other aspect of the Inquiry
24 with respect to perhaps, race relations and the administration
25 of justice? Is this a section that is being followed up by your

1 department, monitored by your department on an on-going
2 basis?

3 A. A section, I'm sorry.

4 Q. Is it an aspect of the inquiry?

5 A. Well, it's...it would be hard...I'd be hard pressed to say there is
6 any aspect of this Inquiry that we're not trying to keep on top
7 of. But on the other hand it's largely an enquiry that's
8 occupying the careful attention of officials in another
9 government and another branch, so...

10 Q. I see. But what I wanted to find out whether or not you were
11 aware of anybody in the Department of Justice who was
12 perhaps charged with monitoring the proceedings from the
13 point of view of race relations and the law?

14 A. No, I don't know of any specific assignment in those terms.

15 Q. Thank-you. In your direct examination you indicated to Mr.
16 MacDonald that one of the concerns, at least...well, I shouldn't
17 say concerns, something that was considered was whether or
18 not there would be rigorous cross-examination of witnesses at
19 the reference.

20 A. Yes.

21 Q. Did you recognize at that time that for all intents and
22 purposes it was the position of the R.C.M.P. and the Crown
23 Prosecutor and Mr. Aronson that Marshall was innocent?

24 A. Yes, that was precisely why I raised that concern, and it
25 wasn't that I didn't share the kind of feelings that were being

1 | expressed, albeit I resisted strenuously when Mr. MacDonald
2 | I think tried to suggest that we felt that Marshall was
3 | innocent too. For my part I resisted trying to come to any
4 | conclusion in that regard because that was not our function
5 | and on paper you can't really deal with it that way. But my
6 | concern that I expressed to Mr. Gale and that I say was
7 | expressed in another telephone call that involved my
8 | superior, the Associate Deputy Minister, and I can't recall who
9 | in the Nova Scotia, was that, look, we're all terribly much on
10 | the side of this being a miscarriage, it looks like it, but if the
11 | Court is going to be effective, we can't all go all in there and
12 | take the same side. I mean that's the trouble with an
13 | adversarial proceeding, it works best when the teasing and
14 | pulling apart of effective cross-examination and examination
15 | allows the Court to see the evidence in its most precise and
16 | accurate light, and I was afraid, and I think justifiably so, that
17 | with everybody thinking that this was a horrible miscarriage
18 | and that everybody had lied, that the witnesses wouldn't be
19 | subjected to that process that would allow the Court to bring
20 | its proper evaluation to bear on it. And it wasn't so much
21 | that somebody should go after this witness or that witness or
22 | anything of that sort, it was just the evidence has to be
23 | treated in the proper litigation process if the Court is going to
24 | be effective in this thing.

25

9810 MR. RUTHERFORD, EXAM. BY MR. ROSS

1 3:43 p.m.

2 Q. As I recall, sir, when I cross-examined Staff Sergeant
3 Wheaton he agreed with me that when he became involved in
4 this matter his first mission was to have a look at the
5 evidence which convicted Donald Marshall and, in that regard,
6 he interviewed Chant and Pratico and was satisfied they had
7 lied. And that based on that he concluded that Marshall was
8 innocent. He then embarked on the course to prove
9 Marshall's innocence which automatically meant, it meant
10 opening up the door on Marshall, as I put it him, and it was
11 lock the door on Ebsary. Did you understand that this was the
12 process that was being pursued?

13 A. I don't, I didn't understand that at any particular point. If
14 that's what he says he did I have no comment.

15 Q. I see.

16 MR. ROSS

17 Thank you very much. No more questions.

18
19 EXAMINATION BY MR. NICHOLAS

20 Q. Yes, Mr. Rutherford, my name is Mr. Graydon Nicholas and
21 I'm representing the interests of the Union of Nova Scotia
22 Indians at this Inquiry and I do have just a few questions to
23 put to you. In your opening comments, as well as other parts,
24 you kept referring to the fact that the Federal Government
25

1 compensates on a formula basis legal aid to this province. If I
2 recall, that was the gist of your comment.

3 A. Yes, the Federal Government cost-shares legal aid in the
4 provinces and territories. It pays something like 50 percent
5 of that dollars that are spent on legal aid in each province.

6 Q. And this would involve both the civil legal aid as well as the
7 criminal legal aid?

8 A. I believe so.

9 Q. I see. Now, when the formulas are developed does that taken
10 into consideration the Indian population in this province?

11 A. I'm sorry, I'm not at all intimately acquainted with the
12 formulas. Those are worked out in a branch of our
13 department that I've never had any direct working
14 involvement in and I know there are negotiations, bilateral
15 negotiations and it's all agreed upon according to some
16 principles. But I don't, I'm not aware of the principles.

17 Q. I see. So, okay, well I can't pursue that much further. Now
18 with regard to this anonymous letter that's contained in
19 Volume 31, on page 71, that I would like you to, because
20 you're the one who, in fact, sent that letter, a copy of that
21 letter to the Government of Nova Scotia. And I'm thinking in
22 particular of page 2 of that letter on, which is found on page
23 73, and in particular, the last paragraph of that page. I'm
24 wondering, perhaps, if you could enlighten the Commission as
25

1 to how you happened to get that letter from Mr. Chrétien and,
2 in turn, send that to the province.

3 A. The letter was received, I'm sorry, I made a note because on
4 the exhibit book it's indecipherable. It was received
5 sometime after the reference of the case back to the courts.
6 And the letter came through the Minister's office as received
7 mail. It was sent to me as the person principally involved in
8 the file at that point and because it reflected knowledge of
9 the facts to a degree that I thought might well make this
10 person, if identifiable, a potential witness. I sent it to the
11 Attorney General's Department for whatever use it might be
12 made of.

13 Q. Now was it of any concern that was raised with you people
14 about this issue of racism that seems to be implied in this
15 letter?

16 A. Was it of any concern?

17 Q. Yes, to the Attorney General of Canada.

18 A. I think racism in its negative aspects is always a concern to
19 the government. It has to be.

20 Q. But as raised in this particular letter.

21 A. Well yes. And it wasn't the first time that this had been
22 suggested. The publicity about the case had involved this
23 element of possible racism before this letter had been
24 received but a letter from an anonymous writer isn't, you
25

1 can't really do too much about it, with it.

2 Q. And these other concerns of earlier reference to racism, were
3 they also raised to you anonymously or through particular
4 individuals?

5 A. No, I think what I'm suggesting is the kind of media coverage
6 that had been given. I think there were suggestions that the
7 investigation may have gone off on a, the tangent that I think
8 people assume now that it did, possibly on some basis of
9 racial motivation. I say that as being, I was alive to the fact
10 that those suggestions were being made at various stages
11 throughout this case.

12 Q. And what, in particular then, did you do other than forward
13 this letter to the Government of Nova Scotia? And especially
14 in light of that particular statement on page 2, was there
15 anything that you or your officials did to try to determine if
16 such a statement had any basis.

17 A. I think it was felt that at that stage peeling, as I've referred
18 to it as the first layer of the onion back, and referring it to the
19 court for whatever depth of hearing it was going to get, was
20 the way to deal with it at that stage. We were going to see
21 what came out of that.

22 Q. And were you surprised when this particular issue wasn't
23 dealt with?

24 A. Well I think I can, have to say the same kind of thing I said to
25

1 Mr. MacDonald this morning. I didn't sit down and decide
2 what things surprised me and what didn't. This has been a
3 complex file right from the start and to the extent it may or
4 may not have been dealt with I didn't register an emotional
5 reaction.

6 Q. But in the initial discussions dealing with a reference, was any
7 aspect of racism brought out to be determined by the Court of
8 Appeal? In your discussions either with the Province or with
9 other officials.

10 A. No, I think the primary focus was whether or not there had
11 been a miscarriage, not why. The first layer was to determine
12 that there had been a miscarriage. Questions of why and
13 what consequences flowed were in train after that.

14 Q. Yes. So it would not be implied, then, to you that racism may,
15 in fact, be a component of that miscarriage of justice.

16 A. Well, as I say, I think I've been aware that that has been
17 implied at various stages.

18 Q. But you did not actively pursue that particular aspect, though.
19 Yourself.

20 A. No, I did not.

21 Q. I just have, I believe, just one other area to bring up. That
22 was regarding this international covenant on civil and
23 political rights that was raised in correspondence that we
24 have been referred to. And are you aware of instances where
25

1 Indians in Nova Scotia have raised this covenant on other
2 matters dealing with the government?

3 A. Well, if it isn't involved and I can't at this moment tell you
4 precisely how it's involved in, or on behalf of Leonard
5 Pelletier. I think I put it this way, I'm pretty sure there have
6 been arguments involving the covenant, not this section, in
7 connection with the Leonard Pelletier case. And, of course, he
8 was extradited from Canada over a decade ago and the
9 pleading of Canada in that regard is, I'm pretty sure there
10 was an argument under the covenant, but not that particular
11 provision of it.

12 Q. So you wouldn't necessarily be involved in the Attorney
13 General's office of complaints that are made to the
14 Government of Canada under the Human Rights Commission
15 of the United Nations, then, under this covenant.

16 A. That's not...

17 Q. You're not personally.

18 A. No, I'm not personally involved in that.

19 Q. I see. So then you're not knowledgeable of the complaints
20 that the Micmacs in this province have laid on the
21 government.

22 A. No, I'm not.

23 MR. NICHOLAS

24 I have no further questions, My Lord.
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EXAMINATION BY MR. BISSELL

Q. I have just one question to Mr. Rutherford and that is, upon reflection do you have anything that you wish to add to your evidence?

A. No, I don't think so, Mr. Bissell. Thanks for the chance.

CHAIRMAN

Mr. MacDonald?

MR. MacDONALD

I don't have anything further, My Lord.

CHAIRMAN

Thank you very much, Mr. Rutherford.

WITNESS WITHDREW

CHAIRMAN

Now, it's 4 of the clock and yesterday you indicated, Ms. Derrick, that you couldn't complete your cross-examination of Mr. Urquhart in 20 minutes or so. Now maybe that you've have 24 hours to think it over you've shortened it to five minutes.

MS. DERRICK

I may have shortened it since yesterday but not sufficiently that I'd be finished today by any means.

DISCUSSION

1 COMMISSIONER EVANS

2 By any means?

3 MS. DERRICK

4 Well...

5 MR. MURRAY

6 Yes, My Lord, if I could perhaps speak. I spoke with Mr.
7 Orsborn earlier about this, this possibility and it would be my
8 suggestion and request of the Commission that if Mr.
9 Urquhart were to start that he start in the morning fresh.

10 CHAIRMAN

11 Fine. We have no problem accommodating him. I think
12 we've got to start alerting counsel that now that we've had a
13 lot of the evidence that repetition is going to be frowned on
14 with a great deal of severity. The unprecedented latitude
15 that has been allowed in this Inquiry will not continue
16 indefinitely.

17 ADJOURNED TO 9 MARCH 1988 - 9:30 a.m.

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REPORTER'S CERTIFICATE

I, Margaret E. Graham, Court Reporter, certify that the foregoing is a true and accurate transcript of all the evidence taken by way of recording and reduced to typewritten copy.



Margaret E. Graham

DATED THIS 8th day of March 1988 at Dartmouth, Nova Scotia