ROYAL COMMISSION ON THE DONALD MARSHALL, JR., PROSECUTION

Volume 53

Held: March 8, 1988, in the Imperial Room, Lord Nelson Hotel, Halifax, Nova Scotia

Before: Chief Justice T.A. Hickman, Chairman
Assoc. Chief Justice L.A. Poitras and
Hon. G. T. Evans, Commissioners

Counsel: Messrs. George MacDonald, Q.C., Wylie Spicer, and David Orsborn: Commission counsel

Mr. Clayton Ruby, Ms. Marlys Edwardh, and Ms. A. Derrick: Counsel for Donald Marshall, Jr.

Mr. Michael G. Whalley, Q.C.: Counsel for City of Sydney

Mr. Ronald N. Pugsley, Q.C.: Counsel for Mr. John F. MacIntyre

Mr. Donald C. Murray: Counsel for Mr. William Urquhart

Messrs. Frank L. Elman, Q.C., and David G. Barrett: Counsel for Donald MacNeil estate

Messrs. Jamie W.S. Saunders and Darrel I. Pink: Counsel for the Attorney General of Nova Scotia

Mr. James D. Bissell & Mr. A. Pringle: Counsel for the R.C.M.P. and Counsel for the Correctional Services of Canada

Mr. William L. Ryan, Q.C.: Counsel for Officers Evers, Green and MacAlpine

Mr. Charles Broderick: Counsel for Sgt. J. Carroll

Messrs. S. Bruce Outhouse, Q.C. and Thomas M. Macdonald: Counsel for Staff Sgt. Wheaton and Insp. Scott

Mr. Guy LaFosse: Counsel for Sgt. H. Davies

Messrs. Bruce H. Wildsmith and Graydon Nicholas: Counsel for the Union of Nova Scotia Indians

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

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

Court Reporting: Margaret E. Graham, OCR, RPR

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

2 MR. CHAIRMAN

3 Good Morning.

4 MR. MACDONALD

5 Good Morning. My Lords, the witness this morning is going
6 to be Douglas Rutherford, who is a senior member of the
7 Department of Justice. For the record, I'd like to note that the
8 department has been very cooperative with Commission counsel
9 throughout this Inquiry, while at all times guarding their
10 jurisdiction in federal matters. And we have agreed with Mr.
11 Rutherford that his giving evidence here today, and being
12 prepared to give fairly extensive evidence, would in no way
13 prejudice the right of the department at a subsequent date or in
14 some other form, taking the position that the Commission may be,
15 the jurisdiction of the Commission may be limited. So in giving
16 evidence here, he doesn't want to, anyone to suggest at a later
17 time that the Department may have waived its right to question
18 the jurisdiction of the Commission in particular areas. And on
19 behalf of the Counsel for the Commission, I have agreed to that.
20
21 **DOUGLAS RUTHERFORD**, duly called and sworn, testified as
22 follows:

23 EXAMINATION BY MR. MACDONALD

24

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

1 A. Douglas Rutherford.
2 Q. And your position with the Department of Justice, Mr.
3 Rutherford?
4 A. I'm presently Associate Deputy Minister of Justice.
5 Q. My Lords, I've marked several exhibits, and for the record,
6 I'll identify those and have placed in front of you copies.
7 EXHIBIT 122 are copies of the relevant, or some relevant
8 portions of the Criminal Code of Canada. EXHIBIT 123 is
9 Volume 30 of the documents. EXHIBIT 124 is Volume 31.
10 EXHIBIT 125 is Volume 32 of the documents. And EXHIBIT
11 126 is a copy of a letter dated May 10, 1983 from the Chief
12 Justice of Nova Scotia to the Minister of Justice in Ottawa.
13 EXHIBIT 122 - COPIES OF PORTIONS OF CRIMINAL CODE OF
14 CANADA.
15 EXHIBIT 123 - VOLUME 30 OF MARSHALL INQUIRY DOCUMENTS.
16 EXHIBIT 124 - VOLUME 31 OF MARSHALL INQUIRY DOCUMENTS.
17 EXHIBIT 125 - VOLUME 32 OF MARSHALL INQUIRY DOCUMENTS.
18 EXHIBIT 126 - COPY OF LETTER DATED MAY 10, 1983 FROM THE
19 CHIEF JUSTICE OF NOVA SCOTIA TO MINISTER OF JUSTICE.
20 Q. How long have you been with the Department, Mr.
21 Rutherford?
22 A. I joined the Department of Justice in September of 1969.
23 Q. And just briefly, if you would, trace your role, your
24 experience with the Department?
25 A. Yes, I started in the Justice Department in its Toronto Regional

1 Office and engaged for a number of years in criminal
2 prosecutions federally. I spent some time doing tax and civil
3 litigation and in 1973 was appointed director of the Winnipeg
4 Regional Office and spent two or three years in Winnipeg
5 directing our regional office there. In 1976, I went to Ottawa
6 as general counsel to the Department of Consumer and
7 Corporate Affairs. That's a legal advisory position in the
8 Justice Department but serving a particular department. In
9 1978, I was directed Director of Criminal Law in the Justice
10 Department. In 1980, I was appointed Assistant Deputy
11 Attorney General for Criminal Law, a position I held
12 throughout the period of time that the Department was
13 engaged in the Marshall matter. And in 1986, I was
14 appointed to my present position as Associate Deputy
15 Minister of Justice.
16 Q. What's the relationship on a practical level between the
17 Department and the Minister of Justice?
18 A. Well, the Department is a creature of statute, the Department
19 of Justice Act. The Minister is the head of the department
20 and is responsible for the jurisdiction of the department as
21 set out in the Act. The Minister has a Deputy Minister who is
22 Deputy head of the department and two Associate Deputies
23 and a number of Assistant Deputy Minister, Assistant Deputy
24 Attorney Generals and a total of about 750 lawyers at the
25 present time and another eight or nine hundred staff of other

1 ranks and professions and callings.
2 Q. Now you yourself, Mr. Rutherford, had direct involvement
3 with the Donald Marshall case on behalf of the Department, is
4 that correct?
5 A. Yes, I was, as I said, Assistant Deputy Attorney General,
6 Criminal Law, and the matter of the Donald Marshall case
7 came within the framework of the responsibilities I had.
8 There's a section called "The Criminal Law Section" in Ottawa
9 and it deals with applications under Section 617 of for other
10 prerogative remedies falling within the Criminal Law field, as
11 well as other thins.
12 Q And at that time, from a reporting point of view, where would
13 you fit in the structure?
14 A. My immediate reporting relationship above me was to the
15 Associate Deputy Minister, the position I now hold. The
16 Associate Deputy Minister under the statute is a Deputy of the
17 Minister but I think the words are "under the Deputy
18 Minister" so that there is a line in effect through the Deputy
19 Minister of Justice to the Minister.
20 Q. We've seen the name in the documents, Ron Fainstein. Who is
21 he?
22 A. Ron Fainstein is a lawyer in the Department of Justice. He
23 came out of our Winnipeg Regional Office, works in Ottawa
24 and did during the years of the Marshall case. Our
25 involvement in it, that is, and he is a senior, now called

1 "General Counsel". At that time, I think he was called a
2 "Senior Counsel" in the Criminal Law Section. His duties
3 involved appeals, appeals in the Supreme Court of Canada,
4 and he was and always has been actively involved in a lot of
5 the Sec. 617 applications and he was directly involved in a
6 substantial way in the review of the Marshall case.
7 Q. Mr. Fainstein reported to you at that time?
8 A. Yes, he reported to me through the Director of the Criminal
9 Law Section.
10 Q. And in preparing yourself to give evidence before this
11 Commission, you have discussed the matter with Mr.
12 Fainstein, reviewed his notes, and are prepared to speak to
13 his involvement as well, is that correct?
14 A. To the extent that's appropriate, I have, and I am.
15 MR. MACDONALD
16 To limit the number of witnesses, My Lord, we intend to just
17 call Mr. Rutherford. If anyone takes any objection with any
18 evidence. Obviously he'll be giving some hearsay evidence
19 but...He won't be the first one, that's correct.
20 MR. CHAIRMAN
21 Anything that can be accomplished to speed up these
22 proceedings will be gratefully received.
23 MR. MACDONALD
24 That's what we're attempting to do with Mr. Rutherford, My
25 Lord. Thank you.

1 BY MR. MACDONALD

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

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

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

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

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

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

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

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

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

1 lot of police reports. Others are able to be dealt with in a
2 slightly less detailed fashion, simply on it being ascertained
3 that there is not a basis for a detailed consideration.
4 Q. When such applications are received, is it the practice that
5 they are reviewed by someone in the Department of Justice,
6 some of the lawyers?
7 A. Yes, the applications are received and dealt with, I think it's
8 fair to say, exclusively in the Criminal Law section by lawyers
9 who have experience in criminal litigation. They are
10 reviewed to the extent considered necessary to provide the
11 Minister with advice, both as to the factual circumstances and
12 as to the application of the law. And they're referred then to
13 the Minister for final disposition in every case.
14 Q. Does the Department involve members of any police force in
15 determining whether to advise the Minister to exercise his
16 discretion in a particular way?
17 A. Yes, in any case that's examined in any detail, it's inevitable I
18 think to say that the police are involved. There is always an
19 investigating police force, be it a municipal force, a provincial
20 force, or the R.C.M. Police in their federal capacity so that the
21 original investigation is usually reviewed at least in some
22 detail and where there is additional investigation to be
23 undertaken, it's sometimes appropriate to ask the force of
24 original jurisdiction to do it and it, in some instances, is
25 appropriate for us to ask the federal R.C.M. Police in their

1 federal capacity to act and carry out inquiries on behalf of the
2 Minister directly.
3 Q. Of the approximate 35 a year applications that are made, in
4 your experience how often does the Minister exercise his
5 discretion to order a new trial or to refer it to the Appeal
6 Division?
7 A. I think the precise figure on that is that since 1960 on 14
8 occasions there have been remedies, the Minister has made a
9 positive reference of one sort or another under 617.
10 Numerically speaking, it's rare.
11 Q. Has there been occasions in those 14 where a new trial has
12 been ordered?
13 A. Yes, there have been new trials ordered on occasion. I think
14 of the Shatford case in Ontario as an example of that.
15 Q. Has there been occasions where the matter has been referred
16 to the Court of Appeal, just a question to the Court of Appeal
17 for its opinion?
18 A. Yes, I think the most recent and one of the few instances of
19 that is a case called Gorecki in 1976, I think. It's an Ontario
20 Court of Appeal case and it's reported in the Canadian
21 Criminal cases.
22 Q. What would be the type of, what was the question?
23 A. In Gorecki, as I recall it, and there are two stages to that case,
24 but the original question referred related to whether or not
25 the accused was capable of instructing counsel and fit to stand

1 trial at the time of his trial.
2 Q. In those circumstances where a Court of Appeal is asked to
3 give its opinion on a particular question, after receiving that
4 answer, the Minister decides then to exercise his discretion, is
5 that correct?
6 A. Well, that would certainly be open to the Minister. In fact,
7 the Gorecki case, which is the one I do recall because of its
8 relative recency,[sic] the case ended up being disposed of
9 completely in the courts. There are other proceedings, or
10 have been, and I mention simply because they're well known
11 cases, the Wilbur Coffin case in the mid-fifties and the more
12 recent case of Steven Truscott in the, I have trouble putting a
13 year on that, in the...
14 Q. Sixties, I think.
15 A. Well, I think in the fifties as well. I think of the Supreme
16 Court Report versions about 1957. Those cases were
17 references to the Supreme Court of Canada under the
18 reference power in the Supreme Court Act, but the reason I
19 mention them is they resemble the use of Subsection C in 617
20 where, in effect, a question is referred to the highest
21 Appellate Court and it's possible, depending on the way the
22 question is answered, that the Minister of Justice or the
23 Cabinet would have to exercise some further statutory or
24 prerogative power.
25

1 MR. CHAIRMAN

2 Would the 14 cases include the Coffin case?

3 MR. RUTHERFORD

4 No, they don't, My Lord.

5 BY MR. MACDONALD

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

8 A. That's correct.

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

10 A. Yes.

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

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

1 Q. In your experience with the department, have there been
2 applications for pardon under this section?
3 9:55 a.m. *
4 A. Uh, yes, in fact, I think that many, and I can't be precise on
5 numbers, but I think in many cases applicants under 617 also
6 make reference to Section 683. Many applicants would be
7 quite content with a remedy under either section.
8 Q. Yes.
9 A. And, in fact, in the Marshall case I think the documentation
10 will reveal that Mr. Marshall's counsel made reference to both
11 sections in originally applying to the Minister of Justice.
12 Q. Yes, we'll come to that. In your experience has a pardon ever
13 been granted under 683?
14 A. Again, I am not able to give exhaustive or precise information
15 on that, but to my knowledge after an examination of files in
16 the Department I'm only aware of one free pardon under
17 Section 683. I understand that the use of conditional pardons
18 can be found in recent years at the instance of the Solicitor
19 General of Canada and that conditional pardons may have
20 been used, I'd hate to say frequently, but on one or more
21 occasions in, for instance in the last decade, in fact, I believe
22 there was a case this past summer, but the Justice
23 Department has not had any involvement in these, where a
24 conditional pardon has been used as the mechanism to deal
25 with a person convicted and serving a prison sentence to

1 bring the imprisonment to an end, where otherwise the
2 statute might provide that it would continue for a certain
3 number of years.
4 COMMISSIONER EVANS
5 You had one back about 1953, Regina v Konawalchuk where
6 it was held that the provisions of the highgrading section of the
7 Code, I think it was 424(C) at that time, had not been brought
8 into force, and several who had been convicted and were still
9 imprisoned. I had one myself. I don't know about any others.
10 And they were granted a pardon. He had a very fancy document
11 with seals and lots of ribbons on it, but it is a free...that one was a
12 free pardon, a complete pardon rather.
13 MR. RUTHERFORD
14 Well, I'm glad I endeavoured to qualify the precision of my
15 answers because my institutional memory is not long enough
16 unfortunately to speak to pardons' history.
17 COMMISSIONER EVANS
18 I remember that case because I...got paid for it.
19 MR. RUTHERFORD
20 I should simply say that the Governor-in-Council exercising
21 the pardon power in 683 may do so at the instance of ministers
22 other than the justice minister and that's why I don't think it's
23 fair to say that the Department of Justice has any exclusive license
24 on the precise numbers.
25

1 MR. MacDONALD

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

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

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

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

9 Q. Under the Criminal Code, yes.

10 A. That's correct.

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

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

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

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

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

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

1 book primarily I think. Volume 31.
2 Q. Yes, from your own independent recollection what was the
3 first involvement the Department had with the Donald
4 Marshall, Jr., matter?
5 A. From my own independent recollection somewhere around
6 March 30th of 1982 Mr. Fainstein, who you've already asked
7 about, came and spoke to me about the case. What had
8 happened was that Mr. Stephen Aronson, counsel for Marshall
9 at the time, had written to the Department of Justice, I
10 believe, a letter dated March 26th, 1982, and it's probably an
11 exhibit in...
12 Q. That's in volume seven...or 31 page 17.
13 A. Page 17. And it was a letter that, as I recall it, told the
14 minister that he was going to be making a more formal... yes,
15 the bottom of the first page of that letter, Mr. Aronson says,
16 "It is my intention within the next month to make application
17 on behalf of Marshall under one of the available sections," and
18 he cites 617, 683, 686. He followed that up, as I recall, with a
19 meeting. He came into the Justice Building. He saw Mr.
20 Fainstein, to whom this letter had been referred, on, I think,
21 March 30th, because I do remember Mr. Fainstein bringing
22 Mr. Aronson to meet me after he had met with him and had
23 some considerable discussion about the case. If it's not
24 March...actually I have a note here that he met with Mr.
25 Fainstein on April 1st, 1982, so I think that's probably the

1 accurate date.
2 Q. In the letter from Mr. Aronson to the Minister, which was on
3 page 17.
4 A. Yes.
5 Q. And continuing on to page 18, Mr. Aronson was asking for the
6 opportunity to meet with officials of the department to
7 discuss the appropriate procedure, and that's what he did
8 with Mr. Fainstein, is that correct?
9 A. That's correct.
10 Q. He goes on to talk in the next paragraph about a report by the
11 R.C.M.P. and asking that the Minister obtain a copy. Are you
12 aware of whether the department did obtain copies of the
13 R.C.M.P. report?
14 A. Yes, my own records indicate that I phoned Mr. Gordon Gale,
15 in the Department of the Attorney General here in Nova
16 Scotia, about that report and I phoned the R.C.M.P., both in
17 Ottawa and the local...the division here in Nova Scotia, to
18 make enquiries about how most speedily that report could be
19 obtained, and as I recall it the position of the R.C.M.P. was that
20 as long as the Attorney General of Nova Scotia, for whom that
21 report had been prepared, was satisfied that we should have
22 it, we were going to get it, and I think we got it within a
23 matter of days.
24 Q. And those are the reports that were done by a Staff Sergeant
25 Wheaton, are they?

1 A. I can only assume so. I've seen them. I don't have them
2 here, but we received a large volume of material from the
3 R.C.M.P. and we received material over a period of a month or
4 so because subsequently there was further material I've
5 noted on April the 30th, 1987, further R.C.M.P. material came
6 in and, indeed, as late as May 7th of 1982 additional material
7 was received. I think the last material was photographic
8 evidence dealing with the knives and the fibres and that sort
9 of thing.
10 Q. Was it unusual for your department that a report or an
11 investigation by a R.C.M.P. officer had been carried out before
12 the application for pardon was made?
13 A. No, not unusual particularly in a province where the R.C.M.
14 Police is deployed as a provincial and, in many instances, a
15 municipal police force.
16 Q. I can refer you to the R.C.M.P. reports if you like, but can I
17 suggest to you that what they were saying in the report was
18 that as a result of their reinvestigation the R.C.M.P. were
19 satisfied that Donald Marshall, Jr., did not kill Sandy Seale?
20 A. Well, I'll accept that as a fair summary of the conclusion of
21 the reports. I'm not sure whether their stated conclusion is
22 did not kill or whether somebody else did kill or whether
23 there is now a whole lot of doubt about a whole lot of aspects,
24 but it certainly was one or other of those. If you want to
25 refer me to some part of it, I will certainly agree with

1 whatever it says in that report.
2 Q. Okay. Just let me see if I can quickly turn up something here.
3 I'll just show you my copy if that's all right. It's Volume 34,
4 and that's not in front of you, so...
5 A. Okay.
6 Q. This is a report that is dated, I think it starts on February the
7 25th of 1982 on page 9, and that's when it starts. I'm not
8 sure...it continues on for many pages and I wanted to refer
9 you to page 19 which is a postscript that's added to the report
10 by Inspector Scott. And I want to direct you to the paragraph
11 where he says, "After reviewing this case I feel that Marshall
12 is innocent of the offence and that we presently have enough
13 evidence to support a prima facie case against Ebsary for the
14 murder of Seale."
15 A. Yes.
16 Q. And you would have had that report.
17 A. Yes. I'm quite confident that we had that as well as other
18 materials.
19 Q. Thank-you. From your discussions with the Attorney
20 General's Department was there any view that you may have
21 ascertained from the department as to their conclusions?
22 A. Well, I can certainly go so far as to say that the discussions I
23 had, and I should say I had discussions with none other that I
24 can recall, other than Gordon Gale and on at least one
25 occasions Mr. Frank Edwards, a prosecutor from the Sydney

1 area. I can certainly go so far as to say that their...the
2 discussions I had with them indicated to me that they
3 believed that the conviction of Donald Marshall was fraught
4 with doubt, I say that to say the least, and that some remedy
5 was required.
6 Q. Let me ask you to turn to page 20, Mr. Rutherford, of Volume
7 31.
8 A. Yes.
9 Q. These are handwritten notes, I believe, of Mr. Gale or is it
10 your handwriting?
11 A. No, I believe this is a handwritten note, and I say this only
12 because I've looked at some of these documents, that these
13 are Mr. Aronson's handwritten notes.
14 Q. Okay. You may be right.
15 A. I think that refers to a conversation he had with Mr. Gale. I
16 see my name in it, but I have no recollection of any
17 conversation on March 31st with either of those gentlemen.
18 Q. Okay. But you did have discussions with Mr. Gale.
19 A. Yes.
20 Q. At our about this time.
21 A. My notes show that I called him on March 30th for the
22 purpose of getting the police reports, later in May I had
23 substantial discussions with him about a...the remedy under
24 617 of the Code.
25 Q. Let me refer you to one comment on...if we assume these are

1 Mr. Aronson's notes and, he'll be able to confirm that next
2 week, the second-last line on that page 20 where it says
3 "R.C.M.P. and Gale believe that Junior did not commit the
4 crime." Would that be consistent with your understanding of
5 Gale's position?
6 A. Well, I think he thought that. I can't remember any specific
7 words that I would quote him, but he certainly, I say at the
8 very least, thought that it had to go to some remedial action
9 to deal with it.
10 Q. All right. Let me take you to page 38 of that Volume 31.
11 A. Yes.
12 Q. That's a letter of April the 13th, 1982, from Mr. Aronson to
13 the Department.
14 A. That's correct. This is a letter that we received from Mr.
15 Aronson that was addressed to the attention of Mr. Fainstein
16 and it conveyed, as had been discussed with Mr. Aronson
17 when he had been up in the department on April 1st, it
18 conveyed a lot of the material that we felt would have to be
19 reviewed, including the transcripts of the trial, the appellate
20 materials and his correspondence of the same date, he sent to
21 us his correspondence to the Attorney General for Nova
22 Scotia.
23 Q. Yes. That's numbered 4, he shows on page 1, a copy of his
24 letter to the Attorney General of the same date. That letter is
25 contained on page 36.

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

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

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

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

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

Q. Yes.

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

1 our office of Governor-General.
2 Q. In the next paragraph of that letter Mr. Aronson says, "It is
3 my understanding that both the Attorney General and myself
4 will be asked for our views by the Minister of Justice." Would
5 that be the normal practise?
6 A. It would certainly be the normal practise to consult as widely
7 as was thought useful, in 617 reviews our Department
8 normally consults counsel on both sides of the original case,
9 police forces involved in the case and, to say that the
10 Attorney General of Nova Scotia and defence counsel would
11 be asked for their views would be a very normal thing
12 to...and I'm sure he's reflecting the discussion he had with Mr.
13 Fainstein and probably with myself in saying that.
14 Q. Okay. Do you know if the department, at this time when it
15 was considering what route to take or what route to
16 recommend the minister, had a copy of the R.C.M.P.
17 reinvestigation that was done in November of 1971?
18 A. I'm not sure. I think so. I would have to verify that with
19 reference to the files. I think so.
20 Q. You had certainly seen it at some time then.
21 A. It certainly has become...it's come to our attention in the
22 course of this case. Whether we had it at that precise point or
23 not I'm not sure.
24 Q. On page 37, the first full paragraph, Mr. Aronson is expressing
25 his concern over the leaks that are being made to the press,

1 and the fact that they appear to be coming from the Sydney
2 City Police and the Attorney General's Department. Did you
3 have any discussion with the Attorney General's Department
4 about that particular matter?
5 A. Not that I can recall.
6 Q. Did you have any discussion with the department about Mr.
7 Aronson's request that payment of his fees be sought or made
8 by the department?
9 A. Yes. I can't tell you exactly when. It was probably much
10 later in the history of this case than the spring of 1982. I
11 think the discussion that I was involved would have been
12 more likely to have occurred after the case had been
13 determined in the Nova Scotia Court of Appeal, and after Mr.
14 Aronson had provided legal services throughout that
15 appellate reference process.
16 Q. Is the question of the fee, the expense to be incurred by a
17 prisoner, something that's considered by the department
18 when determining whether to refer it to the Court as opposed
19 to giving a pardon or recommending a pardon?
20 A. I can't say that it might not be a factor that at least would be
21 given some consideration, but I think the determination of
22 whether a case is appropriately referred back to a Court is
23 made on...largely on other grounds than whether...than
24 whether or not there will be fees incurred. The Department
25 of Justice, as I'm sure you're aware, cost shares legal aid

1 throughout the country with each of the provinces, and I do
2 recall, in fact, the more I think about your earlier question,
3 I'm not sure that I didn't have at least some conversation
4 with Mr. Gale about the level of legal aid funding for a person
5 in Mr. Aronson's position going into a reference and what he
6 would be paid.
7 Q. You know it's pretty small.
8 A. It was not the most impressive tariff in the country at that
9 time.
10 10:15 a.m.
11 Q. By referring the matter to the Court, necessarily that requires
12 the prisoner to incur fairly substantial legal fees if they're not
13 paid by someone else, is that correct?
14 A. That's correct.
15 Q. Mr. Aronson also refers in his letter to the Department in the
16 second last paragraph to the question of compensation.
17 A. I'm sorry, this is the letter to the Nova Scotia Attorney
18 General?
19 Q. Yes, it's on page 37.
20 A. Yes.
21 Q. Second last paragraph, where he raises the question of
22 compensation to be paid to Mr. Marshall for having spent
23 eleven years in prison for a crime he didn't commit. Was that
24 matter discussed with the Attorney General's Department?
25 A. Yes, that was the subject of some consideration. When we

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

1 language of a reference and one of the issues that was
2 discussed at that time was whether or not the issue of
3 compensation was going to be inextricably bound up in those
4 proceedings or dealt with in some other way.
5 Q. We'll come to that in a moment, I guess when we come to
6 that letter. Let me take you back to the letter starting on
7 page 38 from Mr. Aronson to the Department and I would just
8 ask you to comment on a few things in that letter. On page
9 3...on page 40 of the document.
10 A. Yes.
11 Q. That paragraph on the top of the page talks about the
12 investigation being carried out by the R.C.M.P. It says:
13
14 > Both witnesses indicate the reason why
15 > they told the story they did at the
16 > preliminary and trial was as a result of
17 > police pressure. It would appear that
18 > these pressures were exerted on the two
19 > witnesses by Detective Sergeant John
20 > MacIntyre of the Sydney Police
21 > Department, who is now Chief.
22 Now that comes out of the R.C.M.P. investigation, does it not?
23 A. Yes, I believe so.
24 Q. Now would that not be an indication to the Minister that, in
25 fact, there may have been some crime committed by the
26 members of the Sydney Police?
27 A. It certainly could be a suggestion of that sort.
28 Q. Would that not be an indication that there should be some

1 sort of an investigation carried out as to whether or not those
2 suggestions by the R.C.M.P. are, in fact, true?
3 A. It could be.
4 Q. Would that be something that the Department would be
5 interested in or would that be left to the Province?
6 A. Well, it would be both. I think it's impossible to say that the
7 Federal Department of Justice isn't interested in the
8 enforcement of the Criminal Code but it is largely enforced
9 under the jurisdiction of provincial attorneys general.
10 Q. Was there any discussion to your knowledge between the
11 Minister, between the Department of Justice federally and the
12 provincial department concerning looking into those
13 allegations to determine whether charges should be laid
14 against members of the Sydney Police?
15 A. There was, at least that was a feature of the case to which
16 provincial officials were alive, in my recollection, but I cannot
17 tell you specifically what Mr. Gale or Mr. Edwards might have
18 said about that. I think, as I recall it, it's reflected somewhere
19 else in the documentation that some consideration would
20 have to be given to whether or not some action was taken in
21 that regard. But I think it's fair to say that at this particular
22 point in time, my concern and the concern of the Justice
23 Department was getting the first layer of problem dealt with,
24 namely Mr. Marshall's problem and the question of his
25 conviction and imprisonment.

1 Q. And can I take it that you were satisfied that the Attorney
2 General's Department was on top of that other matter and
3 would look into it?
4 A. Satisfied that it was properly his area of primary
5 responsibility, yes.
6 Q. And that it would be looked into by the Department of the
7 Attorney General?
8 A. Well, I don't remember ever being concerned that it wouldn't
9 be. It was not the most prominent layer of the onion in my
10 eyes at that time, I have to tell you.
11 Q. Let me take you then again on page 40. I guess it's the
12 paragraph just before that subtitle "Submission". Indeed the
13 sentence before that where Mr. Aronson says:
14
15 > Based on the information I have provided
16 > to you along with other facts contained in
17 > the R.C.M.P. investigation, Staff Sgt. Harry
18 > Wheaton of the R.C.M.P. and Gordon Gale,
19 > Deputy Attorney General of Nova Scotia
20 > had indicated to me that they believe
21 > Marshall to be innocent of the murder of
22 > Sandy Seale.
23 Would you agree with that?
24 A. Well, I agree that's what he wrote.
25 Q. Would you agree that that's what the documents support and
26 that's, in fact, what Mr. Gale had told you?
27 A. Well, I really can't put those words in his mouth. He may
28 well have believed innocence. The documents certainly

1 support the proposition that the evidence is terribly
2 unreliable. There were statements that were totally
3 contradictory and it led to the inevitable conclusion that the
4 thing had to be reconsidered in some proper form.
5 Q. What I'm trying to lead to, and I'm sure you're aware, Mr.
6 Rutherford, is when I keep seeing the word "innocence" being
7 put around, why the exercise of a pardon wasn't
8 recommended, as if he had never committed the crime. If the
9 conclusion of the R.C.M.P. and the Deputy Attorney General of
10 Nova Scotia are that this man is innocent, why isn't he just
11 pardoned?
12 A. Well, I guess that's why I'm being rather cautious. This is
13 what Mr. Aronson says others concluded and you've pointed
14 me to Inspector Scott's statement on that point.
15 Q. And I can, if you like, I can show you Wheaton's statement as
16 well or show you volumes of evidence that he's given here.
17 A. There may be lots of people who said that they came to the
18 conclusion as a paper review of a complicated episode that
19 somebody was not guilty or, indeed, to go further, was
20 innocent, for my own part and I think the actions of the
21 Minister reflect a slightly less fully developed approach to it.
22 It was that there was such substantial doubt about the
23 correctness or the sustainability of the conviction that some
24 remedy had to be granted to deal with the matter. But where
25 a court, a Trial Court, and Appeal Court, and leave refused by

1 the Supreme Court had all dealt with the question of guilt, in
2 the normal way at one era, and now primary witnesses,
3 several of them, I refer to Chant and Pratico and Harriss, the
4 Ebsary information, all indicated that the evidence on which
5 that conviction was found by the courts and upheld was
6 terribly, terribly doubtful and a lot of statements now of the
7 sort referred to by Aronson that people had said they were
8 pressured into saying one thing, now they've said another. To
9 read that and say "I know who's innocent or who's guilty," is
10 just going farther than I think we were prepared to in the
11 Department of Justice. It needed the forum that we have
12 humanly devised best to assess those things, a court.
13 Q. Was it your expectation that the court would look at all of
14 those issues, whether or not, for example, Chant and Pratico
15 had been pressured by the Sydney Police into telling a
16 particular story?
17 A. Yes, I think that was certainly part of my anticipation and the
18 options we considered and the reference that was ultimately
19 directed by the Minister tended to be very open-ended and
20 leave to the discretion of the court who it wanted to hear,
21 what evidence it was prepared to consider, and what remedy
22 it was prepared to grant, albeit within the powers it had.
23 Q. But the anticipation being that the court would look at all of
24 these issues.
25 A. Well, I guess it depends whose anticipation you're talking

about.

Q. Yours.

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

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

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

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

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

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

A. That's correct.

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

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

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

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

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

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

1 that the burden would be on the Attorney General to then
2 conduct a prosecution.
3 Q. Or to decide whether to call any evidence?
4 A. I'm sorry, to decide?
5 Q. Whether to call any evidence at all?
6 A. That's correct. And that was a consideration even when it
7 came to the reference to the Court of Appeal. I'm sure you're
8 coming to that stage of it and so I'll comment more perhaps in
9 that regard. But whether the Court of Appeal would direct a
10 new trial was a matter we had some discussion about.
11 Q. Yes. Was it discussed with the Attorney General's Department
12 whether or not they would proceed if a new trial was ordered
13 under 617 (a)? Was that discussed at all?
14 A. If it was, it was not discussed seriously. We never gave
15 serious consideration to a Subsection (a) reference to directing
16 a new trial, at least I didn't.
17 Q. Was serious consideration in your view always given to
18 617(b)?
19 A. It was...
20 Q. (b) or (c)?
21 A. (b) or (c) and one of the features of whether it should be (b)
22 or (c) was what the result in the court might be. I think I
23 recall with some clarity one of Mr. Gale's expressed concerns
24 was that if the Court of Appeal ordered a new trial, it might
25 place the Department of the Attorney General in an awkward

1 position because, and as Mr. Aronson had stated, Gale did not
2 think there was a reliable case or basis for a new trial. And if
3 the Court of Appeal ordered it, would the Attorney General be
4 in an awkward position in deciding not to proceed or would
5 he, in fact, be forced to proceed with a trial which in ordinary
6 prosecutor's parlance "wasn't a proper case". There wasn't a
7 basis, a responsible basis for proceeding. That was one of the
8 worries that we talked about.
9 Q. Okay, Mr. Aronson concludes his letter by saying?
10
11 > I look forward to being in close contact with you in your deliberations.
12 Was Mr. Aronson kept involved and did he have any input
13 into the ultimate recommendations that went to the Minister?
14 A. Yes. We had, I think it's fair to say he had as much as he
15 appeared to want by way of input. We met with him and
16 talked to him at any time at his own instance and before a
17 decision was made, I discussed with Mr. Aronson on the
18 telephone the discussions I had had with Mr. Gale and the
19 thoughts we now had crystalizing about what we would
20 recommend to the Minister.
21 Q. Now you've provided me with a copy of notes that were made
22 by Mr. Fainstein.
23 A. Yes.
24 Q. And I believe they were circulated yesterday. I have not had
25

1 those marked. Let me take you then to page 54 of Volume
2 31, Mr. Rutherford.
3 A. Yes.
4 Q. This is a letter from the Attorney General of Nova Scotia to
5 the Minister of Justice, from Harry How to Jean Chrétien?
6 A. That's correct.
7 Q. And would that have been given to your staff to use in its
8 deliberations?
9 A. Yes, it was. That letter was received in the Department as
10 dated May 17th. I'm sorry I can't tell you what date it was
11 received. Probably within a few days of that and certainly
12 considered. I think it sets out a number if not all of the major
13 concerns that we were thinking about and discussing both
14 within the department and with Mr. Gale about whether this
15 should be a reference or, indeed, whether there was a basis
16 for a free pardon.
17 Q. Do you know if the Attorney General of Nova Scotia was asked
18 to submit his views by the Department?
19 A. I'm not sure that I can give a positive to that. There was
20 certainly no discouragement registered or expressed that I'm
21 aware of from his doing that and I believe in the context of
22 Mr. Fainstein's notes they reflect discussion with Mr. Gale,
23 between Gale and Fainstein in which it was suggested that
24 there would be input of the sort that this letter from Mr. How
25 dated May 17th, 1982 embodies.

1 Q. Now let me...
2 A. I'm sorry, I'll be very specific. You asked whether we
3 invited that. One of Mr. Fainstein's notes is, "I asked him,"
4 which means Gale, " to write me to advise if they feel a
5 remedy is warranted and if so, which they would
6 recommend."
7 Q. When we get to his notes, then we'll...
8 A. There was a specific invitation then in those terms.
9 Q. In any event, is that something that the Department would
10 want to get in arriving at its decision?
11 A. Yes, normally, for the reasons that I expressed earlier, that
12 it's the provincial Attorney General in a case such as this that
13 has to go forward and conduct whatever proceedings, if there
14 are proceedings, to be undertaken and a reluctant prosecutor
15 isn't going to do much of a job and if they're arguing strongly
16 on it for a free pardon, we'd want to know that.
17 Q. Let me take you then to the comments of Mr. How. In
18 Paragraph 2 in that letter on page 54, he notes he has had the
19 benefit of receiving of receiving final reports from the
20 R.C.M.P. about their reinvestigation and he says, this is in the
21 second paragraph:
22
23 And both the police and the prosecutor are satisfied that on the basis of the
24 information now known, Mr. Marshall should not have been charged with the
25 murder and certainly that the jury would

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

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

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

Q. Oh, yes.

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

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

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

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

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

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

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

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

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

A. I would read that into that.

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

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

What did you understand that to be referring to?

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

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

1 exactly who is telling the truth and who isn't and I know how
2 to sort this out." The best we've been able to do is create
3 courts that do that in public, and that's the way this one went.
4 Q. Let me take you down to the second last paragraph on Mr.
5 How's letter.
6 A. If I can just add one other thing, I'm sorry, before we go to
7 the next part. Not only courts that are able to do that but
8 with rules of evidence and representations so that all parties
9 from whom or to whom the shadow of guilt may pass are able
10 to sort of deal with themselves and protect themselves at
11 least within the limits of law.
12 Q. Do I take it from that that, again, at this stage, you aren't
13 thinking and your intention would be that everyone would
14 give evidence before the Appeal Division, including the police
15 whose reputations are being impugned?
16 A. Well, certainly it was anticipation that if this thing were going
17 to be reconsidered on a 617(b) or (c) reference, in addition to
18 the civilian witnesses, police evidence would have to be
19 reviewed and new evidence given or questions asked.
20 Q. Let me take you then to that second last paragraph, in the
21 middle of that paragraph, Mr. How says:
22
23 There is no doubt from our examination of
the report that relief should be granted to
24 Marshall. The most expedient route would
appear to be a pardon, but there is much to
25 recommend proceeding under 617(b) in

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

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

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

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

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

Q. That wouldn't necessarily be bad.

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

MR. BISSELL

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

COMMISSIONER POITRAS

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

1 definition of a "free pardon", surely included in the concept of a
2 pardon is the actual commission of something that ought not to
3 have been committed. What you're trying to look for is an excuse
4 or a pardon for that commission, again forgetting the definition of
5 the expression "free pardon". I wonder whether that would have
6 been the better course or not in the circumstances. I'm looking at
7 it from Mr. Marshall's viewpoint alone. He gets, let us say, a free
8 pardon, but in the minds of the public, he's being pardoned from
9 what? Now this is the question that I have in my mind.
10 MR. MACDONALD
11 Thank you, My Lord. We'll ask Mr. Marshall what he would
12 have liked.
13 COMMISSIONER EVANS
14 The pardon, there is no proper airing of the whole
15 circumstances. The case I refer to is because the section of the
16 Code was never properly brought into force by an Order-in-
17 Council as required it when the Code was amended in 1927. So
18 there was no section. That's why the person who was improperly
19 jailed and, therefore, he was released on a pardon. But you don't
20 have any airing on a pardon.
21 MR. CHAIRMAN
22 Maybe before we leave that, Mr. Rutherford, you could tell us
23 in the rare cases where there have been free pardons granted,
24 accompanying that decision, is there any public comment
25 indicating the grounds upon which the free pardon has been

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

2 MR. RUTHERFORD

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

14 MR. CHAIRMAN

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

18 MR. RUTHERFORD

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

1 don't really know. Initially best, maybe. But that's only a
2 decision he could really evalu...or a question he could evaluate for
3 his own purposes, I think.
4 BY MR. MACDONALD
5 Q. We've had now brought down the exhibit, I believe, of Mr.
6 Fainstein's notes.
7 EXHIBIT 127 - NOTES OF MR. RON FAINSTEIN.
8
9 10:49 a.m. INQUIRY BREAKS UNTIL 11:08 a.m.
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1 11:08 a.m. *

2 MR. MacDONALD

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

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

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

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

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

1 A. Yes.
2 Q. You've discussed these with Mr. Fainstein and has he told you
3 that those are notes he made during the conversation with
4 Mr. Gale?
5 A. Yes. He told me and I spoke to him as recently as two days
6 ago about these notes, and he said that they are notes he
7 made as he was talking. They tend to be very spotty. They
8 remind him of those conversations and some aspects of them
9 certainly.
10 Q. Let me just refer you to a couple of things on the notes. I'll
11 have the opportunity to ask Mr. Gale about these in some
12 detail. The April 23 notes.
13 A. Yes.
14 Q. "AG has taken case from Sydney Police and given it R.C.M.P. .
15 Sydney Police playing games." Have you discussed with Mr.
16 Fainstein what...if that was an accurate reflection of what Mr.
17 Gale had said?
18 A. Yes, Mr. Fainstein has told me that what that causes him to
19 recollect is that Mr. Gale in that telephone conversation made
20 some sort of a statement to the effect that the Sydney Police
21 may be playing games in their dealings with him. What he
22 told me was that it had something, as he recalls it, to do with
23 the production to the Attorney General's Department of
24 statements and files after their original production. There
25 was sort of more information coming at a later date. That

1 Gale's phrase was...used this term "playing games".
2 Q. Okay.
3 A. He was not able to say that that was a conclusion or a
4 suggestion. That was just...there was conversation about that
5 at Gale's instance.
6 Q. And further down on that page there's a reference, "Aronson
7 referred by A.G. to Legal Aid." Can you help us on what that
8 means?
9 A. It pertains to some part of the discussion about the manner in
10 which Mr. Aronson would be funded in terms of any further
11 court proceedings.
12 Q. "Compensation not decided but may be given because of
13 Sydney Police." Any comment on that?
14 A. Not other than that there was a discussion of compensation.
15 The issue of whether or not and if there was to be
16 compensation how it would be assessed and dealt with was
17 something that was discussed with the Attorney General's
18 Department on more than one occasion. It was discussed with
19 Mr. Fainstein at that point. I think at that point there was
20 writ of summons, if that's the correct term in Nova Scotia civil
21 proceedings, there was a civil action at least commenced at
22 that point by Mr. Marshall naming at least one or other
23 members of the Sydney Police Force, probably Chief
24 MacIntyre as a defendant.
25 Q. All right. Toward the bottom of that page is the reference

1 you made...you referred to earlier where Mr. Fainstein
2 records that he asked him to write to advise if they feel a
3 remedy is warranted and if so which they would recommend.
4 A. Yes. Just to place this whole conversation in some context,
5 Mr. Fainstein's best recollection is about April 23rd and he
6 was really just at that point coming into possession of ample
7 materials. We had got the original police reports, but there
8 were further material to come and this comes about a week
9 after we had got the trial transcripts and all the material that
10 Mr. Aronson sent with his letter of April 13th which would
11 have arrived within a day or two of that date probably.
12 Q. Then on the next page it's noted, "Conversation with Gale
13 made," it says, "20/82," that's May 20, isn't it?
14 A. Yes, that's a...just a typo. I think the actual handwritten note
15 has the date on it.
16 Q. Yes, it does.
17 A. May 20th is the last page on the exhibit. "Made" should read
18 "May".
19 Q. Yes. And that refers to the fact that the letter, and that's the
20 letter we've referred to from Mr. How is on the way.
21 A. Yes, the May 17th letter from Mr. How I think would be
22 what's being referred to here. We hadn't obviously received
23 it by that time, at least Mr. Fainstein hadn't, it might have
24 arrived in the Minister's office by then.
25 Q. Now, let's go back to Volume 31 then, page 56.

1 A. Yes.
2 Q. This is the memo, an internal memorandum of the
3 Department of the Attorney General, referring to a telex from
4 the Minister of Justice, and I'll point you to that in a moment.
5 The second paragraph notes that Mr. Gale is attempting to
6 reach you to inform you that the A.G. agrees with the action
7 and that you and Gale are to work out the procedure for
8 referring the case to the Court of Appeal.
9 A. Yes.
10 Q. And that actually happened, did it, you and Mr. Gale met to
11 discuss the procedure?
12 A. Yes, we did.
13 Q. Okay.
14 A. Do you want dates or any elaboration of that?
15 Q. I'll come to that in a moment.
16 A. Okay.
17 Q. I just wanted to refer to the letter or the telex from Mr.
18 Chrétien to the Attorney General. A copy of the telex is on
19 page 59.
20 A. Yes.
21 Q. But then a better copy of it written in letter form I think is on
22 the following page, page 60.
23 A. Yes. I think the telex is a precise replication of the text of the
24 letter.
25 Q. Yes.

1 A. I'd have to go back to what days were weekend days at that
2 time, but I think that the reason for the telex was simply to
3 get the message there faster than the letter dated May 31st
4 would probably have done in Her Majesty's mail.
5 Q. Now, I read this correspondence from Mr. Chrétien to How to
6 be asking for agreement on the method of proceeding. Is that
7 correct?
8 A. Yes, I think that's...well, "If you agree with this I propose..." is
9 the start of the last paragraph.
10 Q. Yes.
11 A. So, I'm not sure whether it asks or that's what it says.
12 Q. Okay. Let's go to page 62 then. These are notes, I believe,
13 of...again, I don't know if they are Mr. Aronson's, but I believe
14 they are.
15 A. I think so, I've read that.
16 Q. Did you speak with Mr. Aronson about the procedure to be
17 followed? If you note in the middle of that page there's a
18 telephone message from you to Steve.
19 A. Yes. I spoke to Mr. Aronson on June 14th and again on June
20 16th the day the actual reference was dated.
21 Q. Okay. And that phone call is note to be June 14, that slip on
22 page 62.
23 A. Yes, the slip is that's at the middle of the page.
24 Q. Over to the left-hand side of the page there is a note, I take it
25 from Mr. Aronson again. It says, "Fees. If not satisfactory

1 arrangement Justice will do what it can." Did you discuss with
2 Mr. Aronson the payment of his fees that would be incurred
3 as a result of a reference to the Appeal Division?
4 A. Well, it was certainly discussed with him and I know I wrote
5 to Mr. Aronson and got copies of his accounts, but again I
6 think, subject to finding that correspondence, that that was
7 after the reference. But there was some discussion as I
8 alluded to earlier about how he would be paid if there was a
9 reference and as I recall discussing that with Mr. Gale at some
10 point and finding out that the tariff was a pretty skinny one
11 for a pretty important court proceeding.
12 Q. Do you...
13 A. I don't recall...I don't recall ever, I should put that more
14 positively, I was never in a position to make any commitment
15 that Justice would pay anything. As I say, we're...our cost
16 sharing of Legal Aid in some ways militates against making
17 special agreements when somebody wants more than Legal
18 Aid can provide in a province. But I don't...I think it would be
19 fair to suggest that I at least went so far as to raise the matter
20 with Mr. Gale and say can't...can't... whatever is the most
21 suitable arrangement possible be made for Mr. Aronson.
22 After all this is a pretty major appellate proceedings we're
23 contemplating.
24 Q. Okay. Now, let me take you to the other notes on page 62.
25 And I take this to be notes of a conversation with you on June

1 the 16th.
2 A. I think so.
3 Q. "A classical 617(B) as if it were an appeal by Donald Marshall.
4 MacKeigan spoke to Rutherford on June 15, 1982." Did you
5 have conversations with Chief Justice MacKeigan about the
6 setting up of the reference?
7 A. Yes.
8 Q. What would be the purpose of those discussions?
9 A. On...after the exchange of correspondence, the page before
10 this, page 60, which has Mr. Chrétien writing back to Mr. How
11 and proposing that we get together, Rutherford and Gale, well,
12 "Rutherford work out with your officials," I in fact met on
13 June 9th, as I think I said earlier this morning, with Mr. Gale
14 and Mr. Edwards. We discussed options and potential
15 questions that could be asked of the Court, how to deal with
16 this, we discussed whether or not the compensation issue
17 could or should or could not or should not be wound into it in
18 one way or another. We discussed what would happen if the
19 Court of Appeal ordered a new trial. All those issues were
20 discussed. The conversation ended or the meeting ending
21 with Mr. Gale expressing the desire to be able to consult his
22 Minister on the things we had discussed and make final
23 comments. On Monday, June the 14th, I telephoned Gordon
24 Gale for those final comments and I then called Mr. Aronson
25 and told him, and I assume that phone call slip at the middle

1 of page 62, which is dated the 14th, is a reference to my
2 having called him. I did speak to him on that day and I told
3 him that as between the Nova Scotia Attorney General's
4 Department and officials in Justice we were of the view that
5 we would propose a reference as the right remedy to the
6 Minister for his ultimate decision, and that it would be a
7 reference under 617 (C) asking for the opinion of the Court.
8 Q. Two particular questions.
9 A. Two par...yeah, that's correct.
10 Q. Had you given any thought to the question that would be
11 put?
12 A. Yes, there was a lot of thought...there was a lot of thought to
13 put to a number of different questions and ultimately I think
14 it came down to probably one question.
15 Q. Yeah. What would that be?
16 A. I'm not sure whether I've got it. I may have a copy of what
17 we were working with at that time. I have a copy of what
18 has reference as a draft. There were severals drafts, in fact.
19 One of the questions we were considering followed a
20 preambulatory sort of language that sounded like this, that it
21 asked the Court, referred the conviction to the Court for it's
22 opinion and determination in the light of the existing record,
23 the evidence to be adduced by counsel for Donald Marshall,
24 for the Attorney General of Nova Scotia and any other
25 evidence which the Court in its discretion received and

1 consider, the question being, "Does the additional evidence
2 warrant any action being taken in relation to the conviction
3 and, if so, what in the opinion of the Court should be the
4 nature of that action?" That was one question and I think
5 that was one of the ones that we were thinking of most
6 seriously at that time. Other forms of the questions we
7 discussed were of this order "Does this additional evidence
8 warrant any action being taken in relation to the conviction
9 and if so should Donald Marshall, Jr., be granted, (a) a new
10 trial, (b) a free pardon, or (c) some other form of relief alone
11 or in conjunction with the above?" Those were the kind of
12 things we were discussing.
13 Q. Now, had that followed through, if you had proceeded under
14 617 (C) the Court is being asked really to assist the Minister,
15 to give the Minister some...its opinion so he can make a
16 decision, is that correct?
17 A. Yes. Under (C) it would have left, in all likelihood, some
18 executive action to be taken by the Minister, either to refer
19 the matter to a new trial or possibly a free pardon. It led
20 most likely to some further ministerial action. I should say
21 the significance at least to me at that time, and I think to Mr.
22 Gale, was also that it avoided the possible awkward situation
23 of a new trial being ordered, a trial which the Attorney
24 General of the province may have no desire to take at all.
25 Q. Was it then the, at that stage anyway, the preferred option of

1 the officials in the Ministry of Justice and the Attorney
2 General that the best way to proceed would be under 617 (C)?
3 A. That's correct.
4 Q. What...
5 A. And I specifically appreciate your term of preferred option,
6 that was...that's exactly what it was at that point.
7 Q. What changed that position?
8 A. After the final discussions on the telephone with Mr. Aronson
9 and Mr. Gale on Monday the 14th, the options including the
10 preferred option were put to Mr. Chrétien on Tuesday the
11 15th in the morning, 15th of June, 1982. Mr. Chrétien agreed
12 with the preferred option and gave us instructions to finalize
13 the paperwork, that is including letters of transmission to the
14 Court, to counsel, informing Mr. Marshall through his counsel,
15 the related paper work. It was and the best of my
16 recollection is that it was the executive assistant of the
17 Minister at that time suggested to me that it might be
18 appropriate, as a courtesy, to inform the Chief Justice of Nova
19 Scotia, to whom this case in all its public ramifications was
20 about to be referred, presumably later that afternoon, in
21 advance by telephone. In fact, the executive assistant, to the
22 best of my recollection, said to me, "Wouldn't it be a good idea
23 as a courtesy to advise the Chief Justice of what's coming?"
24 My reaction at the time was that that was a good idea. It
25 hadn't occurred to me. Minister's staffs think of those things

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

1 spoke to him on the telephone and the Chief Justice told me
2 that he had read the proposed question for the opinion of the
3 Court and he said, as an off...and I'm not sure whether these
4 were his exact words, but as an off-the-cuff or an immediate
5 reaction, an unstudied reaction, he wondered whether the
6 Court of Appeal had the power to hear fresh evidence or call
7 witnesses to be examined in front of it under Subsection C of
8 617, whereas, and if I can refer you specifically to the powers
9 of the Court of Appeal in the Criminal Code.
10 Q. Those are before in Exhibit 122.
11 A. Whereas the powers to hear witnesses are clearly there under
12 Section 610, sub B and sub C and sub D all referring to the
13 powers of a Court on an appeal itself from conviction to order
14 the attendance and compel witnesses to be examined and to
15 admit their evidence, to receive the evidence if tendered, and
16 Chief Justice MacKeigan simply raised this, he said, "I'm not
17 sure it will work. I'm not sure I can do what you people are
18 asking without those powers and I don't think I have those
19 powers sitting as a Court of Appeal Judge if it's referred for
20 an opinion as opposed to referred under Sub B as if it were an
21 appeal by the accused himself." My first reaction to that was
22 to refer him to the Gorecki case because we had examined our
23 precedents to some extent, and in Gorecki, number one, which
24 as I said earlier, I think, is cited in, to be specific, in Volume
25 32 of the Canadian Criminal Cases around 1976 era. The

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

1 to come back with fuller advice on what he should do. We
2 took a good hard look at Gorecki, the discussion in the Court of
3 Appeal of Ontario's judgement there reflects a discretion in
4 the Court to hear evidence even on a reference under Sub C,
5 but to put it in its simplest form I think we thought why tilt
6 with additional problems. If there may be problems, the
7 object of this thing is to get this case back before the Courts in
8 a way that the Court could look as broadly as it thought
9 appropriate at as much evidence as it thought was
10 appropriate and if Sub B clearly invoked the powers of the
11 Court of Appeal under 610 of the Code to do that, why didn't
12 we just alter it to a Sub B, and that was our...that was our
13 decision to advise the minister that maybe a quick redrafting
14 of that reference would be a good idea.
15 Q. Now, am I correct in my understanding of the difference
16 between Sub B and Sub C to be this, if you referred it under
17 Sub C would the Crown have the burden of presenting any
18 evidence required to the Appeal Court as opposed to Marshall,
19 in your opinion?
20 A. I must admit I'm not sure. I've heard that question asked
21 before. That was not a question that came to our minds at the
22 time at all. The case lay in a...sort of a state where everybody
23 wanted to put evidence before the Court it seemed.
24 Everybody recognized the need to. Whether there would be a
25 different burden under Sub C or not I really don't know. I

1 think it's arguable that it would make a difference. In fact,
2 it's arguable, I suppose, where the federal Minister of Justice
3 refers a question to the Court that maybe he's the one to get
4 in and call the evidence, although that was not the position
5 either our department or the Attorney General in the
6 province was taking in our discussions. It was assumed when
7 we had thought as a preferred option that we'd refer it under
8 C, it was well understood as between our department and Mr.
9 How's department that they would carry those proceedings
10 and that they would carry them in such a way as to
11 vigorously cross-examine witnesses whose testimony was in
12 doubt or had changed to give the Court the benefit of
13 evidence subjected to real and proper cross-examination.
14 And there was never any suggestion that Justice Department
15 counsel would have a lead role, if any role, in it at all.
16 Q. Would you agree with that a proceeding under C, in effect, is
17 having the Court play a role as part of the executive as
18 opposed to part of the judiciary?
19 A. No, I wouldn't adopt those words. The judicial branch is the
20 judicial branch and they're asked for their judicial opinion
21 and it may assist the executive branch or the legislative
22 branch in doing something, but....
23 Q. But it is...
24 A. I don't think it mutates them into part of the executive
25 branch area.

1 Q. But it is the Minister in deciding whether to exercise his
2 discretion asking for the assistance of the Court.
3 A. Correct.
4 Q. The Court's opinion would not necessarily, would not be
5 binding on the Minister.
6 A. No.
7 Q. It wouldn't be subject to appeal.
8 A. No. I hesitate now under the Charter to say anything is not
9 subject to appeal.
10 Q. Okay. In any event the decision was made to go under
11 617(B), is that correct?
12 A. The advice to...
13 Q. Or the advice to the Minister.
14 A. The conclusion we came to at the officials level by late in the
15 afternoon of the 15th was that to go under 617 (B) was the
16 preferable thing to do. Well, the discussion, the conversation
17 or conversations with Chief Justice MacKeigan were on
18 Tuesday, June the 15th. The reference as the Court ultimately
19 got it is dated the 16th and was actually signed by the
20 Minister the next day. It was...we came to our conclusions as
21 to what advice to give on Tuesday, the 15th and we prepared
22 and gave that advice the next morning on Wednesday, June
23 16th and the Minister agreed that that sounded like the right
24 thing to do, we presented him with a draft reference which he
25 then signed and it's the one that was before the Court and I'm

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

11:38 a.m.

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

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

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

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

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

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

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

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

1 enough to encompass certainly a question of whether
2 compensation was appropriate in the circumstances and, if so,
3 what its quantum would be. I think that could have been
4 done. It was one of the possibilities we considered. I should
5 say that that paragraph in the letter from Mr. Chrétien to Mr.
6 How that you've referred to, the second paragraph, reflects as
7 best as I recall it what their departmental position was, that
8 they took that on as their responsibility and wanted to deal
9 with it separately from the Appellate reference.
10 Q. The fact that it was being considered when you were
11 contemplating going under Sec. 617(c), would the question of
12 compensation to Marshall be of any interest to the Minister of
13 Justice, the question of whether there should be compensation
14 and the amount of compensation?
15 A. To say that it was of no interest would be, I think, untenable.
16 It was a consequential matter that arose in the context of the
17 implementation of the criminal law. And even the fact that
18 provincial attorneys general are empowered by the terms of
19 the Criminal Code, exclusively to prosecute the criminal law
20 does not render those prosecutions of no interest to the
21 Minister of Justice. So, in that sense, the question of
22 compensation certainly was not of no interest or was of some
23 interest to the Federal Department.
24 Q. But it was decided to acquiesce in the request of the A.G.'s
25 Department and leave the question of the nature and the

1 quantum for the Government of Nova Scotia to decide?
2 A. Yes, in the same sense that the Criminal Law is left to the
3 provincial Attorneys General to deal with in their discretion,
4 we felt that the compensation issue in this case prosecuted,
5 investigated, dealt with completely by provincial officials was
6 properly theirs to deal with.
7 Q. Let's look at the reference...
8 MR. CHAIRMAN
9 If you had gone under Sec. 617(c) with, under your draft
10 reference, the question of compensation would have been
11 included.
12 MR. RUTHERFORD
13 It was one of the, I guess when Mr. Chrétien proposed that I
14 go down and work out details with the officials here in the Nova
15 Scotia Attorney General's Department, my first telephone call to
16 Mr. Gale established that for the meeting, I would bring some
17 draft questions to look at and that question, one of the draft
18 questions I obviously prepared included having compensation
19 addressed specifically as part of the Sub (c) reference.
20 MR. CHAIRMAN
21 But when you returned to Ottawa and received instructions
22 from your Minister to prepare the final draft, this was before your
23 conversation...
24 MR. RUTHERFORD
25 Yes.

1 MR. CHAIRMAN

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

5 MR. RUTHERFORD

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

10 COMMISSIONER EVANS

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

14 MR. RUTHERFORD

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

1 input to date that that would be okay with them.
2 COMMISSIONER EVANS
3 Well, not only okay with them, that would be preferable to
4 them, I take it?
5 MR. RUTHERFORD
6 Well, the concern was, and you'll note, Chief Justice, that in
7 the letter that Mr. How sent dated May 17th that we looked at a
8 little while ago, he actually refers to 617(b) as one of the options
9 to be considered. The only concern that I recall being expressed
10 on behalf of the Attorney General's Department was that if it was
11 a 617(b), the Court of Appeal might, as its remedy, grant a new
12 trial. And they really thought that that was going to be more
13 awkward than...
14 COMMISSIONER EVANS
15 A disaster.
16 MR. RUTHERFORD
17 Well, although there are two views. One is that a Court of
18 Appeal ordering a new trial is not a mandamus to hold a trial. It
19 orders a new trial within the context of an Attorney General's
20 discretion to prosecute. And we debated that and I think it was a
21 mild concern as opposed to a very serious concern. Hence when
22 we decided to go under Subsection (b) instead of (c), I didn't think
23 that there was going to be...If I had thought that the Attorney
24 General's Department would be terribly upset about it, I think we
25 would have waited until I had got Gale or we would have taken it

1 No, that's right.

2 MR. CHAIRMAN

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

6 MR. RUTHERFORD

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

9 MR. CHAIRMAN

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

12 MR. RUTHERFORD

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

17 COMMISSIONER EVANS

18 Under 610.

19 MR. RUTHERFORD

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

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

MR. CHAIRMAN

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

MR. RUTHERFORD

I've never crossed that.

MR. CHAIRMAN

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

MR. RUTHERFORD

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

1 look at the precedents in the 14 instances where there have been
2 appeals. There may well be some instance where a further appeal
3 has been taken, but I haven't reviewed that.
4 COMMISSIONER EVANS
5 But under (c), there would be no appeal.
6 MR. RUTHERFORD
7 I don't think so.
8 BY MR. MACDONALD
9 Q. While you have it there, Mr. Rutherford, let me take you to
10 Sec. 613, and that's in the handout I gave to you, Exhibit 122.
11 The result of proceeding under Sec. 617(b) is to confer on the
12 court the power set out in 613(1), is that correct?
13 A. I'm sorry, the powers of 613(1)?
14 Q. Yes.
15 A. I think so.
16 Q. And so that on the hearing of the appeal, the court is given
17 the option of allowing the appeal under 613(1)(a) if it
18 satisfied in its opinion that either one of three circumstances
19 exist, is that correct?
20 A. Unreasonable, cannot be supported by the evidence, or should
21 be set aside on the ground of a wrong decision on a question
22 of law, or, I think the fourth one is, or on Sub. 3, any ground
23 there was a miscarriage of justice.
24 Q. Sure. So if the court is of the opinion that the verdict cannot
25 now be supported by the evidence, it is to allow the appeal,

1 correct?
2 A. May.
3 Q. They may allow the appeal.
4 A. Correct.
5 Q. If it's of the view that it's, there's a wrong decision on a point
6 of law, it may allow the appeal.
7 A. That's correct.
8 Q. Or if it's of the opinion that there was a miscarriage of justice,
9 it may allow the appeal.
10 A. That's correct.
11 Q. And if it allows the appeal, you go to Subsection 2 where it
12 says:
13 Where a court allows an appeal under
Paragraph 1(a), it will quash the conviction
14 and do one of two things.
15 A. Yes.
16 Q. Either enter a verdict of acquittal or order a new trial.
17 A. That's correct.
18 Q. Those are the options the court has, subject to what you've
19 said about Subsection 8.
20 A. I believe so.
21 Q. Of the section, okay. Was there any contact between your
22 department and the Attorney General's Department or Mr.
23 Aronson as this reference proceeded toward the hearing?
24 A. I'm sorry, between our department and Mr. Aronson?
25 Q. Or your department and the Attorney General's Department?

1 A. There probably was but I don't remember anything of
2 significance. I think generally once the courts had been, had
3 had the matter referred to it, it became a matter between the
4 Attorney General of the province and Mr. Aronson. They
5 sought the directions of the Court of Appeal and the
6 procedure unfolded. I don't recall any significant
7 communication between our department and any of the
8 parties.
9 Q. Your contemplation, as you've expressed it a couple of times
10 this morning, I think, was that there would be a presentation
11 of all evidence to the court, "vigorous cross-examination", to
12 use your phrase, a true adversarial proceeding, is that
13 correct?
14 A. Yes, that was the subject of some discussion on at least two
15 occasions. It was a matter that I had brought up when I
16 discussed with Mr. Gale and Mr. Edwards on the 9th of June
17 the possible format of a reference. That if we were going to
18 refer it in such a way as to have the court hear evidence,
19 there couldn't be any just sort of falling over and letting the
20 apparent inconsistencies result in an answer. That the court
21 had to have the benefit of these witnesses being, all the
22 witnesses whose evidence was now in doubt in some way,
23 being really cross-examined. The reason that was discussed
24 was that it was a little difficult, and you've pointed to a
25 number of the places in the documentation where police and

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

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

COMMISSIONER EVANS

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

MR. MACDONALD

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

MR. CHAIRMAN

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

MR. MACDONALD

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

COMMISSIONER EVANS

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

BY MR. MACDONALD

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

1 morning.
2 A. Well, we certainly contemplated that possibility, although
3 when it was an appeal, and the issue of guilt or innocence
4 became the focus, I suppose subject to their own direct
5 evidence about observations at the crime scene, which I
6 understand from my knowledge of the original trial which is
7 only what I've read, that there was some direct police
8 evidence. Really, it was the involvement of the police in
9 dealing with other witnesses, such as the Pratico, Chant and
10 Harriss witnesses and to get at the thing in a classic appellate
11 context, the parties considered it only necessary to put up
12 those witnesses. Not, and I think in examining them, there
13 was a great deal of attention paid to why they gave certain
14 statements. And indirectly the conduct of the police was in
15 issue but the parties considered it unnecessary to call the
16 police at that point.
17 Q. If you're going to comment on whether or not there's been a
18 miscarriage of justice and where the allegation is that the
19 police coerced witnesses to tell a story at trial that wasn't
20 true, surely you have to have that evidence before you can
21 determine if there's any miscarriage of justice.
22 A. Well, I mean I can't agree with that because there was a
23 determination here that there was a, and I hesitate to use the
24 word "miscarriage". Some people use it in one context and
25 others in another, to determine the complete extent of

1 whether justice miscarried. Obviously, you'd have to examine
2 every aspect of it. But the Court of Appeal was able to
3 determine that the conviction was no longer supportable and
4 whether that is a miscarriage or not, I think depends on how
5 you use that term. The way Sec. 613 puts it out, it's as if it
6 could lead you to the conclusion that a miscarriage of justice
7 is something other than a verdict that's unsupportable on the
8 evidence or wrong in law or any of the other three options.
9 And I guess I'm a little unwilling to venture an opinion as to
10 just precisely what "miscarriage" means other than in the lay
11 sense that justice did not carry itself to the objective sought,
12 namely the determination of the truth, and that was the
13 ultimate conclusion here and it wasn't necessary apparently
14 to call the police officers in that proceedings to reach the
15 conclusion that the conviction was no longer supportable.
16 Q. You read the decision, Mr. Rutherford?
17 A. Yes, I did.
18 Q. That's the decision of the Appeal Court on the reference?
19 A. Yes, I have.
20 Q. And you would have read it fairly soon after it was filed, I
21 take it?
22 A. As soon as we got on our hands on it.
23 Q. And you've read it recently.
24 A. Yes.
25 Q. Is it your view that, to share my view, that the Court of

1 Appeal is saying that there was no miscarriage of justice
2 here?
3 A. No.
4 Q. You don't?
5 A. No, the court says in or around the last two or three pages,
6 there is a line tat I will struggle to the death to avoid
7 interpreting, because I don't want to interpret their words
8 particularly in the line that says "any miscarriage is more
9 apparent than real." And, quite frankly, I'm not sure what
10 the difference between real and apparent is. I thought they
11 tended to mean the same thing.
12 Q. Do you agree with me that the court is, in effect, saying that
13 Marshall in a large measure is the author of his own
14 misfortune?
15 A. Well, the only proper position for me to take is to say that the
16 court said what it said and everybody has dealt with it on
17 what they think is required in the light of that. It said what
18 it said there and I'll agree with any line you read out of it.
19 Q. But more than that, the department, and later we'll come to it,
20 in dealing with Marshall's request for compensation itself
21 referred to the comments of the court that, in effect, Marshall
22 caused it himself and he's not entitled to compensation.
23 A. Is the judgement in one of these books?
24 Q. Yes, in Volume 4 I've given to you.
25 A. I'm sorry.

1 Q. Volume 4, and it starts on page 80.
2 COMMISSIONER EVANS
3 Are you now asking this witness to interpret that judgement
4 of the Court of Appeal?
5 MR. MACDONALD
6 Not at the very moment, My Lord, but I might.
7 COMMISSIONER EVANS
8 I thought you were headed that way.
9 MR. MACDONALD
10 And I'll lay the context for the doing that, My Lord, because
11 there are letters from the Department of Justice in response to
12 request for compensation where portions of the decision are
13 quoted.
14 COMMISSIONER EVANS
15 I was just trying to anticipate the direction in which you were
16 going.
17 MR. MACDONALD
18 That's where I'm going.
19 BY MR. MACDONALD
20 Q. I would like to start at page 143. Mr. Rutherford, on page
21 143, it's the only full paragraph where the Court states that:
22
23 However, the fact remains that Marshall's
24 new evidence, despite his evasions,
prevarications, and outright lies supports
the essence of James MacNeil's story,
25 mainly that Seale was not killed by

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

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

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

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

> In our opinion, the evidence of Donna

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

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

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

Pratico didn't give evidence.

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

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

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

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

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

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

1 order the conviction quashed.
2 They go on then to say that "we take the course of taking a
3 judgement of acquittal rather than ordering a new trial."
4 A. And on a completely extraneous connection, I note the
5 Truscott case cited just before you started reading in 1967,
6 not '57. So one can be decades out on anything.
7 Q. Now that really is the end of it, isn't it? The Court at that
8 time had decided that they should allow the appeal and direct
9 a verdict of acquittal.
10 A. That's correct.
11 12:07 p.m. *
12 Q. In legal phrase the rest of this obiter, as we go on from there.
13 A. Well, I think one could characterize that way. As I say, there
14 it is. They've swung, the Court has swung from what appears
15 to be reliance on the parts of 613 that you referred to earlier
16 dismissing...allowing an appeal where, in the connection with
17 the unreasonableness of the evidence, a ground that's
18 unreasonable, and cannot be supported by the evidence, to
19 talking about miscarriages of justice on the next page.
20 Q. And don't you conclude from what they've said in the next
21 page and a half that they would not have allowed the appeal
22 on the basis that there had been a miscarriage of justice?
23 A. Well, I don't...I don't know what to conclude in that regard. I
24 would have thought that anywhere that a verdict is set aside
25 on the basis that it's unsupportable on the evidence that you

1 could say that justice has miscarried. I don't think that
2 miscarriage has to be reserved for cases where there is
3 particular...particular brutality involved in the way the law
4 was applied or malice of any sort. If justice miscarries, it
5 miscarries.
6 Q. Were you surprised that there's no evidence from the police
7 who were alleged to have coerced witnesses to tell untrue
8 stories at trial?
9 A. I don't think I ever reacted with any particular surprise.
10 There was at all times, I think here throughout the period of
11 this reference, there was a pending civil action, at least
12 commenced, against the police, which would have directed
13 itself, at least in part, at precisely their conduct. My
14 discussions with Mr. Gale made it very clear that the Attorney
15 General's Department understood with excruciating clarity
16 that there was a real problem that had to be examined and if
17 the Court of Appeal proceedings didn't get at the bottom of it
18 that wouldn't be the end of...end of things, and if to determine
19 this appeal it wasn't, strictly speaking, necessary to have the
20 police give evidence, that didn't surprise me.
21 Q. Were you surprised that the Court didn't comment on the fact
22 that Jim MacNeil's evidence, the evidence that they relied on,
23 had been in the hands of the Sydney police from two days
24 after, I'm sorry, ten days after Donald Marshall was
25 convicted?

1 A. That they didn't comment on that.
2 Q. Um. The effect of that on whether there was a miscarriage of
3 justice.
4 A. Well, no, I can't...I can't say that I sat down and registered
5 any particular emotional reaction to what was done or not
6 done. We had...we got the judgement and it dealt with what it
7 dealt with. It didn't deal with what it didn't deal with. As I
8 say, there was a civil action and a lot more to be concerned
9 about than... this wasn't the end of it. But...
10 COMMISSIONER EVANS
11 Really what you...I'm sorry.
12 MR. RUTHERFORD
13 Sorry.
14 COMMISSIONER EVANS
15 What you were concerned about, I take it, was the release of
16 Donald Marshall and the acquittal of him on the charge which he
17 had faced.
18 MR. RUTHERFORD
19 Well, that was the primary...I mean that was the connection to
20 the Minister of Justice's direct role in it was to deal with what he
21 had to deal with, namely potential miscarriages or mistakes under
22 Section 617. He had exercised all the power he had and the Court
23 of Appeal had done the initial, I referred to it as sort of the layers
24 of problems, had dealt with the first layer by undoing the
25 conviction. And that certainly was one of the most immediate

1 goals, to deal with whether or not that conviction was proper.
2 And that had at least been dealt with by the time this judgement
3 was released.
4 MR. MacDONALD
5 Q. Let me take you to Volume 30 of the evidence, which is
6 Exhibit 123, and on page 26 of that volume.
7 A. Yes.
8 Q. That's a letter from Mr. Cacchione, who was now acting for
9 Mr. Marshall, to the Minister of Justice, Mark McGuigan, and
10 seeking compensation for Mr. Marshall on the basis of an
11 international covenant of which Canada is a signatory or to
12 which Canada is a signatory "To provide compensation to
13 persons who have been wrongfully convicted or punished for
14 a crime and who have later been exonerated." Was your
15 department involved in the drafting of a response to this
16 letter?
17 A. Well, Mr. McGuigan did respond to this, I think a month later.
18 Q. Yes. Was your department involved in that particular
19 matter?
20 A. Yes, I think there is no doubt that that letter was reviewed in
21 the criminal law section and I'm sure I saw it before a
22 response went out.
23 Q. The response is on page 29.
24 A. Yes.
25 Q. Was that response drafted by your department?

1 A. It was drafted in the department. I can't be positive who
2 may have had what role in its preparation, but I see Mr.
3 McGuigan's signature and so it's his letter.
4 Q. Now, in the...in response to the request for compensation by
5 Mr. Marshall for having been wrongfully convicted, reference
6 is made to the comments of the Court of Appeal to which I've
7 just referred, in fact they're quoted in some detail, showing
8 that Mr. Marshall did not emerge untarnished. Is it not the
9 fact that the department placed great emphasis on those
10 comments by the Court of Appeal in denying Mr. Marshall's
11 request for compensation?
12 A. Well, I think it's undeniable that the judgement was there
13 and it had a conclusion from a five member bench of the
14 Court of Appeal of this province which reads, "There can be
15 no doubt that Donald Marshall's untruthfulness through this
16 whole affair contributed in a large measure to his conviction."
17 That was a judicial finding that was part of that judgement.
18 To say we placed great emphasis on it or not I guess is
19 debatable, but it's cited in this letter as one of the features in
20 the environment in which Mr. Cacchione is suggesting that the
21 compensation is...should be paid and that in recognition of
22 that the clause of the international covenant on civil and
23 political rights should be brought into play or brought into
24 view.
25 Q. But you also were aware that the two eyewitnesses at trial

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

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

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

MR. BISSELL

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

MR. CHAIRMAN

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

1 MR. RUTHERFORD

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

4 MR. CHAIRMAN

5 That's all right.

6 MR. RUTHERFORD

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

14 MR. MacDONALD

15 But it's Canada.

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

1 this point, it seems to me that is, it says "In my view an issue
2 for the provincial and municipal authorities for although the
3 offence was alleged, alleged there was a contravention of
4 federal law, the original investigation was carried out by
5 provincial...by municipal police and the prosecution was
6 conducted by provincial officials." And that was the position
7 that Mr. McGuigan and the department was operating on
8 throughout and that I think we understood to be one with
9 which the Attorney General of the province was in complete
10 agreement, that there was an issue to be dealt with and it was
11 the province's responsibility to deal with it.
12 Q. It's Canada though that has signed the convention. It's not
13 the Province of Nova Scotia.
14 A. Oh, indeed I think the authority is clear that only the
15 Dominion government can enter into international treaties.
16 Q. And the covenant provides for compensation being paid to
17 people who are wrongfully convicted, yes.
18 A. In a nutshell.
19 Q. Yeah. And, is it not, at least in the first instance, the
20 department's position that that covenant doesn't give you any
21 right to payment but you may have right to payment from
22 the province for other reasons.
23 A. Well, I'm not...I'm not going to set myself up as any expert in
24 interpreting covenants or, indeed, as an international lawyer.
25 Mr. McGuigan was the international lawyer in the department

1 as Minister and, of course, that is his speciality and I don't
2 profess it, but I think we have always acted on the
3 assumption that to the extent there were obligations on the
4 country they could well be carried out at different levels of
5 government than the federal government. Indeed it doesn't
6 follow that every international obligation must be carried out
7 domestically by the federal government.
8 Q. Let me take you to that paragraph on page 30 that you've
9 referred to. It starts "Article 14(6) of the International
10 Covenant provides for compensation for a person whose
11 conviction has been reversed," and then, "On the ground that
12 a newly discovered fact shows conclusively that there has
13 been a miscarriage of justice unless the nondisclosure of the
14 unknown fact in time is wholly or partly attributable to him."
15 Now, what new-found fact, newly discovered fact showed
16 there was a miscarriage of justice and that would...had been
17 either wholly or partly attributable to Marshall?
18 A. Well, all I can do is point back to the record of the decision of
19 the Court of Appeal. I'm not sure precisely what fact or facts
20 in their entirety they're referring to, but they say that his
21 untruthfulness throughout the whole affair contributed in
22 large measure to his conviction. There is reference at page,
23 well, the middle of page 145 the Court says,
24
25 By lying he helped secure his own

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

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

1 with this issue of compensation. I think his position on the
2 public record was very clear. It wasn't that there shouldn't
3 be compensation. Quite the contrary, but that the province
4 had the duty to deal with it. And, he took increasingly
5 vigorous steps up to and including his discussions with the
6 Attorney General, who became Attorney General in the
7 province in or around the end of of 1984, Mr. Giffin. He spoke
8 to him the records shows on several occasions in an attempt
9 to urge him to get on with the dealing with this compensation
10 issue.
11 MR. CHAIRMAN
12 Mr. Rutherford, before we leave that, I'm having some
13 difficulty with that last part that you refer to, the letter of
14 September the 2nd, being the point of Mr. McGuigan's letter.
15 Without interpreting it I might, if I read it, be...treat that more as
16 an aside. If you...in looking at the letter from Felix A. Cacchione of
17 August the 2nd, 1983, he clearly argues under...in the second
18 paragraph or suggests that Canada as a signatory to the
19 International Covenant on Civil and Political Rights had an
20 obligation to pay compensation to Donald Marshall, Jr.. I think
21 that's a fair reading.
22 MR. RUTHERFORD
23 Canada undertakes the obligation in the terms of that
24 covenant.
25 MR. CHAIRMAN

1 That's right. In the terms of that covenant. The implication
2 being that if you're not obligate under that provision it would
3 be...no other jurisdictional obligation is imposed upon you. But
4 then when I read the letter of September the 2nd, which recites
5 the findings of the Court of Appeal of Nova Scotia on the
6 reference, to which you have referred, followed then by the
7 paragraph, in reference to the International Covenant were I read
8 this, "Unless the non-disclosure of the unknown fact in time is
9 wholly or partially attributable to him, (emphasis added.)" It
10 seems to me that letter is in response to Mr. Cacchione's
11 suggestion that the Government of Canada may have some
12 obligation under that treaty. Would that be a fair...is that a fair
13 reading?
14 MR. RUTHERFORD
15 Well, I...again it puts me in the position of trying to say what
16 the Minister intended by this letter I take from it that in
17 response to the putting forward of this covenant as a focal point
18 and talk about when and where and who is going to compensate,
19 the response by Mr. McGuigan says, well, you've recited some of
20 the covenant, there is another part, it may be arguable or you
21 may infer from what the Court has said that the covenant is not
22 applicable. On the other, he...and so he simply opens up the issue
23 that there may be a problem in just how applicable that
24 thing...that covenant is, but in any case, he says, "This is a matter
25 that the province has got to deal with."

1 MR. CHAIRMAN

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

4 MR. RUTHERFORD

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

1 for international obligations to be satisfied through the actions of
2 provincial and municipal officials. The problem arises where the
3 obligation isn't satisfied at all and then I think the national
4 government has a problem to deal with. But here I read Mr.
5 McGuigan as saying we're not really arguing about this, although
6 don't forget there is a subclause to that and I underline that with
7 emphasis so that you appreciate that you may...it may inferred
8 that your client doesn't necessarily fall under that umbrella of
9 that covenant. On the other hand the last paragraph on page 30
10 recognizing fully the argument that I think Mr. MacDonald is
11 putting to me that surely there was a lot more than Marshall's
12 own lack of candour that led to this miscarriage of justice. But the
13 whole thing is a matter that the province is going to deal with, it's
14 their responsibility, it's their obligation, says Mr. McGuigan. And
15 that's what I read the letter to say.
16 COMMISSIONER EVANS
17 Those problems arise, I would think, quite frequently or...in
18 environmental problems.
19 MR. RUTHERFORD
20 I think almost any area of international agreement,
21 commercial, free trade, all kinds of problems that involve our
22 federal structure, challenging as it is.
23 COMMISSIONER EVANS
24 Have we got you far enough off your track now?
25

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

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

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

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

A. Yes.

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

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

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

A. Yes.

Q. Did you ever, to your knowledge, anyone in your department ever discuss with the R.C.M.P. the investigation that was 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.

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

A. Yes.

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

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

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

A. Yes.

Q.

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

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

2:16 p.m.*

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.
Marshall had testified in 1971 to
18 attempting to roll Ebsary and MacNeil this
would have made absolutely no difference
19 in the outcome of his trial since he was
20 being pointed out as the murderer by two
supposed eyewitnesses who were
21 perjuring themselves.
22 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 you 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.

Q. Mr. Hnatyshyn.

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

> Those precise questions were asked and answered in this House last week. The fact of the matter is Mr. Marshall was prosecuted by a Crown Prosecutor in the Province of Nova Scotia under the direction of the Attorney General of Nova Scotia after the investigation of a crime by the police of the City of Sydney, Nova Scotia, which of course falls under the jurisdiction of the Province of Nova Scotia. There is no federal involvement under the Department of Justice in the investigation or trial of Mr. Marshall. Although we certainly have no responsibility to do anything, because I am so concerned that the Province of Nova Scotia has not yet assumed any responsibility in this important case, I have discussed the matter with the Attorney General of Nova Scotia and asked him to consider very seriously the responsibilities I believe the province should undertake.

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

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

> Ministers recognize the injustice committed to those who are wrongfully convicted and imprisoned. I believe the federal government has a responsibility in this area, a view welcomed by my provincial colleagues. Minsters agreed to set up a federal/provincial task force of officials to review the matter and develop options for ministerial consideration.

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

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

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.

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

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

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

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

A. Yes, it did.

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

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

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

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

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

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

Is that a fair statement?

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

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

> The expression shall be compensated according to law would appear to lead to the conclusion that entitlement to compensation should be based on the statute. This view is reinforced by the 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

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...
12 MR. BISSELL
13 I would object to that question on the basis of relevancy. I
14 wonder how relevant to this Inquiry that particular...
15 CHAIRMAN
16 I was more concerned, which Minister of Justice are you
17 referring to? The Province?
18 MS. EDWARDH
19 Well, I suppose, really, any of the ministers that Mr.
20 Rutherford...
21 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?
24 MS. EDWARDH
25 No, of Canada. I'm interested really, and let me just

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

Government's interests.

CHAIRMAN

True.

MR. RUTHERFORD

Some RCM Policemen have private representation.

CHAIRMAN

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

COMMISSIONER EVANS

What more do you want to know?

MS. EDWARDH

Well, I guess the fundamental...

COMMISSIONER EVANS

Anybody can write in that feels...

MS. EDWARDH

The fundamental issue is a very grassroots one.

COMMISSIONER EVANS

Is it?

MS. EDWARDH

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

COMMISSIONER EVANS

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

MS. EDWARDH

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

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.
21 COMMISSIONER EVANS
22 Well isn't there a Federal ombudsman who looks into matters
23 of this kind?
24 MS. EDWARDH
25 I'm not sure, My Lord.

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

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 ombudspeople 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...
6 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...
9 CHAIRMAN
10 I used to play football...Mr. Stewart, isn't it? Davie Stewart.
11 MR. RUTHERFORD
12 Yeah, but you're right. It was, it was Miss Inger Hansen who
13 was the first...
14 COMMISSIONER EVANS
15 That's who I was thinking of.
16 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

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

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.
7
8 MS. EDWARDH
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 Q. Can you give me an example of a case of someone saying that
7 they're wrongfully convicted where a pardon would be the
8 only effective remedy?
9 A. Well I really don't want to get into an examination of the Fox
10 case because it requires a detailed knowledge of it that I'm
11 not sure I can bring forward at this point. But Fox, which is
12 cited in this Compensation Task Force report is a case where
13 free pardon was given. It did not go back to the Courts.
14 There are some people who thought that it was a great
15 mistake that it wasn't referred back to the Courts. I think it's
16 a matter of record in that case that the Provincial Attorney
17 General in British Columbia strongly opposed it going back to
18 the Courts and there were problems in resurrecting the
19 evidence in that case. The prime witness, who was the
20 victim in the offence, had suffered a very serious motor
21 vehicle injury and, in effect, could never be expected to be
22 able to give testimony again. So that a consideration of
23 whether it was the only effective remedy certainly arose.
24 Q. Okay. That just clarifies that kind of circumstances that it
25

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

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

Q. And so those of us who...

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

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

A. I suppose so.

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

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

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

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

CHAIRMAN

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

MS. EDWARDH

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

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

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

COMMISSIONER EVANS

If the Government moved that quickly I would be surprised.

MS. EDWARDH

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

COMMISSIONER EVANS

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

MR. RUTHERFORD

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

MR. EDWARDH

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

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

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

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

A. 610 and 613.

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

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

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

A. I think it's...

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

A. I think it's in 613.

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

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 wiling 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

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.

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

A.

> Refers the conviction for hearing and determination in the light of the existing judicial record and any other evidence which the Court in its discretion receives and considers as if it were an appeal by Donald Marshall.

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

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

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

COMMISSIONER EVANS

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

MR. RUTHERFORD

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

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 tat 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 tat 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

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.
6 COMMISSIONER EVANS
7 And a decision made.
8 MS. EDWARDH
9 Yes.
10 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

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

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

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

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

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

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

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

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

MR. CHAIRMAN

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

MR. ROSS

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

MR. CHAIRMAN

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

MR. RUTHERFORD

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

MR. ROSS

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

A. I'm sorry, Mr. Ross, I'd have to go back and re-read the police reports and the advisory material that went to the Minister. My recollection on this point is that the robbery...the suggestion that Donald Marshall and Sandy Seale were in the park that night engaged in, as it's put here, "Rolling strangers", I think was raised in that material. But to say 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

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

A. A section, I'm sorry.

Q. Is it an aspect of the inquiry?

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

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

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

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

A. Yes.

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

A. Yes, that was precisely why I raised that concern, and it 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

3:43 p.m.

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

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

Q. I see.

MR. ROSS

Thank you very much. No more questions.

EXAMINATION BY MR. NICHOLAS

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

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

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

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

A. I believe so.

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

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

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

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

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

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

A. Was it of any concern?

Q. Yes, to the Attorney General of Canada.

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

Q. But as raised in this particular letter.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

A. No, I did not.

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

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.
25

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

COMMISSIONER EVANS

By any means?

MS. DERRICK

Well...

MR. MURRAY

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

CHAIRMAN

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

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

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 8thday of March 1988 at Dartmouth, Nova Scotia