

RG44
Vol. 254
#1

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

Volume 56

Held: March 15, 1988, in the Imperial Room, Lord Nelson Hotel,
Halifax, Nova Scotia

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Court Reporting: Margaret E. Graham, OCR, RPR

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MR. ARONSON, EXAM. BY MR. ORSBORN

1 March 15, 1988 - 9:30 a.m.

2 MR. CHAIRMAN

3 Associate Chief Justice Poitras is unable to be here today. He
4 had to return to Montreal this morning to attend functions
5 concerning, arising out of the unfortunate death of the Chief
6 Justice of Quebec. But he will be returning this evening. So my
7 colleague and I will struggle on as best we can.

8 MR. ORSBORN

9 Thank you, My Lord.

10

11 STEPHEN ARONSON, still sworn, testified as follows:

12

13 EXAMINATION BY MR. ORSBORN

14

15 Q. Mr. Aronson, when we finished yesterday, we had just
16 completed our discussion of the hearing to admit new
17 evidence on October the 5th and the order that followed that
18 hearing. Am I correct that as a result of that hearing that
19 none of the affidavits that had been filed were regarded as
20 evidence in the proceeding?

21 A. That's correct.

22 Q. Turn now to the reference hearing itself and I understand
23 that that evidence was heard on December 1st and 2nd of
24 1982?

25 A. I believe so, yes.

MR. ARONSON, EXAM. BY MR. ORSBORN

1 Q. And, in your opinion, your view where you're starting off
2 with a clean evidentiary slate at that time?

3 A. Yes.

4 Q. And, indeed, it was being heard by a differently composed
5 Court than had heard the other application?

6 A. Yes.

7 Q. I'd like to review some of the evidentiary matters arising in
8 the course of the hearing, predominantly the reference to
9 some of the affidavits and I'll be referring to Volume 3, the
10 reference transcript, which I believe you have in front of you.
11 And I'll ask you comments on a number of references to
12 affidavits and statements in the course of the hearing.
13 Turning first to page 44, a number at the top of the page,
14 page 44 of Volume 3, and this is a cross-examination of
15 Donald Marshall, Jr. by Mr. Edwards and he refers at page 44
16 towards the top of the page to Mr. MacNeil's affidavit and at
17 pages 44 and later at page 51, Mr. Edwards puts to Mr.
18 Marshall some of the information contained in the affidavit
19 and in the statements attached to the affidavit. To your
20 knowledge, was any move made at that point to admit the
21 affidavit and its attached statements as evidence?

22 A. No.

23 Q. At page 58 of Volume 3, again Mr. Edwards is cross-
24 examining Mr. Marshall and he refers in the middle of the
25 page to Mr. Chant's affidavit having been filed and then he

1 questions Mr. Marshall on the contents of the statements
2 attached to that affidavit. To your knowledge, was there any
3 move made at that point to admit the affidavit of Mr. Chant?

4 A. No.

5 Q. On page 71, after some discussion between yourself, Mr.
6 Edwards, and the Court, do I understand that Mr. Marshall's
7 statement given to the R.C.M.P. at Dorchester in March of
8 1982 was admitted?

9 A. Yes.

10 Q. And he was then cross-examined on that statement.

11 A. That's correct.

12 Q. That statement was admitted as a formal exhibit.

13 A. Yes.

14 Q. Now on page 108 and 109, or really 109 and 110, I guess, I'm
15 sorry. It says Mr. MacNeil's cross-examination by Mr.
16 Edwards and do I understand that Mr. MacNeil is being cross-
17 examined by Mr. Edwards on a statement attached to Mr.
18 MacNeil's affidavit, that statement being his 1982 statement
19 given to the R.C.M.P.?

20 A. Yes.

21 Q. To your knowledge, was any move made at that time to admit
22 the affidavit of Mr. MacNeil and the attached statements?

23 A. I'm not sure if that affidavit was. I don't believe it was but...

24 Q. I can indicate that there's nothing in the transcript. I'm
25 wondering if to your recollection there was any move made to

1 admit it that may not be admitted in the transcript?

2 A. No, I'm just noting here about halfway down the page at
3 approximately Line 18, "Q. I'm now going to show you
4 Exhibit, a copy of Exhibit B, your affidavit."

5 Q. Yes.

6 A. Now I, it may have, whether it was actually introduced, it
7 seems to have been entered as Exhibit B.

8 Q. By reference to the affidavits filed, I believe Exhibit B was the
9 statement...

10 A. Oh, okay.

11 Q. Given to Staff Wheaton, which was attached to the affidavit.

12 A. As opposed to the affidavit itself.

13 Q. Yes.

14 A. All right. In that case, it wasn't admitted.

15 Q. There's a comment at about Line 8 attributed to Mr. Justice
16 Pace. It's in the affidavits and I believe the "it" refers to the
17 statement in question. Do you remember Mr. Justice Pace
18 making that reference to the affidavit?

19 A. No. When I see it, I see it but I have no recollection.

20 Q. Would that suggest that he was aware of the contents of the
21 affidavit?

22 A. Oh, very definitely the Court was aware of the contents of all
23 the affidavits.

24 Q. How did you determine that?

25 A. Well, first of all, we were required to file all the affidavits

1 prior to the October, well in advance of the October motion
2 and in discussions in the October motion, I recall the Court,
3 several of the members of the Court noting problems or
4 perceived problems with the contents of the affidavit. I
5 particularly recall Mr. Justice Jones referring to the affidavits
6 of certainly Mary Ebsary and indicating that he felt that there
7 was some hearsay in it, which to me indicated that, I don't
8 want to say all the members of the Court had read the
9 affidavits but certainly more than one had read the affidavits
10 quite carefully to pick out that kind of material.

11 Q. And these comments were in the October 5th application.

12 A. Yes.

13 Q. The application to leave.

14 A. They may have been in the...It was the application we made
15 to introduce, whether it was heard in October. I recall having
16 filed them some time in July, but when the actual...It may
17 have been in October that it was first heard.

18 Q. I believe that the argument was made in October, although
19 the supporting documentation was filed in October, in July.

20 A. That's right.

21 Q. Do you recall references in a similar vein, though, in the
22 reference hearing itself, references to the affidavit and what
23 was in them that may not have been reflected in the
24 transcript?

25 A. No.

1 Q. Turning to page 150, and this is Mr. Edwards' cross-
2 examination of Patricia Harriss and he again refers her to her
3 affidavit which was filed and then at page 154, there is a
4 further reference to that affidavit, page 154 at about Line 12.
5 And a question by Mr. Edwards, "My Lord, is the original
6 affidavit filed with the Court there in reference to her?" The
7 Court. "This has not been received, it has not been filed, none
8 of the affidavits." Does that confirm your understanding that
9 at least at that point none of the affidavits filed for the
10 purposes of the October hearing were part of the record for
11 purposes of the reference?

12 A. That's correct. I think it's the reference by the Court may be
13 slightly erroneous in saying "it has not been filed, none of the
14 affidavits." I think, to me, what the intent was they had not
15 been admitted in evidence. They obviously had been filed.

16 Q. And in a similar vein on page 160, the Court confirms in
17 about Line 19, "It is not filed with the Court. It is not filed
18 with the Court." Do I understand, though, that with respect to
19 Patricia Harriss' affidavit that that, in fact, was introduced as
20 an exhibit and it was marked "R-5" at the reference hearing?

21 A. I believe so.

22 Q. There is a reference to that on page 160 at about Line 8 and if
23 one turns to page 235 of this volume which is the last page,
24 235, My Lord. Exhibit R-5 there is shown as the affidavit of
25 Patricia Harriss.

1 A. That's correct.

2 Q. Do you remember that affidavit being entered?

3 A. I believe it was entered on direct examination but maybe...

4 Q. I see. On page 187, this was the cross-examination of
5 Maynard Chant and at Lines 21 and 22, the Court is reported
6 to have said, "Excuse me, Mr. Edwards, you referred to the
7 first statement, the one on May 30th." My reading of the
8 transcript of Mr. Chant's examination prior to that does not
9 divulge any reference to a statement on May 30th as such. Do
10 you have any knowledge of whether or not the Court was
11 aware from the documentation filed that Mr. Chant had given
12 a statement on May 30th?

13 A. I'm not even sure of the reference when I look at that and I
14 see "first statement May 30th." I assume that that must be a
15 reference to a statement made on May 30th, 1971.

16 Q. It was, it was, but there was a degree of particularity in the
17 reference of the Court that is not apparent from the earlier
18 transcript.

19 A. It would appear to be a reference to a statement attached as
20 an exhibit to the affidavit of Mr. Chant.

21 Q. To your knowledge, was any such statement or affidavit of
22 Mr. Chant entered as an exhibit?

23 A. No, it was not.

24 Q. At page 231, there is at page 231 about following Line 20, a
25 paragraph attributed to yourself, and this is a discussion, I

1 believe, between yourself and the Court and Mr. Edwards
2 involving Mr. Pratico. And you make the suggestion about
3 halfway through the paragraph,

4
5 I would suggest that something be done
6 either by way of admitting certainly
7 affidavits which support the opinion with
8 respect to his credibility or that he himself
9 be called as a witness if that's not
10 sufficient.

11 And the Court said, "Yes, if there's any other evidence that
12 you wish, that you're applying to have adduced." And if you
13 continue over to page 233, at the second line, the Court: "I
14 see. We shall not admit the affidavits. You've applied for
15 leave to produce Mr. Pratico," and you answer "The point I'm
16 making..." The Court, "Are you asking that he be produced?"
17 And you say, "No." What was your understanding of the
18 disposition of the affidavit of Mr. Pratico that you referred to
19 on page 231?

20 A. That it had not as yet been admitted into evidence. It had
21 been filed but not admitted.

22 Q. Was there any process by which you or Mr. Edwards
23 consented to that affidavit being admitted?

24 A. No.

25 Q. Was there any discussion by which you and Mr. Edwards
agreed, consented to the affidavit of Dr. Mian being entered?

A. No.

1 Q At page 232, at the top of that page, Mr. Edwards refers to his
2 application to have members of the Sydney Police Department
3 and Sheriff Magee called. Would I be correct in saying that
4 this was one of the matters that had been left open from the
5 October 5th hearing?

6 A. That's correct.

7 Q And do I also understand from reading the transcript that
8 you would not have objected to the affidavits being filed
9 provided you were able to cross-examine those witnesses?

10 A. That's correct.

11 Q What was the disposition of that?

12 A. The Court refused to admit the affidavits.

13 Q So am I correct that the Court had before them no evidence
14 from the police either by way of affidavit or viva voce
15 evidence?

16 A. No evidence on the record, that's correct.

17 Q So in summary then with respect to the affidavits and
18 statements that had been part of the October hearing or have
19 been filed prior to the October hearing, am I correct that the
20 only affidavit that formed part of the record of the reference
21 was the affidavit of Patricia Harriss?

22 A. Yes.

23 Q Now Mr. Edwards in his notes, and they're reproduced in
24 Volume 17. I won't ask you to get the volume out. I'll simply
25 read them to you, and I'm reading from Volume 17 at page

1 15.

2 COMMISSIONER EVANS

3 I'll interrupt you for a moment. Dealing with the summary
4 there, you say the affidavits filed on the application except that of
5 Patricia Harriss were never entered as exhibits at the hearing,
6 correct?

7 MR. ARONSON

8 That's correct.

9 COMMISSIONER EVANS

10 Now following that, the composition of the Court at the
11 hearing was different than the Court on the application of October.

12 MR. ARONSON

13 Yes, it was.

14 COMMISSIONER EVANS

15 That is, Justice Morrison was present on the application for
16 new evidence but he was not present, he had been replaced by
17 Mr. Justice Pace on the...

18 MR. ARONSON

19 The actual hearing of the reference, that's correct, My Lord.

20 COMMISSIONER EVANS

21 So can we assume then that Mr. Justice Pace would not have
22 the affidavits?

23 MR. ORSBORN

24 That would be a question, My Lord.
25

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

1 I have no knowledge as to whether he did or didn't have. I
2 feel fairly certain he would have had access to the file in the
3 Court.
4

COMMISSIONER EVANS

5 Because I think there's a question indicating some questions
6 by the Court but then there's one indicating a question by Mr.
7 Justice Pace himself with respect, as I gather, with respect to the
8 affidavits.
9

MR. ORSBORN

10 His comment that we spoke of, I think reads "It's in the
11 affidavits."
12

COMMISSIONER EVANS

13 Right.
14

MR. ORSBORN

15 And the question would be whether... one question whether
16 knowledge from the previous hearing translated into a
17 subsequent hearing for existing judges and whether or not
18 documentation from the early hearing was documentation for the
19 new judges. A point to be perhaps explored.
20

BY MR. ORSBORN

21 Q. Mr. Edwards writing in Volume 17, page 15, makes a note on
22 December 6th, 1982 and I'll read it to you. Page 15 of
23 Volume 17, and he is indicating that he told Martin Herschorn
24 that the Court had signalled that they did not want to get into
25

1 that regarding the evidence of the police officers. Would you
2 concur that the Court had signalled that they did not want to
3 get into the evidence?

4 A. Oh, I would agree with that, yes.

5 Q. Now my understanding, though, is that from the transcript
6 that they did not want to get into that or refused the hearing
7 of that evidence because you wanted to cross-examine.

8 A. I believe the other point I made was that it was perhaps not
9 relevant to whether Donald Marshall, Jr. was properly
10 convicted. It may deal with the circumstances surrounding
11 how he was convicted but it certainly didn't go to whether he
12 was properly convicted.

13 Q. Do you recall that point being made by the Court?

14 A. No.

15 Q. Do you recall a reluctance of the Court to get into the evidence
16 from the police officers?

17 A. My recollection was that there was a pause for a brief period
18 of time in which Chief Justice MacKeigan turned to his
19 colleagues and there was a reasonably quick decision made
20 concurring that they should not be admitted.

21 Q. Mr. Edwards goes on to say in his note: "When I was asking
22 for leave to cross on the O'Reilly statement, I believe the
23 statement of Mary O'Reilly, CJ (I presume Chief Justice) had
24 made the point that witnesses now admit they had lied. No
25 point in getting into why they had lied. Recall that he had

1 made at least three references in that vein." Do you have any
2 recollection of the court indicating that they did not or they
3 did or did not want to know why witnesses had lied?

4 A. I believe in the direct examination of Maynard Chant, and I'd
5 have to take a look at the transcript, but my recollection was
6 that when I was starting to go into the areas to explain why
7 they made the earlier statements at the Sydney City Police
8 that the court perhaps suggested that I shouldn't get into the
9 area. That's a recollection I have now, whether it's a fact out
10 born out by the transcripts, I don't know.

11 9:55 a.m. *

12 Q. Mr. Edwards also noted, and this is at page 16 of Volume 17,
13 again in his note of December 6th, "Bottom line was that
14 police had come through in best possible light and calling
15 them would not have improved their position." Was it your
16 view from attending the reference that the Crown was
17 attempting to place the police in the best possible light?

18 A. I think so. I think Mr. Edwards certainly attempted to
19 advocate that position.

20 Q. Thinking specifically now at the...at the hearing of the
21 evidence, not necessarily the later argument.

22 A. Throughout the hearing of the evidence he was quite
23 vociferous in the position that, you know, trying to get the
24 affidavits of the policemen admitted. I think that in itself, the
25 efforts he went to to balance or indicate the position of the

1 police with respect to the allegations of Chant, Pratico and
2 Harriss in their affidavits, although mind you Pratico's
3 affidavit is an admitted, and for all intents and purposes it
4 didn't exist.

5 Q. Do you have any view of what light the Crown was trying to
6 place Mr. Marshall in at the reference hearing?

7 A. In the light that he was in one or another way responsible for
8 the outcome of the 1971 trial.

9 Q. Do you recall the Crown attempting to explore with Mr.
10 Marshall whether or not he had been involved in any
11 previous rolling or robbery attempts?

12 A. Very much so, very much so.

13 Q. What do you recall of that?

14 A. I recall Frank putting to...or Mr. Edwards putting to Donald
15 Marshall, Jr., in cross-examination whether he had been
16 involved in a, I don't know if he used the expression "rolling"
17 or robbing other people before or in the park. Junior being
18 a...perhaps to put it somewhat mildly, reluctant to answer the
19 question.

20 Q. Did you make any objection to that?

21 A. I don't recall whether I did or I didn't. I may have.

22 Q. There is an objection reflected in the transcript, it's at page 63
23 and following. Do you have any view on the relevance of
24 exploring previous attempts of Mr. Marshall, if any, to roll
25 people?

MR. ARONSON, EXAM. BY MR. ORSBORN

1 A. I didn't believe it was particularly of any relevance and I
2 thought if anything it was certainly of more prejudicial value
3 than anything and I strongly believe that if it would have
4 been before a jury, the evidence never would have gone in.

5 Q. Did the Court allow the evidence in?

6 A. Yes.

7 Q. But during this hearing in December, do you have any
8 memory of any reaction from the bench that was critical of
9 Mr. Marshall?

10 A. No.

11 Q. Do you have any memory of reaction from the bench that was
12 critical of the police?

13 A. No.

14 Q. That was critical of Miss Harriss, Mr. Chant or Mr. Pratico.

15 A. None whatsoever.

16 Q. Now, I understand that following the hearing of the evidence,
17 yourself and Mr. Edwards had to prepare written factums for
18 filing with the Court.

19 A. That's correct. Had to get the transcript first.

20 Q. Well, it seems like he got it fairly quickly.

21 MR. CHAIRMAN

22 You say you had to get the transcript to prepare
23 your factum.

24 MR. ARONSON

25 Yeah, well, to file, that's correct. And, we...because of the

MR. ARONSON, EXAM. BY MR. ORSBORN

1 nature of the case the Court...we couldn't get a date for an
2 argument until we had the transcript and because we were...the
3 hearing finished December 2nd and I recall going down either on
4 that afternoon or the following day to trial and make
5 arrangements to get the transcript done as quickly and having, I
6 believe, the Court's cooperation to try and get the transcript
7 because we were starting to approach the Christmas season,
8 although it was just a two-day hearing, it would take some
9 considerable time to type up the transcript. And when we went
10 back for the date of the hearing, it was the motion, I believe it
11 was in front of Mr. Justice MacDonald and he was mildly critical of
12 the delay in getting the transcript.

MR. CHAIRMAN

14 That has a familiar ring.

MR. ORSBORN

16 Q. You did get it.

17 A. Oh, yes, very definitely. I think we got it before the end of
18 the calendar year, I think.

19 Q. Not bad. Not bad. I'd like to just to raise a couple of points in
20 your own factum, Mr. Aronson, this is found at Volume 4,
21 pages 44 to 79, a couple of references. Volume 4. And
22 turning to page 70, page 70 of Volume 4. I just want to
23 understand the bottom line of your submission and looking at
24 paragraph 57 you write,

25

MR. ARONSON, EXAM. BY MR. ORSBORN

1 It is the appellant's submission that the
2 reception of the first evidence will support
3 the appellant's position that his conviction
4 for the murder of Sanford Seale was
5 unreasonable and cannot be supported by
6 the evidence, or in the alternative, that the
7 appeal should be allowed on the grounds
8 that there was a miscarriage of justice.

9 And do I understand that those alternative grounds reflect
10 the grounds that are contained in I think 613 of the Code, one
11 is sub 1 and one is sub 3?

12 A. I believe so.

13 Q. Did you have any preference for the ground on which it
14 should be allowed?

15 A. I personally preferred the miscarriage of justice.

16 Q. Why?

17 A. Because I believe that the evidence that was admitted
18 supported the fact that there was somewhere along the line a
19 miscarriage of justice. The fact that it was...that our first
20 alternative couldn't be supported by the evidence sort of
21 seemed to be brought in by that umbrella as part of the
22 miscarriage of justice.

23 Q. When you use the phrase "miscarriage of justice," what did
24 you mean in law?

25 A. Yeah, I guess we use that term fairly frequently without
trying to define precisely what it means. The miscarriage of
justice I personally take occurs when there has been some
fault on the part of one or another member of the

MR. ARONSON, EXAM. BY MR. ORSBORN

1 administration of justice, whether it is defence lawyer, court,
2 police, prosecution. In particular in evidence or other
3 material or the truth isn't before the court, that perhaps is too
4 narrow a definition, but I'm not sure I want to get beyond
5 that at this point.

6 Q. Page 73 of your factum...

COMMISSIONER EVANS

8 Did you mean that the truth was not before the court because
9 of some action?

MR. ARONSON

11 That's right. But whether intentional or not intentional, that
12 there had been some error, omission.

MR. ORSBORN

14 Q. Page 73 of your factum, you comment on the term
15 "miscarriage of justice" and you say "In its narrowest or most
16 limited sense, it means the conviction of an individual for a
17 crime which another has committed, for this is the ultimate
18 miscarriage of justice." And then you go on to cite the British
19 Columbia Court of Appeal to that effect.

20 A. I should have read my brief.

21 Q. Was it your view then that, at least in its narrowest sense, the
22 conviction of an individual for a crime which somebody else
23 committed was in law a miscarriage of justice?

24 A. Most definitely.

25 Q. Now, turning to the factum of the Crown, which is also found

1 in the same volume at, I think, pages 1 to 43, I'd like to ask
2 for your comments on a couple of matters. At page 15 of that
3 factum, page 15, at the top of the page, the Crown
4 acknowledges that Jimmy MacNeil told the police that Roy
5 Ebsary had stabbed Seale and given a written statement to
6 that effect on November 15th, '71. Do you recall that being
7 addressed in the evidence?

8 A. No, I think the Court, my recollection is the Court didn't want
9 us to go into the 1971 reinvestigation either.

10 Q. But it was...is it fair to say that it was nonetheless the position
11 of the Crown as set out in the factum that the Sydney police
12 were aware that Roy Ebsary had stabbed Seale in November
13 of '71?

14 A. That's correct.

15 Q. And, in similar vein on page 18 at the bottom of the page, do
16 I understand that here the Crown is acknowledging that the
17 matter was again brought to the attention of the police by
18 Donna Ebsary and Dave Ratchford in 1974?

19 A. That's correct.

20 Q. Now, during to page 39.

21 COMMISSIONER EVANS

22 Sorry, what page?

23 MR. ORSBORN

24 39, My Lord.

25 Q. Turning to page 39, the conclusions, and referring to

1 paragraph 83, and I'll read it,

2
3 The respondent and the Crown disagrees
4 with counsel for the appellant who argues
5 that the aforementioned order could issue
6 on the basis that there had been a
7 miscarriage of justice. It is submitted that
8 the latter phrase connotes some fault in
9 the criminal justice system or some
10 wrongdoing on the part of some person or
11 institution involved in that system. The
12 respondent contends that such was not the
13 case and that care should be taken to
14 dispel any notion.

15 Earlier on that page at the beginning, the Crown agrees that
16 the appeal should be allowed and a verdict of acquittal
17 entered. Do I understand from that that the position of the
18 Crown was that the acquittal should be entered on the basis
19 that the evidence would not now support the conviction?

20 A. I believe so, yes.

21 Q. I understand that the Crown did not agree with your
22 submission that there was a miscarriage of justice.

23 A. I believe they disagreed with the definition, yeah.

24 Q. Well, then as it related to the provisions in the Criminal Code,
25 sub 1 being the evidentiary provision and sub 3 being the
miscarriage of justice, am I correct that because you agree on
the ultimate disposition, did the adversarial position of the
parties and...revolve around simply whether it was to be sub
1 or sub 3, whether it was a miscarriage of justice or not?

1 A. It seemed to revolve more as to whether...my main
2 recollection is the argument was more over whether it
3 was...the conviction of Marshall, Jr., was attributable to him as
4 opposed to other factors in the system, and that that in
5 itself...that's my best recollection. I'm not sure we actually...or
6 perhaps it was in the written submissions that in oral
7 argument perhaps it wasn't pursued as vociferously as the
8 point I've already mentioned about Marshall being
9 responsible for his own conviction.

10 Q. In that vein, turning then to page 40 of the Crown's factum,
11 and in paragraph 85 on page 40 the Crown comments about
12 the possibility of the criminal justice system being called into
13 question, and that the public confidence must be maintained,
14 and then the Crown goes on at paragraph 86 at the bottom of
15 the page.

16
17 For the above reasons it is respectfully
18 submitted that the Court should make it
19 clear that what happened in this case was
20 not the fault of the criminal justice system
21 or anyone in it including the police, the
22 lawyers, the members of the jury, or the
23 Court itself.

24 Was it your opinion that the Crown was attempting to
25 exonerate the criminal justice system?

A. Oh, very much so.

Q. In your view was that...were those considerations relevant to

1 the reference?

2 A. No, they were not relevant.

3 Q. Why not?

4 A. Because there was no evidence before the Court on which
5 they could make certainly an educated, informed decision
6 onto how Donald Marshall, Jr., was convicted. They had no
7 evidence from the police. There was quite limited evidence
8 with respect to the reasons why certainly Chant and Harriss
9 didn't...were not truthful in 1971. We didn't know about the
10 1971 reinvestigation, weren't allowed to speak about that.
11 Basically there was insufficient evidence on which the Court
12 could properly base that kind of a decision that Frank was
13 proposing. That was the position I took.

14 Q. What would be your position on the relevance of the activities
15 in the criminal justice system, leaving aside matters of
16 evidence? Was the criminal justice system on trial in the
17 reference?

18 A. I think in a broad sense perhaps it was, but it seems to me a
19 case like this you have to deal first of all with the legal issue,
20 a determination of guilt or innocence before one can begin to
21 look at...paint a broader picture of how it happened. In other
22 words, how can one go about vindicating either Donald
23 Marshall, Jr., or the system if Donald Marshall, Jr. still stands
24 rightfully convicted of murder. It seems to me we had to deal
25 with that issue first and what bore directly on that was

1 relevant and that which dealt with other matters relating to
2 police conduct, or conduct of others in the administration of
3 justice should be dealt with in some other forum. In addition,
4 the...it was easy to try the case as a discrete issue. It was also
5 limited by the nature of the reference and the question put in
6 the reference.

7 Q. Did the...did the reference question ask the Court to determine
8 how it happened?

9 A. I don't believe so.

10 Q. Did the Court have evidence before it on which it could
11 determine how it happened?

12 A. I don't believe so, no.

13 Q. Now, the sentence I just read out from the Crown's factum,
14 "The Court should make it clear it was not the fault of the
15 criminal justice system or anyone in it, including the police,"
16 as I read that that suggests that there was...the Crown's
17 position is that there was no fault on the part of the police.
18 Was that view consistent with the position taken by Mr.
19 Edwards to you in the months leading up to the reference?

20 A. That was the official position that was taken, yes.

21 Q. Was that consistent with the position taken by Mr. Edwards to
22 you?

23 A. Well, it was consistent with the official position Mr. Edwards
24 took with me. I don't know if I'm answering your...

25 Q. No. Do you have any knowledge of Mr. Edwards' views on the

1 role of the police in the investigation?

2 A. I believe Frank personally was somewhat less than convinced
3 that the police perhaps did not have an active role, but how
4 can I say, I'm somewhat uncertain as to his precise position. I
5 just...as I say, I don't believe he personally agreed with the
6 submission he was making.

7 Q. Did he ever suggest to you that he had any reservations about
8 advancing the view that the police were blameless?

9 A. No.

10 Q. With respect to the statement about the lawyers, you
11 interviewed the lawyers that were involved in the case in
12 1971.

13 A. That's correct.

14 Q. On the defence side.

15 A. Right.

16 Q. The fact that there is a suggestion here that there was no
17 error or fault on behalf of the lawyers, is that consistent with
18 your own view?

19 A. I'm somewhat uncertain of that. I...I think that the lawyers
20 who acted for Donald Marshall, Jr., in 1971 could have taken
21 further steps in terms of the investigation. But I think in
22 respect of their activities before the Court and their advocacy
23 on his behalf I have no...take no issue with that.

24

25

1 10:15 a.m.

2 Q. The Crown is asking the court to exonerate the lawyers. Was
3 there evidence before the Court on which they could
4 exonerate or not exonerate the lawyers?

5 A. No, there's nothing before them.

6 Q. Was there evidence before the Court on which they could
7 exonerate or not exonerate the members of the jury?

8 A. I don't even know if that came up as an issue but there
9 certainly wasn't any evidence.

10 Q. Now Paragraph 88 on page 41, the Crown says:

11
12 It is submitted that had the appellant,
13 meaning Junior Marshall, had been
14 forthright, the odds are that both the police
15 investigation and/or his defence would
16 have taken different directions. The
17 likelihood is that he would never have
18 been charged let alone convicted.

19 To your knowledge, was there any evidence that the police
20 investigation would or would not have taken a different
21 direction had the police been aware of the robbery in May of
22 '71, or the alleged robbery?

23 A. None whatsoever.

24 Q. Was there any evidence that his defence would have taken a
25 different direction?

A. There's no evidence but it seems to me it would a logical
assumption to take.

1 Q. I'm sorry?

2 A. I'm sorry, I think, yeah, I was thinking....No, that's correct.

3 Q. Let me ask it again so we're clear. Was there any evidence
4 that his defence would have taken a different direction had
5 defence counsel been aware of the altercation or alleged
6 robbery?

7 A. I must say the question itself doesn't make practical sense to
8 me, in a way. But there wasn't any evidence. I just find it
9 confusing.

10 Q. Based on your discussions with Mr. Khattar and Mr.
11 Rosenblum, was there anything that led you to believe that
12 the defence would have taken a different direction had they
13 been apprised of that alleged robbery?

14 A. No, it was mainly concerning with the statements of the other
15 witnesses.

16 Q. Now is it a fair reading of that paragraph, and I appreciate
17 you didn't write it, that is it a fair reading of that that the
18 Crown is saying that Mr. Marshall would never have been
19 charged let alone convicted if he had been forthright in '71.
20 Is that a fair reading of it?

21 A. Yes.

22 Q. I'll just ask you to look at Volume 28 and I'm looking at page
23 6.

24 A. I'm sorry, page?

25 Q. Page 6. This is a letter written by Mr. Edwards in 1984,

1 almost two years following. Now just, the circumstances are
2 not relevant, but I just draw your attention to the middle of
3 the second paragraph on page 6, and I'll read it out.

4
5 Mr. Marshall would not have been
6 convicted of murder in 1971 had it not
7 been for the failure of the police and/or
8 the Crown to disclose to his counsel the
9 existence of the first written statements of
10 Chant, Pratico, and Harriss. Further, his
11 appeal in 1972 would likely have been
12 successful had his counsel been apprised of
13 the reinvestigation in November of 1971.

14 Did Mr. Edwards ever voice that opinion to you?

15 A. I think perhaps in other words but that was certainly his
16 view.

17 Q. Did Mr. Edwards ever suggest that opinion to the court?

18 A. No.

19 Q. Now I presume you got the Crown's factum and you read the
20 position that they were going to take that there was, in effect,
21 no miscarriage?

22 A. Yes.

23 Q. Did you discuss that position with your client?

24 A. Yes, we discussed it.

25 Q. How did he feel about it?

A. He wasn't very happy with that kind of position, which put
him at fault for, as it was concluded, for a murder he didn't
commit. He took great issue with it.

MR. ARONSON, EXAM. BY MR. ORSBORN

1 Q. Now the argument, the oral argument, I believe, was held in
2 early February?

3 A. Yes.

4 Q. How long did it take?

5 A. I think it lasted a sum total of 30 to 45 minutes, something
6 along those lines.

7 COMMISSIONER EVANS

8 How long?

9 MR. ARONSON

10 A. 30 to 45 minutes.

11 COMMISSIONER EVANS

12 We'll take note of that.

13 MR. ORSBORN

14 Q. Well, it's apparent that both yourself and the Crown were
15 agreed on what the final result should be.

16 A. Yes.

17 Q. That there should be a verdict of acquittal entered. What
18 were you arguing about?

19 A. Two issues. The issue we've just discussed concerning who
20 was to blame for Donald Marshall, Jr.'s conviction, sort of
21 generally, he or whether the fault lay elsewhere. The second
22 issue was as to the general issue of the Crown's role in a
23 criminal appeal is to advocate on behalf of the Crown and
24 not...that was an issue that was raised.

25 Q. Speaking of the latter issue, in what context was that raised?

MR. ARONSON, EXAM. BY MR. ORSBORN

1 A. I believe during the course of Mr. Edwards' oral submission to
2 the court, it was put to him by Mr. Justice Pace that perhaps
3 as much of an allegation as a question that he was not being a
4 proper advocate or not advocating the Crown's case by
5 agreeing with the ultimate submission. I took it from what
6 Pace was saying, if one followed it to its logical conclusion,
7 Frank should have said that there was lots of evidence in
8 which Donald Marshall, Jr. could have been convicted. In
9 other words, take the ordinary adversarial type role, which is
10 customary in criminal cases.

11 Q. Are you saying then that Mr. Justice Pace was indicating to
12 counsel for the Crown that he should not have been arguing
13 or advocating an acquittal?

14 A. Perhaps to put it as clearly as I can, what he was saying was
15 that Frank had not played his proper role in the adversarial
16 system, which I take it would have meant that he should
17 have not agreed with the conclusion that he arrived at and
18 that he submitted to the court.

19 Q. His conclusion being that there should be an acquittal.

20 A. Yeah, that the verdict should be quashed.

21 Q. Now that was one issue, you say. Do you recall from the
22 argument what was the other issue?

23 A. The other issue was as to where the, or it appeared to be
24 where fault lay in Donald Marshall, Jr.'s conviction in 1971,
25 whether it was the police, the witnesses, Donald Marshall, Jr.,

1 but primarily centering around Donald Marshall, Jr.'s failure
2 to be, as Mr. Edwards put it, forthright in his statement in
3 1971.

4 Q. Was there any argument directed to the evidence or lack of
5 evidence about the participation of people other than
6 Marshall in his conviction?

7 A. I certainly recall having, my recollection as indicating, well,
8 here you have witnesses who have testified under oath that
9 they were put under pressure by police to make the
10 statements that they made, specifically Maynard Chant and
11 Patricia Harriss, which would, in my view, certainly should be
12 given some weight particularly having regard to the fact that
13 there was no evidence to indicate that the police had not
14 exerted any pressure or had, in fact, other than the evidence
15 of those two witnesses.

16 Q. Was there any response from the bench to that argument?

17 A. No.

18 Q. Do you recall if there was any suggestions from the bench
19 during the course of the argument that were critical of Mr.
20 Marshall?

21 A. There may have been. I have no present recollection of any
22 actual criticism of his role.

23 Q. Do you recall any suggestions from the bench that could be
24 viewed as critical of the police?

25 A. There was no comment with respect to that matter.

1 Q. Do you recall any suggestions that were critical of Miss
2 Harriss, Mr. Chant, or Mr. Pratico?

3 A. None.

4 Q. Any suggestions critical of Crown or defence counsel?

5 A. Other than the comment by Mr. Justice Pace concerning...

6 Q. I'm sorry, Crown or defence counsel in '71.

7 A. No.

8 Q. Now Mr. Edwards wrote a later note, and again I won't ask
9 you to look at the volume. I'm referring to Volume 29,
10 Exhibit 98, at page 49, and this appears to be a note written
11 by Mr. Edwards in response to some questions after the fact.
12 And he writes, apparently the question was why did the
13 judgement come out, cannot be supported by evidence rather
14 than miscarriage? Mr. Edwards says: "Bench very close to
15 ordering a new trial which would have been real tragedy. My
16 reading they'd be far more inclined to acquit if the
17 submission was..." And I can't read the next word, it might be
18 "couch" perhaps, "In terms it was." He seems to be saying
19 there that the court was close to ordering a new trial. Do you
20 have any memory of that during the argument?

21 A. Certainly I would have taken it away from the argument and
22 come to that conclusion. I had no indication from the court.
23 It may have been something that was mentioned in passing,
24 the various kinds of remedies or orders that could be made,
25 but certainly no stress on that particular one or indication

1 that they were leaning in that direction as opposed to another
2 direction.

3 Q. He seems to suggest in that note that his reading at least of
4 the court was that it would be more inclined to acquit if there
5 was no finding of a miscarriage of justice. Did you have that
6 impression or contrary impression?

7 A. No, I didn't have that impression.

8 Q. Did you get any sense during the argument as to whether or
9 not the court was sympathetic to your argument about there
10 being a miscarriage of justice?

11 A. My impression from the court, and as I say, we had through
12 the four or five appearances we made in front of either single
13 judges, panels of three, panels of five, that the sympathy was
14 there at the outset. That is to say, in June or July. Once the
15 affidavits were filed, and I think the court became more
16 aware of the actual nature of the case as opposed to perhaps
17 admissible evidence, they seemed to be less sympathetic.

18 Q. When you say "actual nature of the case," what do you mean?

19 A. Before Donald Marshall, Jr.'s affidavit had been filed, there
20 had been no indication that there was any form of altercation
21 or alleged robbery, rolling in the park, and it had generally
22 appeared because of the type of media coverage that Donald
23 Marshall was wronged. And once it turned around and that
24 statement, I shouldn't say the statement was filed, but once
25 information came out through Donald Marshall, Jr.'s affidavit

1 and Jimmy MacNeil's affidavit, I think it took a turn to have
2 less sympathy from the court. That's my personal view. I
3 had no, there's no indication nor any expression of... by the
4 court to that effect. And, as I say, the panels were quite
5 different throughout. So it may have had as much to do with
6 the judges as it had to do with that particular event.

7 Q. The statement that Mr. Marshall gave to the R.C.M.P. in
8 Dorchester, if I recall correctly, was not attached to his
9 affidavit that was filed, was it?

10 A. No, his affidavit, I believe, spoke of an altercation in
11 Wentworth Park but Jimmy MacNeil's affidavit spoke of an
12 assault in Wentworth Park.

13 Q. And his 1982 statement, Marshall's 1982 statement did not
14 come before the court formally until the actual reference
15 hearing in December.

16 A. That's correct.

17 Q. He was cross-examined on it.

18 A. Yes.

19 Q. Now turning to the judgement itself, which is found at
20 Volume 4, pages 80 to 147, this was released, I think, in May.
21 If I could direct your attention to page 114. And at the
22 bottom of the page, the court writes, and it's referring to
23 James MacNeil, at the bottom of page 114. "His evidence was
24 unknown to Marshall's counsel," (and this was back in '71)
25 "and in the light of their client's" (meaning Marshall's

1 instructions) "could not have been discovered by them with
2 reasonable diligence before the trial." Was there any
3 evidence, to your knowledge, directed to whether or not Mr.
4 Khattar and Mr. Rosenblum could have discovered James
5 MacNeil?

6 A. I don't believe so, no.

7 Q. Was there any evidence that the reason that they did not
8 discover him was because of Mr. Marshall's instructions?

9 A. No.

10 Q. Do you recall at the oral argument if it was argued that Jimmy
11 MacNeil could not have been discovered because Mr. Marshall
12 didn't talk about the robbery?

13 A. That particular point was never raised.

14 Q. Now on page 121, in the middle of the page, the reference
15 reads:

16 During cross-examination, [and I believe
17 that to be the cross-examination of Mr.
18 Marshall], reference was made to an
19 affidavit which Mr. MacNeil, [James
20 MacNeil] had sworn.

21 And then the court goes on to recite three paragraphs in the
22 affidavit and then reproduces in full the 1971 statement of
23 Mr. MacNeil. To your knowledge, was that statement and that
24 affidavit introduced in evidence?

25 A. It was not.

Q. Now at page 126 and 127, Mr. Chant's May 30th statement is
reproduced in full, and that statement was of course attached

MR. ARONSON, EXAM. BY MR. ORSBORN

1 to his affidavit. To your knowledge, was either the affidavit
2 with the statement attached or the statement itself
3 introduced in evidence?

4 A. It was not introduced in evidence.

5 Q. At page 129, and reading the bottom paragraph in the page,
6 the paragraph commencing with "John Pratico...", fourth line
7 of that paragraph reads:

8
9 With the consent of counsel for the Crown,
10 the appellant (Mr. Marshall) produced an
11 affidavit in which Mr. Pratico indicated
12 that he had not in fact been a witness to
13 the actual killing (et cetera) together with
14 a second affidavit from a psychiatrist
15 indicating that Mr. Pratico had been a
16 patient (et cetera)].

17 And then the Court quotes from the affidavit of Dr. Mian and
18 then reproduces in full the May 30th statement of Mr. Pratico.
19 To your knowledge, were the affidavits of Mr.. Pratico and Dr.
20 Mian in evidence before the court?

21 A. No.

22 Q. What about the May 30th statement of Mr. Pratico?

23 A. No.

COMMISSIONER EVANS

24 Are you saying that you did not consent, there was no consent
25 by you to the admission of these affidavits?

MR. ARONSON

Well, I don't recall them ever having been introduced as

MR. ARONSON, EXAM. BY MR. ORSBORN

1 exhibits to get to the stage, you know, where somebody stood up
2 and said, you know...

3 COMMISSIONER EVANS

4 Where you could consent or not.

5 MR. ARONSON

6 We could consent. It was never transpired that way. Part of
7 it was perhaps a bit of confusion on my part, but I, these
8 affidavits were during the actual hearing of the reference rarely
9 referred to and it is only in the judgement that you see references
10 to the affidavits and the statements.

11 COMMISSIONER EVANS

12 As I understand your evidence, it is to the effect that these
13 statements were not physically before the court on the hearing.

14 MR. ARONSON

15 They were on file in the court as opposed to having been
16 introduced as evidence.

17 COMMISSIONER EVANS

18 But they were never presented to the court....

19 MR. ARONSON

20 Or marked as exhibits, that's correct.

21 BY MR. ORSBORN

22 Q. Am I correct in saying, I think we covered earlier, that the
23 only affidavit which was an exhibit in the reference
24 proceeding itself was that of Patricia Harriss.

25 A. It was the only one marked as an exhibit, yes.

1 Q. That was marked as that formal exhibit. Now on page 141,
2 the second last paragraph on that page reads:

3
4 There was also evidence before us to the
5 effect that counsel for Marshall at the time
6 of his trial had no knowledge of the prior
inconsistent statements given to the police
by Chant, Pratico and Harriss.

7 Do you recall what evidence there was before the court to
8 that effect?

9 A. None specifically or generally.

10 Q. There is reference to that in Mr. Khattar's and Mr.
11 Rosenblum's affidavit.

12 A. That's correct.

13 Q. Were those affidavits entered as exhibits, to your knowledge?

14 A. No, they were not.

15 Q. But to be fair, there was also a reference in your own factum,
16 you state something to the effect it is a fact that they did not
17 know of those statements. But other than that reference and
18 other than, say, a conclusion drawn from the trial transcript,
19 are you aware of any source for this conclusion?

20 A. No, I'm not aware of any other source.

21 Q. Now turning to page 144, the middle of the page reads:

22
23 We must accordingly conclude that the
24 verdict of guilt is not now supported by
25 the evidence and is unreasonable and must
order the conviction quashed.

1 Do I understand that that would be the first alternative under
2 the Criminal Code, would be the evidentiary alternative
3 rather than the miscarriage alternative?

4 A. I'm sorry, I'm not sure what page.

5 Q. 144, about the middle of the page, the court concludes that
6 the verdict is not now supported by the evidence.

7 A. Yes.

8 Q. And that was the first of your two alternatives.

9 A. Yes.

10 Q. And that was the, it was the submission urged by the Crown.

11 A. That's correct.

12 Q. On the following page, page 145, the court then goes to say:

13
14 Any miscarriage of justice is, however,
15 more apparent than real.

16 Do you know what that means?

17 A. I think it's a reference to the view that Junior was
18 responsible, in large measure, for his own conviction, although
19 I don't want to try and read between the lines.

20 Q. Well, put it this way, do you read that as saying that there
21 was or was not a miscarriage of justice?

22 A. I read that as saying there was not, in fact, a miscarriage of
23 justice.

24 Q. The court says in the middle of the page, "By lying, he helped
25 secure his own conviction." From your knowledge of the case

MR. ARONSON, EXAM. BY MR. ORSBORN

1 and your opinion, of the people that testified as trial--Mr.
2 Marshall, Miss Harriss, Mr. Chant, and Mr. Pratico, what
3 opinion do you have as to their truthfulness between
4 themselves? How would you rate them?

5 A. With the exception of...

MR. PUGSLEY

7 Is it of interest to this Commission as to what this man's
8 opinion was of the truthfulness of witnesses who gave evidence at
9 the trial? How does that help us? I suggest that it's most
10 irrelevant..

MR. ORSBORN

12 It may be perhaps more relevant to the Commission than to
13 Mr. MacIntyre, but... Given that this man was counsel to Mr.
14 Marshall, was counsel on the reference, was present for the
15 hearing of the evidence and for the hearing of the argument, I see
16 no reason why he should not be at least permitted to comment on
17 the decision as for his reaction and reaction of his client, if any.

COMMISSIONER EVANS

19 Are you asking him as to his opinion as to the truthfulness of
20 these various witnesses?

MR. ORSBORN

22 Yes.

COMMISSIONER EVANS

24 As opposed to a finding of the court?

MR. ORSBORN

1 Yes.

2 MR. PUGSLEY

3 With respect, I find that an extraordinary question to ask of
4 this witness. What possible relevance does Mr. Aronson's opinion
5 have concerning the truthfulness of witnesses who gave evidence
6 in 1982 and how does that assist Your Lordships in coming to
7 your conclusions?

8 MR. CHAIRMAN

9 It would seem to a conclusion that we have to make.

10 MR. RUBY

11 If I could just add to his, it's helpful in the sense that in
12 understanding Mr. Aronson's evidence how he went about his
13 task, what his response was to the reference and what Mr.
14 Marshall's response was to it, it's important to know what he
15 thought. It may not be helpful in other issues but certainly
16 understanding his evidence and Mr. Marshall's approach to it,
17 that's very important, in my respectful submission.

18 MR. CHAIRMAN

19 Can we hear the question again?

20 MR. ORSBORN

21 I was simply asking for Mr. Aronson's view on, and his
22 opinion on the contribution of the various witnesses that were
23 heard at trial and whether or not, in his opinion, the conviction
24 was secured more or less by the lying of Mr. Marshall and more or
25 less by the lying of Miss Harriss or Mr. Pratico or Mr. Chant.

MR. ARONSON, EXAM. BY MR. ORSBORN

1 Simply his view as a participating counsel. Whether it's of
2 assistance or not to the Commission will perhaps be apparent
3 when the Commission sits down to look at all the facts that are
4 before it and there may well have been one or more questions
5 asked in the past that will be found not to have been of assistance.

MR. CHAIRMAN

7 But I...

MR. ORSBORN

9 I don't feel strongly about it.

MR. CHAIRMAN

11 No, surely this is...We have before us a transcript of all of the
12 evidence at the trial, at the appeal, and now mountains of
13 evidence since then. That really is a conclusion that we have to
14 reach and our view is that that's not an appropriate question to
15 put to this witness.

MR. ORSBORN

17 Q. At the bottom of that page, Mr. Aronson, the court says,
18 talking of the description of Mr. Ebsary, and the conclusion is
19 there, right at the bottom of page 145, last two words:

21 With this information, the truth of the
22 matter might well have been uncovered by
the police.

23 To your knowledge, was there any evidence at the hearing
24 which addressed the issue of whether or not the police would
25 have found Mr. Ebsary if Mr. Marshall had provided a

1 description?

2 A. I'm uncertain. I believe there was some evidence given in
3 Marshall's oral testimony that he had told the police, given his
4 description and told the police where, that he lived close by
5 but exactly where he lived, he didn't know, that is, Junior
6 didn't know where Ebsary lived.

7 Q. But was there any evidence directed to whether or not the
8 police could have uncovered Mr. Ebsary had they known
9 exactly what he looked like?

10 A. No.

11 Q. Did you discuss this decision with your client?

12 A. We discussed it, yes.

13 Q. What was his reaction?

14 A. I think the initial reaction was it was quite positive because
15 he was acquitted, he had significant burden off his shoulders.
16 He was upset more how they arrived at the verdict and the
17 verdict itself in the sense that they blamed him and he felt
18 that it wasn't his fault, that the fault lay elsewhere.

19 Q. Did you have any avenues available to challenge any aspects
20 of the decision that bothered you?

21 A. Not that I was aware of.

22 Q. You couldn't appeal it?

23 A. No.

24 Q. Now do I understand that around this time you were in the
25 throws of leaving practice?

1 A. Around that time, yeah.

2 Q. When did you...

3 A. In the months leading up to the 10th of May. The day this
4 decision was handed down on May 10th, 1983 was the day I
5 closed my law office on five o'clock that afternoon.

6 Q. Why did you do that?

7 A. Well, it had been something I had sort of been wanting to do
8 for some time to try and do something a bit different. One of
9 the reasons why I stayed was, in part, because of the
10 Marshall case. But I had already sought and had pretty well
11 been assured of employment in the federal government in
12 Ottawa prior to a lot of these events transpiring. And I
13 advised my client, I believe it was some time in March after
14 the hearing that we would be looking for other counsel and if
15 the decision wasn't handed down before May the 10th, that
16 other counsel would be dealing with it.

17 Q. Had you been contemplating leaving practice prior to being
18 retained by Mr. Marshall?

19 A. Yeah, I don't think quite as seriously and certainly Marshall
20 didn't push me more in that direction but I had certainly
21 contemplated it before I took on the Marshall case.

22 Q. So if I understand you correctly, this case was not a factor in
23 your decision to leave practice.

24 A. It was a factor. I wouldn't want to say it was an overriding
25 factor.

1 10:45 a.m. *

2 Q. Did you have a news conference or press conference
3 following the decision?

4 A. Yes, we did.

5 Q. And, I won't go into all of it, but do I understand from
6 reading a transcript of that news conference, which I believe
7 is found at Volume 32 on pages 148 and following, that
8 during the course...I don't believe you have that. But is it true
9 that during the course of that you made a call for public
10 inquiry?

11 A. I did, yes.

12 Q. At this point had you been paid?

13 A. No, I had received no funds.

14 Q. Uh-hum.

15 A. I shouldn't say that. I had received some funds from the
16 Attorney General of Nova Scotia to defray the costs of certain
17 witnesses to attend at the reference in December.

18 Q. Did you ever get paid?

19 A. Yes.

20 Q. How did you come to get paid?

21 A. I came to get paid as a result of the compensation settlement
22 between the Province of Nova Scotia and Donald Marshall, Jr..

23 Q. Did you have any role to play in reaching that settlement?

24 A. No, I did not.

25 Q. Did you keep in touch with Junior and/or his new counsel?

MR. ARONSON, EXAM. BY MR. ORSBORN

1 A. I kept in touch with his new counsel. I did not keep in touch
2 with Junior with...we never spoke about compensation.

MR. ORSBORN

4 That's all, thank-you.

MR. CHAIRMAN

6 This may be appropriate time to break.

7 BREAK - 10:46 a.m.

8 INQUIRY RESUMES - 11:06 a.m.

MR. CHAIRMAN

10 Mr. Ruby.

EXAMINATION BY MR. RUBY

12 Q. Mr. Aronson, we've had an opportunity to read the transcript
13 of the calling of evidence in the reference, but what doesn't
14 come through and I'd like you to help me on it if you can, is
15 the atmosphere, tone. What was it like? We see the words on
16 paper but we don't know anything about the tones or voice or
17 the manner in which people were talking and saying things.
18 What was it like?

19 A. I didn't find anything unusual about the tone other than the
20 amount of media that were present and the amount of media
21 coverage. To me it was just an ordinary trial-type situation.
22 The tone was by in large in that vein. Nothing...no shouting.
23 There were a couple of moments when there...I would say
24 that there was a significant amount of tension in terms of
25 waiting for a witness to respond to a question or something

1 along those lines. But generally it seemed to be the usual
2 type trial.

3 Q. Let me turn to the question of the R.C.M.P. report that you
4 didn't get until quite a late date from Mr. Edwards. What was
5 the effect of not giving you that report? What effect, if any,
6 did it have on you and your activities?

7 A. Well, it certainly created some delay in my ability to make
8 submissions with...have some reliability on information as
9 opposed to just being given oral indications of what other
10 people had said. It also put me under a great deal of pressure
11 in relation to the preparation of the affidavits, because I
12 didn't get the report until June 23rd. The first court
13 appearance was some time early in July and the affidavits
14 had to be filed as I recall before the end of July, sometime
15 before the end of July, which I basically had a month to go
16 through all the information, material, find all the witnesses,
17 prepare all the affidavits, not all the witnesses were in Cape
18 Breton. There was one in Boston, Sackville. There were also
19 witnesses I had to try and reach in Calgary. It took a
20 significant amount of basically full time for one month to put
21 it together.

22 Q. It would seem that one month is not an adequate time to
23 really put all that together. Would you agree with that?

24 A. I would have preferred a longer period of time. If I would
25 have had the report before the reference was handed down, I

1 could have done a significant amount of groundwork before.

2 On the other hand, without knowing how the Minister of
3 Justice in Ottawa was going to dispose of the case, arguably it
4 wasn't necessary to to speak to some of the witnesses.

5 Q. It's hard for me to understand how your input into the
6 question of what should be done in terms of reference, what
7 kind of reference and so forth, could be effective if you didn't
8 have the facts the others had.

9 A. Yeah, well, I think that's a point I had made that without
10 having reliable documented information it was difficult to
11 make submissions to the Attorney General of Canada and I
12 had to rely largely on what I was told by the R.C.M.P..

13 Q. On the issue of fees which you touched on, you were told by
14 the Attorney General's office to have Mr. Marshall apply for
15 legal aid, I take it.

16 A. Yes.

17 Q. And the nominal limit is fifteen hundred dollars at that time.

18 A. I don't know if...it was the general limit. It was a limit on the
19 certificate that I received.

20 Q. Fifteen hundred dollars is obviously not nearly enough to do
21 the reference and the job that was required, is that fair?

22 A. That's fair.

23 Q. Even if you double it or triple it, you were getting second-
24 class justice at best.

25 A. Certainly.

1 Q. And then you said that this particular case, in any event, was
2 not properly covered under the legal aid plan.

3 A. That was my belief at the time and it still remains so.

4 Q. If payment beyond the fifteen hundred dollars was to be
5 made by the legal aid plan, I take it you would have to satisfy
6 them that the amounts expended in excess of that were
7 necessary and appropriate and proper. You couldn't just
8 spend the money and be guaranteed payment.

9 A. I think with respect to the amount of the fees, in other words
10 the...what the lawyer would personally be able to obtain, the
11 maximum was fifteen hundred dollars. I don't recall at this
12 point in time whether there was a maximum set on
13 disbursements or expenses, but I believe that there was some
14 requirement that they be approved by the legal aid plan
15 before I could commit the expense.

16 Q. And, this is a body that produced this certificate at the
17 request of the Attorney General's office.

18 A. I think I had actually written to the legal aid plan with
19 respect to apply for legal aid.

20 Q. All right.

21 A. But it was at the request, as you've indicated, of the Attorney
22 General.

23 Q. Ultimately the fees were paid out of Mr. Marshall's pocket
24 and not out of the pocket of the Attorney General.

25 MR. SAUNDERS

1 Well, isn't that a matter for argument as to who paid what to
2 whom?

3 MR. RUBY

4 Well, let's see if he knows before we do.

5 MR. CHAIRMAN

6 I take it that the simple question is who paid your fees?

7 MR. RUBY

8 Q. Do you know who paid your fees?

9 A. My fees were paid by Donald Marshall, Jr., out of the proceeds
10 of the compensation from the Province of Nova Scotia.

11 Q. You didn't receive payment from the Attorney General of
12 Nova Scotia.

13 A. No.

14 Q. Regarding the reference, did you have either a retainer to
15 explore or the resources to explore the issue of who was at
16 fault in this particular conviction?

17 A. No.

18 Q. I think you've indicated that the Court didn't have the
19 evidence that would have enabled them to honestly explore
20 that issue.

21 A. That's correct.

22 Q. What was your feeling about the conclusion that any
23 miscarriage of justice is more apparent than real? What was
24 your feeling about that?

25 A. Well, I certainly disagree with that conclusion. I don't think

1 there was sufficient evidence before the Court of Appeal on
2 which they could make that finding. I believe all the
3 evidence they had before them on balance indicated that
4 certain evidence was not before the trial in 1971 and what
5 evidence was before the trial in 1971 was unreliable
6 testimony.

7 Q. You've given me an answer that's rational and intellectual. I
8 want to know how you felt.

9 A. Emotionally.

10 Q. Yep.

11 A. I was disappointed. I was upset.

12 Q. Can you expand on that at all?

13 A. I think I was somewhat shocked by the fact that the Court
14 was basically vindicating a system of justice, putting all the
15 blame on the appellant, Donald Marshall, Jr.. That they
16 convicted him of a crime which he was never charged with,
17 namely the alleged robbery in the Sydney...Sydney's
18 Wentworth Park. I just found a lot of the factual basis of the
19 decision or should I say the basis of the decision was on facts
20 which either were not known to the Court of Appeal or were
21 never admitted in evidence before the Court of Appeal.

22 Q. Let me take up this not admitting of evidence. My friend
23 brought out that a number of crucial documents relied on by
24 the Court of Appeal were never in evidence. Am I correct in
25 saying that one effect of that is that you would not be

1 addressing any of your submissions to those documents
2 because they were not before the Court, is that correct?

3 A. No, that's correct. The first I realized that the Court had used
4 the affidavits was in reading the decision.

5 Q. And Crown counsel equally would not be able to direct
6 submissions to the Court respecting those documents knowing
7 that they were not, in fact, in evidence.

8 A. Not properly make those submissions, that's correct.

9 Q. And you're aware that one of the cornerstones of natural
10 justice and the rule of law in Canada is that you're to have the
11 right to make submissions on matters that are in issue.

12 A. That's correct.

13 Q. And that doesn't appear to have been the case in that
14 reference hearing, is that fair, in respect to those documents?

15 A. Yes.

16 Q. There is one thing in Mr. Edwards' factum that I found
17 surprising and I'd like to direct your attention to it, it's
18 Volume 4, page 41. Tell me if it struck you, and maybe I
19 don't understand the practise here in Nova Scotia. But in the
20 middle of the page in paragraph 87 at the end after running
21 through the fault argument with respect to Donald Marshall
22 he says, "It is not difficult to speculate upon how believable
23 either the police or defence counsel found that story." And,
24 the Court ultimately accept that invitation in their reasons
25 and they do just that. But I would have thought, you tell me

MR. ARONSON, EXAM. BY MR. RUBY

1 if it's not correct here, that it would be improper to urge
2 speculation on the Court in a factum or argument and that one
3 just doesn't do that.

4 A. Oh, I agree. I've been in courts where any attempt to
5 speculate is declined on the part of the Court. They're not
6 interested in speculation.

7 Q. Have you ever before seen a factum in the Court of Appeal or
8 in any trial court where speculation has been urged in writing
9 on a Court?

10 A. I'm not aware of any, but it doesn't surprise me what
11 solicitors put in factums.

COMMISSIONER EVANS

12 By either Crown or Defence.

MR. ARONSON

13 That's correct, My Lord.

MR. RUBY

14 Q. I want to avoid making this personal. Can you tell me
15 something about how Junior Marshall was holding up under
16 all this? What...what was his state of mind, his emotional
17 state from the beginning when you first got involved with
18 him through the waiting up and your not having the R.C.M.P.
19 report and through the reference itself? Can you describe
20 that?
21 that?

22 A. I think for...the large impression I had, and I did spend a
23 considerable of time with Junior, was a lot of pressure. When
24
25

1 he first was released from Dorchester, and you'll have to
2 recall he went in...he was seventeen years old, he came out he
3 was twenty-seven years old. He had never been outside of
4 the federal institution or federal custody, never been home to
5 Cape Breton during the course of those years and it was a bit
6 like, I guess you could say a little kid who just doesn't have
7 the experience in a non-institutional type setting. As court
8 dates would approach, whether it was a motion for release
9 from custody or an application to admit evidence, the
10 pressure on him would mount and it's at those points that I
11 was basically able to see after the first few times that this
12 had a considerable effect on him mentally. But there was
13 very little I could do about it, and he was certainly in need of
14 a significant amount of counseling and assistance in trying to
15 return to society or perhaps begin a life in society.

16 Q. Did the government of Nova Scotia take any steps to make
17 any of those kinds of assistance available to him?

18 A. I recall not too long after he was released that the...I forget
19 the official position of the Minister in Nova Scotia, but there
20 was a public offer of a position for Junior, by "position" I
21 mean a job. Other than that I'm not aware of any assistance
22 that was offered to Donald Marshall by the province.

23 Q. Was that Edmund Morris?

24 A. Yes, that's correct.

25 Q. And as I recollect when Mr. Morris didn't like the response of

MR. ARONSON, EXAM. BY MR. RUBY

1 Mr. Marshall to the job offer, he made his entire file public, or
2 made elements of his file public in an announcement to the
3 media, is that correct?

4 A. I don't have any recollection. My recollection is of...my first
5 knowledge of the offer came in from the media, not from
6 Junior or certainly not through my office, and I'm still not
7 certain of whether Junior ever became directly aware of it
8 other than through the media, that there was a job available
9 and I find it a somewhat remarkable way to proceed.

COMMISSIONER EVANS

11 What job?

MR. ARONSON

13 I'm sorry.

COMMISSIONER EVANS

15 What job was offered?

MR. ARONSON

17 I believe some position with perhaps social services
18 department or, of the Province of Nova Scotia. I don't know if...I
19 have no recollection of the specific kind of job or the nature of the
20 work involved in the job. It was never pursued in any event.

MR. RUBY

22 Q I take you don't have a clear recollection of this incident from
23 your tone.

24 A. Of.

25 Q You don't have a clear recollection of this incident, is that

1 right, or am I...

2 A. A clear recollection.

3 Q. Do you remember any more about this than you've told us?

4 A. No.

5 Q. Okay.

6 MR. CHAIRMAN

7 But before we leave that, did the National Parole Board
8 provide any program of assistance? I mean...I don't mean
9 monetary assistance.

10 MR. ARONSON

11 Oh, yes.

12 MR. CHAIRMAN

13 To Mr. Marshall.

14 MR. ARONSON

15 Before Junior was released, the release date was fixed by
16 agreement between the Parole Board and Junior and I. And, it
17 was agreed that he would go to the Carlton Pre-release Centre in
18 Halifax, Nova Scotia, which is the facility operated by Corrections
19 Canada. They provide general counseling assistance and support
20 for those individuals who pass through their doors and who are
21 inmates of the federal penitentiary system.

22 MR. RUBY

23 Q. How long was he in that institution, do you remember?

24 A. I believe it was somewhere about three months.

25 Q. And the object was to assist him in reintegrating into the

- 1 community, I take it, while he was at that point on parole?
- 2 A. That's correct, and in addition the services of Charlie Gould
3 from the Sydney Indian reserve were retained to spend time
4 with Junior in terms of how to deal with, I guess you could
5 say, the outside world once he was back on the street. And
6 Charlie Gould spent well over three, four, five months
7 virtually on a daily basis with Junior, in part because of
8 cultural factors and part to provide additional support and
9 assistance that the pre-release centre couldn't provide. It
10 enabled...it was difficult, for example, for Junior who speaks
11 Mic Mac, and perhaps in many ways is more comfortable in
12 Mic Mac than English, to speak with somebody who could
13 speak his language and there isn't generally anybody
14 available in the area who is fluent in the language, so Charlie
15 Gould, who is fluent in the language, I think they had a
16 certain bond as a result of that.
- 17 Q. And who paid for that?
- 18 A. I believe that was paid for by the Union of Nova Scotia
19 Indians.
- 20 Q. All right. Not by the Attorney General of Nova Scotia?
- 21 A. Not to my knowledge, no.
- 22 Q. What other support mechanisms were put into place around
23 his re-entry into the community, if any?
- 24 A. Those are the two basic ones.
- 25 Q. Was the Carlton institution's facilities available to him after

1 he actually physically left residence there? Did he go
2 back...could he go back for further counseling if he needed it?

3 A. Oh, yeah, I believe the services would have been made
4 available to him if he wanted to come and talk to the
5 counsellors or find some assistance or anybody to talk to. He
6 was quite welcomed to go to the centre. I think you have to
7 understand until he was actually acquitted or the verdict was
8 quashed he was still technically on parole and, therefore,
9 was...had certain minor obligations in that respect.

10 Q. But more importantly that...this counseling was available to
11 him right through the period that you're dealing with him.

12 A. Yes.

13 Q. You said that you had been planning on leaving the private
14 practise of law for awhile or at least contemplating it, then
15 you admitted that this case was a factor in your decision to
16 leave, but you didn't explain how. In what way was it a
17 factor? What effect did it have on you in relation to that
18 decision?

19 A. I guess in terms of being able to conduct a practise and earn
20 an income, the case certainly put me in a difficult financial
21 position, although I certainly wasn't desperate by any means.
22 The other factor was that, with respect to the Marshall case,
23 was that it...the whole case bothered me in the way things
24 had been handled all the way from 1971 through by various
25 actors in the administration of justice in the province. The

1 feeling that it would take a long time to pursue and it wasn't
2 something...I felt that if I stayed that I would almost be under
3 an obligation to continue, whether it was with the
4 compensation case, with pushing for a public inquiry, and I
5 thought that the...it should...it was the kind of case that should
6 have a much broader audience and greater involvement by
7 other members of the legal profession. So, I guess that...I
8 hope that helps to explain at least some... In other words, my
9 feeling now, and it remains my belief now, is that if I would
10 have remained in practise in this area that I would have still
11 been involved with the case on virtually a day-to-day basis
12 and perhaps I just didn't feel that I wanted to personally
13 devote my life to the cause, so to speak.

14 Q. And you would have been left with a very substantial debt
15 that you had no assurance would ever get paid at all for all
16 your work, is that correct?

17 A. That's correct. Promises, promises.

18 Q. Promises, promises.

19 MR. RUBY

20 I want to thank-you on behalf of Donald Marshall and I want
21 to tell you personally that I am...you're one of the people who
22 make me proud to be a lawyer. Thank-you.

23 MR. ARONSON

24 Thank-you.

25 MR. CHAIRMAN

1 Mr. Pugsley.

2
3 EXAMINATION BY MR. PUGSLEY

4 Q Mr. Aronson, as you know, I am acting on behalf of John
5 MacIntyre.

6 Am I correct in understanding that you did not receive the
7 R.C.M.P. Wheaton's initial report until June 23rd of 1982?

8 A. That's correct.

9 Q And was it at that point in time that you started preparing
10 the affidavits that were collected for use on the filing of the
11 application for the reference?

12 A. Shortly after that, yes.

13 Q Yes, right. No affidavits were prepared by you before you
14 received the Wheaton report.

15 A. No.

16 Q No. And is it fair to say that you used the Wheaton report as
17 the basis for the information that you set out in the
18 affidavits?

19 A. In the affidavits that arose directly from the report, yes.

20 Q Yes. And indeed, did you...and the evidence I guess you gave
21 yesterday was that on some occasions some of the affidavits
22 were sworn, taken by you in a typewritten form, to the
23 deponents and showed to them the day that they, in fact,
24 swore to the affidavit?

25 A. On a number of occasions, that's correct.

MR. ARONSON, EXAM. BY MR. PUGSLEY

1 Q. Yes. And so that the basis of the information that was
2 contained in the affidavits was essentially your interpretation
3 of what was said by these witnesses to Wheaton as set forth
4 in the Wheaton report?

5 A. Yes, I agree with that.

6 Q. Yeah. And with respect to Maynard Chant, do I understand
7 correctly that Sergeant Carroll and another R.C.M.P. staff
8 sergeant took you down to Louisbourg so that you could meet
9 with Mr. Chant and have that affidavit sworn?

10 A. That was the general purpose, yes.

11 Q. Yes. And were there...did Mr. Chant make any changes in the
12 affidavit that you had prepared for him?

13 A. Not that I recall.

14 Q. I don't think there is any...

15 A. Interlineations.

16 Q. No, I don't think so. I'm not sure what page that...Mr. Orsborn
17 perhaps can help us. It's Volume 39, is it?

18 MR. ORSBORN

19 Page 35.

20 MR. PUGSLEY

21 Page 35, thank-you.

22 Q. Volume 39 then, page 35, Mr. Aronson. I don't think there
23 are any changes made by Mr. Chant and so that, in effect,
24 what was done, this affidavit was prepared presumably in
25 your office in Dartmouth, taken down with you when you

1 went down to see Chant and on the 14th of July you showed
2 the affidavit to him, he read it and was prepared to sign it.

3 A. That's correct.

4 Q. Yes, right. Now, that...you did not take that affidavit in the
5 sense that you were not the person before whom he swore
6 the affidavit, and I don't believe you were the individual
7 before whom John Pratico swore his affidavit. Was there any
8 particular reason for that?

9 A. These particular witnesses were in my view quite crucial...

10 Q. Yes.

11 A. ...to the ultimate case in terms of whether or not they had told
12 the truth in 1971. I was somewhat uncertain as to what
13 ultimately would be the disposition of the affidavits or how
14 they would be used, and my preference was to have them
15 sworn before another commissioner of oaths or another
16 solicitor.

17 Q. Sure. Although many of the affidavits were, in fact, taken
18 before you.

19 A. I don't want to use the "many". Quite a number of them
20 were, I couldn't quantify it exactly, many or some.

21 Q. Well, Donald Marshall's affidavit, I think, was taken by you.

22 A. Yes.

23 Q. Right. And that was sworn on the...let's just take a look at
24 that if we can for a moment, if I can find the page that that is
25 contained on.

1 MR. ORSBORN

2 Page 136.

3 MR. PUGSLEY

4 Q 136, thank-you. And that affidavit of Donald Marshall, Jr.,
5 was sworn on, well, it's a little hard to tell. But I think
6 September, I think it's...does September ring a bell with you,
7 Mr. Aronson, as being...

8 A. I believe it is dated in the month of September.

9 Q Right.

10 A. The precise date I'm not certain of.

11 Q Now, you obviously had the Wheaton report prior to the time
12 this affidavit was sworn and in that report there...were the
13 statement that was taken by Staff Wheaton at Dorchester
14 Penitentiary from Mr. Marshall.

15 A. I did.

16 11:35 a.m.*

17 Q And you are familiar with that and in the course of that
18 statement, which is found in Volume 34 at page 52. Perhaps
19 the witness could just have an opportunity of seeing that
20 statement. At page 34...Sorry, Volume 34, page 52, My Lord.
21 It's Exhibit 98. And if you take a look at page 52, Mr.
22 Aronson, at the bottom of the page:

23
24 I asked Sandy if he wanted to make some
25 money. He asked how and I explained to
him we would roll someone. I had done

MR. ARONSON, EXAM. BY MR. PUGSLEY

1 this before myself a few times. I don't
2 know if Sandy had ever rolled anyone
3 before. We agreed to roll someone so we
4 started to look for someone to roll.

5 Now you obviously would have been aware that Junior
6 Marshall would have given that information to Wheaton.
7 There's no reference in Mr. Marshall's affidavit to that
8 incident at all. Was there any particular reason that that was
9 not included in the affidavit?

10 A. Well, this affidavit was taken some time later, approximately
11 two months after the earlier affidavits of Pratico, Chant. I
12 was aware of this statement and did receive it along with the
13 contents of the R.C.M.P. report. The reason why I didn't
14 attach it was because of instructions from my own client in
15 discussions with him as to the reasons why he gave the
16 statement to the R.C.M.P. that... and it was because of that
17 discussion that I refrained from attaching it to his affidavit.
18 The second part was perhaps a technicality, but whether you
19 can qualify it as fresh evidence because it would certainly
20 have been, this type of evidence would have been available in
21 1971. Whether it even complied with the fresh evidence
22 rules was a technical matter.

23 Q. I take it the first reason was Donald Marshall told you that
24 the information he gave to Wheaton was not true concerning
25 that incident, is that correct?

 A. That's correct, yes.

1 Q. Although certainly when he gave evidence at the reference, I
2 don't want to get into an argument as to whether or not he
3 acknowledged that he did roll someone, but certainly the
4 import of his evidence is that he was out to get some money,
5 no matter what way he was going to get it, he was going to
6 get some money.

7 A. I think that is a conclusion one could draw.

8 Q. And, indeed, if one looks at Volume 3 at page 51, which is the
9 evidence given in the transcript, and I'm not here to take up
10 the cudgels for the Appeal Division of the Supreme Court of
11 Nova Scotia but I note, and I have not attempted to focus on
12 this in any way, except just this morning in the break and I
13 noticed that there is certainly reference by Mr. Edwards, and
14 I haven't examined your examination, but there is certainly
15 reference by Mr. Edwards to several of the affidavits in his
16 cross-examination of witnesses. For example, at Line 19 he
17 says:

18 Q. Now in answer to one of my previous
19 questions, you said that you're aware of
20 the affidavit that Mr. MacNeil filed with
21 this court.

22 A. Yes.

23 And Mr. Edwards goes on to say:

24 Q. And you are also aware that in that
25 affidavit he says you grabbed his arm

1 and put it behind his back at that point
2 and he indicated I jumped him from
3 behind.

4 And then again at the next, at page 53, Mr. Marshall says...Mr.
5 Edwards says at Line 17:

6 Q. Isn't it true, Mr. Marshall, that when
7 Ebsary and MacNeil were called back, at
8 least the intention in your mind, you can't
9 speak for Mr. Seale, but in your mind,
10 your intention was to roll these fellows?

11 A. [And Mr. Marshall's answer was]
12 Intentions was to get money regardless of
13 how I got it. These men after they left us
14 they had a choice to keep going so they
15 had the choice to leave when they left.

16 Now that, I take it, was inconsistent with the information that
17 Mr. Marshall had given you which influenced you to leave
18 this matter out of the affidavit?

19 A. That's correct. I think perhaps if I could explain the
20 circumstances.

21 Q. By all means.

22 A. And the reason for Mr. Marshall having told me that was he
23 had a significant feeling that he did have some role or shared
24 some blame or guilt in terms of the events that happened that
25 night. That Sandy Seale was no longer alive. That it was for
him to take the blame and responsibility. That he felt that
this was the easiest way to do it. That it was the only way

1 the case would turn around and that the R.C.M.P. would
2 believe him. That is the understanding he gave to me.

3 Q. Are you suggesting, and perhaps I'm taking the wrong
4 inference from your evidence, are you suggesting that Mr.
5 Marshall was telling you that, "Look it, there was a robbery
6 planned and attempted but it was Seale, it was in Seale's
7 mind to do it, not mine, but I'll take part of the blame
8 because, after all, he died and is not here to explain himself."
9 Was that the thrust of what he was telling you?

10 A. Not altogether. Junior took the position with me that there
11 was, in fact, no robbery or alleged robbery, that it didn't quite
12 transpire that way. That he himself was somewhat confused
13 as to what was happening in the one or two minutes prior to
14 the stabbing. That his understanding or his recollection that
15 he and Seale were together. That they were speaking with
16 both Ebsary and MacNeil, whose names were unknown to
17 them at the time. That they knew that they did not have any
18 money. That it was pointless to ask them for any money.
19 That MacNeil and Ebsary walked away. That Marshall
20 thought that was it. Sandy Seale called them back. Junior
21 didn't know why he called them back. That, then Sandy Seale
22 asked the individual we now know is Ebsary to give him what
23 he had in his pockets, while at the same time Sandy Seale's
24 hands were in his own pockets. And the next thing Donald
25 realized was a knife coming out. So, in other words, he in my

1 mind had never formed the specific intent necessary based on
2 what he told me but that to Donald Marshall, Jr., who is not an
3 articulate person, the word "robbery" or "roll" has a number
4 of connotations not necessarily restricted to the pure criminal
5 sense of the word. And I think in common parlance, we can
6 often use the word "I was robbed" without necessarily
7 meaning it bears criminal connotations. That's the
8 explanation.

9 Q. There's a reference at page 58 of the same volume in the
10 cross-examination of Donald Marshall, Jr. by Mr. Edwards.
11 About Line 13, Mr. Edwards says:

12 Q. You have the trial transcript?

13 A. Yes.

14 Q. How long had you had that?

15 A. A long time, I don't know. Several years,
16 a few years.

17 Q. A few years, and you must have read
18 through that a number of times.

19 A. Yes.

20 Q. And you must have read Chant's
21 testimony?

22 A. Yes.

23 Q. [And then the question appears] And
24 you're aware that Chant has filed an
25

1 affidavit with this court respecting these
2 particular proceedings?

3 A. Yes.

4 Q. And you've seen statements given by
5 Chant.

6 A. Yes, I've seen a few statements.

7 So certainly Mr. Edwards, it would appear, and he obviously
8 will speak for himself when he gives evidence, but certainly
9 there's reference to affidavits before the Appeal Division and
10 statements given by witnesses in 1971.

11 A. Oh, yes.

12 Q. And are you saying you took the position that
13 notwithstanding those references by Mr. Edwards that this
14 material was not before the court?

15 A. Well, it was my position that all of the information, the
16 statements was available because it was on file and anybody
17 in the public could have taken advantage of them and that
18 there was no objection saying "Have you seen statements by
19 such and such?" There was no specific reference to that as
20 being evident.

21 Q. Yes. I'd like to address your attention to Volume 29 and page
22 8. These are notes...

23 A. I haven't got the volume.

24 Q. I'm sorry, Volume 29. Mr. Aronson's notes, Exhibit 99. I'll
25

1 direct your attention to page 8, which I understand are notes
2 made by you on July 14th, 1982, being the day that you saw
3 Maynard Chant and the day that he swore the affidavit. And
4 there's a reference at the bottom of the page, "4:55-5:15 p.m."

5 A. Yes.

6 Q. Would that be the time that you saw Maynard Chant?

7 A. Yes.

8 Q. And that was the only time that you spent in his presence, I
9 guess at any time until December 1st, 1982, when he gave
10 evidence at the...

11 A. No, that's not true.

12 Q. I see. You saw him on another occasion?

13 A. I saw most of the witnesses again prior to the reference to go
14 over the material.

15 Q. All right. Now at the bottom of that page 8, you write:

16
17 Does not recall June 4, 1971 interview very
18 well. Acknowledges that he may have
19 blocked it out.

19 A. Those are the words, yes.

20 Q. Those are the words he used and he advised you that he did
21 not recall the interview in the Louisbourg Town Hall very
22 well.

23 A. That's correct.

24 Q. On page 10 of the same volume, are these notes that you
25 made of interviews you conducted on the next stage, July

1 15th?

2 A. Yes.

3 Q. And, in particular, at the bottom of the page, Mrs. Ebsary,
4 that would be the wife of Roy Ebsary, and the comment
5 appears at the bottom of that page: "I really didn't think he
6 did it." Is that something Mary Ebsary told you with respect
7 to her opinion concerning her husband's involvement in the
8 Seale stabbing?

9 A. That quote would have been the expression of her view after
10 she heard about the stabbing of Sandy Seale in the park as
11 opposed to her current belief when I spoke to her.

12 Q. Did she, were you aware of the fact that she gave a statement
13 in 1971, in November of '71 at the time Jimmy MacNeil came
14 forward, were you aware of that?

15 A. In what I call the "reinvestigation in 1971"?

16 Q. Yes.

17 A. Yes.

18 Q. And essentially that, my recollection of her statement at that
19 time is that it is consistent with this phrase, that she at that
20 time did not think that her husband...

21 A. That's right.

22 Q. Yes, and that's what she was expressing to you on July 15th;
23 namely, that in 1971, she did not think her husband did it.

24 A. Exactly.

25 Q. Now on the following page, you met with Dr. Mian at about, on

1 July 16th between 3:30 and four o'clock?

2 A. That's correct.

3 Q. And you showed to him the affidavit that you had prepared
4 before you had gone down to Sydney on that trip on or about,
5 before you left for Sydney for the trip on the 14th?

6 A. That's correct.

7 Q. And I just want to refer to that affidavit for a moment, if I
8 may. That would be in Volume 39, Dr. Mian's affidavit. On
9 page 25, that is an affidavit that you prepared before you
10 went to Sydney consequent upon the information disclosed in
11 the Wheaton report?

12 A. No, it is not.

13 Q. Oh, I see, okay.

14 A. It...

15 Q. I beg your pardon. Then go ahead and tell me about the
16 circumstances surrounding this affidavit?

17 A. I had initially prepared an affidavit for the signature of Dr.
18 Mian. I discussed it with him when I spoke with him during
19 the interview. He indicated that he would like to have his
20 own counsel or counsel for the hospital examine it and, in fact,
21 it was their... I believe that there were some changes made to
22 the affidavit and it was Dr. Mian's affidavit drafted by his
23 own solicitor that was returned to me.

24 Q. I understand. And that's the reason why we see it's the 19th
25 of July, 1982 and sworn before John, it appears to be John

1 Khattar?

2 A. Yes. It's also in my notes on page 11.

3 Q. Yes, I see that. "3:30-4 Dr. Mian. He must first show
4 affidavit to John Khattar, the hospital solicitor, and will send it
5 off to me next week."

6 A. That's correct.

7 Q. No problem. Right. So that the words in Paragraph 3 of Dr.
8 Mian's affidavit:

9
10 That the said John Pratico has been a
11 psychiatric patient of mine from August,
12 1970 to date.

12 Those words were certainly words that he focused on.

13 A. That?

14 Q. That he focused on before he swore this affidavit and that he
15 proposed to...

16 A. I couldn't really say what, I don't recall that as having been
17 one of his concerns. It may very well have.

18 Q. But, in any event, he had the affidavit for some days before
19 he swore to it.

20 A. Yes.

21 Q. You saw Mr. Pratico yourself. When did you see him?

22 A. I saw him before I saw Dr. Mian.

23 Q. Yes, would that be...

24 A. July 15th.

25 Q. Page 10.

1 A. Page 10.

2 Q. Yes, right. Did you come to the conclusion after talking to Mr.
3 Pratico and Dr. Mian, and perhaps from the Wheaton Report
4 as well, that Pratico's evidence was unreliable?

5 A. My concern was that it was unpredictable, which may have
6 affected its reliability, certainly, but I was more concerned
7 with the unpredictability of the witness.

8 Q. You mean you didn't know what he would say.

9 A. I didn't know what he was going to say.

10 Q. And was that consistent with the fact that after he had
11 interviewed Wheaton on the first occasion, he had gone on
12 radio in Sydney and said that everything he had told
13 Wheaton was untrue and that what he had said in 1971 was
14 true. You were familiar with that radio broadcast?

15 A. Not, I may have been aware of it at the time but I have no
16 recollection of it now.

17 Q. Well, in addition to the unpredictability, which was an
18 assessment you made yourself, certainly Dr. Mian testified
19 that he was a wholly, unreliable informant, or he deposed to
20 that fact on July 19th, 1982.

21 A. That's certainly the thrust of his affidavit.

22 Q. Was it your intention then that Pratico's affidavit or evidence
23 should be relied upon by the Court in any way in coming to a
24 conclusion as to what transpired in 1971?

25 A. In many ways that was for the Court to decide what kind of

1 weight should be given to it.

2 Q. And that's why you had the Mian affidavit, so the Court...

3 A. That's correct, so that it would give the Court some indication
4 as to what weight could be attributed to it and I didn't make
5 a judgement.

6 Q. Am I correct that your first meeting with Staff Sgt. Wheaton
7 was on April 14th, 1982 and that's referred to, I believe, on
8 page two of Volume 29, where you met with him for about
9 four hours. Was that the first occasion?

10 A. No.

11 Q. You had met with him before that, had you?

12 A. Yes.

13 Q. I see. And did you say in your evidence that you were in
14 pretty constant communication with Staff Wheaton during
15 these months, two to three times a week, something like that?

16 A. Yeah, something like that.

17 Q. And do you recall whether or not the advice he gave you
18 concerning the document falling off the desk or being slipped
19 was a face-to-face interview you had with him or a telephone
20 interview you had with him?

21 A. I really don't recall.

22 Q. You have reviewed Frank Edwards' notes, have you, before
23 you testified here?

24 A. No, not...Perhaps I may have reviewed some of them but I
25 had never seen them before I came to Halifax to testify.

MR. ARONSON, EXAM. BY MR. PUGSLEY

1 Q In Volume 17 at page 9, dealing with notes made on
2 Saturday...I can read it to you, it's only a small point, and you
3 may certainly have the note if you wish after I phrase my
4 question, but I don't think you're going to require it. Mr.
5 Edwards in referring to this incident says at about a third of
6 the way down the page:

7
8 Also told me that Herb Davies had noticed
9 Chief slip some of the information on the
10 floor behind desk. Believes it was some
11 information with transcript attached
relating to threats by Christmas against
Pratico.

12 Do you recall whether or not Wheaton discussed with you
13 what the nature of the information was that was on the floor,
14 whether it was, in fact, the information relating to threats by
15 Christmas against Pratico, as Edwards has reported?

16 A. My best recollection is that it was a statement by Harriss, but
17 I may be wrong, as opposed to a statement indicated in the
18 quote you've made, that it was Pratico. But all I recall clearly
19 is a statement and beyond that, I'm somewhat uncertain as to
20 whose it was. As I say, I think it was Harriss, one of Harriss'
21 statements.

22 Q But it's your recollection that that, in fact, was told to you by
23 Wheaton before the letter was secured from the Attorney
24 General dated April 20th, and, indeed, that led up to and was
25 one of the main reasons for getting the letter of April 20th

1 from the A.G.

2 A. I believe so, yes.

3 Q. In Volume 29 at page 15, again your notes to file, you write
4 at the end of the page:

5
6 Donald's memory of events is good to a
7 point. Certain events he recalls vividly.
8 Others he is uncertain of.

9 Were there any key elements concerning the night of the
10 stabbing that he was uncertain of?

11 A. That's more my assessment.

12 Q. I appreciate that.

13 A. Of his story. I can't recall. It's more the number of times the
14 story is told and there's some variation in details where
15 perhaps some, there's greater detail the second time around,
16 that the same story is told. Other things may perhaps have
17 been omitted and it just gave me the impression that his own
18 recollection was not quite perfect.

19 Q. Well, there's a difference, I guess, between being not quite
20 perfect and being uncertain of certain matters. Do you recall
21 specifically what matters he was uncertain of on the 8th of
22 September, 1982?

23 A. Not specifically, no.

24 Q. In any event, he had no reluctance whatsoever about you
25 approaching John MacIntyre in late January 1982 to have this
matter reinvestigated.

1 A. That's correct.

2 Q. Volume 39 again, which is the volume containing the
3 affidavits. I just want to refer to the affidavits of Mr. Khattar
4 and Mr. Rosenblum that I believe are found on 129 and 132.
5 Now Mr. Khattar's affidavit is dated the 9th of August 1982
6 and it's sworn before Leo MacPhee. And Mr. Rosenblum's is
7 dated, I'm not sure if it's the same day or not, but it's
8 certainly in the month of August, sworn before Murray Ryan.
9 These affidavits were drafted by you and typed in your
10 office, were they?

11 A. Yes.

12 Q. And what did you do? Did you go down to see Mr., I think
13 you indicated you never really met with Mr. Rosenblum, you
14 only talked to him on the telephone.

15 A. I spoke with him on the phone because... and I think you'll
16 note his affidavit is taken some time in August.

17 Q. Yes.

18 A. He was out of the country at the time and, while I would
19 have liked to have gone to where he was, I was unable to
20 speak with him personally. We spoke in a phone
21 conversation about the affidavit and upon his return.

22 Q. Yes, you forwarded his affidavit directly to him, did you?

23 A. Yes.

24 Q. And you forwarded Mr. Khattar's directly to Mr. Khattar and
25 left it to them to make the arrangements to get them sworn?

1 A. I left it with them to review and govern themselves
2 accordingly and appreciate if they would be good enough to
3 return a sworn affidavit.

4 Q. Mr. Justice Evans addressed your attention to Paragraph 11 in
5 the Khattar affidavit yesterday. Paragraph 11 in the
6 Rosenblum affidavit is identical, I believe. I haven't read it
7 word by word, but in any event, I take it you drafted
8 Paragraph 11 and...

9 A. Yes.

10 Q. On the basis of what you felt their evidence would be and
11 they were prepared to depose to the accuracy of that drafting.

12 A. Yes.

13 Q. I didn't quite understand your explanation yesterday
14 concerning Mr. Khattar's evidence, Mr. Khattar's affidavit in
15 particular, but they were not, there was no indication at the
16 time that they were willing to change their original testimony
17 in view of (1) Pratico's conversation with the sheriff in which
18 Mr. Khattar was subsequently involved; and also in view of
19 the fact that Chant was declared an adverse or a hostile
20 witness at the trial. In view of that, what did you have in
21 your mind when you drafted those words?

22 A. I think it was largely concerned with the actual, the varying
23 number of statements that those particular witnesses had
24 given to the police which they weren't aware of.

25 Q. I see.