

MR. ARONSON, EXAM. BY MR. ORSBORN

1 confuse the troops.

2 MR. ORSBORN

3 And the final exhibit is a thicker volume entitled "Volume
4 39". I'm advised the number will be 134. And that really is,
5 simply for ease of reference, it's a compilation of material dealing
6 with the reference, the bulk of which was extracted from the files
7 of the Court of Appeal and it's simply been compiled in this
8 fashion for ease of reference.

9 EXHIBIT 134 - VOLUME 39 - COMPILATION OF MATERIAL -

10 COURT OF APPEAL FILES

11 COMMISSIONER POITRAS

12 Did you say you were going to put this sheet of paper in, 133,
13 then?

14 MR. ORSBORN

15 I guess that's number 133, yes, My Lord. 132 would be
16 Volume 28, the single sheet of paper would be 133 and the
17 Volume 39 will be 134.

18 (To Mr. Aronson:) Do you wish to be sworn or simply take the
19 position as an officer of a court you do not need to be sworn?

20 MR. ARONSON

21 That's fine by me.

22 STEPHEN ARONSON, duly called, testified as follows:

23 EXAMINATION BY MR. ORSBORN

24 Q. What is your full name, Mr. Aronson?

25 A. Stephen Jack Aronson.

1 Q. And where do you live?

2 A. Ottawa, Ontario.

3 Q. And who are you employed by?

4 A. The Federal Department of Justice.

5 Q. In what capacity?

6 A. Legal counsel with the Canadian International Development
7 Agency.

8 Q. And how long have you been employed by the Department of
9 Justice?

10 A. Approximately a year and a half.

11 Q. And what about prior to that?

12 A. Prior to that I was employed with the Department of Indian
13 and Northern Affairs in Ottawa.

14 Q. For how long?

15 A. Approximately three and a half years.

16 Q. And what about prior to that?

17 A. Prior to that I was in private practice in Dartmouth, Nova
18 Scotia.

19 Q. Were you a sole practitioner?

20 A. I would, had an associate and an articulated clerk but it was
21 essentially solo practice.

22 Q. And have you been in private practice since the date of your
23 admission to the Bar?

24 A. No, since 19-, February of 1976.

25 Q. And what about prior to that?

MR. ARONSON, EXAM. BY MR. ORSBORN

1 A. Prior to that, I graduated from Dalhousie Law School in May
2 of 1973. I was admitted to the Nova Scotia Bar in February of
3 1974. From roughly the time I was admitted to the Bar until
4 towards the end of 1974, I was employed by the Union of
5 Nova Scotia Indians in a legal capacity on a full-time basis as
6 counsel for them. During the year 1975 I was in Australia
7 attending university there and it was upon my return at the
8 end of 1975, early 1976, that I went into private practice.

9 Q. What type of practice did you have?

10 A. It was a fairly general practice. I did a reasonable amount of
11 work in the area which I describe as Native law, in terms of
12 hunting and fishing rights, treaties and so on. Land claims.

13 Q. I'd like to move to September 1971...

14 CHAIRMAN

15 How long did you say you were in practice, Mr. Aronson?

16 A. From February of 1976 until May of 1983.

17 Q. In either late August or early September of 1981, did you
18 have occasion to be contacted concerning Donald "Junior"
19 Marshall?

20 A. I did.

21 Q. And what was the nature of that contact?

22 A. I was contacted, as you've indicated, in late August or early
23 September of 1981, by Stewart Killen who was the research
24 director of the Union of Nova Scotia Indians and he was my
25 liaison or contact person with that particular organization, and

1 it was he who gave instructions as to what work or matters
2 that the Union wished me to look after. And on this
3 particular occasion he asked if I would look into the Donald
4 Marshall, Jr. case and go up and see him in Dorchester
5 Penitentiary.

6 Q. I take it, then, that you had been referred work on occasion
7 by the Union of Nova Scotia Indians?

8 A. Yes. During the course while I was, during the time I was in
9 private practice, yes.

10 Q. And following that request from Mr. Killen, what did you do?

11 A. I don't recall the exact date when he contacted me but shortly
12 thereafter, I believe on September the 3rd, 1981, I attended
13 at Dorchester Penitentiary in Dorchester, New Brunswick, to
14 meet, for the first time, with Donald Marshall, Jr. as well as
15 other individuals who were associated with the case or who
16 had information in relation to the case.

17 Q. And do you remember who those other individuals were?

18 A. Roy Gould. Danny Paul. Mitchell Sarson. There may have
19 been one or two others. Those are the individuals who I
20 recall having been there.

21 Q. And were all of these people present at your meeting with
22 Mr. Marshall?

23 A. Initially. The facilities for visitors is one large room,
24 somewhat smaller, about half the size of this room, where all
25 visitors are initially, meet. There was, and we spoke for some

1 period of time together and then Junior and I went into one of
2 the private interview rooms which is immediately off the
3 main large room.

4 Q. Mr. Aronson, I'm showing you a copy of Exhibit 133. Are you
5 able to identify the handwriting on that exhibit?

6 A. Yes, I am. That's my handwriting.

7 Q. The heading there is, I believe, "Meeting with Junior at
8 Dorchester, September 3, 1981." Would this, I take it then, be
9 a note of your discussions on that date?

10 A. That's correct.

11 Q. Can you tell us what you remember of the discussions initially
12 with the larger group of people and then following that with
13 Mr. Marshall himself?

14 A. The initial discussion I had was with, that bore directly on the
15 case, was with Mitchell Bayne, or the name is actually
16 Mitchell Bayne Sarson. I wrote it down at the time as
17 Mitchell Bayne. He indicated to me, and it's expressed in the
18 notes, that he had had occasion to be in Sydney on a course.
19 That he had stayed with Roy Ebsary in a room and board-
20 type of situation. And that during the course of his stay with
21 Mr. Ebsary that there had been drinking one evening and Roy
22 Newman Ebsary had indicated to him, related the story of
23 what had happened in Wentworth Park in, the events leading
24 up to the stabbing of Sandy Seale.

25 Q. Was Mr. Bayne introduced to you as Mr. Bayne or as Mr.

1 here and...

2 Q Were you given any information on the context in which that
3 test was taken?

4 A. No, I was not.

5 Q Were you told that this had been part of a subsequent
6 investigation after Mr. Marshall's conviction?

7 A. No, I was not. I was not aware of a subsequent investigation
8 at the time.

9 Q I take it you then interviewed Mr. Marshall by yourself?

10 A. Yes.

11 Q And do I understand that notwithstanding the fact that Mr.
12 Marshall was your client, that you are able to discuss your
13 conversations with him?

14 A. I understand I am, yes.

15 MR. RUBY

16 Privilege has been waived.

17 Q What, if anything, do you remember of your first discussions
18 with Mr. Marshall?

19 A. The discussion we had primarily related to two things. One
20 was the evidence and the actual conviction for which he
21 claimed his innocence. The second aspect concerned parole.
22 With respect to the conviction, Donald Marshall Jr. related to
23 me, in his own words, what had transpired on the night that
24 Sandy Seale was killed and that was the large part of our
25 discussion centered around that.

1 gentlemen back and the next thing Junior saw was a knife
2 coming out and stabbing Sandy Seale.

3 Q. Did he give you any information about the circumstances
4 under which Mr. Seale called the two men back?

5 A. No. He was, he, himself, didn't call them back. He had no
6 intention of calling them back and he didn't understand why
7 Seale called them back at that particular moment in time.

8 Q. What were your impressions of Mr. Marshall at this first
9 meeting?

10 A. Well physically he was in quite good shape. He was
11 somewhat nervous, not especially articulate in being able to
12 explain what had happened but a person who's quite
13 convinced of their own innocence and quite certain that a
14 misjustice had been done. That they shouldn't be there.

15 Q. Did you consider the possibility of any collusion between Mr.
16 Marshall and Mr. Sarson?

17 A. I thought it was a possibility. I, when I talked to Sarson one
18 of the things I asked him, I obviously knew he had some
19 record since he had been in prison and I was somewhat
20 concerned about the credibility of one witness, particularly in
21 relation to hearsay.

22 Q. How long were you speaking with Mr. Marshall alone?

23 A. Perhaps an hour or so. Roughly an hour, I would say.

24 Q. And...

25 A. It's not a conducive atmosphere to carry on a lengthy

1 interview in Dorchester Penitentiary.

2 Q. What, if anything, did you decide to do following your
3 discussions with him?

4 A. Well, I, after I left I believe I spoke with Roy Gould briefly.
5 Roy provided me with certain transcripts, I believe of the
6 preliminary hearing, in the original murder conviction and I
7 indicated that I'd like to do a little more work in it to try and
8 find the balance of the transcripts at the trial and the case on
9 appeal and get some idea of exactly what the basis of the
10 conviction was.

11 Q. Who was your client at the time?

12 A. I took it, my client was Donald Marshall, Jr., but that the
13 retainer fees were going to be paid by the Union of Nova
14 Scotia Indians. It had been, it would not have been the first
15 time that that type of an arrangement had been made.
16 Where I acted for an individual although I was paid by the
17 Union of Nova Scotia Indians.

18 Q. Did you travel to Dorchester with this group or did you travel
19 independently?

20 A. Independently.

21 Q. I see. And had you met Mr. Sarson before meeting him in
22 Dorchester?

23 A. No.

24 Q. What did you do following the meeting at Dorchester?

25 A. I tried to dig up the, or to locate and obtain copies of the trial

1 transcript and the case on appeal transcript. I was led to
2 believe by Roy Gould that a solicitor in Truro, I believe
3 Melinda MacLean, had been involved in the case at one point
4 and that she had copies of the transcript. I wrote to her and
5 asked if she might forward to me copies of those transcripts
6 and...

7 Q. And did you receive them?

8 A. At this, I'm not sure if I actually got them from her. My
9 recollection was, no, I did not get them from her, but I may
10 very well have. I recall her having sent me correspondence
11 indicating that she would be glad to send them to me but that
12 there were certain, a small fee outstanding. Whether, in fact,
13 I got them from her, as I say, I don't recall.

14 Q. Did you have any priorities at the time as to what you wanted
15 to see happen first?

16 A. My initial priority was, as I say, getting some background into
17 the case and I also wanted to see if we could begin something
18 in terms of parole. Junior's parole date was coming up in
19 November of that year.

20 Q. There is a letter that you wrote to Mr. Marshall on September
21 11th, that's found in Volume 31, at page 1, that refers to your,
22 in the first sentence, to your discussions with Mr. Marshall
23 and you speak of having contacted a friend in the Solicitor
24 General's Department. What does that refer to?

25 A. I had spoken with Jack Stewart who was actually with

1 Correction Services Canada and was, at the time, the director
2 of the Carlton Pre-Release Centre in Halifax.

3 Q. You also speak in that letter of attempting to locate a
4 trustworthy investigator. Did you, in fact, employ the
5 services of an investigator?

6 A. No, I did not.

7 Q. Why not?

8 A. Two reasons. One, I had no funds with which to retain a
9 private investigator and, secondly; I had some difficulty in
10 locating a reliable individual who had had experience in
11 criminal investigation in Nova Scotia and, particularly, in Cape
12 Breton, which is why I had gone to see Jack Stewart.

13 Q. Now there is correspondence in this volume over the next
14 month of two, correspondence back and forth between
15 yourself and Melinda MacLean concerning the transcripts. A
16 letter of page 5 to Junior inquiring about parole interviews. A
17 letter back from Junior commenting on that. And then a
18 letter in December from Junior to Mr. Ebsary. Other than the
19 bare facts that are noted in this correspondence, are you able
20 to tell us anything about events unfolding in the late stages of
21 1981?

22 A. The primary efforts I made was, as I say, to get background
23 on the Marshall case. I did have the opportunity of reading
24 the transcripts at the trial. I have no actual recollection now
25 as to the day I received the transcripts but I believe it was

1 sometime after I first Junior. Similarly, at the same time I
2 was working, I had been in touch with the parole authorities
3 and attempted to determine what possibility or hope there
4 was of Junior's parole application being successful. The
5 reasons why it was being held back or why it was likely not
6 to be recommended by the office or the board.

7 Q. I'm sorry, the reasons why it was likely not to be
8 recommended?

9 A. Yes.

10 Q. And what was that?

11 A. That he showed no re-, that he had been convicted of murder.
12 That he had not shown any remorse, nor any
13 acknowledgement of the crime.

14 Q. Who did you speak to?

15 A. Maude Hoady, I believe.

16 Q. H-O-D-Y?

17 A. H-O-A-D-Y.

18 Q. And in this period did you meet with Junior again?

19 A. I met with Junior on a second occasion to discuss the case. I
20 believe it was late in the fall and at that time there was just
21 Junior and I. There was no one else in attendance and we
22 spent some time going over the parole as well as talking
23 about the case.

24 Q. Had you formed any opinions of your own at that time as to
25 the validity of the case that Junior was making?

1 A. No. Not in the sense of being certain that he was innocent or
2 believing he was innocent. I guess I'm a bit conservative and
3 believe that when people are convicted by courts of crimes
4 that they are convicted justly. And the burden was on us
5 and Junior to reverse it which was not going to be an easy
6 thing to do.

7 Q. The letter that's reproduced on page 7 of that Volume 31, the
8 letter to Mr. Ebsary, and you got a copy of it, did you suggest
9 that he write Mr. Ebsary?

10 A. No, I did not.

11 Q. Page 8 of that volume. There's a letter of January 26, 1982,
12 to the Sydney Police Department. Why did you approach the
13 Sydney Police Department as opposed to, say, the Crown or
14 the RCMP?

15 A. I can't say as there is a particular reason. I think that was
16 the way in discussions that Junior and I had had that that's
17 who he felt I should be writing to and it was certainly one of
18 the groups who was appropriate to write to in the case.

19 Q. Had you had any direct discussion with the Sydney Police
20 Department prior to writing this letter?

21 A. None whatsoever.

22 Q. So this letter would have come to them...

23 A. Cold.

24 Q. Cold. The third paragraph, last sentence of that letter, said, "I
25 spoke with Bayne personally and he told me that Ebsary had,

1 indeed, confessed to him." Did you speak with Mr. Sarson on
2 any occasion other than the time at Dorchester?

3 A. No.

4 Q. Did you have instructions from Mr. Marshall to approach the
5 Sydney Police Department? Or let me put it another way, did
6 you discuss with Mr. Marshall, prior to approaching the
7 Sydney Police Department, what you planned to do?

8 A. Yes. Which was to write to the Sydney City Police and
9 request that the investigation be re-opened based on the
10 conversation with Sarson and the recent charge. What
11 actually stimulated it is the comment in the last sentence
12 where I had gotten information, I believe it was through Roy
13 Gould, that Ebsary had, once again, or I shouldn't say once,
14 had been charged with an assault and I was led to believe
15 that the assault involved a knife.

16 Q. You say that stimulated the letter?

17 A. It added what, in my mind, was some similar fact evidence.
18 That here we have a man who fits the description. It's an
19 offence involving a serious or aggravated assault. And my, as
20 I say, my understanding was that it involved a knife as well.

21 Q. Are you suggesting that if that assault had not taken place
22 that the letter would not have been written?

23 A. No, I think that, my instructions were to try and get an
24 investigation re-opened but that added an additional factor to
25 assist.

1 Q. Up until this time, had you had any communication with
2 either Mr. Moe Rosenblum or Simon Khattar?

3 A. No.

4 Q. Following your sending the letter to the Sydney Police
5 Department, what was your next involvement with the case?

6 A. Receiving a phone call from Staff Sergeant Harry Wheaton of
7 the RCMP detachment in Sydney, Nova Scotia, who advised
8 me that the letter I had written to Chief MacIntyre had been
9 passed on to him.

10 Q. Page 9 of that volume, there's again, a letter from you to
11 Junior, referring to having received a call from Staff Wheaton
12 and I would assume that that was received on February the
13 8th?

14 A. I'm sorry, that the call was received from Staff Sergeant
15 Wheaton...

16 Q. Yes. "I spoke with you this morning..."

17 A. I believe so, yes. Yes.

18 Q. Did Staff Wheaton give you any information about the
19 investigation other than the fact that he had been asked to
20 look into.

21 A. No. I believe we may have arranged a meeting at that time in
22 terms of transcripts and so on but no great discussion on the
23 phone.

24

25

1 12:00 Noon

2 Q Turn to page 11 of Volume 31 and there's a notation, I
3 believe on February 9th with some kind of a, some shorthand
4 there. They're referring to an Ed MacNeil, I think, or
5 "MacNeil, Ed- Cape Breton Post." Can you enlighten us?

6 A. "LDTF" is my shorthand for "long distance telephone call".
7 MacNeil was the editor of the Cape Breton Post. a daily
8 newspaper in Sydney, Nova Scotia. The note was taken in ,
9 Wagmatcook, Cape Breton Island on that date, the 9th of
10 February.

11 Q Do you have any idea where Mr. MacNeil got his information?

12 A. I had no direct ideas to where. The only two sources I could
13 believe were either the Sydney City Police or the R.C.M.P. I
14 was somewhat surprised that he was aware that there was an
15 investigation going on.

16 Q There's a notation a bit further down on the page about
17 February 10th. It appears to be a conversation with D.
18 Marshall. Is that Junior Marshall?

19 A. That's Donald Marshall, Sr.

20 Q And that relates that he had also been contacted by the Cape
21 Breton Post?

22 A. That's correct.

23 Q And the following day a conversation with Staff Wheaton?

24 A. Yes, that took place in Sydney, Nova Scotia.

25 Q That was a face-to-face conversation?

- 1 A. A face-to-face conversation.
- 2 Q. Anybody else present?
- 3 A. Cpl. Bill Carroll. Jim Carroll, I'm sorry.
- 4 Q. And what, if anything, were you told of the status of the
5 investigation at that time?
- 6 A. Nothing that I recall of any substance. It was essentially a
7 discussion as to what was the evidence that I had, the
8 conversation with Sarson, any other factors that I thought
9 were a cause of concern in the case.
- 10 Q. Did you have discussions with Junior during this period about
11 the fact that the R.C.M.P. were investigating?
- 12 A. I don't know if I had a discussion. I may have, I think he was
13 certainly aware that I was going to be meeting with the
14 R.C.M.P.
- 15 Q. Were you aware that he was contacted by the R.C.M.P.?
- 16 A. That?
- 17 Q. That Junior was contacted?
- 18 A. Junior? Not at that point in time, no.
- 19 Q. Had you given any advice to Junior about the possibility of his
20 being contacted by investigators?
- 21 A. No, my first contact, knowledge on that was a call from Staff
22 Wheaton. I'm not sure when, sometime mid-February
23 perhaps. Perhaps it was during the conversation that I had in
24 Sydney when he had asked whether I had any objection to he
25 and Carroll going down. As I say, I don't recall whether that

1 was during my meeting on February the 11th or in a
2 subsequent conversation I had on the phone with Staff
3 Wheaton.

4 Q. And did you have any objection to his visiting Junior?

5 A. No.

6 Q. Turning to page 12, Mr. Aronson. This notes a conversation
7 with Staff Wheaton apparently on March the 11th. The
8 preceding note is February the 11th. Do you now have any
9 memory of what, if anything, you might have been doing in
10 the intervening month?

11 A. No, not any clear recollection.

12 Q. The note refers to a 10-page report. Did you ask Staff
13 Wheaton at that time for a copy of the report?

14 A. I believe I did, yes.

15 Q. What was his response?

16 A. That it had to be sent to the Attorney General's Department in
17 Halifax and that it was up to them to make a decision, but he
18 had no authority to release it.

19 Q. The note also says "Based on the cases they have seen
20 investigated, no jury could convict if they had all the
21 evidence." Do you know if, the part in quotes, "No jury could
22 convict," are they your words or Staff Wheaton's words?

23 A. I believe that they would have been Staff Wheaton's words.
24 If I could just preface my comments with respect to the
25 conversation referred to on page 12, I had received a call that

1 day from Donald Marshall, Jr. in Dorchester, from Dorchester
2 indicating that he had taken a call from either Staff Wheaton
3 or Jim Carroll indicating to him that they had certain evidence
4 that would be of great assistance to him. He was quite excited
5 when Junior called me, Junior was quite excited and asked
6 that I get in touch with Staff Wheaton.

7 Q. Was this then the first indication that you had had from the
8 R.C.M.P. that there was a possibility as to Junior's innocence?

9 A. Yes, but I had had a somewhat vague feeling that once the
10 R.C.M.P. took on the investigation that perhaps something
11 would transpire, positive.

12 Q. Why did you have that feeling?

13 A. Because they appeared to me to be taking it quite seriously.
14 It was not an off-handed type of discussion that we had. I
15 found it to be quite serious and so I took some hope from
16 that.

17 Q. Page 13 of that volume, there's a letter dated March the 11th
18 to the Department of Attorney General, Attention Mr.
19 Herschorn. You're advising that you act for Mr. Marshall and
20 asked for a copy of the report and asked that a meeting be
21 arranged. Had you had any contact with any representative
22 of the department prior to your sending that letter?

23 A. Just a phone conversation, I believe, with Mr. Herschorn.

24 Q. Prior to sending the letter?

25 A. It may have been on the same day. I believe it was on the

1 same day that the letter is dated.

2 Q. What was the point of the conversation?

3 A. To insure that the Attorney General's Department was aware
4 of the case, what was basically transpiring, and also to assist
5 in obtaining his immediate release from Dorchester
6 Penitentiary pending further disposition of the case.

7 Q. What response, if any, did you get to your request for
8 assistance in obtaining his release?

9 A. I was advised that, basically, they would do what they could
10 in terms of advising the parole board that there was an
11 investigation going on and that they would cooperate in that
12 respect. I was also advised that the R.C.M.P. investigation was
13 not at that point completed.

14 Q. Was not completed?

15 A. That's correct.

16 Q. Was there any indication given to you that you would receive
17 a copy of it when it was completed?

18 A. No.

19 Q. Was your request for a meeting with the department
20 granted?

21 A. I don't know if it was a result of this particular letter. I did
22 have one meeting that I recall with Gordon Gale.

23 Q. Yes, I'll come to that in a second. I think perhaps closer to the
24 end of March. You then wrote again to the Carlton Centre on
25 March 15th, as contained at page 14. And in the third

1 paragraph of that letter, you referred to having requested a
2 copy of the R.C.M.P. report but you frankly do not expect to
3 receive it. What did you base that belief on?

4 A. I believe I had been advised that it was not the practice of
5 the Attorney General's Department to release police reports to
6 counsel, that they were for internal use and for prosecutors.

7 Q. I see. Turning to page 16, you're again communicating with
8 Junior and you say in the second paragraph: "I have spoken
9 to the Director of the Carlton Centre...the Attorney General's
10 office..." Are you referring now to the conversation that you
11 just related to us about access to the report?

12 A. I believe so, yes.

13 Q. And on March 26th, page 17 of this volume, you communicate
14 with the Federal Minister of Justice. Why did you choose to
15 communicate with him?

16 A. Well, at that point in time, this was just shortly after Junior
17 was actually released from penitentiary and the remedies
18 that were available to Junior were essentially remedies open
19 to the Attorney General of Canada, not the Province of Nova
20 Scotia.

21 Q. Although at this point you weren't applying for any particular
22 remedy.

23 A. No, no. I was essentially drawing to their attention and
24 indicating that what would transpire in the next few weeks
25 once we had sorted things out.

1 Q. Were you hopeful that they would assist you in obtaining
2 copies of the R.C.M.P. report?

3 A. Yes.

4 Q. You note in Paragraph 4:

5 The Attorney General of Nova Scotia has
6 the report of the R.C.M.P. and has, through
7 his office, advised me that representations
8 will be made to you although they have
9 been otherwise most uncooperative.

10 A. That was with respect to, largely with respect to the fact that
11 I didn't receive any information or material concerning the
12 R.C.M.P. investigation and it was the kind of case where the
13 police essentially have your case. Because it's not only the
14 material evidence, or facts concerning Marshall's innocence
15 but the same evidence to be used in charging another
16 individual with the same crime.

17 Q. Did you request this report or these reports on more than one
18 occasion?

19 A. On numerous occasions, yes.

20 Q. Who would you make these requests to?

21 A. To Gordon Gale, to Mr. Coles...

22 Q. I'm sorry?

23 A. To Mr. Coles, the then Deputy Attorney General of Nova Scotia,
24 I believe.

25 Q. And are you speaking of written requests or phone requests?

A. Oral requests and I believe at one point there is at least one

1 written request.

2 Q And was their response consistent?

3 A. It was consistent in that I was refused the material.

4 Q You say in that same paragraph:

5 As Mr. Marshall's solicitor I have been
6 given no copy of the report, although I am
7 aware of much of its contents through
8 other sources.

9 What were those "sources"?

10 A. The R.C.M.P.

11 Q And who?

12 A. Staff Wheaton and Carroll. I had no actual copies of any
13 documents. I essentially had an oral discussion with them
14 and based my knowledge of the case at that point in time on
15 notes that I took during our discussion.

16 Q The top of page 18, 12th line on that page, you say:

17 The only avenue we wish to follow is one
18 which will, ultimately, ensure that
19 Marshall is acquitted, not merely
20 "forgiven" for an act which he did not
21 commit.

22 What did you mean by that?

23 A. A pardon can be looked upon from a number of perspectives
24 but a pardon, per se, doesn't necessarily indicate that one was
25 not guilty of a crime, rather that he is essentially forgiven and
irrespective of whether he was properly convicted or not.

1 The purpose in writing that statement was that essentially we
2 want it shown that he did not commit the crime in the first
3 place and there was no reason to pardon him. That was one
4 avenue.

5 Q. So you wanted it shown that he did not commit the crime?

6 A. Yes, but a pardon would have also had certain other
7 advantages; namely, if it would have been granted it would
8 have gotten Junior over the issue of further proceedings. No
9 need to go to court or to have to relive the events of the last
10 ten and a half, eleven years.

11 Q. I understand that a pardon would be action by the Minister,
12 whereas the airing that you're speaking of would be
13 presumably some kind of a court proceeding.

14 A. That's correct.

15 Q. Is there any way you could have accomplished both?

16 A. Yes, under one section of the Code, I think that the remedy
17 was available under Sec. 617(c). It might have been (b), but I
18 believe it was (c), where the Court of Appeal would hear a
19 reference and not render a decision but provide an opinion or
20 recommendation to the Attorney General of Canada who
21 would have the ultimate authority to dispose of the case by
22 way, for example, of a pardon.

23 Q. I see. On page 20, there is a reference to what appears to be
24 a meeting with, is that Gordon Gale?

25 A. That's correct.

MR. ARONSON, EXAM. BY MR. ORSBORN

1 Q. On March 31st. Do you know if this was your first face-to-
2 face meeting with department representatives?

3 A. Yes, it was

4 Q. And I gather Mr. Gale indicated to you that he was in receipt
5 of an R.C.M.P. report dated March 16th, is that correct?

6 A. That's correct.

7 Q. Did you request that report of this meeting?

8 A. I did.

9 Q. What was the response?

10 A. I was given the customary response, that it was not the policy
11 to release R.C.M.P. reports or information.

12 COMMISSIONER EVANS

13 Could we just have that a little louder?

14 MR. ORSBORN

15 Q. Could we just have your last answer?

16 A. I was given the usual comment that it was not the Attorney
17 General's policy to release statements or reports of the
18 R.C.M.P.

19 Q. Now Mr. Marshall was out of jail at this time. Can I take it
20 that you were now directing your energies towards his
21 acquittal?

22 A. That's correct, towards the procedure leading to that.

23 Q. Yes. In your view at the time, on whom did the onus lie to
24 carry on those proceedings?

25 A. The major onus, in my view, lay with the Attorney General of

1 Nova Scotia, since it was they that had all the information.

2 Q. Could you have sat back and done nothing?

3 A. Oh, I don't believe so. I think unless significant efforts were
4 made to press the Attorney General's Department...I wouldn't
5 want to suggest that nothing would have happened, but I
6 don't believe it would have happened as quickly. I don't
7 believe reports would have been transmitted to Ottawa as
8 quickly as they ultimately were. I don't believe that unless
9 the Attorney General was pushed that they would cooperate
10 of their volition. In other words, they wouldn't offer, they
11 would not at that point offer any assistance in respect of
12 Junior and publicly...I was somewhat dismayed that the then
13 Attorney General indicated that as far as he was concerned it
14 was a federal responsibility because Junior happens to be an
15 Indian.

16 Q. Who was the then Attorney General?

17 A. I believe it was Harry How.

18 Q. Did you ask for assistance publicly, that they provide
19 assistance by means of some public statements?

20 A. No, in fact, one of the concerns I had with Gordon Gale is
21 where all the media reports are coming from. I found it
22 somewhat strange that I was able to read more in the
23 newspapers as to witnesses and what witnesses said than I
24 was able to get out of the Attorney General's office.

25 Q. With respect to the carriage of any later court proceedings,

1 did you have any understanding at this point on whom the
2 onus lay to carry those proceedings?

3 A. The onus is on Junior Marshall and his counsel; namely, me.

4 Q. Do you know if that point was advanced to the Department of
5 the Attorney General in your request for information?

6 A. I'm sorry, I'm not sure I follow that.

7 Q. Did you say something to the effect that, "Look, if we get to
8 court, I've got to carry the proceedings..."

9 A. Oh, yes.

10 Q. I need the information.

11 A. Very definitely. The burden was on me in the proceedings.
12 We were the applicant/appellant in a court proceeding and
13 the burden was on me to adduce evidence before the court,
14 evidence which was contained in a report by the R.C.M.P., or
15 facts that were contained in a report.

16 Q. Was Mr. Gale willing to discuss any details of the R.C.M.P.
17 reports without actually providing you with the paper?

18 A. I believe he would have been prepared to do so, yes.

19 Q. Did you ask him?

20 A. We did discuss some of the facts in the fact because, by that
21 time, I had gotten an oral report from the R.C.M.P. and was
22 relatively familiar with the basic outline and the basic facts of
23 the case, the witnesses and their statements and so on.

24 Q. Because what I'm trying to understand, I would not want to
25 have your testimony miscast if it, in the sense of the Attorney

1 General, say, withholding information, if that's not what you
2 intend to say. If it was perhaps a matter of principle of not
3 releasing the R.C.M.P. reports. What reason were you given
4 for not giving you the reports?

5 A. Well, essentially that it was contrary to their policy to release
6 reports to the public and that that was the standard line.
7 That was my recollection that the main reason for not wishing
8 to provide me with a copy of even the statements that were
9 given by the witnesses.

10 Q. Was your work on behalf of Mr. Marshall hindered by the
11 lack of any information?

12 A. I think it was. It assisted in delaying the kinds of
13 proceedings, because you were never sure what you knew
14 compared to what, for example, the Department of Justice in
15 Ottawa might know as compared to what the Attorney
16 General's office in Halifax might know. And it seems to me
17 usually this kind of situation where if anybody should have
18 quite good ideas as to the contents of the information in order
19 to be able to act in the best interest of one client, it's the
20 client's counsel.

21 Q. At this stage, did you view the respective positions of
22 yourself and, say, Mr. Gale, as adversarial?

23 A. Yes.

24 Q. Why?

25 A. Not in perhaps a formal sense that they were on the other

1 side. No proceedings had started. At that point, in addition
2 to being concerned with the R.C.M.P. report, I also was
3 concerned with the position that the Attorney General was
4 going to take with respect to the remedy to be recommended
5 to the Minister of Justice in Ottawa. In that sense, it was an
6 adversarial, in that respect I think we, I believe we had a
7 frank, open, and candid conversation.

8 Q. In what sense would you characterize the relationship as
9 adversarial?

10 A. Well, when we disagreed, it became adversarial and when we
11 agreed, it wasn't. I think that's the way I kind of look at it.

12 Q. That then is no more than saying that if two people have a
13 difference of opinion it's adversarial.

14 A. Well, in the sense that I didn't believe I was able to
15 adequately carry out my responsibility as solicitor for Donald
16 Marshall, Jr. without the report. To me, that was a key
17 element in being able to proceed.

18 Q. Did Mr. Gale offer any suggestions to you as to how you might
19 get this information?

20 A. Not that I recall.

21 Q. Anything to the effect that, "Look, it's our problem, don't you
22 worry about it"?

23 A. No, not that I recall.

24 Q. The note on page 20, the second line from the bottom, if I
25 read it correctly say: "R.C.M.P. and Gale believe that Junior

MR. ARONSON, EXAM. BY MR. ORSBORN

1 did not commit the crime."

2 A. That's correct.

3 Q. Was that said to you by Mr. Gale?

4 A. Yes, it was

5 12:25 p.m. COURT RECESSED UNTIL 2:00 p.m.

6 INQUIRY RESUMES

7 MR. CHAIRMAN

8 Okay. Yes.

9 MR. ORSBORN

10 Thank-you, My Lord.

11 EXAMINATION BY MR. ORSBORN [Continued]

12 Q. Mr. Aronson, just a couple of more questions on your meeting
13 with Mr. Gale reported on page 20 of Volume 31. Do you
14 know if at that meeting there was any discussion of possible
15 compensation for Mr. Marshall?

16 A. I have no recollection of any discussion on compensation
17 during that meeting.

18 Q. Do you know if at that meeting there was any discussion with
19 respect to the role that the Sydney Police may or may not
20 have played in the conviction of Mr. Marshall?

21 A. There may have been some discussion about the role that the
22 police played in the conviction, but it would have been
23 relatively peripheral to the major purpose of the discussion.

24 Q. Was there any discussion on the role that Mr. Marshall may
25 or may not have played in his conviction?

1 A. I believe we did have some words on that.

2 Q. Do you remember to what effect?

3 A. That I think in the simplest way that Marshall was at least in
4 part responsible for what happened to him.

5 Q. Was this expressed to you by Mr. Gale?

6 A. I believe so.

7 Q. Did you take any issue with him?

8 A. I would, yeah, yeah, since I felt that he was not responsible at
9 all for his conviction.

10 Q. Was it raised in the context that this should make a difference
11 as to whether or not Mr. Marshall was given relief?

12 A. No, the bottom line was that it made no difference in terms of
13 whether he was properly convicted given the evidence or the
14 nature of the facts that had been...come to light through the
15 R.C.M.P. investigation.

16 Q. Are you able to tell us why it was brought up at all?

17 A. I'm sorry.

18 Q. Are you able to tell us why it was brought up?

19 A. No.

20 Q. Do you know if around this time you had any discussions with
21 Mr. Edwards, Mr. Frank Edwards?

22 A. Not that I can recall. It was not, I believe until either well
23 into May or June that I had a...approximately the time when
24 the reference was passed down by the Minister of Justice.

25 Q. I see. I'd just direct your attention to page 24 of this same

1 volume, and it's...this is not a document that you're likely to
2 have seen in the normal course of events. I believe it to be a
3 communication between Mr. Edwards and Mr. Gale and at
4 page 24 there is a date of April the 5th, right in the middle of
5 that page Mr. Edwards is writing to Mr. Gale.

6
7 If the Minister of Justice agrees, then I
8 submit that the most desirable result of
9 the reference would be a direction by the
10 Appeal Division that a verdict of acquittal
11 be entered, Section 613(2)(a) on the basis
12 that there had been a miscarriage of
13 justice. 613(3.)

14 Did Mr. Gale ever express to you that that would be the most
15 desirable result of the reference?

16 A. I believe so, an acquittal, although I don't believe we got
17 specifically into discussions to whether it would be a
18 miscarriage of justice or insufficiency of evidence. I don't
19 think we went into the technicalities of it. Basically he agreed
20 that the bottom line was that Marshall was not guilty of the
21 offence of which he was convicted and that he should be
22 ultimately acquitted.

23 Q. I see. Did Mr. Edwards, when you eventually did get to speak
24 with him, suggest that the desirable result was an acquittal on
25 the basis of a miscarriage of justice?

A. I believe so initially although Mr. Edwards took the formal
position that Junior was largely responsible for his conviction.

1 Q. When you say "formal position" what do you mean?

2 A. His position in public and to the Court as opposed to his
3 position when he and I had had discussions, as just as
4 between he and I.

5 Q. And what was the position as expressed to you?

6 A. Well, he indicated to me that the formal position that he was
7 taking was that Junior would be considered as largely to
8 blame for what transpired in 1971 and that that his personal
9 position was not quite that extreme.

10 Q. Could you tell us when these discussions with Mr. Edwards
11 would have taken place?

12 A. It would have been after the reference was handed down.

13 Q. After the reference was handed down.

14 A. After mid-June of '82 I guess we're in now.

15 Q. Perhaps we'll come back to that then. I don't want to jump
16 ahead too much in time. There is an indication that you met
17 with Mr. Fainstein in Ottawa on or about the 1st of April and
18 that reference is shown on page 38 of this volume where you
19 write him later in April and you say, "Further to our
20 discussions in Ottawa on April 1," did you travel to Ottawa for
21 the purpose of meeting Mr. Fainstein?

22 A. Yes.

23 Q. What was the purpose of that meeting?

24 A. To basically go through with Mr. Fainstein the information
25 that I had in my possession, what I knew about the case to

1 try and indicate what our position was with respect to how
2 the Attorney General of Canada should dispose of the case
3 with respect to either a pardon or a reference under 617. I
4 guess you could call it advocacy on behalf of my client.

5 Q. You were attempting to...

6 A. Express our position as to what the preferred way we hoped
7 that the Minister of Justice would decide.

8 Q. Now, on April 13th you wrote to Mr. Gale. This letter is found
9 at page 36 of Volume 31. And on the second page of that, the
10 second paragraph, you asked to be kept advised as to the
11 department's position. Had you up to this time received any
12 information from the Department, any extracts or statements
13 from the R.C.M.P. reports?

14 A. No.

15 Q. Had you made other requests for them?

16 A. I believe that I had written to the Attorney General or to Mr.
17 Gale with respect to that issue.

18 Q. In the third paragraph on that page you ask for payment of
19 your fees from your department, and you indicate that your
20 instructions had not...had been not to apply for legal aid.
21 Were those your instructions?

22 A. Yes.

23 Q. May I ask why you were instructed not to apply for legal aid?

24 A. Well, at that point my understanding was that arrangements
25 were being made to pay the fees from sources other than

1 from the Department of the Attorney General?

2 A. I think that was part of the request that Mr. Munro had made
3 of me that I would request legal fees to be paid by the
4 Attorney General's Department and to make efforts to pursue
5 that avenue, which I did.

6 Q. Do I understand then that a commitment that you understood
7 you had received from Mr. Munro was a commitment to pay
8 you in the event that you weren't paid through the
9 Department of Attorney General or that the Department
10 would be a routing for federal funds? I want to make sure
11 I'm clear.

12 A. Not as...my understanding was never that the Attorney
13 General's Department would be a routing for federal funds
14 but rather as perhaps a first alternative and if there was
15 no...no success pursuing that avenue then the Department of
16 Indian Affairs would pick up the fees and my belief and my
17 knowledge is that the Minister of Indian Affairs did write to
18 the Attorney General to pursue the request that they pay the
19 fees.

20 Q. Yes. Page 38, you wrote to Mr. Fainstein and in that letter I
21 believe on page 40, the bottom of page 40, you make formal
22 application for a ...for a free pardon with the 617 procedure
23 being used as a...

24 A. An alternative.

25 Q. ...an alternative. I understood you to say this morning that

1 your preference was for some kind of procedure whereby Mr.
2 Marshall could have the story told publicly and then sort of
3 receive a pardon after that.

4 A. That's right.

5 Q. This appears to be somewhat of a change.

6 A. Perhaps not so much of a change. I guess I was of two minds.
7 In terms of my own client's...what I thought were in his best
8 interests was to get it over as quickly as possible, and if we
9 would have succeeded in obtaining a free pardon it would
10 have been over for him at...in terms of legal process relating
11 to his conviction, it would have been at an end. On the other
12 hand the public would not have had any knowledge as to the
13 reasons behind the free pardon. My understanding is that it's
14 a ...in practise a decision of the federal cabinet. It would have
15 been announced in the House of Commons and perhaps there
16 would have been some sort of a...Junior would have been
17 present in the House when the Minister made the
18 announcement and so on, and then it would have been over.

19 On the other hand, there would be no need for a public
20 explanation as to what had transpired or what had passed,
21 how Junior was convicted. So on the other side to balance it
22 out there was some feeling on my part, as well as Junior's,
23 that he wanted his day in court. And he wanted the
24 opportunity to present his own case and, as a result, the 617
25 seemed to be the, one or other of the possible procedures

MR. ARONSON, EXAM. BY MR. ORSBORN

1 under 617 would have been the most appropriate way to
2 obtain the public understanding or knowledge as to what had
3 happened.

4 Q. Did you discuss with Junior the pros and cons of each
5 approach?

6 A. Yeah. Basically as we've discussed them now.

7 Q. What was his state of mind at the time this was going on?

8 A. He wanted to get it over with but his most sincere desire was
9 to be able to take the stand and explain his own story himself.

10 Q. So do I understand that his preference, then, was for sort of
11 the reference route rather than the free pardon route?

12 A. For the opportunity to state publicly his position, his case.

13 Q. Turn to Volume 29, Exhibit 98, that's another volume, Mr.
14 Aronson. The red volume 29. And I'd like to direct your
15 attention to page 2 of that volume.

CHAIRMAN

16
17 Mr. Orsborn, before you move off the last letter, if you direct
18 Mr. Aronson's attention to page 41, the second sentence.

19
20 With respect to Section 6(1)(a), Mr. Gordon
21 Gale has advised me that he would be
22 reluctant to lay a charge of murder against
23 Donald Marshall, Jr. as there's no reliable
24 information which would support such a
25 charge.

24 We're lost as to what that means. Maybe Mr. Aronson can tell
25 us.

1 A. As to...

2 CHAIRMAN

3 What you're talking about there in that, or driving at.

4 A. You would have been, one of the possibilities under Section
5 617 is that the Court of Appeal would itself make a decision
6 and one of the possible verdicts that could have been handed
7 down in a reference was quashing the verdict and...

8 CHAIRMAN

9 Ordering a new trial.

10 A. Ordering a new trial.

11 CHAIRMAN

12 All right. I see.

13 A. Perhaps I should have said a new trial as opposed to a retrial.

14 MR. ORSBORN

15 Q. In that same volume if I could direct your attention back to
16 page 20, page 20 of Volume 31. This is the note of your
17 meeting with Mr. Gale, at page 20. And the last sentence on
18 that page speaks to "the possibility of a retrial and possibly
19 insufficient evidence to prosecute."

20 A. "And probably insufficient evidence to prosecute." Those are
21 Gale's words.

22 Q. So it was your understanding that if a retrial were, in fact,
23 raised that the Department would be relooking to prosecute
24 because of a lack of evidence.

25 A. It was the "follow" position they took but there was no

MR. ARONSON, EXAM. BY MR. ORSBORN

1 evidence I mean, which a retrial could take place. There was
2 no evidence which could be presented to a jury which would
3 provide them with cause to convict. That's why no retrial.

COMMISSIONER POITRAS

4 Well do I understand nobody was contemplating proceedings
5 under 617(b) or 617(c) at the time?
6

7 A. Those were the two options, My Lord, (b) or (c).

COMMISSIONER POITRAS

8 As opposed to (a).
9

10 A. As opposed, well, (a), I don't think was even considered.

CHAIRMAN

11 I think you indicate in your letter.
12

13 A. Yeah.

MR. ORSBORN

14 Q. Turning to page 2 of Volume 29, page 2 and following. These
15 notes are in your handwriting, Mr. Aronson?
16

17 A. Yes, they are.

18 Q. And do they report a conversation that you had with Harry
19 Wheaton on April the 14th, 1982?

20 A. That's correct.

21 Q. Can you tell us how you came to have what appears to be a
22 lengthy discussion with Staff Wheaton?

23 A. I had arranged to meet with Harry Wheaton in Sydney. I was
24 there on some other matters as well. We got together on that
25 evening basically as between they and I in largely what

1 might be described as an off-the-record discussion. They had
2 brought the RCMP report with them and they basically went
3 through the evidence that they had gathered and as they
4 proceeded I did the best I could to try and keep notes as to
5 what were the contents of that report, in terms of what
6 witnesses statements said and so on. That was my first real
7 detailed knowledge of what was, of the contents of the report.

8 Q. When you say off the record, what do you mean?

9 A. Off the record, it was not a formal-type of arrangement where
10 the Attorney General was privy to the disclosure.

11 Q. Were they not authorized, then, to speak with you?

12 A. I couldn't say whether they had authority or whether they
13 required authority to speak with me. We had had numerous
14 conversations before and to me this was just a continuation.
15 The police are not bound not to speak to me and they're quite
16 free to speak with counsel and they did. But I don't think it
17 was in the sense of something that I could have repeated in a
18 public-type forum. I think it was given to me in confidence
19 to assist in my pursuit of this particular case.

20 Q. Were you requested not to advise the Department of Attorney
21 General that you had met with the RCMP?

22 A. No, I had no request.

23 Q. I see. And do you know what reports the RCMP people were
24 referring to when they were speaking to you?

25 A. I believe it was the report that had initially been submitted

1 to the Attorney General's Department previous to our
2 conversation on April the 14th.

3 Q. And do you know if they referred to statements that they had
4 taken from witnesses?

5 A. They did, yes.

6 Q. Did you see any of the statements?

7 A. I may have seen some of the statements.

8 Q. See them to read them?

9 A. Yes. I don't think, I'll perhaps try and clarify that. I may
10 have seen one or two of the statements that witnesses had
11 given to the RCMP. But I certainly did not see the entire
12 report or given the opportunity to read through the entire
13 report.

14 Q. Were you given any copies of any of the statements?

15 A. No.

16 Q. Any copies of any extracts of the reports?

17 A. No.

18 Q. The note at the top of page 2 suggests, I think, that you met
19 them from 8:45 to, I think, 12:40.

20 A. That's correct.

21 Q. About four hours.

22 A. Four hours.

23 Q. And the following note says, "H.W. I think a redneck
24 atmosphere in Sydney. Pressure and tension racial in 1971.
25 But cleared by MacNeil's post." Do you recall discussing with

1 Staff Wheaton the matter of racial tension and the redneck
2 atmosphere?

3 A. Yes.

4 Q. What was the context of that discussion?

5 A. The context began, I had mentioned in my earlier testimony
6 that I had met with Wheaton and Carroll in Sydney in
7 February 8th or 9th and during that discussion I had
8 mentioned the fact that perhaps Sydney, in 1971, was a bit of
9 a redneck town. And at the time Wheaton disagreed with me.
10 Coming back to the evening of April the 14th, it was then that
11 Harry Wheaton indicated to me that he was of the inclination
12 that perhaps Sydney, in 1971, was a redneck town.

13 Q. Were these your words or his words?

14 A. The way it came out, it was as if he was agreeing with me
15 that in 1971 Sydney was a redneck town.

16 Q. What do you mean by "redneck"?

17 A. Intolerant.

18 Q. And on what do you base that?

19 A. My own experiences in, well there's two points. One, it was in
20 part to be the provocative in our original discussion. The
21 second factor was that I had had some considerable
22 experience in dealing with Native people, both in Cape Breton
23 as well as in mainland Nova Scotia. And generally I found the
24 attitude towards Indians in Cape Breton to be quite poor and
25 quite intolerant.

1 Q. Without necessarily getting into names at least at this stage,
2 can you give us some specifics of the, why you would reach a
3 conclusion about an intolerant attitude towards Natives?

4 A. As much from historical research as from actual experience.
5 And when I speak about historical research I had occasion, in
6 a number of the cases I was involved with with Native
7 people, particularly with respect to land claims in Cape
8 Breton, to understand the history of the development of the
9 reserve system in the Province of Nova Scotia and the loss of
10 reserve lands to settlers who were coming into Cape Breton
11 largely in the period around the 1830s, 1840s when the
12 original reserves were set up in Cape Breton. That there was
13 a significant amount of squatting. That efforts by the Indians
14 to try and maintain their land rights, efforts on the part of
15 missionaries and priests from Indian people in Cape Breton to
16 Provincial officials in Halifax, were not successful. That the
17 Province did not attempt to protect reserve lands. That the
18 settlers in Cape Breton were, caused problems for, for
19 example, the sheriff, who attempted to enforce, to remove
20 squatters from the land. In Sydney itself, the case of re
21 Sydney Indian Reserve 1917, I think it was 1917 Exchequer
22 Court Reports, which dealt with the expropriation of an Indian
23 reserve in Sydney, Cape Breton. The reason for the removal
24 of the reserve, or the desire to expropriate was to get rid of
25 the Indians from the City of Sydney.

1 Q. Do you have any basis for suggesting or concluding that this
2 historical intolerance which you speak of remained in 1971?

3 A. I believe so. And it was perhaps, the experience of Indians
4 not being a part of the general way things work in Cape
5 Breton, of constantly being outsiders and being treated like
6 outsiders, of Indian people ashamed to speak their own
7 mother tongue because it was something to be ashamed of.

8 Q. What were you doing in '71 yourself?

9 A. I was... attended the Faculty of Law at Dalhousie University,
10 in first, second year, something along those lines.

11 Q. I'm trying to understand the basis for your conclusions of the
12 atmosphere and feelings that existed around 1971.

13 A. And I had also heard storied from Indian people in the early,
14 of certain events that came up in the early 1970s, some of
15 which involved the Seale family, some of which involved
16 Indian families. The difficulty they had with the police. The
17 feeling that they were picked out as specifically as Indians as
18 being trouble-makers and as causing difficulties for the police
19 as opposed to any other particular group. The...

20 Q. You acted at least for the Union of Indian for a while, I take it.

21 A. Yes.

22 Q. Over how long a period?

23 A. From, in various matters from 1973 through to 1983, so for
24 ten years.

25

1 2:30 p.m.

2 Q. And from your dealings on behalf of the union, do you have
3 any first hand experience of the attitudes that you've spoken
4 of?

5 A. I've felt paternalism towards Indian people on several
6 occasions when I've appeared in Magistrate's Courts in Cape
7 Breton, which I've found different than the attitudes on
8 mainland Nova Scotia. For example, I recall a case in the, it
9 would have been 1974, I believe, the Isaacs case, attending in
10 Port Hood and never having appeared in that particular court
11 before and the judge being quite paternalistic towards me by
12 calling me by my first name, which I found quite unusual in
13 any type of court. Secondly, by saying "Well, the case is going
14 on appeal anyway, so he's guilty." And that was basically the
15 decision and it was because I was from Halifax so I was sort
16 of, relatively speaking, the "big city lawyer" and I certainly
17 had the feeling when I was in that courtroom. That's one
18 instance that I recall specifically in Cape Breton. I've had
19 other instances on mainland Nova Scotia which are, well, to
20 me certainly evidence of racial prejudice.

21 Q. Then suggested that a "red-neck atmosphere" to Harry
22 Wheaton, you were drawing upon some of your past
23 experiences to elicit his reaction?

24 A. In part. It's difficult to say. I don't like to generalize about
25 Cape Bretoners and when I say that, I don't mean to accuse

1 people from Cape Breton of all being red neck, but there's, in
2 many areas, there's some intolerance within the community
3 and I felt it, and Indian people felt it.

4 Q. In your discussions with Staff Wheaton, did he mention
5 anything about Junior Marshall being involved in a robbery?

6 A. I believe that he did, yes, when he indicated to me the
7 statement that they had obtained from Donald Marshall, Jr. I
8 don't know whether it was this evening, although I think it
9 may have been that evening.

10 Q. Were you aware of the suggestion of a robbery before Staff
11 Wheaton mentioned it to you?

12 A. No, I was not.

13 Q. Did it surprise you?

14 A. It was one of a number of surprises, yes, but I think that one
15 in particular was a surprise to me.

16 Q. Why?

17 A. Well, it's basically has to do with the solicitor/client
18 relationship. If that, in fact, would have been true or correct,
19 why he should have really told me before, if that's what had
20 happened, because perhaps we could have avoided him giving
21 a statement.

22 Q. The information that's contained in these four or five pages of
23 notes, I take it that this reflects the information provided to
24 you by Staff Wheaton?

25 A. Yes, it does.

1 Q. And, for example, on that page, too, the third last line of notes
2 on page two where you're speaking, I believe, about Maynard
3 Chant, the note is: "I think MacNeil threatened to charge him
4 with perjury if he changed his statement." Do I take that as
5 being information provided to you by Staff Wheaton?

6 A. Yes.

7 Q. Just going back to Volume 31 for a moment, on page 48, Mr.
8 Coles of the Department of Attorney General replies to you on
9 April the 23rd. This I take it is in response to your request
10 for payment of fees and also you raise the issue of
11 compensation. Am I correct that Mr. Coles told you that you
12 should apply for Legal Aid?

13 A. Yes.

14 Q. Had you had any discussions with any representative of the
15 department prior to receiving this letter about fees?

16 A. There may have been some. I have no specific recollection of
17 any major discussion on the subject. I recall having had a
18 discussion with Mr. Cole...

19 Q. Cole or Coles?

20 A. Coles, with respect to the fees and being told in quite
21 straightforward terms that he would raise it with the Minister
22 but he was not prepared to recommend it.

23 Q. Did he say why not?

24 A. Oh, if, I can't recall a reason. It may very well have been that
25 he felt that Legal Aid was a proper avenue in which to pursue

1 the fees.

2 Q. Did you, in fact, then apply for Legal Aid?

3 A. I did write a letter or a note to, I believe Mr. Murray...

4 Q. Yes.

5 A. In New Glasgow who was the Director of Nova Scotia Legal
6 Aid.

7 Q. Just for the reference, Mr. Aronson, in Volume 27, Exhibit
8 113, is a reply from Legal Aid Commission at pages 10 and 11
9 of that volume?

10 A. Yes.

11 Q. And the certificate on page 11 signed by Mr. Digby of the
12 Legal Aid Commission.

13 A. That's correct.

14 Q. Authorizing Legal Aid payment. I notice that there's no
15 agreement signed by yourself on that certificate.

16 A. That's correct.

17 Q. Why not?

18 A. There were a number of reasons. First of all, I didn't feel it
19 was an appropriate case for Nova Scotia Legal Aid. Secondly,
20 the kind of fees that were made, I thought was, again,
21 somewhat paternal. It was sloughing it off. It wasn't taking
22 it seriously. When you set a maximum fee of \$1500 when
23 there's still significant uncertainty as what the procedure
24 would be given, that it's dated May 4th, 1982 and we didn't
25 even know what was going to happen. That it was just

1 arbitrary.

2 Q. Is that...

3 A. Without any discussion with me. No consultation. Just out of
4 the blue a letter comes down from Nova Scotia Legal Aid.

5 Q. That \$1500 maximum, is that a maximum which is in the
6 discretion of a Legal Aid Commission, to your knowledge?

7 A. I have no knowledge as to what the maximum is. My
8 understanding was that, first of all, that this case was not
9 properly covered under the Nova Scotia Legal Aid plan. That
10 the choice of counsel is limited to those subject to life
11 imprisonment. That Junior had already been convicted. That
12 his case was not covered by the Nova Scotia Legal Aid plan.
13 That their offer perhaps might not ultimately be enforceable
14 and that, in any event, I took it as a personal insult and so I
15 just let it go. Filed it and forgot it.

16 Q. I take it you had not received any money from any source at
17 this point.

18 A. That's correct.

19 Q. Turning back to Volume 31, Mr. Aronson, and at page 46.
20 May 3rd of '82, I believe you're making a note of a
21 conversation again with Mr. Fainstein?

22 A. That's correct.

23 Q. And he basically updates you as to what is happening to that
24 stage. The last three or four lines of that note say: "They
25 won't give out report." What report does that refer to?

1 A. It refers to the R.C.M.P. report.

2 Q. Had you requested from Mr. Fainstein a copy of the R.C.M.P.
3 report?

4 A. Yes.

5 Q. And he turned you down?

6 A. Yes.

7 Q. On what basis?

8 A. On the basis of the three bottom notations I've made on that
9 particular page. One, they'd been requested not to, and my
10 question mark there is as to whether the request not to is
11 made by the Attorney General or the R.C.M.P. The second one,
12 that it was confidential protecting sources. The third, that it
13 was considered an internal document not for release to the
14 public, of which I was considered a member at the time.

15 Q. With respect then to the provision to you of the R.C.M.P.
16 report, was there any difference between the position taken
17 by the Federal Department of Justice and the Nova Scotia
18 Department of Attorney General?

19 A. I understood that there was in the sense that what the
20 Federal Department of Justice was saying to me was to
21 continue trying to obtain a copy of the report from the
22 Attorney General of Nova Scotia, that they themselves would
23 attempt to raise the issue with the Attorney General's
24 Department in Nova Scotia. They were far more sympathetic
25 to the difficulty that I was faced with in obtaining

1 information than the Attorney General's Department and, at
2 one point, my recollection is that I was told that in the event
3 that the Attorney General of Nova Scotia did not provide me
4 with a copy that they would do their best to make sure that I
5 was given the information I needed.

6 Q. Turn to page 52 of that volume. You're noting a discussion
7 with Mr. Gale on the 11th of May. It appears to read: "Final
8 report yesterday re Marshall. Have spoken to Frank Edwards.
9 Suggest that an appeal 617." And a note there, "Sometime
10 this week." Are you able to tell us what was happening at the
11 time in terms of getting this thing to a resolution, getting it
12 before the courts. What was going on?

13 A. At that time, the decision was in the hands of the Minister of
14 Justice in Ottawa and the issue was whether we would be
15 following an appeal route under Sec. 617 of the Code or a free
16 pardon. And the notation there in the fourth line down,
17 "Suggest an appeal Sec. 617," was the approach that my
18 understanding was Nova Scotia's submission. On the other
19 hand, Ottawa, according to Gale, was taking, leaning in the
20 direction of a free and unconditional pardon. And it was
21 basically a discussion about the appropriate route to follow.

22 Q. Were you involved in any of these discussions as to which
23 route should be followed?

24 A. I was involved with the Department of Justice in Ottawa with
25 respect to making submissions but I made mine quite

1 independently of the Attorney General's submissions. There
2 was never any time when I, somebody from the Attorney
3 General's office or somebody from the Minister of Justice ever
4 sat around a table or had a joint conversation with respect to
5 the disposition. It was all done separately. People, it was
6 always one-on-one discussions.

7 Q. When did you find out that the decision had been taken to go
8 by way of reference?

9 A. When I received a phone call from Douglas Rutherford, then
10 assistant deputy minister of Criminal Law in the Department
11 of Justice in Ottawa. On a day or two before the actual
12 reference was handed down, he called me to indicate that the
13 Minister had made his decision, that he had just got off the
14 phone having spoken to Chief Justice MacKeigan to indicate to
15 him what the Minister was proposing to do and that as a
16 result of that conversation, that it would be held up for a day
17 or two because the court was, or Justice MacKeigan was of a
18 view that the case should be handled under 617(b) as
19 opposed to (c).

20 Q. Now that conversation with Mr. Rutherford, I believe there
21 may be a note of that on page 62 of this volume?

22 A. That's correct.

23 Q. That's in your writing?

24 A. Yes.

25 Q. Prior to that, had you been aware that the reference

- 1 procedure was being considered and that there were...
- 2 A. Yes, I was aware that that was one of the options that the
3 Minister was considering.
- 4 Q. Had you been involved in any discussions involving what
5 form the reference would take, whether it would go under
6 617(b) or 617(c)?
- 7 A. Yes, my submission was that it should have gone under,
8 here's were I get a bit confused in these sections because I
9 haven't got the Code with me. I believe it's (c).
- 10 Q. (c), I believe, is the advisory.
- 11 A. Yeah, the advisory was the...
- 12 Q. Appeal.
- 13 A. Principal alternative to the free pardon as opposed to (b),
14 which would have been further down the list of our
15 preferences.
- 16 Q. Had you been involved in the drafting of any possible
17 questions under a 617(c) reference?
- 18 A. No.
- 19 Q. Had you seen drafts of any such question?
- 20 A. No.
- 21 Q. The notation that you have there on page 62, about the third
22 line, says: "MacKeigan spoke to Rutherford and refused [I
23 guess] here under (c) as no new evidence." The word "refuse",
24 do you know if that is your word or Mr. Rutherford's word?
- 25 A. I'm not certain as to that but usually when I take notes, if I

1 use a word other than what the person has indicated, it's to
2 indicate the same tenor or tone that it was given to me. But I
3 couldn't honestly say that that's the word Rutherford used.

4 Q. It's Mr. Rutherford's evidence, and he was quite clear about it,
5 was that in his conversations with Chief Justice MacKeigan,
6 there was no suggestion that the court would not hear it but
7 simply that the matter of hearing new evidence may be a
8 problem under a sub(c) reference.

9 A. Well, the ultimate concern was that if we decided to not
10 follow Chief Justice MacKeigan's advice, that we would start a
11 617(c) and we would get part way into the process and the
12 court would say, "No, you'd have to go as they did in another
13 case in Ontario." You'd essentially have to go back to the
14 Minister of Justice for a submission, go under 617(b), which
15 would significantly lengthen the process and the pressure
16 that Junior was under. So the alternative was to make it
17 perhaps twice as long as it ordinarily would have been,
18 although these things are a bit difficult to predict.

19 Q. Do you have any strong feelings one way or the other about
20 proceeding under 617(b)?

21 A. My preference is 617(c) simply because the same type of
22 evidence would have come out but the decision ultimately
23 would have been to the Minister of Justice. And one of the
24 options open to the Minister was a recommendation for
25 executive clemency and a free pardon.

1 Q. Your concern, I take it, was, leaving the decision at the court
2 was that a new trial would be ordered?

3 A. It was not a major concern given the factual information that
4 I had. As I indicated earlier, there was no basis upon which a
5 retrial could frankly take place. There was no evidence to put
6 before the court. But nevertheless, it was certainly a concern
7 in the back of my mind because the court, well, at that point
8 in time, I didn't know what evidence the court was going to
9 actually hear, listen to, and admit. And that in itself is a
10 factor.

11 Q. On that same page, Mr. Aronson, at the bottom, a sideways
12 note there. It appears to be a "Q" at the top and then it says
13 "Fees. If no satisfactory arrangement, Justice will do what it
14 can."

15 A. Yes.

16 Q. What does that mean?

17 A. Basically Justice, to take it quite literally, it was not an offer
18 on the part of the Department of Justice to pay the fees but
19 rather to make inquiries to see if they could convince the
20 Province to pay the fees. How can I say, to take positive
21 steps in that direction as opposed to sitting by and watching.

22 Q. Turning to page 63, this is again a letter...

23 MR. CHAIRMAN

24 Is it your hope that if it had gone under 617(c) that the
25 question of compensation for Donald Marshall, Jr. would have

1 | been dealt with as well?

2 | MR. ARONSON

3 | A. It certainly didn't occur to me that we would be dealing with
4 | compensation at that stage since I took the position that it
5 | was difficult to deal with the issue of compensation until he
6 | was acquitted or were the matter disposed of in a judicial or
7 | legal sense. That to make a request for compensation at that
8 | point in time would be, it was really depending on the
9 | outcome. I don't know if I've answered your question.

10 | MR. CHAIRMAN

11 | Yes. You, I gather from your evidence, you felt that going
12 | under 617(c) would have afforded Junior Marshall an opportunity
13 | to go...

14 | MR. ARONSON

15 | To have his day in court.

16 | MR. CHAIRMAN

17 | To have his day in court, yes.

18 | MR. ARONSON

19 | Right.

20 | MR. CHAIRMAN

21 | And to review all the facts surrounding the...

22 | MR. ARONSON

23 | That's correct.

24 | MR. CHAIRMAN

25 | Prosecution and incarceration, et cetera.

1 MR. ARONSON

2 But without the court itself making the decision.

3 MR. ORSBORN

4 Q. Were you in any way influenced by your knowledge of this
5 possible robbery? Did that influence you in any way to
6 prefer (c) as against (b)?

7 A. No. I don't think the...It wasn't a factor that decided whether
8 to go (b) or (c). It was a factor but I don't think, to me it
9 didn't weigh as heavily as other factors. In other words, the
10 evidence would come out either (b) or (c). So in that sense it
11 wasn't a factor.

12 Q. Page 63 of Volume 31 is a letter from Jean Chrétien to Mr.
13 How, and the last, this is enclosing the reference, in the last
14 four lines of that letter say:

15
16 I understand, however, that your officials
17 intend to meet with Mr. Aronson and make
18 available the necessary information to
19 enable the appropriate evidence and
witnesses to be brought before the Court in
an effective manner.

20 Prior to the reference coming down, prior to June 16th, had
21 you had any indication from officials of the Department of
22 Attorney General that they would meet with you and give
23 you the information that you needed to proceed with the
24 court hearing?

25 A. I have no recollection of any indication by them.

1 Q. That letter also says in the second paragraph:

2

3

4

5

6

7

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 for you and your government to decide.

8

9

10

Had the matter of including compensation of the Reference been raised at all between you and the Attorney General's people?

11

12

13

14

15

A. I think in a peripheral sense. There was an indication that assuming that Junior was acquitted or that the conviction was overturned that there would be a claim for compensation made and I had not given a considerable amount of thought to the actual quantum and so on.

16

17

Q. Is it fair to say that this was not a priority with you at the time?

18

19

20

21

22

23

24

25

A. It was certainly not a priority. It seemed to be more of a preoccupation with many other people who were on he outside of the case and trying to figure out how much it was worth and, in many ways, it seemed to be a preoccupation of the media as to, well, how much are you going to claim and there was certainly interest in it because of the uniqueness of the case but I took the attitude, let's do things one step at a time. The only thing I did in terms of compensation was to

1 initiate legal proceedings, issued Originating Notice Statement
2 of Claim in the Sydney Courthouse against the Sydney City
3 Police and then Chief MacIntyre and Urquhart.

4 Q. Any preoccupation with possible compensation by people
5 other than the media?

6 2:52 p.m. *

7 A. Not other than peripherally. It was usually raised in...I
8 shouldn't say usually, but it had been raised in some
9 discussions with both the Attorney General's Department as
10 well as the Department of Justice in Ottawa.

11 Q. In what context?

12 A. Just as a matter that would have to be dealt with at the
13 appropriate time basically.

14 Q. Turn to Volume 29 at page 6. Do you have that? The date at
15 the top of page is that June 17th, '82?

16 A. Yes.

17 Q. And, I'm interested in the middle of that page, is
18 that...appears to be Gale, is that correct, left-hand side, centre
19 of the page?

20 A. Yes. My handwriting is getting worse, I guess.

21 Q. It can't be any worse than mine. Do you know if the
22 reference to Gale there refers back to June 17th?

23 A. I believe so because the date of the reference it was...the day
24 of the reference is roughly mid-June. It would have been
25 perhaps a day or two before this conversation or perhaps

1 even the same day.

2 Q. Uh-hum.

3 A. When...and I don't know who is, in respect of a
4 conversation...of a call I made to Mr. Gale or a call he made to
5 me. But essentially what was indicated was that Frank
6 Edwards would be dealing with the case, that I was to deal
7 with him as opposed to dealing with the Attorney General's
8 office in Halifax. That...and it just goes on to indicate what the
9 gist of the conversation was.

10 Q. What does that second line mean?

11 A. That the Attorney General's Department was satisfied that
12 there had been a miscarriage of justice and that they had no
13 objection to a free pardon, and that's what I was told but that
14 it wasn't their...certainly wasn't their decision to make, it
15 was...and I was never privy to any recommendations from the
16 Attorney General's Department. That's what I was told.

17 Q. The reference to a miscarriage of justice, do you know if those
18 are Mr. Gale's words?

19 A. I believe so.

20 Q. And is he then saying that insofar as the Department was
21 concerned there had been a miscarriage of justice?

22 A. That was my understanding. That's what I took from it.

23 Q. The...

24 MR. CHAIRMAN

25 What's the second word there, "satisfied"?

1 MR. ARONSON

2 "With" it's a "W" with a slash over and it's my shorthand for
3 "with". We all have our own peculiarities in writing I guess.

4 MR. CHAIRMAN

5 So, that should read, "Satisfied with miscarriage of justice."

6 MR. ARONSON

7 Yeah. That's also, by the way, in my mind, an indication that
8 I'm writing down what's being said because I can only write so
9 fast. If I was writing my own notes up, I wouldn't say it that
10 way.

11 MR. ORSBORN

12 Q. Does that suggest that the phrase "refers to its usage within
13 Section 617 of the Code," there...you're satisfied with the
14 miscarriage of justice approach being 617 and then traced
15 down through to the remedial provisions?

16 A. I don't believe it was put in the context, formally in the
17 context of Section 617. It was just said as a general statement
18 that they were satisfied that there had, in this particular case,
19 been a miscarriage of justice.

20 Q. It was your understanding then, and please correct me if I'm
21 wrong, but on the facts of the situation as were known at the
22 time, Mr. Gale was advising you that they were satisfied there
23 had been a miscarriage of justice?

24 A. That's correct.

25 Q. The third line there, if I read it correctly, "All material to be

1 available through Frank Edwards."

2 A. That's correct.

3 Q. What material is that?

4 A. I took it to mean the report and statements of the R.C.M.P.
5 would be made available to me. Since I was not aware of any
6 other information or material that would be of any assistance
7 other than the report.

8 Q. Do you know if the R.C.M.P. reports were mentioned
9 specifically?

10 A. No. I can't say that they were.

11 Q. Had you asked for anything else other than the R.C.M.P.
12 reports?

13 A. Not from the Attorney General's Department.

14 Q. Did this then represent a change in the position of the
15 Attorney General with respect to the R.C.M.P. reports?

16 A. Yes.

17 Q. Did you ask him why that change had taken place?

18 A. No. I was just happy to get it.

19 Q. Did you understand then from that conversation that Mr.
20 Edwards would be authorized to provide you with those
21 reports?

22 A. That's what I took that sentence to mean, that conversation to
23 mean.

24 Q. The reference the next line down appears to be "Bentley,
25 already told Coles of Hart's discussion with him. Hart is senior

1 judge, I guess, as MacKeigan is away, therefore, I am to be
2 applicant." Can you tell me what that means and who the
3 names refer to?

4 A. Okay. When I see that note this...these notes and as well the
5 comment from Gale above that were taken on the day that
6 the reference was handed down. I heard officially the
7 reference in the morning and within a short period of time
8 there was calls either from me to Gale or from him to me,
9 shortly thereafter I received a call from Mr. Bentley who was
10 then the, I don't know what his official is, called director of
11 regional...Atlantic Legal Services in Halifax for the Federal
12 Department of Justice, who indicated that he had had
13 discussions with, I believe it's Coles or Hart had called Bentley
14 and indicated to him what the procedure...what they proposed
15 the procedure to be in the reference which was as I indicate
16 there.

17 Q. I should point out perhaps that in the...in the letter of the
18 reference which was transmitted to the Chief Justice Mr.
19 Bentley's name is given as one who will be available to assist
20 if needs be.

21 A. Yeah. And I was also given to understand that...from Mr.
22 Bentley that although...at least at the initial stage that they
23 would be present in Court and they were, I believe, on the
24 first motion that was made, that basically that it was my case
25 and that they were just watching it.

MR. ARONSON, EXAM. BY MR. ORSBORN

1 Q. I apologize to be jumping around a little bit in the volumes,
2 but I direct your attention to Volume 27 at page 12, and this
3 appears to be a letter you're writing on June the 18th to the
4 Department of Indian and Northern Affairs generally
5 speaking about the problem with fees. But you say in the
6 second sentence that your...you're personally somewhat
7 disappointed in the decision. Now, I take it that's the decision
8 to refer it in the manner in which it was referred.

9 A. Yes.

10 Q. So, is it fair to say that you were disappointed that it was not
11 a free pardon or was not an advisory reference?

12 A. Well, when your first two preferences are free pardon,
13 Section 617 (c), I didn't get the preferences that I was looking
14 for, so...in that sense I was personally disappointed.

15 Q. And the commentary here about your fees, does this...this
16 follows on from the discussions with the Attorney General
17 and the Legal Aid Commission.

18 A. Yes.

19 Q. Now, Volume 31 at page 68.

COMMISSIONER EVANS

21 What volume?

MR. ORSBORN

22 41, My Lord, I'm sorry. Page 68.

23 Q. There is a ...what appears to be a typed notation of a meeting
24 with Frank Edwards and yourself. May I ask, is that a
25

1 notation that you made?

2 A. That probably would have been a notation I made on the tape
3 recorder that was transcribed by my secretary. I think it was
4 probably done in a car driving back from Cape Breton or
5 something.

6 Q. So, it is your notation.

7 A. Yeah.

8 Q. And it refers to a meeting of June 23rd with Mr. Edwards.
9 Where did that take place?

10 A. That took place I believe in his office in Sydney, Nova Scotia.

11 Q. And, was it at that meeting that you received the copies of
12 the R.C.M.P. report you had been looking for?

13 A. Yes.

14 Q. Do you know what R.C.M.P. report you received?

15 A. I'm not sure I know how I could identify it.

16 Q. Was there more than one?

17 A. I was always somewhat confused because when I had
18 originally been advised about the R.C.M.P. report I was also
19 told that it wasn't complete and I don't know, frankly, when
20 the case was actually complete. But I understood that as of
21 June 23rd I had ninety-nine point nine percent of whatever
22 information was available to Frank Edwards was made
23 available to me.

24 Q. Okay. And, what, if any, restrictions were placed on your use
25 of that material?

1 A. I don't...I don't know if there were really any restrictions. It
2 was given to me in confidence to deal with the case and...

3 Q. Did Mr. Edwards give you any indication if he was or was not
4 authorized to give you the material?

5 A. It never occurred to me that he wasn't authorized, as I said
6 the conversation with Mr. Gale indicating that I would be
7 given all the material and Frank giving me the material just
8 seemed to follow logically from.

9 Q. So you took it that Mr. Edwards providing this material was in
10 line with the earlier conversation you had had with Mr. Gale?

11 A. Yes.

12 Q. Now, you knew at this time that Mr. Edwards was
13 representing the Crown on the reference.

14 A. Yes.

15 Q. Did he give you any indication at this time as to what position
16 the Crown would be taking on the reference?

17 A. I have no recollection of that at this particular meeting on
18 ...the Sydney meeting on June 23rd.

19 Q. Now, there is reference in that note to a copy of the letter
20 from Gordon Gale dated April 21, 1982, enclosing the letter
21 from Harry How to Chief John MacIntyre, which I believe was
22 a letter directing Chief MacIntyre to turn over the files of the
23 Sydney Police Department to the R.C.M.P.. Had you seen that
24 letter prior to that date?

25 A. No.

1 Q. Were you aware of the existence of such a letter prior to that
2 date?

3 A. Yes.

4 Q. How had you become aware of it?

5 A. In a conversation with Staff Wheaton.

6 Q. And in what context had Staff Wheaton raised it?

7 A. My recollection is that, just to put this in context, I'd say that
8 Staff Wheaton and I were perhaps in conversation with one
9 another two to three times a week throughout this. So, I'd be
10 a little weary of trying to pin it down as to when exactly it
11 transpired. But it occurred shortly after Staff Wheaton and
12 another R.C.M.P. officer, who I believe may have been either
13 Scott or Christen, the head of the detachment in Cape Breton.
14 In any event, Wheaton and another R.C.M.P. officer attended
15 at Chief MacIntyre's office, were in conversation with him
16 about whether they had received all of the statements that
17 had been made by the witnesses in 1971. That they were
18 told, yes, that they were starting to turn around or say "Good-
19 bye" and they noticed something slip either from MacIntyre's
20 hand to the floor or from his desk to the floor. They left his
21 office. They spoke to one another briefly indicating that
22 "Maybe we should go back and see what it is that fell on the
23 floor," they went back into his office, asked him what it was
24 that fell on the floor. Wheaton advised that MacIntyre was
25 somewhat embarrassed by it and gave them...picked it up and

1 gave them the statement. And, subsequent to that they felt
2 that at point he had not been altogether cooperative and that
3 they were somewhat uncertain now, because of the document
4 falling off the desk, did they really have all of the statements
5 given by all of the witnesses and as a result they made a
6 request to the Attorney General's Department or reported it
7 to the Attorney General's Department and as a result this
8 letter was issued.

9 Q. So, is it your evidence that Staff Wheaton advised you that
10 the letter of demand was written at least partly because of
11 this incident of the statement falling on the floor?

12 A. That's my understanding, yes.

13 Q. Do you have a recollection now of Staff Wheaton telling you
14 that?

15 A. The...the time when Staff Wheaton told me that he did not
16 mention any letter. He just indicated, I believe, that there
17 was...that they had indicated a request, and I'm not sure
18 whether it was Wheaton or Frank Edwards that formally told
19 me that there was an actual letter written and when I
20 received a copy. So...

21 Q. Staff Wheaton, I'm sorry.

22 A. I'd be somewhat uncertain, I think it was Frank Edwards, but
23 as I say, my recollection is is that it was at least in part
24 because of that incident that they made the request to the
25 Attorney General's Department. In other words that the

1 letter came subsequent to the incident that I've spoken of
2 concerning Chief MacIntyre.

3 Q. Staff Wheaton has told us that the letter came before the
4 dropping on the floor or placing on the...dropping on the floor
5 incident and that it was at the meeting when they brought
6 the letter to the Sydney City Police Department that the
7 statement fell to the floor. I take it then that his testimony is
8 inconsistent at least with your recollection?

9 A. Yes. He might be right though. You know, as I say, that's my
10 recollection of it.

11 Q. There's a phrase in the middle of that note on page 68, Mr.
12 Aronson, the end of the first full paragraph, speaking of, I
13 think, the Louisbourg statement taken from Mr. Chant, "It was
14 the typed statement which was used by the Crown at both the
15 preliminary hearing and trial to ensure Chant provided the
16 story." Now, the matter of Chant providing the story. Do you
17 know if those are your words or Mr. Edwards' words?

18 A. Oh, those would have been my words.

19 Q. I see. They...I get the impression from those words, and
20 correct me if I'm wrong, that Chant providing a story is
21 something different than Chant telling the truth. Is that a
22 mistaken impression?

23 A. No, it's not a mistaken impression.

24 Q. Do you have any memory now of Mr. Edwards discussing with
25 you anything to the effect that the police had suggested a

1 story to Mr. Chant that was not the truth?

2 A. Not specifically, no.

3 Q. Do you remember when you met with Mr. Edwards if he had
4 any criticism at all to make at the way the investigation was
5 conducted?

6 A. I recall Frank Edwards told me that when...that the Crown
7 Prosecutor's office in Sydney had no filing system before he
8 became Chief Crown Prosecutor. That the place was
9 essentially a shambles. They had absolutely no records of
10 cases dealt with before Frank became Chief Crown Prosecutor
11 in Sydney. That he had basically gotten along well with the
12 Sydney City Police force. That since his involvement in this
13 case and the R.C.M.P. report relationship...the relationship had
14 been diminished somewhat. That it had been affected by the
15 case.

16 Q. Did he offer any comment to you as to his feelings about Mr.
17 Marshall's involvement in his conviction?

18 A. If I could...are you talking about this specific time when we
19 met or just generally?

20 Q. Yes, when you met on this occasion following the filing of the
21 reference and these reports were handed to you.

22 A. No specific recollection. I know we did have a discussion
23 about it but I don't know if it was at this...on this occasion or a
24 subsequent occasion.

25 Q. Now, I take it you reviewed the information and on page 69

1 on July 2nd you appear to make a request of Mr. Edwards for
2 additional statements.

3 A. Yes.

4 Q. Did you receive those statements?

5 A. I believe I did, yes.

6 Q. It might be a convenient time to take a break, My Lord.

7 MR. CHAIRMAN

8 Okay.

9 BREAK

10 3:39 p.m.

11 Q. Mr. Aronson, I believe about July the 8th, 1982, yourself and
12 Mr. Edwards met with Chief Justice MacKeigan to discuss how
13 the reference would proceed, is that correct?

14 A. I think it was a Chambers' application.

15 Q. Yes.

16 A. Yeah, if you want to call that a meeting, yes.

17 Q. What was the purpose of that? To get directions on how the
18 reference should proceed.

19 A. Yes.

20 Q. I have not seen any notes of your own but I can direct you to
21 Volume 29 at page 35. I believe that to be a note by Mr.
22 Edwards, page 35 of Volume 29, appears to be "Appeared in
23 Appeal Division Chambers before Chief Justice MacKeigan,
24 Aronson and articulated clerk present."

25 A. Yes.

1 COMMISSIONER EVANS

2 What volume are you reading from, please?

3 CHAIRMAN

4 Volume 29, page...

5 MR. ARONSON

6 Volume 29, page 35, My Lord.

7 Q. And he states that,

8
9 Aronson's submission (1) direction on how
10 to proceed re fresh evidence, (2) notice of
11 appeal in usual form if something about
12 giving particulars. Second thought, will
13 treat reference as Notice of Appeal.

14 Do you remember having that discussion in Chambers?

15 A. Vaguely. My recollection was that the, with respect to the
16 Notice of Appeal that we didn't need a Notice of Appeal
17 because we already had a reference which initiated the
18 proceedings by the Minister of Justice...

19 Q. Right.

20 A. Which represented the Notice.

21 Q. And was it your understanding following that Chambers'
22 discussion that you and Mr. Edwards, if necessary, would then
23 make formal application to have fresh evidence heard?

24 A. That's correct.

25 Q. There's a note in Volume 31 at page 77, Volume 31, page 77,
and this note appears to be at least a secondhand version of
the discussion in Chambers. It appears to be a report given

1 by Frank Edwards to somebody else. I can't tell you who it is.
2 But in the first paragraph, there, in the third, fourth line of
3 that first paragraph it says, "M.K.", which I presume refers to
4 the Chief Justice, "surprised re Frank suggesting that police
5 witnesses be called." Do you recall any discussion with the
6 Chief Justice in the Chambers' application about the possibility
7 of having police witnesses called?

8 A. Not of witnesses being called but of affidavits that might be
9 submitted.

10 Q. And do you recall whether or not the Chief Justice expressed
11 any opinion on the filing of affidavits on, by the police?

12 A. I have no recollection of the comments of the Chief on that.

13 Q. And do I understand, then, that following this initial
14 application you then went off to collect the necessary
15 affidavits.

16 A. That's correct.

17 Q. There is reference in Volume 29 at page 8 and following,
18 Volume 29, page 8 and following of discussions that you
19 appear to have had with a number of people, I presume, in
20 the Sydney area. Can you outline for us briefly the process
21 which you followed in obtaining affidavits from the
22 appropriate people?

23 A. I wouldn't say I treated them all in a consistent manner but
24 generally what I did was with a number of the witnesses I
25 went and had a meeting or discussion with them. Requested

1 their cooperation in terms of preparation of affidavits and
2 discussed the statements and so on that, reports I had been,
3 that I had received. The bulk of the time I was alone when I
4 had the discussions. On two or three occasions when I was
5 down in Cape Breton, on one day the RCMP provided some
6 assistance in locating witnesses.

7 Q. Did you have occasion to prepare any affidavits prior to
8 speaking with any of the potential witnesses?

9 A. I don't believe so. In part because the, I didn't know, like the
10 Chambers' application was on July the 9th and I was doing
11 this on July the 14th. It's possible, but my recollection was
12 many of the affidavits were drafted after an initial discussion,
13 although some of the affidavits, as I recall, were drafted
14 before I went down.

15 Q. Well, perhaps I can give you an example. At the bottom of
16 page 8 there you appear to be referring to a conversation
17 with Maynard Chant.

18 A. That's correct.

19 Q. Held 4:45 -5:15 on July 14th.

20 A. Correct.

21 Q. The affidavit that we have on file from Mr. Chant, and you
22 don't need to turn it up, but it's in Volume 39, I'm looking at
23 the last clause, page 37. That was sworn on the 14th of July.

24 A. So it would have been prepared before, yes.

25 Q. Okay. So at least with respect to Maynard Chant's affidavit

1 that would have been prepared prior to your speaking with
2 him.

3 A. Yes.

4 Q. And can you tell us what information you would have used as
5 the foundation for the affidavit?

6 A. The information from the documents in the RCMP report
7 primarily concerning the statements that he had made to the
8 police.

9 Q. And would you have also used any of the information
10 provided to you by Staff Wheaton in your meetings with him?

11 A. I don't have any specific recollection of having done that but
12 it's possible. Because my understanding was what he was
13 telling me was basically what was in the RCMP report. After I
14 had the RCMP report I didn't really need to speak to him.
15 And my recollection was that the, if not 100 percent from the
16 report then certainly 99 percent from the report.

17 Q. Perhaps I will direct your attention to Volume 39. We have,
18 affidavits are compiled in that volume. And at page 36 it's
19 part of the affidavit of Maynard Chant. He refers, and I'm
20 looking particularly at paragraph 9 and paragraph 11. He
21 uses the names both MacIntyre and Urquhart in both of those
22 paragraphs. Now to the best of my knowledge those names,
23 as such, are not delineated in either the RCMP reports or in
24 the statement that the RCMP took from Maynard Chant. Can
25 you give us any idea as to where the separate references to

1 the two police officers would come from?

2 A. I have no specific recollection of where that came from. I
3 assume that it came from the RCMP report but I, without
4 looking at the report I couldn't say.

5 Q. I see. Am I correct, though, that at least when this was
6 prepared the information did not come from Maynard Chant?

7 A. That would be correct, yes.

8 Q. Now can you tell us what process you went through when you
9 met with Maynard Chant, if any, to see that he agreed with
10 what had been stated in the affidavit prepared by yourself.

11 A. Well I think from the notes that I took on the day, by and
12 large we had a discussion of what he had seen and, or rather,
13 what he had not seen, and the reasons for the giving of the
14 statements. The reasons why he hadn't come forward before.
15 I think a fairly general discussion. It was at that point I
16 believe I gave him the affidavit to review to see if it reflected
17 accurately his recollection of what had transpired. And my
18 recollection, we were there for some time because we had to
19 obtain the services of a Commissioner for Oaths and so I
20 would not take his affidavit. And so we had a discussion
21 about it. We were in his home in Louisbourg and he signed
22 the affidavit and we brought in the Commissioner and he was
23 given an opportunity to read it and...

24 Q. The Commissioner, in this case, would be Elaine MacPherson?

25 A. Yes.

1 Q. And that, I take it that's, she's a lady.

2 A. Yes.

3 Q. And did she accompany you when you spoke to Mr. Chant?

4 A. No, she did not. She came after our discussion and obviously
5 before the affidavit was executed.

6 Q. And did Mr. Chant execute the affidavit in your company?

7 A. I was present when he executed it.

8 Q. Do you remember him reading it over?

9 A. I'm certain he read it over. How carefully he read it over I
10 can't say but I know he read it over.

11 Q. The reason for the question, Mr. Aronson, is when Mr. Chant
12 testified it's my recollection that he, himself, was not able to
13 tell us the basis for the reference, particularly to William
14 Urquhart.

15 A. I can't explain it. I...

16 Q. With respect to paragraph 12 of that affidavit, he refers to
17 having spoken with Donald C. MacNeil after the preliminary.
18 He was informed that he would be charged with perjury if he
19 changed his statement. And just referring to this by way an
20 example to see if this is the type of information in the RCMP
21 reports that would result in a statement like this in the
22 affidavit and I won't ask you to turn to it, but the RCMP
23 report found in Volume 34 at page 9 and following, and this is
24 the report of the 25th of February. And at page 14 of that
25 volume, paragraph 18, the RCMP report is commenting on the

1 statement of Mr. Chant and the RCMP says,

2 He, (meaning Chant), emphasized that he
3 was 14 turning 15 years of age at the time
4 and felt pressured into helping the police
5 and prosecutor. He advised that the
6 prosecutor threatened him with a charge of
7 perjury if he changed his story after the
8 lower court hearing.

9 Now that is the only reference I've seen, I stand to be
10 corrected, but the only reference I've seen that correlates
11 perjury, preliminary hearing and what have you. Are you
12 able to tell us if that is the sort of information that would be
13 translated into affidavit form?

14 A. That's correct.

15 Q. And that would be done by yourself?

16 A. Yes.

17 Q. Your notes on page 8 of Volume 29 indicate that you had
18 spent some time with Mr. Khattar.

19 A. Yes.

20 Q. The name there is George Khattar.

21 A. It was Simon Khattar, I believe.

22 Q. Simon Khattar. It was the Mr. Khattar that represented Mr.
23 Marshall.

24 A. It was.

25 Q. And did you have occasion to prepare an affidavit for Mr.

1 Khattar?

2 A. I did, yes.

3 Q. Was his affidavit prepared prior to meeting with him, do you
4 know?

5 A. I believe it was prepared subsequent, but as I say, I'm, at this
6 very point, very uncertain of dates and whose were prepared
7 first and whose later.

8 Q. And you indicated that in your notes that Mr., you were
9 advised that he was not aware of these earlier statements of
10 Pratico and Chant?

11 A. That's correct.

12 Q. And it's also mentioned there that money was not a problem.

13 A. Yes.

14 Q. You say, "Does not appear to have done a lot of investigation.
15 They acted on information from Indians as witnesses." Can
16 you explain that?

17 A. I queried Mr. Khattar as to what investigation of their own
18 they had conducted in representing Donald Marshall, Jr. at his
19 original trial in 1971. They indicated that they themselves
20 had done no investigation and had, as I've indicated in my
21 notes, that they had relied on Marshall and the MicMac
22 people or the Indian people in Sydney to provide whatever
23 information and assistance they could.

24

25

1 3:50 p.m.

2 Q. Did you advise Mr. Khattar that it was becoming apparent the
3 witnesses were now saying that they had lied?

4 A. Oh, I believe so. I think that's indicated at the very outset of
5 those notes when I either showed or read to him the
6 statements of Pratico, Chant and Harriss and the fact that
7 there were three statements by Harriss and his indication
8 that he had absolutely no knowledge of those statements.

9 Q. Do you know if you discussed with Mr. Khattar the possibility
10 of Mr. Marshall's being involved in a robbery?

11 A. I have not, it's possible but I don't recall.

12 Q. Mr. Khattar's affidavit is found at page 129 of Volume 39 and
13 that was sworn later in August, but there is a statement in
14 paragraph 11 at page 140, last paragraph of the affidavit.
15 And the last five lines read,

16
17 I believe that if evidence of the contents of
18 the statements and affidavits referred to
19 herein had been adduced at trial, then the
20 jury might reasonably have been induced
21 to change its views regarding the guilt of
22 Donald Marshall, Jr.

21 Did you prepare those words for Mr. Khattar?

22 A. I believe so. I'm not sure, there were a couple of affidavits
23 where the person who signed the affidavit wanted some
24 changes in which I would have made. Whether it occurred in
25 this particular one I don't recall. Certainly that looks like the

1 typewriter that was used and that's my office typewriter. So
2 I assume that I would have drafted it.

3 Q. Did you discuss that conclusion with Mr. Khattar?

4 A. Yes.

5 Q. And does that affidavit reflect his conclusion?

6 A. It does.

7 Q. So you were advised, then, that had those statements been
8 produced Mr. Khattar felt there would have been a different
9 result at trial.

10 A. He was quite certain of it.

11 Q. During this time that you were in Sydney did you come into
12 contact with Frank Edwards at all?

13 A. Oh, yes.

14 Q. In what context?

15 A. In terms of dealing with the various witnesses and affidavits
16 and concerning the reference.

17 Q. When you say dealing with witnesses and affidavits what do
18 you mean?

19 A. I used on one or two occasions the facilities of the Crown
20 Prosecutor's office to do some redrafting, some changing
21 around and speaking with witnesses to prepare some
22 affidavits after I had spoken with witnesses or to put down in
23 some sort of note form what, where I had missing chinks in
24 my own notes that I had already taken with witnesses. Frank
25 and I would occasionally have a discussion or take a break

1 and have a cup of coffee and talk about the case or something
2 not even related to the case.

3 Q. Did Mr. Edwards have the opportunity to read any of the
4 affidavits that you were either preparing or had taken?

5 A. He was provided with photocopies of all the affidavits prior to
6 them being filed with the court. I don't know if it was all in
7 one set of affidavits or a number of sets.

8 Q. Did you have any discussion with Mr. Edwards with respect to
9 some, any of the allegations that were made in the affidavits
10 concerning the police practices?

11 A. Yes. He was certainly concerned with the allegation that
12 certain deponents were making in their affidavits and in one
13 or another of the discussions it came about that we dealt with
14 the position the Crown was going to take in the reference.
15 And with respect to the police it was Frank's position that he
16 was going to obtain affidavits from certainly Chief MacIntyre
17 and Mr. Urquhart to refute the allegations made by the
18 witnesses or deponents Harriss, Chant and Pratico. In other
19 words, I knew he was going to try and rebut their sworn
20 affidavit testimony.

21 Q. Did Mr. Edwards suggest to you that he did not believe the
22 allegations that were being made?

23 A. The allegations by Harriss, Pratico, Chant?

24 Q. Yes.

25 A. His advice from the police and with whom he, how can I say,

1 he drafted their affidavits and that was what they had told
2 him. In terms of his own honest belief I really couldn't say
3 whether he believed it or he didn't.

4 Q. Did you have any discussions with Mr. Edwards as to his
5 views on whether the outcome of the '71 trial would have
6 been different, as Mr. Khattar suggested, had those
7 statements been made known?

8 A. Oh, I think Frank was quite certain that there was no
9 evidence based on the RCMP report and the affidavits that
10 were based on that that Marshall would have been convicted
11 or even brought to trial.

12 Q. Well, let me put it this way. To your knowledge did Mr.
13 Edwards share the view expressed in Mr. Khattar's affidavit
14 that had the statements of Chant, Pratico and Harriss, their
15 first statements been produced at trial, that the result may
16 well have been different? To your knowledge did he share
17 that view?

18 A. I can't think of a specific occasion when he actually said those
19 words but I must admit that I certainly believe that that's,
20 was his view.

21
22 COMMISSIONER EVANS

23 May I interrupt you for a moment. Going back to that
24 affidavit of Khattar at page 130. The paragraph 11 said that,
25

MR. ARONSON, EXAM. BY COMMISSIONER EVANS

1 Every possible effort was made at trial to
2 obtain the truth from witnesses Chant,
3 Pratico and Harriss but there was no
4 indication at that time that they were
5 willing to change their original testimony.

6 Then you go on to say, "And I believe that if the evidence of
7 the contents of the statements and affidavits referred to herein
8 had been adduced at trial..." Well surely Khattar was well aware
9 that there had been an effort by Pratico to change the...Chant or
10 Pratico. Was it Chant or Pratico?

CHAIRMAN

11 Pratico.

12 A. By Pratico, yes.

COMMISSIONER EVANS

13 And he admits that when you interviewed him on the 14th of
14 July that he knew of this.

15 A. I think when he's talking about efforts I think that they did
16 make an effort, at least my recollection from the trial was
17 they were aware of the incident and when it occurred, when
18 they came back in, it was either during a continuation of Mr.
19 Rosenblum or Mr. Khattar's cross examination that they were
20 trying to bring out this evidence but they were prevented
21 from doing so by the court. In other words, that was their
22 effort. They knew of that statement and that's all they knew
23 about.

COMMISSIONER EVANS

24 Did they ever give any indication to you, that is Mr. Khattar,
25

MR. ARONSON, EXAM. BY COMMISSIONER EVANS

1 of anything that they did with respect to investigation of this
2 comment.

3 A. None whatsoever. I think I can honestly say that they gave
4 me, they told me they didn't do any themselves personally or
5 have any conducted personally.

COMMISSIONER EVANS

7 Did you share the view that there was some property in a
8 witness that you wouldn't interview Crown witnesses?

9 A. Ordinarily I have no difficulty, I don't think there is a
10 property in a witness. If the witness doesn't want to talk to
11 you there's very little you can do unless, until you get to court
12 but, at least in a criminal matter. And, but if you don't ask
13 you never find out.

COMMISSIONER EVANS

15 That's what I've always thought, too, but...

COMMISSIONER POITRAS

17 But the reference in the last paragraph of Mr. Khattar's
18 affidavit is to the very first statements of Chant, Pratico and
19 Harriss, is that it?

20 A. My understanding, perhaps I should read it through more
21 carefully myself. No, I think when we're talking about
22 statements and affidavits in paragraph 11 we're talking about
23 those statements in the affidavits referred to in paragraphs 8,
24 9 and 10 which were attached to Khattar's affidavit. It gets a
25 little complex but that's as short and sweet as I can make, in

MR. ARONSON, EXAM. BY COMMISSIONER EVANS

1 other words, it was with reference to all of the statements.

2 They never saw any statements from the prosecutor until, if
3 they were adduced at trial. Other than that they had no,
4 there was no Crown disclosure.

COMMISSIONER EVANS

6 Was it ever asked for by Khattar or Rosenblum?

7 A. I couldn't say.

COMMISSIONER EVANS

9 All he says he was not, your note says, "He was not aware of
10 them referring to the three statements and not provided him by
11 either MacNeil or MacIntyre."

12 A. In other words, they were not provided to him by the Crown
13 Prosecutor, Donald MacNeil...

COMMISSIONER EVANS

15 No. Would you have expected the Crown Prosecutor or
16 MacNeil, or MacIntyre to run over to Khattar's office and deliver
17 them to him?

18 A. Personally, no. I would not have expected that.

COMMISSIONER EVANS

20 What did he indicate to you, if anything, about that?

21 A. They had not pursued, my recollection is that they had made
22 no request...

COMMISSIONER EVANS

24 Made no request, that's what I've been trying to get through.
25 Thank you.

1 MR. ORSBORN

2 Q. Did you also meet with Mr. Rosenblum?

3 A. I don't recall having met with him. We did have a fairly
4 lengthy phone conversation. That's my recollection.

5 Q. And his affidavit is contained at pages 131, 132 of that
6 volume. Again, in paragraph 11, did Mr. Rosenblum express
7 that view to you that the outcome at trial would likely have
8 been different had those statements been provided?

9 A. Yes.

10 Q. Do you know if you discussed with Mr. Rosenblum the
11 possibility of Mr. Marshall's being involved in a robbery?

12 A. To my knowledge Mr. Rosenblum was not aware, we did
13 discuss it and Mr. Rosenblum was not aware of the allegation
14 that there had been some robbery.

15 Q. So you did discuss it?

16 A. Yes.

17 Q. Do you remember if Mr. Rosenblum offered any opinion as to
18 whether or not the outcome of the trial or the conduct of his
19 defence would have been any different had he known about
20 the robbery at the time?

21 A. I can't say. I think the, my understanding from Mr.
22 Rosenblum was that if he had been aware of the statements,
23 essentially the robbery part was irrelevant since there was no
24 evidence in which could convict him of the murder of Sandy
25 Seale and that's what he was charged with.

MR. ARONSON, EXAM. BY MR. ORSBORN

1 Q. Well we can pull that together then. We've got two or three
2 matters which are unknown to counsel. One is the allegation
3 of a robbery, the others are these initial statements of Harriss,
4 Pratico and Chant. Are you able to say as between those what
5 opinions were advanced by you, I'm sorry, what opinions
6 were advanced by Marshall's counsel as to the effect of those
7 on the trial?

8 A. Certainly Mr. Rosenblum would have given the weight to the
9 statements of Pratico, Chant and Harriss in terms of what
10 would have been useful to him.

11 Q. Now just to look briefly at the formal documentation, Mr.
12 Aronson, at page 21...

CHAIRMAN

14 Before you leave Mr. Rosenblum. Did you discuss with him
15 the appeal from the conviction of Donald Marshall, Jr.?

16 A. With Mr. Rosenblum?

CHAIRMAN

18 Yes.

19 A. This would have been the appeal in 1972 we're speaking of as
20 opposed to the reference.

CHAIRMAN

22 Yes.

23 A. I believe just briefly and we talked about it in the context of
24 the 1971 re-investigation. In other words, subsequent to
25 Donald Marshall, Jr.'s conviction but before the appeal there

MR. ARONSON, EXAM. BY MR. ORSBORN

1 had presumably, or my understanding was that there had
2 been some re-investigation, certain witnesses were called in.
3 He was not made aware of that by the Crown either. That
4 was the context that we spoke about, the appeal. But in
5 addition I also recalled Mr. Rosenblum having saying that he
6 felt that based on the trial there was no ground for appeal
7 that would be successful.

CHAIRMAN

9 Did you discuss with him the ruling of the trial judge with
10 respect to admitting the evidence of Pratico changing his, or
11 attempting to change his evidence during the trial?

12 A. No. I mean other than discussing the incident as opposed to
13 the ruling by the judge which we didn't discuss.

MR. ORSBORN

15 Q. Page 21 of that volume, Mr. Aronson, Volume 39. There's a
16 formal notice that you then filed with respect to the
17 application for leave to adduce fresh evidence.

18 A. Yes.

19 Q. And who did you want to get fresh evidence from?

20 A. Fresh evidence from the witnesses, or the supposed witnesses
21 in 1971. And I think, in total, we had prepared somewhere
22 between 15 to 17 affidavits all together.

23 Q. But was it your intention to ask for leave to adduce fresh
24 evidence from each person that you had filed an affidavit
25 from? And the reason I ask is, for example, there is an

MR. ARONSON, EXAM. BY MR. ORSBORN

1 affidavit from Terry Gushue, an affidavit from Barbara Floyd,
2 affidavit from Sandra Cotie. Was it your intention that fresh
3 evidence should be obtained from each of these individuals?

4 A. Certainly initially it was. You can always cut it down but if
5 you don't put it in it gets a littler harder to get it in after.

6 Q. And do I understand also that the Crown made application
7 to, for leave to adduce fresh evidence and that that notice is found
8 at page 76.

9 4:10 p.m.

10 A. That's correct.

11 Q. And I gather, then, that you were given a date of October 5th
12 for the argument to adduce fresh evidence?

13 A. That's correct.

14 Q. And that notice is found at page 139 of that volume. Now
15 prior to the argument on the leave to adduce fresh evidence,
16 both sides filed briefs?

17 A. Yes.

18 Q. And turning to page 185, of this same volume, page 185, and
19 I believe this to be the brief of the Crown submitted by Mr.
20 Edwards, I believe. He seems to be suggesting in the last half
21 dozen lines of that page that the Crown wanted to call the
22 police evidence and that it was difficult to assess the
23 credibility of the other witnesses, Chant, Pratico, and Harriss,
24 or at least Chant and Harriss, without hearing from both sides.
25 Was that the position being advanced to you by the Crown?

MR. ARONSON, EXAM. BY MR. ORSBORN

1 A. Yes.

2 Q. At page 189 of Mr. Edwards' brief, starting with the second
3 paragraph, Mr. Edwards states:

4 It is also likely that the appellant failed,
5 [being Marshall] Marshall failed to tell his
6 counsel the whole story in 1971 thus
7 hampering their efforts to have him
acquitted.

8 Is that statement consistent with the views that have been
9 expressed by Mr. Khattar and/or Mr. Rosenblum?

10 A. No, in respect of the last phrase "thus hampering their efforts
11 to have him acquitted."

12 Q. Yes.

13 A. It would not be an accurate reflection of my understanding of
14 the position that Messrs. Khattar and Rosenblum took.

15 Q. In the preceding paragraph, last sentence, talking about the
16 appellant being less than forthright, it goes on:

17
18 It is entirely conceivable that had the
19 police been told the whole truth, the
20 investigation would have taken a different
direction and another individual charged.

21 Does that reflect the view that Mr. Edwards had expressed
22 early on to you about there being a miscarriage of justice?

23 A. It would not appear to, no.

24 Q. Did you discuss with him the apparent shift in the position?

25 A. I believe so, yes. What started off as a miscarriage of justice

MR. ARONSON, EXAM. BY MR. ORSBORN

1 ends up being something that's blamed on Donald Marshall, Jr.
2 Go from, to me, one extreme to another extreme. In the sense
3 that I think I was somewhat taken aback a bit by the change
4 of position but what I have more difficulty recollecting is
5 conversations with Frank in which there's some
6 acknowledgement that there is any change in position or
7 whether it was his position, other than we talked, sometimes
8 it's difficult to know if he was expressing a personal opinion
9 as opposed to the official position of the Attorney General.

COMMISSIONER EVANS

11 Wasn't it the understanding was that on this Reference it was
12 going to be on an adversarial approach though? It was not going
13 to be a cut and dried proposition.

MR. ARONSON

15 I'd have to disagree with that. I think Frank believed that
16 the outcome, as the Attorney General believed, at least this is my
17 understanding, that he should be acquitted. The issue was less
18 the bottom line so to speak than how one arrives at the bottom
19 line. And his position was that wasn't blaming the system, in
20 quotation marks, the blame should be put on Junior, okay? Or
21 more blame should be put on Junior.

COMMISSIONER EVANS

23 Well, you were apparently agreed on what the bottom line
24 should be. The thing was what method or what procedure was
25 going to adopted to arrive at it.

MR. ARONSON, EXAM. BY MR. ORSBORNMR. ARONSON

1 Well, in terms of the...Well, as I said, I'll just leave it at that, I
2 guess.
3

COMMISSIONER EVANS

4 Well, when you say that, in your view, there was a change of
5 position by Frank Edwards, all I'm trying to get at was that as a
6 result of some advice given that it was to be an adversarial
7 approach and that he wasn't going to make any admissions?
8

MR. ARONSON

9 At one point, Frank and I had a conversation which he
10 advised me that the Attorney General's office was upset with him
11 because of the position he was taking as Crown Prosecutor in
12 relation to the case. Frank advised me that there was a possibility
13 that another prosecutor would be appointed in place of Frank
14 Edwards to appear at the reference or to take charge of the case
15 and the individual's name was Reinhold Endres, who was at the
16 time a Crown Prosecutor with the Attorney General of Nova Scotia.
17 And it is because of that that my understanding, my belief was
18 that Frank took a somewhat different position than did his
19 superiors in headquarters at the Attorney General's office in
20 Halifax.
21

MR. CHAIRMAN

22 Were you privy to the discussions that had gone on between
23 officials in the Department of the Attorney General of Nova Scotia
24 and officials in the Department of the Attorney General of Canada?
25

MR. ARONSON, EXAM. BY MR. ORSBORN

1 MR. ARONSON

2 No, I was not.

3 MR. CHAIRMAN

4 I think we were told by Mr. Rutherford that some of the
5 discussions involved how best to have this matter tried in an open
6 forum where witnesses would be cross-examined and that this
7 was what they were striving for. Were you part of these
8 discussions? Did you know that that philosophy was behind the
9 reference as opposed to a full pardon?

10 MR. ARONSON

11 Well, it was certainly the understanding I was given by the
12 Federal Department of Justice but my understanding from Nova
13 Scotia was, officially, or at least as they expressed it to me, their
14 official position was that they had no objection to the granting of a
15 free pardon. One can look at that, in other words, they were
16 neutral on it. But in terms of being privy, I had never sat in at a
17 meeting as between the two departments or officials from the two
18 departments.

19 MR. CHAIRMAN

20 They consulted with you, did they not, from time to time
21 during that period?

22 MR. ARONSON

23 I was only consulted by the Federal Minister of Justice. I was
24 never consulted by the Attorney General of Nova Scotia.

25 MR. CHAIRMAN

MR. ARONSON, EXAM. BY MR. ORSBORN

1 Earlier today, I think you suggested that you were trying to
2 find a formula whereby, to quote you, your client, Donald
3 Marshall, Jr. "could have his day in court."

4 MR. ARONSON

5 Yes.

6 MR. CHAIRMAN

7 Is that why you preferred to go under 216(c)?

8 MR. ARONSON

9 617(c), yes, that's correct.

10 MR. CHAIRMAN

11 Did you envisage that that would have involved calling
12 witnesses who would be subject to cross-examination?

13 MR. ARONSON

14 Oh, I most certainly did, yes.

15 MR. CHAIRMAN

16 Which would have been an adversarial approach.

17 MR. ARONSON

18 Ordinarily, yes. Because of the unusual nature of the case, as
19 I say, the difficulty was it's difficult to be adversarial when you're
20 put in the awkward position of agreeing with what the outcome
21 should be. In other words, if Frank Edwards had had charge of
22 this case, knowing all along with all the statements, that it's
23 unlikely that the charge would have been pursued. Based on that,
24 there was nothing to argue about in terms of a bottom line. There
25 was no disagreement that the outcome should be, the verdict

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1 should be quashed. I don't think Frank Edwards ever led me to
2 believe otherwise in our conversations or discussions in his official
3 position or in his final submission to the court on the reference.

MR. ORSBORN

4
5 Q. With respect to the hearing in October, Mr. Aronson, the
6 hearing on the application for leave to adduce the fresh
7 evidence, I direct your attention to page 42 of Volume 29,
8 and these notes, I don't believe these are your notes. I do not
9 recall seeing notes of yours with respect to this application.
10 The names up in the left-hand side of page 42, they represent
11 the names of the judges which sat on this application?

12 A. That's correct.

13 Q. That's Chief Justice MacKeigan, Mr. Justice Hart, and Mr.
14 Justice Jones, Mr. Justice Morrison, and Mr. Justice
15 MacDonald?

16 A. That's correct.

17 Q. Now there's a note at the top of that page, "Made clear that
18 affidavits were not evidence." Do you remember any
19 discussion at this hearing about the, whether or not the
20 affidavits that had been tendered by both sides were
21 evidence? And if so, evidence for what purpose?

22 A. I was never frankly clear on the exact status of the affidavits
23 until...In other words, I never really knew the first time when
24 I see it, although I've seen this before, it was my first time
25 seeing this one I realize that the affidavits had not been

MR. ARONSON, EXAM. BY MR. ORSBORN

1 admitted at that time. I can understand that they weren't
2 admitted because we had been asked to say by the court on
3 that day, October 5th, what witnesses do you require to
4 establish your case. That was always the main issue. Who
5 was going to be called? And it was after some discussion that
6 the list immediately approximately in the centre of page 42
7 was established by myself as to the witnesses I felt were
8 needed in the case.

9 Q The witnesses that you felt were needed were, if I'm reading
10 it correctly, Chant, Pratico, Mian, James MacNeil, Patricia
11 Harriss, Mary, Donna, and Greg Ebsary, Duff Evers, R.C.M.P.,
12 and...

13 A. No, I would have omitted...There was some discussion about
14 Pratico and Mian in terms of being a witness and I recall
15 going back and forth with the court, myself and Frank, as to
16 whether it would be useful to have Pratico called as a witness
17 and if so, we would have to assure that Mian was called or
18 some evidence given by Mian as to the mental state of Mr.
19 Pratico. With respect to Mary Ebsary, I don't believe I had
20 any strong feeling that she should testify. Other than that,
21 the list also with the exception of Wheaton, because Wheaton,
22 as I recall, was, it was basically I think that Frank thought
23 would be useful to call. It certainly wasn't what the court
24 ultimately decided as to who should be called.

25 Q Do you recall what, if any, argument was directed to the

MR. ARONSON, EXAM. BY MR. ORSBORN

1 calling of police witnesses? Mr. Edwards had, I believe, filed
2 affidavits from Chief MacIntyre, Detective Urquhart, and Chief
3 Magee, or Sheriff Magee. Do you recall if there was argument
4 directed to the calling of these witnesses?

5 A. I think there was some argument where Frank wanted to call
6 the witnesses and I think it was basically the court didn't
7 really make a decision one way or the other. I think they left
8 the issue open at this particular hearing.

9 Q. There is an order reproduced at page 190 of the same volume
10 and the application to receive evidence is allowed for seven
11 people that are outlined there. And on the second page of the
12 order, the decision is reserved on the application for
13 examinations of person other than those named.

14 A. Yeah.

15 Q. And it says also: "We reserve decision on the application to
16 receive in evidence any of the affidavits tendered."

17 A. Yeah.

18 Q. Do you know if those decisions that were reserved were ever
19 ruled on?

20 A. The only evidence that was ruled on in respect of the
21 affidavits was at the very end of the actual reference in
22 December of '82 in which Frank had attempted to get the
23 affidavits of Urquhart, MacIntyre, and I believe one or two
24 other prosecution affidavits and that was at the very end of
25 the case and the court heard his submission and I indicated to

MR. ARONSON, EXAM. BY MR. ORSBORN

1 the court that while I had no objection to it, I had the
2 opportunity to cross-examine and would take advantage of
3 that opportunity. And the court decided not to admit the
4 affidavits.

5 Q. Was that the same court that heard this application?

6 A. Not precisely, no.

7 Q. What was the difference?

8 A. Mr. Justice Morrison did not appear at the actual reference
9 and in lieu, or rather than Mr. Justice Morrison, Mr. Justice
10 Leonard Pace appeared.

11 Q. So we've got one bench sitting on October 5th ruling on the
12 application for leave reserving certain decisions and then
13 another bench hearing the evidence itself.


14 A. That's correct.

15 4:30 p.m. COURT ADJOURNED UNTIL MARCH 15th at 9:30 a.m.

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REPORTER'S CERTIFICATE

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



Margaret E. Graham

DATED THIS 14 day of March 19⁸⁸ at Dartmouth, Nova Scotia