

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.

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

COMMISSIONER EVANS

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

MR. ORSBORN

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

COMMISSIONER EVANS

14 Right.

MR. ORSBORN

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

BY MR. ORSBORN

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

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

MR. ARONSON, EXAM. BY MR. ORSBORN

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.

COMMISSIONER EVANS

22 Sorry, what page?

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  
affidavit which Mr. MacNeil, [James  
MacNeil] had sworn.

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

23 A. It was not.

24 Q. Now at page 126 and 127, Mr. Chant's May 30th statement is  
25 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)].

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

18 A. No.

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

20 A. No.

21 COMMISSIONER EVANS

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

24 MR. ARONSON

25 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

MR. ARONSON, EXAM. BY 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

MR. ARONSON, EXAM. BY MR. PUGSLEY

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

affidavit with this court respecting these particular proceedings?

A. Yes.

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

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

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

A. Oh, yes.

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

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

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

A. I haven't got the volume.

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

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.

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.

MR. ARONSON, EXAM. BY MR. PUGSLEY

1 A. But I believe it was also reference to the incident that you've  
2 referred to in which Pratico, I believe it was Pratico...

3 Q That's my recollection.

4 A. Was declared a hostile witness.

5 Q No, I think it was Chant declared hostile.

6 A. I'm sorry.

7 Q And Pratico was the one who said, allegedly said to the sheriff  
8 and subsequently Mr. Khattar and others, "I didn't see him do  
9 it," or something to that effect.

10 A. That's a specific one that comes to mind.

11 Q Did Mr. Rosenblum tell you that he believed that Donald  
12 Marshall, Jr. was guilty? In 1971, of course?

13 12:05 a.m. \*

14 A. I don't remember. He may have.

15 Q Would you refer to page 47 of Volume 39, Exhibit 134, which  
16 is the affidavit of Patricia Harriss? And, in paragraph 6,  
17 which is found on page 47 says, "That I recall the night of  
18 June 17, 1971, vividly," and it's...focus on the word vividly,  
19 did she make any comment to you at the time you took this  
20 affidavit, and that was sworn on the 22nd of July, 1982,  
21 before you. Did she make any comment to you about the use  
22 of the word "vividly"?

23 A. Not that I can recall.

24 Q. Although she did make...yes, go ahead.

25 A. I think when she used the word "vividly" she's speaking

1 solely that particular event in that paragraph as to what she  
2 recalls. She doesn't recall necessarily all the events that  
3 transpired in terms of her own involvement in the case.

4 Q. She's talking about the night of June 17th.

5 A. That's correct, when she was...

6 Q. Yes.

7 A. ...questioned by the police.

8 Q. It's my recollection, either before this Commission or before  
9 the reference, that she wanted to have the word "vividly"  
10 deleted because it did not represent an accurate  
11 representation of her state of mind in July of 1982. Do you  
12 recall that at all?

13 A. No, not at this point.

14 Q. Again, this affidavit was prepared by you in Halifax and  
15 taken down and shown to her and she signed it with...

16 A. It wasn't quite that simple with respect to Patricia Harriss.

17 Q. Well, tell me about it then?

18 A. I believe I met with Patricia Harriss who was somewhat  
19 reluctant to speak with me. When I did finally manage to  
20 speak with her, I don't recall if it was on that particular  
21 occasion that I actually put the affidavit to her, but  
22 subsequently she retained her own counsel, Mr. North, and it  
23 was through Mr. North, I believe, we had some considerable  
24 discussions about her evidence and her testimony, although I  
25 don't recall whether...

1 Q. That was after the affidavit.

2 A. ...the affidavit is prior to...

3 Q. Yeah.

4 A. ...prior to her retaining counsel or after. Since I took the  
5 affidavit I would assume that it was prior to her retaining  
6 counsel.

7 Q. Yes, that Mr. North was retained after you had taken the  
8 affidavit. And I presume she must have been in Halifax at  
9 the time because that affidavit is sworn...

10 A. That's correct.

11 Q. ...to at Halifax. She did, however, make a change in paragraph  
12 10, did she? She deleted the words "or elsewhere".

13 A. That's correct.

14 Q. Yes. On how many occasions did you have a discussion with  
15 Staff Wheaton concerning the incident in the Chief's office and  
16 the statement on the floor?

17 A. I only recall one specific conversation on that.

18 Q. And that would have been at or about the time that occurred?

19 A. Fairly close to the time when it occurred. Like I say I don't  
20 now remember the day that I was...that the incident occurred  
21 nor the exact day that I was told, but I believe that it was  
22 very close thereafter.

23 Q. Yes. Did he indicate that someone went with him to  
24 MacIntyre's office?

25 A. I believe he had indicated that there was another R.C.M.P.

MR. ARONSON, EXAM. BY MR. PUGSLEY

1 officer with him at the time the incident took place.

2 Q. Yes. Thank-you.

3 MR. PUGSLEY

4 That's all the questions I have

5 EXAMINATION BY MR. MURRAY

6 Q. Mr. Aronson, my name is Donald Murray and I'm  
7 representing William Urquhart at these proceedings.

8 COMMISSIONER EVANS

9 And you're going to indicate your connection or your client's  
10 connection with this.

11 MR. MURRAY

12 That is correct. Mr. Urquhart is referred to in several of the  
13 affidavits particularly, and I want to ask about those references,  
14 particularly in relation to Maynard Chant and John Pratico and  
15 then I would like to ask one question with respect to the  
16 statement of claim, which appears at page 130 of Volume 31.

17 COMMISSIONER EVANS

18 In which affidavits?

19 MR. MURRAY

20 John Pratico, Maynard Chant.

21 COMMISSIONER EVANS

22 Taken by this man, by this witness.

23 MR. MURRAY

24 That is correct.

25 COMMISSIONER EVANS

1 All right.

2 MR. MURRAY

3 Were drafted by this witness.

4 COMMISSIONER EVANS

5 Fine, go ahead.

6 MR. MURRAY

7 Q With respect to making up the affidavits, Mr. Aronson, do I  
8 take it that the only statements you had access to were the  
9 typewritten ones from 1971 and the typewritten ones from  
10 1982?

11 A. That's correct.

12 Q You refer to John Pratico and Maynard Chant as quite crucial  
13 and if we could turn to John Pratico's affidavit which is  
14 Volume 39, page 27, and you refer to William Urquhart in  
15 paragraphs 6 and paragraph 9.

16 A. I'm sorry, I have the wrong...Volume 39.

17 Q 39.

18 A. Page.

19 Q John Pratico's affidavit, page 27, 28 and 29.

20 A. Oh, I'm sorry.

21 Q And actually the paragraphs I'm referring to in that affidavit  
22 are on page 28.

23 A. That's correct, yeah, yeah.

24 Q Where did the reference to William Urquhart come from?

25 A. I believe it came from one of the statements that he gave to

1 the R.C.M.P..

2 Q. The only statement I'm aware of that John Pratico gave to the  
3 R.C.M.P. is on page 30, the same volume, and the first two  
4 lines, "In 1971, May, I was questioned by John MacIntyre and  
5 I believe Michael R. MacDonald." There's no reference in that  
6 statement to William Urquhart.

7 A. I would agree with that.

8 Q. Mr. Urquhart's name would appear on the 1971 statement  
9 which is Exhibit C to that affidavit on page 33 and 34. It  
10 would be reasonable to assume, I guess, that that is where  
11 Mr. Urquhart's name came from.

12 A. Yeah.

13 Q. That's certainly how you were aware of Mr. Urquhart's  
14 involvement.

15 A. That's correct and that's the reference in paragraph 6 to  
16 Mr. Urquhart or Detective Sergeant Urquhart.

17 Q. Would it be fair to say that John Pratico at the time you  
18 talked to him, was it on July 14th or a couple of days later,  
19 July 15th, July 15th I understand it, you would have had a  
20 discussion with him about the inclusion of Mr. Urquhart's  
21 name.

22 A. Yes.

23 Q. And did he...did he raise that with you or did you raise that  
24 with him?

25 A. I don't think it was raised other than he was to read through

1 the affidavit, ensure he understood what he said and if he  
2 wanted any changes let me know. In other words, this...while  
3 I had drafted it I...there was no compulsion or compunction  
4 on the part of Pratico to sign.

5 Q. No, I appreciate that. But was it a matter of at some point  
6 John Pratico stopping and you explaining, "Yes, William  
7 Urquhart as you see on this statement from 1971 is shown to  
8 be a witness."?

9 A. I don't have any recollection of that kind of discussion.

10 Q. It was certainly important to John Pratico's credibility,  
11 whatever that was, that he could specifically identify the  
12 people that he was making allegations about in 1971, is that  
13 not correct?

14 A. Yeah.

15 Q. It would be important from your...

16 A. Oh, yeah.

17 Q. ...case presentation. And the same with Maynard Chant.

18 A. That's true.

19 Q. And so it would materially assist your case if these witnesses  
20 could put forward that they remembered the specific person  
21 and could make a specific allegation about this specific  
22 person.

23 A. I was concerned if they could describe specifically what  
24 happened.

25 Q. Uh-hum. And who said particular things?

1 A. If that was possible, yes, the more detail the better.

2 Q With respect to Maynard Chant, and his affidavit is on page  
3 35, and there is references in paragraph 7, 9 and 11 to  
4 William Urquhart. Now, I can show you the references if you  
5 like. There is nothing in his first statement to the R.C.M.P. in  
6 1982 and nothing in his second statement to the R.C.M.P. in  
7 1982 which mentions Mr. Urquhart's name. And, I can be  
8 corrected if I'm wrong, I believe his evidence to this  
9 Commission was that until you arrived with Jim Carroll that  
10 day he did not know who Mr. Urquhart was and that it was  
11 explained to him that Mr. Urquhart was the one that came  
12 down with John MacIntyre on the second day and was  
13 present for the June 4th statement, thus Urquhart's name gets  
14 in the affidavit. What is your recollection of that interview on  
15 July 14th?

16 A. Other than what I would have in my notes, I don't have any  
17 recollection of it now.

18 Q Your notes about that are on page 8 of Exhibit 99, which is  
19 volume, red Volume 29.

20 A. What page did you refer to, I'm sorry?

21 Q 8. And about six lines, seven lines from the bottom of the  
22 page there is a note, "Second statement, his mother left the..."  
23 something, "...because she was asked to by MacIntyre and..." it  
24 looks like, U-R-Q.

25 A. The fourth line up I believe is "He indicated that after he told

1 his mother he lied he was going to do something," probably,  
2 well, it doesn't say anything. I assume I was going to say do  
3 something about it.

4 Q Perhaps you could go three lines above that, the line that  
5 starts, "Second statement."

6 A. Yeah.

7 Q "His mother left the interview..."

8 A. Yes.

9 Q "...because she was asked to by MacIntyre and..."is it U-R-Q?

10 A. I see U-R on my copy but...

11 Q Um. Does that assist you at all in understanding what  
12 happened when you went to see Maynard Chant?

13 A. Yes.

14 Q Could you explain?

15 A. He is explaining to me the statement indicating that Urquhart  
16 was present when the statement was made.

17 Q Uh-hum. Where did he come up with Mr.Urquhart's name?

18 A. I couldn't specifically say where he came up with it, whether  
19 it was...

20 Q Did Jim Carroll tell him?

21 A. I don't know.

22 Q I understand that there is some evidence before the  
23 Commission that Jim Carroll did. I take it that the sum of  
24 your evidence then on Pratico and Chant is that you're not  
25 able to recall today exactly how they came to be aware of

1 William Urquhart's name?

2 A. Well, they were shown the statements that they gave in 1971  
3 and I believe some of the statements indicate Mr.Urquhart's  
4 name is right on the statement.

5 Q Uh-hum. So, it would be...

6 A. And it wasn't necessary for anybody to tell them that they  
7 were with Urquhart. I think from reading they would recall  
8 that likely that this was one of...one or more of the individuals  
9 who were present when the statement was taken.

10 Q So, that that's the explanation that you're most comfortable  
11 with.

12 A. No, it's...I'm not saying comfortable, but that's the conclusion I  
13 would come to is where they...at least an initial conclusion  
14 without any further knowledge or recollection, that was what  
15 I would say.

16 Q Okay. Now, I'd like you to turn to page 130 of Volume 31,  
17 which is a copy of the statement of claim that you had issued  
18 against the City of Sydney, John MacIntyre and William  
19 Urquhart. And, my question doesn't relate to the substance of  
20 that at all, it's, however, the allegations based in that, I take  
21 it, were based on information you received from the R.C.M.P.  
22 report.

23 12:20 p.m.

24 A. I think certainly there was a factual basis or an apparent  
25 factual basis. I don't necessarily say altogether in the R.C.M.P.

MR. ARONSON, EXAM. BY MR. MURRAY

1 report but that certainly formed part of the basis.

2 Q. The R.C.M.P. report then and the interviews you had  
3 conducted with the witnesses?

4 A. The interviews I conducted with the witnesses, yeah.

5 Q. Anything else?

6 A. Well, the primary purpose in issuing a statement of claim was  
7 with respect to limitation periods. I was somewhat uncertain,  
8 given the length of time involved in the case, if, for example,  
9 whether the case goes back to 1971 for limitation purposes,  
10 those kinds of things, and I felt that it was of some  
11 importance to protect Junior's interest in the compensation  
12 aspect. And it was that that caused me to issue a statement  
13 of claim, which I don't believe was ever served.

14 A. No, I don't think.

MR. MURRAY

15 I have nothing further.  
16  
17

MR. BARRETT

18 To save you asking, I can just advise you that I have two or  
19 three questions and they simply relate to Mr. Rosenblum, the  
20 affidavit of Mr. Rosenblum that was prepared by him and, in  
21 particular, in respect to disclosure of statements by Crown.  
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EXAMINATION BY MR. BARRETT

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Q Mr. Aronson, my name is David Barrett. I represent the Estate of Donald C. MacNeil. You've testified you met with Simon Khattar and you had a telephone conversation with Mr. Rosenblum.

A. That's correct.

Q And both lawyers advised you they were not aware of the earlier statements that particularly Chant and Pratico had given?

A. That's correct.

Q And Mr. Pugsley has pointed out to you the similarity in the affidavit that you prepared for both Mr. Khattar and Rosenblum and, particularly, Paragraph 11 in which they indicate that they had no knowledge of these earlier statements. My question is, you've obviously testified you had the transcript of the original Marshall trial?

A. I didn't catch the last part of the question?

Q You had the transcript of the original Marshall trial.

A. That's correct, yes.

Q And I wonder if that Volume 1, if that can be shown to Mr. Aronson? And I'm referring, Mr. Aronson, to page 151 and 152 of that transcript. In that transcript beginning at the bottom during the cross-examination of Chant by Mr. Rosenblum, Chant testified to telling the police....

1 A. Volume 1?

2 Q. Actually it's Volume 1 of the red.

3 A. Oh.

4 Q. Page 151, the bottom.

5 A. Yes, I'm there.

6 Q. Looking at the bottom of that, this conversation took place or  
7 this transcript relates to the cross-examination of Chant by  
8 Mr. Rosenblum and Chant testified to telling, or testified that,  
9 to telling the police an untrue story on Sunday. That would  
10 be the 30th of May, 1971 and he further testified on page  
11 152 that he had been questioned by Det. Sgt. MacIntyre for  
12 two hours on that Sunday. And I'm wondering in your  
13 interview or your conversation with Mr. Rosenblum whether  
14 you asked him why he did not request that if any statement  
15 was taken on that day it not be produced to Mr. Chant? Did  
16 you ask him that question?

17 A. Not that specific question, no.

18 Q. Did you ask him, Mr. Rosenblum, why he didn't ask Chant  
19 what untrue story he told the police?

20 A. Not specifically. The concern was with respect to the  
21 statements that had been given to the police as opposed to his  
22 conduct or Rosenblum's activities at the 1971 trial.

23 Q. So I take it you didn't ask Mr. Rosenblum at that time as well  
24 if he had asked Mr. Chant why he gave an untrue statement  
25 to the police on the 30th of May.

1 A. Yes.

2 Q. You didn't ask Mr. Rosen...

3 A. That's right, I didn't ask.

4 MR. BARRETT

5 Those will be all my questions.

6 EXAMINATION BY MR. SAUNDERS

7 Q. Mr. Aronson, Jamie Saunders on behalf of the Attorney  
8 General of Nova Scotia. I'd like to begin, sir, by asking if you  
9 can assist me on the question of what affidavits were filed  
10 with the Court of Appeal during the reference. You spoke a  
11 number of times on the filing of material in advance by  
12 yourself and Mr. Edwards and I'd like to hear it from you as  
13 specifically as you can recollect what it was that, in fact, was  
14 filed with the court. There is a letter, sir, that you forwarded  
15 to the Prothonotary at the Law Courts and this is in red  
16 Volume 31, Exhibit 124 at page 109. Do you have it, sir?

17 A. Yes.

18 Q. Volume 31. Could I get you to turn to page 109?

19 A. Yes.

20 Q. This, Mr. Aronson, I presume is your transmittal letter to the  
21 Prothonotary in advance of the hearing in October of 1982?

22 A. That's correct. Those are affidavits in addition to ones that  
23 had already been filed, I think in July.

24 Q. Can you tell the Commission which affidavits were filed  
25 before the court in July?

MR. ARONSON, EXAM. BY MR. SAUNDERS

1 A. The balance of the affidavits other than these others. There's  
2 two batches. The first one in, as I say, in July and the second  
3 one in September. So I take it that from my recollection and  
4 by the process of elimination, the earlier affidavits would  
5 have been Chant, Pratico, Harriss. I believe Mary Ebsary,  
6 Greg Ebsary, Dr. Mian. I believe there may have been a  
7 couple of more, but those are the ones I recollect.

8 Q. Is it accurate to say that the only affidavits prepared by Mr.  
9 Edwards were the ones for Messrs. MacIntyre, Urquhart, and  
10 Magee?

11 A. Yes.

12 Q. And that you drafted each and every other affidavit?

13 A. By and large, that's true, yes.

14 Q. And at one time or another, whether July, October or  
15 December, you had filed with the court all of the affidavits  
16 that you had prepared?

17 A. Yes.

18 Q. And were those affidavits, Mr. Aronson, assembled in some  
19 kind of booklet form?

20 A. I believe that there was a booklet prepared at the request of  
21 the court, yes.

22 Q. Do you remember if you prepared five copies of that booklet  
23 for submission to the court, sir?

24 A. I don't have any actual recollection but I believe that's the  
25 case, yes.

MR. ARONSON, EXAM. BY MR. SAUNDERS

1 Q. Thank you. You mentioned this morning that during the  
2 argument before the Court of Appeal in February, 1983 and  
3 in the written factum that Mr. Edwards filed in advance of  
4 oral argument, he seemed to be attempting to persuade the  
5 court that the court ought to exonerate the criminal justice  
6 system, if I have my note correctly. And you saw that in the  
7 written factum prepared by Mr. Edwards in advance of the  
8 February argument?

9 A. Yes.

10 Q. You also said in answer to questions put by my friend, Mr.  
11 Orsborn, that you considered that issue not to be relevant  
12 before the court in February of '83. Did you challenge that  
13 position taken by Mr. Edwards, sir, in the oral argument you  
14 gave?

15 A. Perhaps not as directly as I might have but I certainly took  
16 an opposite approach to it.

17 Q. Certainly in your factum you had taken an opposite approach  
18 to that set out by Mr. Edwards in his.

19 A. Yeah, well, I had to do my factum first, yeah.

20 Q. The position that you had set forth was different than the  
21 position set forth by Mr. Edwards?

22 A. Yes.

23 Q. When you said in answer to a question put by Mr. Justice  
24 Evans how long the argument took, was it 40 minutes in total  
25 or 40 minutes per counsel, do you recall?

1 A. Total.

2 Q. You had the opportunity to present the arguments that you  
3 chose to present on behalf of Mr. Marshall, did you?

4 A. Yes. Well, the thing is at the very outset with the verdict  
5 having been agreed to, there was relatively little need to, it  
6 was more the argument about how one arrives at...

7 Q. Exactly.

8 A. Which is perhaps as a result practically limited the nature of  
9 the argument. We weren't arguing too much law any more.

10 Q. The bottom line or the result had been determined in  
11 advance, correct?

12 A. Well, the submission was agreed to in advance.

13 Q. The procedures as to how to get there were left for argument.

14 A. That's right.

15 Q. Did you feel that you had opportunity to present your  
16 arguments to the Court of Appeal in February of '83?

17 A. Yes.

18 Q. Now to take you back in the discussions that you had with  
19 officials with the Attorney General's Department in Nova  
20 Scotia, you asked the officials to provide you with copies of  
21 the R.C.M. Police reports and you made that request of Gordon  
22 Gale?

23 A. Yes.

24 Q. And Mr. Gale told you that it was not the policy of the  
25 department to release confidential police reports, is that

1 correct?

2 A. It was either "confidential" or "internal", I'm not sure which  
3 word.

4 Q. Yes.

5 A. Perhaps both.

6 Q. And Staff Sgt. Wheaton had also told you, sir, that he had no  
7 authority to release the R.C.M. Police reports that were  
8 prepared for superiors?

9 A. That's correct.

10 Q. And were you also advised by the Department of Justice that  
11 they could not authorize or give to you the R.C.M.P. reports,  
12 that they did not have that authority?

13 A. No.

14 Q. They did not tell you that?

15 A. No.

16 Q. What was the Department of Justice's position with respect to  
17 the police reports?

18 A. That they took the same position but my recollection is that I  
19 was advised by the Department of Justice that they would  
20 make every effort to insure that the material that I needed to  
21 proceed was made available to me if the Attorney General did  
22 not provide it. Now I'm not trying to be inconsistent with  
23 what you're saying but that's basically what happened. That's  
24 my recollection.

25 Q. That Justice would do what it could to see that you were

1 given it, is that fair?

2 A. Yeah, but that did not necessarily exclude them providing me  
3 with a copy of it.

4 Q. And I take it Justice never gave you the R.C.M.P. report or  
5 reports.

6 A. No.

7 Q. Did you understand, Mr. Aronson, that those reports were  
8 internal and/or confidential?

9 A. In general, yes.

10 Q. Did you understand that it made good sense that those types  
11 of reports ought not to be disseminated publicly?

12 A. I don't think I was in a situation of being a member of, an  
13 ordinary member of the public.

14 Q. In a general sense, were you in agreement that that kind of  
15 report ought not to be disseminated publicly but that you in a  
16 position for Marshall made some sort of exception to that?

17 A. It seems to me a lot of this kind of material that was in the  
18 R.C.M.P. report would have formed part of the Crown case  
19 which defence counsel would have been entitled to in relation  
20 to disclosure. Now I certainly don't want to split words with  
21 you. When we say it is a "report", you know, it's a Crown, in  
22 many ways it performs what we call "a Crown sheet" plus  
23 many statements.

24 Q. And there are facts contained in any kind of police report but  
25 there is also a commentary, I suggest, on the part of writers

1 of such reports.

2 12:35 p.m. \*

3 A. Yes, some commentary I guess.

4 Q. Yes.

5 A. And would you agree generally with me, sir, that that kind of  
6 commentary confidentially expressed by an investigating  
7 police officer to superiors ought not to be disseminated  
8 publicly?

9 A. I would agree it shouldn't be disseminated publicly. I don't  
10 necessarily...I would exclude counsel from the definition of  
11 public though.

12 Q. He who were in the role of defence counsel...

13 A. That's correct.

14 Q. ...in this case on behalf of Marshall. Correct?

15 A. That's right.

16 Q. Now, was your basis for writing that the Attorney General's  
17 Department was uncooperative with you the fact that they  
18 had not provided you with copies of the R.C.M. Police reports?

19 A. They had provided me with copies of nothing.

20 Q. Yes.

21 A. No statements and no reports and I think when I refer to the  
22 report I think you have to understand I didn't know what  
23 was in the report other than what I was told. I didn't know  
24 that there was a commentary in it. I wasn't aware of the  
25 substance of it.

1 Q. Yes. But was that the basis for you saying, sir, that the  
2 Department was uncooperative with you?

3 A. Yes.

4 Q. All right.

5 A. One of the basis.

6 Q. Now, you said yesterday that Gordon Gale, that you sensed  
7 that Gordon Gale would have discussed the details of the  
8 report with you but not have actually provided the report to  
9 you.

10 A. Yeah, we discussed some of the contents of the report during  
11 our...

12 Q. Yes.

13 A. ...meeting.

14 Q. And did he indicate to you some of the contents of those  
15 reports, sir?

16 A. Maybe a very, very small number of facts, many which I...had  
17 already been advised of anyway.

18 Q. Yes. Advised by Messrs. Carroll and Wheaton for example.

19 A. Yes.

20 Q. Yes. Did you ever ask Mr. Gale, "Look, if you can't give me the  
21 entire report could you give me a synopsis or some kind of  
22 report that has vetted the confidential material from it?" Did  
23 you ever ask him that?

24 A. No.

25 Q. Why not?

1 A. Because I'm not so sure that that's...that isn't really what I  
2 wanted. What I wanted was copies of the statements and the  
3 information that had been collected and a synopsis wouldn't  
4 really have been satisfactory.

5 Q. In any event...

6 A. I had a synopsis.

7 Q. The synopsis provided to you by the R.C.M.P..

8 A. Yes.

9 Q. Yes. In any event on June 23rd, 1982, you met with Mr.  
10 Edwards and he provided you with those police reports, sir.

11 A. Yes.

12 Q. And would you say that you had complete cooperation of Mr.  
13 Edwards in the exchange of information between the two of  
14 you?

15 A. Yes.

16 Q. He provided access, I think you said yesterday, to his office  
17 and his facilities when you needed it.

18 A. As and when it was required, yeah.

19 Q. All right. When Mr. Edwards gave those reports over to you  
20 he told you, I gather, that they were given in confidence.

21 A. Yeah.

22 Q. What did you understand that to mean?

23 A. Well, that they were to be used for the purposes of assisting  
24 in the appeal.

25 Q. Did you think it permitted you to show them to other

1 persons?

2 A. Once they were made public through the affidavits it was a  
3 matter of public record in any event.

4 Q. But the R.C.M. Police reports were never as a report made  
5 public.

6 A. Not as such, no.

7 Q. Did you ever show those reports to any other person, sir?

8 A. Yes.

9 Q. To whom?

10 A. To other counsel and eventually I believe a copy of it was  
11 given to Michael Harris.

12 Q. And when you say to "other counsel" who is that?

13 A. When the case went from me to Felix the...he received a copy  
14 of my file which included a copy of the police report.

15 Q. I understand. Did you indicate to Mr. Cacchione or any other  
16 counsel the expression of Mr. Edwards that they were passed  
17 to you in confidence?

18 A. I have no recollection of doing that, no.

19 Q. Who passed the copy of the report or R.C.M. Police reports to  
20 Mr. Harris?

21 A. I did.

22 Q. When did you do that, sir?

23 A. It was quite some time after I received a copy and when I  
24 say "some time", I mean quite a number of months and  
25 perhaps six, eight months after.

- 1 Q From the date of June 23rd, 1982.
- 2 A Yeah.
- 3 Q Did you express to Mr. Harris that they had been given to you  
4 by Mr. Edwards in confidence?
- 5 A I'm fairly certain I did, yes.
- 6 Q Do you know, sir, how they came to allegedly be in the  
7 possession of a lawyer in Truro named Kirby Grant?
- 8 A No, I have no knowledge of that.
- 9 Q Besides making the R.C.M. Police reports available to your  
10 successor counsel, Mr. Cacchione, and to Mr. Harris, did you  
11 make copies available to anyone else?
- 12 A No.
- 13 Q You spoke yesterday of the undertaking that you thought you  
14 had from the federal Minister, Mr. Munro, to pay your fees,  
15 sir.
- 16 A Yes.
- 17 Q Yes. And you gathered that undertaking from a private  
18 discussion that you and he had had on an occasion in Cape  
19 Breton, do I have that correct, sir?
- 20 A That's correct.
- 21 Q Did you ever indicate to officials within the Attorney  
22 General's Department that you felt you had an undertaking  
23 from the federal ministry to pay your fees?
- 24 A I have no specific recollection of it, but I believe Frank and I,  
25 Frank Edwards and I may have discussed it, not in the sense

1 of saying in a formal kind of sense, but just in passing.

2 Q. For example, when you spoke to Mr. Gordon Coles and he  
3 suggested to you that you make application for Nova Scotia  
4 Legal Aid, did you advise Mr. Coles that you thought you had  
5 an undertaking from the federal Minister to pay your fees?

6 A. I guess perhaps the undertaking might be described more  
7 accurately as a contingent undertaking.

8 Q. In what way was it contingent?

9 A. Contingent on pursuing every other avenue including the  
10 Attorney General and Nova Scotia Legal Aid plan and so on,  
11 and ...

12 Q. Is that the way it was put to you by Mr. Munro?

13 A. He undertook to pay the fees but at the same time he asked  
14 that I make every effort to look at other sources including the  
15 Attorney General of Nova Scotia and he himself, I believe,  
16 undertook to write to the Province in respect to that.

17 Q. But you thought you had a flat commitment from the federal  
18 Minister to pay your account.

19 A. Well, it turned out that I thought I had a flat one since the  
20 contingency didn't turn out, yes.

21 Q. Yes, thank-you. Did I hear you say yesterday that Gordon  
22 Gale indicated to you his belief that the best outcome for  
23 Junior Marshall would be an acquittal?

24 A. It was either an acquittal or a free pardon. I believe the  
25 acquittal was one of the alternatives he mentioned.

1 Q. Yes. Did he mention to you his quandary, and it was a  
2 quandary shared by Mr. Rutherford, who spoke last Tuesday  
3 on behalf of the federal ministry, of what would happen if the  
4 Court of Appeal were to order a new trial?

5 A. Oh, yeah. We had discussed a lot of implications of the case  
6 and the concern that I had and which I had raised with  
7 Rutherford is the...if we go through these proceedings that  
8 this is a Crown case against another individual, it's not just a  
9 case for the benefit of Donald Marshall, Jr..

10 Q. Yes.

11 A. And, it...I found that to be a pretty awkward kind of situation  
12 to be in and I believe that both the Attorney General of Nova  
13 Scotia, as well as the Minister of Justice in Ottawa were aware  
14 of the...that it is a very awkward situation.

15 Q. Thank-you. And Gale had those concerns as expressed to you  
16 directly.

17 A. I believe so, but I don't have a specific recollection of that. I  
18 think we're pretty well aware of it though.

19 Q. Was it a common goal that you and Mr. Gale on the one hand,  
20 and you and Mr. Rutherford or Mr. Fainstein on the other,  
21 were working towards, that is to accomplish the acquittal of  
22 Junior Marshall as quickly, expeditiously as you could, and  
23 then deal with the matter of compensation?

24 A. It was certainly we would deal first with this disposition of  
25 the conviction and subsequently deal with the compensation.

- 1 Q. And in your discussions with officials with the provincial  
2 Department of the Attorney General did you sense that they  
3 were as concerned as you with the uniqueness of the Donald  
4 Marshall case and uncertainty in terms of procedures of how  
5 to get to this result you both wanted?
- 6 A. I think so, but I think that they perhaps had other concerns  
7 as well.
- 8 Q. Messrs. Gale and Edwards with whom you dealt, were they  
9 sympathetic to Junior Marshall's case, sir?
- 10 A. I never really thought of it that way. I...you could probably  
11 say that though.
- 12 Q. Thank-you. And the province, I thought you said yesterday,  
13 favoured the free pardon route.
- 14 A. That's what it says in my notes, yeah.
- 15 Q. Yes. Did you recognize that...that if you had the public airing  
16 that from time to time Junior Marshall that he would then be  
17 opening himself to cross-examination?
- 18 A. We had discussed that.
- 19 Q. That is you and Junior...
- 20 A. Oh, yes.
- 21 Q. ...had discussed it.
- 22 A. Yeah.
- 23 Q. And you recognized, I suggest, sir, that by going the route of  
24 having the public airing before a Court of Appeal that Mr.  
25 Marshall would be obliged to take the stand and talk about

1           what happened in 1971.

2           A. That's correct.

3           Q. And that by doing so he would be faced with cross-  
4           examination by Crown counsel.

5           A. Yes.

6           Q. Was it Staff Wheaton who first disclosed to you that Junior  
7           Marshall had admitted to him of a robbery or an attempted  
8           robbery in Wentworth Park?

9           A. I couldn't say for sure if it was Staff Wheaton or Jim Carroll.

10          Q. All right.

11          A. It was one or the other.

12          Q. And, one or the other indicated that to you after their visit  
13          with Junior at Dorchester Penitentiary.

14          A. It was sometime after they visited. It was not immediately  
15          after.

16          Q. Yes.

17          A. I believe the Attorney General was made aware of it well in  
18          advance of myself.

19          Q. I took from your answer yesterday that you felt let down as  
20          Marshall's solicitor that that information came to you from  
21          the police rather than from your client.

22          A. Perhaps not so much let down because of that, in other words  
23          the statement, as that in our discussions that...discussions I  
24          had with Junior that he had certainly not indicated this, but I  
25          at the time never had an opportunity to discuss with him the

1 statement until after he was released, which was towards the  
2 end of March.

3 Q. Yes. I take it you had no specific discussions with either Mr.  
4 Rosenblum on the phone or Mr. Khattar in person as to what  
5 they would have done as defence counsel or what they might  
6 have done differently had they known of this back in 1971.

7 A. Yeah, we had some discussion. I think that's the basic tenor of  
8 one of the paragraphs in their respective affidavits.

9 Q. But that is to say with respect to this knowledge that Mr.  
10 Marshall was engaged in a robbery or attempted robbery. I  
11 take it you did not talk to Rosenblum or Khattar about what  
12 they might have done or done differently had that knowledge  
13 been in their minds, correct?

14 A. I suspect we did, but I don't have any recollection of it or  
15 what the discussion consisted of.

16 Q. There is nothing in your notes on that, Mr. Aronson.

17 A. No.

18 Q. For example, did you discuss with either gentlemen whether  
19 they would have put their client on the stand had they known  
20 what he and Mr. Seale were allegedly about that evening?

21 A. No.

22 Q. You did not.

23 A. We did not discuss it.

24 Q. All right. I'm interested in your comment in your notes at  
25 page 8, Exhibit 99, sir, where you write, "Money was not a

1 problem". It's midway down the page. Volume...red Volume  
2 29, and it's Exhibit 99 at page 8.

3 A. Yes.

4 Q. And these are your notes made July 14, '82.

5 A. That's correct.

6 Q. And just above that phrase that I've quoted, you've written  
7 "Khattar says the band," is it?

8 A. Yeah, that would have been the...

9 Q. The band paid him.

10 A. That's correct.

11 Q. Yes. And, what "D/A Rosenblum," what does that refer to?

12 A. It's actually "D-I-A Rosenblum", in other words, the  
13 Department of Indian Affairs paid Rosenblum.

14 Q. Thank-you. And, "K" would that be Khattar, "Not involved in  
15 '72 appeal"?

16 A. That's correct.

17 Q. Yes. And then you write, "Money was not a problem."

18 A. Yeah.

19 Q. "Does not appear to have done a lot of investigation, they  
20 acted on information from 'Indians' on witnesses."

21 A. Yes.

22 Q. Yes. How did that...first of all, I take it it's Mr. Khattar's  
23 answer to you, "Money was not a problem."

24 A. It was either an answer or a comment made.

25 Q. During your discussions.

1 A. Yeah.

2 Q. Yeah. And how did that arise, sir, why were you interested in  
3 finding out from Mr. Khattar whether money presented any  
4 problem?

5 A. I can't recall specifically even if I asked them. I think maybe  
6 the discussion, it was one of the things that he mentioned in  
7 passing.

8 Q. Were you concerned whether there were any limitations on  
9 what Rosenblum and Khattar did to defend Junior Marshall  
10 and if there were limitations or reasons for why they didn't  
11 do certain things whether the reason was money?

12 A. Not particularly, no. I think the reason perhaps we may have  
13 got on to that particular subject was there had already  
14 been...I think it had been fairly widely known that there was  
15 some difficulties in getting the fees and it was just something  
16 that was raised to say, something like, "Hey, I didn't have, we  
17 didn't have the same kind of problem because it was before  
18 Nova Scotia Legal Aid," and at that time in 1971 the  
19 Department of Indian Affairs at the request of the band paid  
20 the fees and...

21 Q. I understand.

22 A. And that there was no, how can I say it, upward limit  
23 necessarily.

24 Q. So, you did not put a question to either Khattar or Rosenblum  
25 as to whether or not their defence of your client had been

1 limited by lack of funds?

2 A. No, it was not limited by lack of funds.

3 Q. It was not.

4 A. No.

5 Q. And the clear indication you had from them is that they did  
6 not do any investigation themselves.

7 A. That's correct.

8 Q. Thank-you. That's all.

9 12:50 p.m. ADJOURNED TO 2:17 p.m.

10 2:17 p.m. INQUIRY RESUMES.

11 **EXAMINATION BY MR. ROSS**

12 Q. For the record, sir, my name is Anthony Ross and I would like  
13 to ask you one or two questions and at first I'm primarily  
14 interested in this robbery theory which you spoke about in  
15 your direct evidence. When did you first learn that there was  
16 a robbery theory in which Donald Marshall and Sandy Seale  
17 might have been involved?

18 A. When I had gotten an indication of the story that Jimmy  
19 MacNeil, of his statement or statements.

20 Q. That would be quite early in your retainer?

21 A. I believe so. It probably would have been the time when I  
22 spoke to Harry Wheaton and Jim Carroll in Sydney. I believe  
23 it was some time early mid April.

24 Q. Around February? Well, perhaps we can get you to refer to  
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one or two of your own records. Have you got Volume 29 with you?

A. Yes.

Q. Have you got Volume 27? Volume 27 is Exhibit 113. I'd ask you first to turn to Volume #27 at page 32. Have you got it?

A. Yes.

Q. I take it, sir, that pages 32 through 40 represent your activities on this file between September 1981 and the date that it was issued, February 28th, 1983.

A. Yes.

Q. Now I ask you, I need to clarify something. On page 40, there's an indication, "Balance owing on fees - August 4, 1982." Should that have been 1981? Is that '82?

A. I couldn't really say. It was to reflect the previous billing that had been issued.

Q. Yes, but I ask you then to turn, just to compare pages 32 with 40, it might help.

A. Okay.

Q. Page 32 picks up on August 27, 1981.

A. Right.

Q. And it goes right through to page 39, which is February 16, 1983. And the invoice is rendered on February 28th, 1983.

A. Yeah.

Q. Now there appears to be two explanations for the entry on

1 page 40 to which I referred you. One is that it should be  
2 August 4, 1981 instead of August 4, 1982.

3  
4 A. No, I believe it was August 4th, 1982. What that was, it was a  
5 previous account to the file but this particular exhibit of  
6 February 28th is a detailed accounting from the very  
7 beginning, whereas the previous billing referred to as August  
8 4th, '82 is a fairly short capsule as opposed to a detailed  
9 billing.

10 Q. I see. So then the entry or the number for August 4, 1982  
11 would have covered really the information on pages 32 to 36,  
12 the end of that first big paragraph?

13 A. I believe so, yes, yes.

14 Q. I see. Okay, as far as your retainer is concerned, just let me  
15 get something, you were retained by the Union of Nova Scotia  
16 Indians?

17 A. Yes.

18 Q. And later on, your account was further guaranteed by the  
19 Minister of Indian Affairs.

20 A. Yes, he made an undertaking to pay.

21 Q. Now when you got involved, as I understand it, you assumed  
22 a file from Melinda MacLean?

23 A. At the time I was retained, I wasn't even aware that Melinda  
24 MacLean was involved in or had had any involvement.

25 Q. But you got her material shortly after.

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A. Some time later, yes.

Q. Now as I look through her material, it appears as though the name that Junior Marshall identified as the killer was Mickey Flynn. Does that ring a bell with you?

A. Not at all, no.

Q. Did you get an opportunity to look through a memorandum done by an associate of Melinda MacLean, a memorandum of his visit to Junior Marshall while in the penitentiary?

A. No, I have not seen that before.

Q. And I take it that when you became involved back in August of 1981, you had some understanding that there might have been a rumour about a robbery.

A. No, when I first went to see Donald Marshall, Jr. at the penitentiary in early September of '81, I went in cold. I had never even heard of the case before.

Q. Okay, what did he tell you as far as Sandy Seale was concerned?

A. Essentially the story he told me was the same story in his original statement to the police in 1971 in which there was no alleged robbery referred to.

Q. And I take it you had advised Donald Marshall that it was very important that he tell the truth if he ever had to take the stand once again?

A. Yes.

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Q. And I take it further that prior to the reference you had copies of the statements that Donald Marshall had given to the R.C.M.P?

A. That's correct.

Q. And I take it then you would have had Exhibit 110, which is, I'll get it for you. Exhibit 110, which is a one-page statement of Donald Marshall? Sorry...

A. I have it in front of me, Exhibit 110.

Q. Sorry, Exhibit 101, not 110, sorry, my mistake. You've got Exhibit 101?

A. I do.

Q. And I take it that Wheaton or Carroll or somebody would have given you a copy of this at some time before the reference?

A. Yes.

Q. And I look at the four words, the last line, it says: "I called them back," referring to Ebsary and MacNeil. Now this is Donald Marshall. The last sentence, "They started to walk away from us. I called them back."

A. Oh, I see, yeah, at the very end, the last sentence.

Q. Yes. Now your evidence was that when you spoke to Donald Marshall, he told you that Sandy Seale called them back. Do you recall giving that evidence today?

A. Yeah, I believe that that's what he told me.

1  
2 Q Did you quiz Marshall on why he would tell you Seale called  
3 them back and why would you tell Wheaton that he called  
4 them back?

5 A. The reason, I tried to express previously, perhaps not as well  
6 as I could have, that Marshall indicated to me that when he  
7 gave the statement, #101, that he felt a certain amount of  
8 guilt for what had happened that night or that is in  
9 Wentworth Park and he was willing to take the responsibility  
10 for it. And the second aspect was that he felt that he had to  
11 say that to the police; otherwise they weren't going to help  
12 him or nothing would work out positively for him.

13 Q So he was going to make up a story and he was going to tell  
14 that to the police, is that it?

15 A. I don't know if you could say "make up a story." He felt that  
16 that was the only thing that would help him is if he gave a  
17 statement along those lines. In that sense, perhaps you're  
18 correct.

19 Q I take it that when he gave evidence at the reference, he also  
20 was not quite willing to accept that there was a robbery or  
21 attempted robbery. Do you recall that?

22 A. Yes.

23 Q And as a matter of fact, in the decision on the reference, the  
24 judges found that Marshall was still unwilling to acknowledge  
25 his role in a robbery or in an attempted robbery. Do you

1 recall that?

2 A. Not specifically.

3 Q. Well, perhaps I can, I wouldn't bother taking you through it.  
4 It's going to be a matter of record. Now, sir, are you aware  
5 that Marshall has since recanted the entire robbery theory?

6 A. Since?

7 Q. Since the reference?

8 A. No.

9 Q. Perhaps then I'd ask that you be shown Exhibit Book #9.  
10 Have you got it?

11 A. I have it.

12 Q. Perhaps you can go through with me. I'm going to start at  
13 page 37. This is on the direct examination of Junior Marshall  
14 by Mr. Edwards and I will tell you that this is in the third  
15 Ebsary trial, at page 37 at the bottom, Mr. Edwards says to  
16 him:

17  
18 Q. Just take your time. What, if anything,  
19 did the two of you decide to do or did you  
20 go your separate ways at that time?

21 A. We did not go our separate ways.

22 MR. RUBY

23 I take exception to this because I can't see what the  
24 significance is for this witness. I can see in the end that argument  
25 will have to be directed to Your Lordships on this point of view.

1 This was a certain time frame of involvement on what he did.  
2 Why on earth would we care whether he knew there had been a  
3 changing of evidence, if that's the allegation?  
4

5 MR. ROSS

6 I can respond very quickly, My Lord. All I want to do is to, I  
7 propose to question this witness a little further. One of the things  
8 that he did indicate was that the lawyers for Junior Marshall in  
9 1971 did not do a detailed investigation as far as the facts were  
10 concerned. That was his evidence. Now we know that and we  
11 know the situation in 1982. And I wanted to take the story that  
12 Marshall had given him on the one hand, take another story that  
13 Marshall had given on the second hand and then with this  
14 witness, go through what Marshall allegedly did the night in  
15 question as disclosed to this witness and find out about what he  
16 did or could have done as far as an investigation is concerned.

17 MR. CHAIRMAN

18 Well, you...

19 MR. ROSS

20 I can find another way to do it. I can find another way to do  
21 it. You know, there's an easier way.

22 MR. CHAIRMAN

23 No, but my understanding to this witness says that he's never  
24 heard this story.

25 MR. ROSS

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Fine. Well, then that's fine.

MR. ARONSON

Well, I'm certainly not aware of this statement. I've never had the opportunity to read it before. I'm not aware of it.

MR. CHAIRMAN

So how can he respond to it?

MR. ROSS

Well, if he's not aware, then I'll just abandon that question, My Lord.

BY MR. ROSS

Q. Now tell me something, Mr. Aronson, when you were involved in doing the investigation, at least you did an investigation of the facts and you were satisfied with certain facts prior to the reference, weren't you?

A. Oh, yes.

Q. And in that regard, you had the statements of Keith Beaver?

A. Yes.

Q. And there was reference in them to Alanna Dixon.

A. Yes.

Q. And as a matter of fact, you contacted Alanna Dixon by telephone.

A. I did.

Q. And in your notes, you've got her listed as a potential witness. Do you recall what she told you about Sandy Seale the night

1 in May, 1971?

2  
3 A. I recall having spoken to her. I believe she may have been in  
4 Edmonton or somewhere out west. If that's not Alanna Dixon,  
5 then I don't really remember her. I remember her name and  
6 I remember the statement and I do remember speaking to  
7 her. I don't recall the contents of the conversation. Unless  
8 there's a note on file, I would have no recollection of it.

9 Q. Did you get any indication from her or from anybody that  
10 Junior Marshall and Sandy Seale were friends?

11 2:35 p.m.\*

12 A. Oh, yes.

13 Q. Who?

14 A. Well, Donald Marshall, Jr. himself acknowledged that they  
15 were acquainted with one another.

16 Q. And anybody else?

17 A. Not that I can specifically think of, no.

18 Q. And in your investigation, the statement of Keith Beaver's  
19 statements is that he left the dance and Sandy Seale was with  
20 him, Alanna Dixon until they reached the section at Pollett's  
21 Drugstore on the corner of George and Argyle Street. Is that  
22 your recollection generally?

23 A. I have no recollection and I take it that what you're saying is  
24 correct.

25 Q. I see. What about Marvel Mattson. Had you heard that name?

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A. No.

Q. What about Scott MacKay, had you heard that name?

A. It certainly rings a bell.

Q. We understand that Scott MacKay was the one who came along and found Sandy Seale lying on the ground?

A. OK.

Q. Do you recall that now?

A. I recall some...the first witness on the scene who saw Sandy Seale, yes.

Q. Did you try to interview him?

A. No.

Q. Can I take it, sir, that the reason for this is that your job was to bring evidence before the Court which would satisfy the Court that Marshall might have been convicted on perjured testimony and it was not really your role to go out and reinvestigate the entire case and bring the facts to the court?

A. I would agree with that, yes.

Q. Well, the evidence of Staff Sergeant Wheaton was to the effect that when he became involved after he had interviewed MacNeil and Maynard Chant that he was of the view that Marshall was convicted on perjured testimony. Did he communicate that to you?

A. Perhaps not at that particular point in time, but certainly when we met in mid-March or when we spoke in mid-March

1 and again in early April, yes.

2  
3 Q. Is it fair to say that as far as the reference is concerned, what  
4 you wanted out of the reference was for the Court to actually  
5 find that Marshall might have been convicted on improper or  
6 perjured testimony?

7 A. That was certainly one aspect, yes.

8 Q. Did you form the view that Marshall was innocent?

9 A. I did form that view, yes.

10 Q. Innocent of what?

11 A. That he was innocent of the...well, that he had not stabbed  
12 Sandy Seale.

13 Q. That he was not the person who had the knife in the hand?

14 A. That's right.

15 Q. Your evidence, as I recall it today, was that Marshall indicated  
16 to you that he and Sandy Seale knew that Ebsary and MacNeil  
17 didn't have any money. Do you recall that?

18 A. Yes.

19 Q. And having told you that, didn't you find it strange that  
20 people who knew that victims didn't have any money was  
21 still going to rob them?

22 A. I personally find it somewhat strange.

23 Q. Did you quiz Marshall on that?

24 A. Yeah, and as I say, he indicated to me that he didn't have any  
25 actual intent to rob these specific people, roll them or ask

1  
2 them for money. In fact, my recollection is and his statement  
3 indicates that they did carry out a conversation prior to  
4 Ebsary and MacNeil leaving or beginning to leave the park  
5 and I don't know whether they were talking about bumming  
6 some cigarettes, whether it was from Seale and Marshall to  
7 Ebsary and MacNeil or the reverse, I don't recall, and being  
8 aware that they had just come from a tavern, that they had  
9 been drinking and basically didn't have any money anyway.

10 Q. That would come from them, that's Ebsary, MacNeil?

11 A. Ebsary, MacNeil.

12 Q. And just so that I get the correct framework, with all of your  
13 involvement in the reference, I take it your thrust was just to  
14 establish that Marshall should not be in jail because of the  
15 admissions that Chant and Pratico had perjured themselves, if  
16 for no other reasons?

17 A. Yeah, well, I certainly had no interest in a purely legal sense  
18 as to whether or not Sandy Seale and Donald Marshall had in  
19 fact committed a robbery since that wasn't what the  
20 reference was about.

21 Q. Sure. Would you then say, sir, that as far as the findings and  
22 as far as the reported decision on the reference is concerned,  
23 it went substantially further than you had expected or even  
24 anticipated in that it addressed the robbery theory and came  
25 to certain findings?

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A. I think that's a fair statement, yes.

Q. And is it fair to say that your concern was to have the evidence before them so that they could be satisfied that by excluding the evidence of Pratico and Chant from the trial testimony, they could then determine on the basis of the rest whether or not there could have been a finding of guilt?

A. That's right.

Q. Would that have been part of the reason why the police evidence would not have been introduced in the reference in 1982?

A. Which evidence are you speaking of?

Q. The police evidence from the 1971 investigation, calling the City of Sydney police.

A. Yeah, in other words their evidence didn't...they couldn't say one way or another whether Donald Marshall, Jr. was or was not guilty of the murder of Sandy Seale?

Q. And I take it that that was, though important to you, it was not something that you pursued, the investigation of that, with any vigour whatsoever?

A. That's correct.

Q. And the evidence of Staff Sergeant Wheaton was further that when he believed Marshall was innocent, he discussed it with the prosecutor Edwards who also believed that Marshall was innocent and then discussing it with you, you also believed

1 that Marshall was innocent. Is that a fair statement?

2  
3 A. Well, with respect to what you said about me, yes. I would  
4 have no knowledge...

5 Q. O.K. fine. But did you find that there was much variance  
6 between your impression of the innocence of Marshall and  
7 that of Frank Edwards?

8 MR. SAUNDERS

9 Sorry, My Lord, just so that I'm clear on what the question is  
10 getting at. Is the witness being asked to compare his impression  
11 with what he took to be Mr. Edwards' impression?

12 MR. ROSS

13 Well, I'll take it further. It's obvious that these people had  
14 discussed the case. They discussed it quite intimately and I'll ask  
15 a direct question for your benefit, Mr. Saunders.

16 Q. Did Mr. Edwards at any time prior to the reference indicate to  
17 you that he was of the view that Marshall was innocent?

18 A. Yes.

19 Q. And Wheaton, I guess, also indicated to you that he thought  
20 Marshall was innocent?

21 A. That Wheaton thought Marshall was innocent, yes.

22 Q. And is it fair that all three of you, you, Wheaton and Edwards  
23 then had a common interest, which was to get Marshall out of  
24 jail?

25 A. I think Marshall was already out of jail.

1 Q. Oh, sorry, to get him to get an acquittal entered?

2 A. I perhaps couldn't indicate that we had the precise same  
3 interests. We certainly agreed with what the bottom line, so  
4 to speak, was, but perhaps we had some differences,  
5 obviously, as to how one arrived at that bottom line.

6 Q. As far as the events of the night of May, 1971, is concerned,  
7 the only person that was not called, the only person that was  
8 left, that wasn't called, was Roy Ebsary. Is there any reason  
9 why he wasn't summonsed to give evidence at the reference?

10 A. Well, there was a reason. It was because we didn't want to  
11 put him in the position of having to testify about his own role  
12 in the trial which could have certainly prejudiced any case he  
13 might have developed if charges were laid against him in  
14 connection with the murder. I think that part of the way the  
15 system works is on fairness. And while I had no great  
16 difficulty in pointing the finger in Mr. Ebsary's direction, I  
17 certainly wasn't going to call him as a witness. I think it's a  
18 pretty serious thing to call somebody as a witness and ask  
19 them whether they committed the murder, so...

20 Q. Well, as a matter of fact, what about asking what happened?  
21 There was the robbery theory.

22 A. No, I didn't really consider that as being the most important  
23 aspect of the case, although I would acknowledge that it had  
24 some significance.  
25

1  
2 Q And during the investigation and prior to the reference, did  
3 you make any inquiries to people from the penitentiary  
4 services as to what they might have on record as far as  
5 statements given by Donald Marshall, Jr., is concerned?

6 A. Yes.

7 Q And did they give you these statements?

8 A. I believe I received a fair bit of material from Correction  
9 Services primarily relating to psychiatric assessments and  
10 applications for...for example, temporary absences or leaves.

11 Q Out of these, do you recall, did you see in any of these  
12 statements that Marshall had given very many different  
13 versions of what happened that night in May of 1971?

14 A. He may very well have. I don't recall the substance of the  
15 documents now.

16 Q In any event, I take it that whatever statements were given  
17 to you, you focused just on the narrow issue of having it  
18 established that he was convicted on perjured testimony  
19 rather than investigating the truth of all these statements  
20 that were given to you?

21 A. Yes, certainly more the former than the latter.

22 Q Now tell me something else, please, Mr. Aronson. With  
23 respect to your experience as defence counsel in this area,  
24 now you indicated and it comes from your notes, that you  
25 found a bit of a redneck atmosphere in Sydney. Do you recall

1 that?

2 A. Yes.

3 Q. And this was when you were involved in the reinvestigation  
4 in 1982?

5 A. That's when I made the statement, yes.

6 Q. Did you find that this attitude existed prior to the 1982...did  
7 you become conscious of it prior to 1982?

8 A. Oh, most definitely, yeah.

9 Q. Around when would you have become conscious of this  
10 attitude?

11 A. I can't say that there is a specific day when suddenly the idea  
12 popped into my head. I think it was after having some  
13 experience in dealing with some of the land claims in Cape  
14 Breton, particularly in the rural areas, that I came across  
15 those views.

16 Q. And was this an attitude that was specifically directed toward  
17 just Indians or did they apply to Indians and any other  
18 minority groups?

19 A. My involvement was primarily with Indians and I really  
20 couldn't comment in respect of attitudes towards other racial  
21 groups.

22 Q. And you practiced in Dartmouth for a while?

23 A. I did.

24 Q. How many years were you practicing in Dartmouth?  
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A. Seven, I think.

Q. And for a substantial time your offices were located in the courthouse?

A. Yeah, in the Dartmouth magistrate's court.

Q. And when you were located over there, did you have an opportunity to represent black people from time to time?

A. Yes, I did.

Q. And to the best of your recollection, was there a perception, to any degree among black people, that they felt they were not getting a fair shake as far as the justice system was concerned? A perception?

A. I was certainly never given to believe that by black people who I acted for that they had that feeling. In relation to my own personal dealings with my clients, I have no recollection. Perhaps, when I think about it, I remember just a couple of criminal charges where I recall the clients having been black or other than Indian or white.

MR. ROSS

Thank you very much, Mr. Aronson. No more questions.

EXAMINATION BY MR. WILDSMITH

Q. You and I know each other, Mr. Aronson, but for the record, my name is Bruce Wildsmith and I'm here representing the interests of the Union of Nova Scotia Indians. Let me take the last point that Mr. Ross touched on first. With respect to this

1 rednecked atmosphere that apparently prevailed in Sydney  
2 in 1971, it's fair to say, is it not, that something like that  
3 doesn't just turn on and off like a light?  
4

5 A. Well, I would agree with that statement, yeah.

6 Q. And so it was there in 1971, probably also there through the  
7 seventies and into the eighties?

8 A. Yes.

9 Q. Probably also there today?

10 A. I haven't been to Cape Breton for about five years, but I have  
11 no knowledge of any change.

12 Q. Thank you. Now I'd like to turn your attention for a moment  
13 to Junior Marshall as a witness at the reference hearing and I  
14 think I understood you to say so far that Junior Marshall was  
15 not a very articulate person?

16 A. That's correct.

17 Q. As I look through the beginning of his testimony in front of  
18 the appeal division in Volume 3 at Pages 10, 11 and 13, I see  
19 several times at the outset that the appeal court seems to say  
20 to him directly "Please speak up."

21 A. Yes, he spoke very softly and was difficult to hear unless he  
22 was either very close to the microphone or he spoke louder.

23 Q. Would it be fair to say that Junior Marshall did not make a  
24 very good witness on his own behalf?

25 A. Perhaps so, yes.

1 Q Would you say, based on your experience of some ten years  
2 working on Indian issues in Nova Scotia, that that might be  
3 typical of Indian accused and Indian witnesses?  
4

5 A. It was certainly common, yes.

6 Q I'd like to turn to Volume 29, Page 2, where the note appears  
7 on rednecked atmosphere. Volume 29, Page 2. Mr. Orsborn  
8 directed your attention to that yesterday and I'm looking at  
9 the transcript and it may be helpful if we looked at the  
10 transcript of yesterday's proceedings, Volume 55, Page...if you  
11 can believe it 10124. Does somebody have a copy of that for  
12 you? Volume 55? page 10124.

13 A. 124?

14 Q 124, the very last line at the bottom and I believe it's part of  
15 Mr. Orsborn's question to you. He's translating, I think, that  
16 comment at the top of Page 2. And I wonder if you could  
17 take a look at your notes and I'm particularly referring to the  
18 last phrase which Mr. Orsborn has put down as...or translated  
19 as "but cleared by MacNeil's post." And as I read it, but of  
20 course it's your notes, I read "blamed by MacNeil's past."

21 A. Oh, flamed by MacNeil's Post, Cape Breton Post being the daily  
22 newspaper we had spoken about, I believe in my testimony  
23 yesterday.

24 Q So the first word in that expression is "flamed" is it?

25 A. "Flamed" and that is a reference to when Sandy Seale was

1 killed in 1971, the way it was portrayed or my understanding  
2 of the way it was portrayed that it involved some racial  
3 element and that the newspaper, in other words, Mr. MacNeil,  
4 editor of the Post did nothing to prevent that impression from  
5 being made.

6  
7 Q. And these notes at the top of Page 2, are they the comments  
8 that Harry Wheaton would have made to you then?

9 A. That one would have been because I have never read the  
10 Cape Breton Post in 1971.

11 Q. Is it fair to take from this and I think on Page 125 now, if you  
12 turn the page, there's some sense of this in your testimony  
13 that Harry Wheaton was agreeing with you about these  
14 points?

15 A. I believe that's correct, yes.

16 Q. And that he had concluded...indeed, he testified in front of the  
17 commission this way, that he agreed that a rednecked  
18 atmosphere did prevail in Sydney in 1971.

19 A. Yes.

20 Q. Did you or did he indicate anything to you about how he  
21 informed himself or brought himself around to this view?

22 A. I believe he spoke about it very briefly but I don't have any  
23 recollection of the reasons other than the indication of racial  
24 tension, but I remember having discussed the early 1970's in  
25 Nova Scotia when the...how can I put it, there was a growing

1 movement among blacks in the province as well as amongst  
2 the Indians in the province, to improve their situation.

3 Organizations like the Union of Nova Scotia Indians were  
4 formed in 1969. The Black United Front, I believe, is roughly  
5 in that same time period. And Sydney having a population, a  
6 black population as well as a native population within a fairly  
7 small city, there was some tension and he was aware of that.

8 Q. Going down a little farther on this page in the transcript from  
9 yesterday, when you were asked what you meant by "red  
10 neck", your answer was "intolerant". But I take it from your  
11 explanation later on that when you used this word  
12 "intolerant", you're including tolerance or intolerance based  
13 on race.

14 A. Yes.

15 Q. In other words what you were referring to was racial  
16 intolerance.

17 A. Racial cultural intolerance.

18 Q. Okay. Could you elaborate on the difference?

19 A. No, I think it's just like when I think of the Micmac language  
20 being spoken in front of nonMicmac people, the feeling on the  
21 part of Indians that they were ashamed of their language,  
22 they weren't allowed to teach it in their schools, and they  
23 were basically not in a legal sense forbidden from speaking it  
24 but made to feel ashamed to speak it. That perhaps is, I don't  
25

1 know whether you want to say that that's racial or cultural  
2 because, to me, language is an important part of Micmac  
3 culture, certainly.

4 Q. Thank you. A little farther down in that page towards the  
5 bottom, you indicate "considerable experience in dealing with  
6 native people both in Cape Breton and in mainland Nova  
7 Scotia." And then in the last sentence you refer to "finding  
8 the attitude towards Indians in Cape Breton to be quite poor  
9 and quite intolerant." I'm wondering if you intend to make  
10 the same comment in relation to the mainland of Nova Scotia  
11 or whether you were singling out Cape Breton?

12 A. I found it in my experience perhaps somewhat more in Cape  
13 Breton than on mainland Nova Scotia but I am aware and I  
14 have been involved in some situations, perhaps more blatant  
15 on mainland Nova Scotia than in Cape Breton.

16 Q. Perhaps I could pursue that for a moment because I think  
17 you did answer in the same way yesterday to Mr. Orsborn but  
18 did not elaborate.

19 MR. SAUNDERS

20 Before my friend does, I must rise with an expression of  
21 caution. I think we all well recall the difficulties that we  
22 encountered in the middle of Staff Wheaton's direct examination  
23 when certain revelations were made by that witness and I'm  
24 concerned that if my friend pursues this line of questioning with  
25

MR. ARONSON, EXAM. BY MR. WILDSMITH

1 Mr. Aronson without Mr. Aronson being advised of the danger, if  
2 specific instances or names are to be mentioned, that will run a  
3 grave risk of harming people who aren't here represented and I  
4 have no idea what Mr. Aronson's answer will be and I'm not  
5 prejudging that in any sense of the word, but I am awfully  
6 concerned that there may be indications given by this witness or  
7 some subsequent witnesses that will have that impact. And we're  
8 all here. We've spent some 55 days looking at one wrongdoing  
9 and I'm sure none of us want to see that something else is done  
10 improperly. So I express that concern before Mr. Aronson is  
11 asked this kind of question.

MR. CHAIRMAN

13 So far I've seen nothing from Mr. Aronson that would lead me  
14 to the conclusion that he would place himself in that kind, in that  
15 position. And I'm sure that Mr. Wildsmith won't put that kind of  
16 question to him. The line of questioning so far has been, I think  
17 arising out of the obvious experience that this witness has had in  
18 dealing with natives. Now I agree with you that this is not a  
19 forum for, you know, creating gossip or making statements that  
20 may be harmful to people who are not before us.

MR. SAUNDERS

22 Thank you, My Lord.

MR. CHAIRMAN

24 But I so far have seen no sign of that from this witness.  
25

MR. ARONSON, EXAM. BY MR. WILDSMITH

1 We're always alert to these things but sometimes they catch us  
2 before we can stop them.

MR. WILDSMITH

4 Perhaps I could also comment on that because I did want to  
5 direct his attention to two particular cases or instances that he  
6 has some knowledge of. Hopefully do that in a way that shows  
7 some specifics instead of generalities, but without naming people,  
8 if that is agreeable to the Commission. It's always a danger to talk  
9 in generalities without getting down to any specific cases that  
10 might be available. On the other hand, I understand my friend's  
11 concern.

BY MR. WILDSMITH

13 Q. So at this particular point, Mr. Aronson, you were indicating  
14 that you had some experiences on mainland Nova Scotia that  
15 might be suggestive of racial intolerance, and I take it in the  
16 administration of justice you're referring?

17 A. Yes.

18 Q. And without naming names, could you tell us what transpired  
19 in that case or cases?

20 A. The one case that strikes me as being fairly blatant was a case  
21 that I recall as vividly as if it had happened yesterday and it  
22 happened, I believe, in the late 1970's in Magistrate's Court in  
23 Windsor, Nova Scotia. It was a preliminary hearing of two  
24 Indians charged with assault causing bodily harm and the  
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victim was also an Indian from the Shubenacadie Indian Reserve. During the course of my cross-examination of the witness, who had been called by the Crown, I asked the witness, "What do you do for a living?" And before the witness had an opportunity to respond in testimony, the Crown Prosecutor blurted in, "They're all on welfare." I was somewhat upset at having heard that. I immediately asked the judge to strike it from the record and it was stricken from the record in the same preliminary hearing. At the conclusion of the preliminary hearing, the accused were held over for trial, released on their own recognizance and the last comment that the Crown Prosecutor made to them was, between the time of the preliminary and the time of their actual trial date, "Don't go potato-picking down in Maine." Which was a reference to a custom among many Micmac people in Nova Scotia who go down to Maine towards the end of the summer and early fall, partly as vacation, partly as a small income earner to pick blueberries and potatoes as essentially farm labour.

21 Q. Do you know the latter experience to be a cultural experience  
22 for Micmac people?

23 A. For Micmac people, it is.

24 Q. Do you know enough to elaborate on why it would be that  
25 way?

1 A. Well, for Micmac people, their, part of it has to do with their  
2 relationship and part of it has to do with historically they  
3 have no...Nova Scotia is a political boundary but, historically,  
4 Micmacs have, their territorial area encompasses now what's  
5 part of Maine and they have traditionally traveled and at  
6 certain seasons of the year to various parts of the Maritime  
7 Provinces as well as the New England, northern New England  
8 states.

9 Q. Is it fair to describe this experience as kind of a community  
10 gathering?

11 3:05 p.m. \*

12 A. Oh, very much so. I think just to say that if the prosecutor  
13 had wanted the accused to remain he just could have said,  
14 "And I'd ask you not to leave the jurisdiction." Instead he  
15 made a comment that was, in my view, uncalled for,  
16 unnecessary and blatantly racist.

17 Q. Were there other experiences on mainland Nova Scotia that  
18 you had in mind?

19 A. None quite as clear as that or that I could with any honesty  
20 say was evidence of racism.

21 Q. Okay. Now, you have a reasonable degree of experience in  
22 working with Indians and working on Indian issues. We've  
23 already heard evidence of some time employed with the  
24 Union of Nova Scotia Indians, some ten years experience of  
25 working in private practise in Nova Scotia, working with the

1 Union of Nova Scotia Indians, although not directly employed  
2 by them, some time with the Department of Indian Affairs in  
3 Ottawa, I believe also with the Department of Justice in the  
4 native law section.

5 A. That's correct.

6 Q. And, indeed, you have a Masters Degree in Law from Monash  
7 University in Australia.

8 A. I do, yes.

9 Q. And your work there was based on...

10 A. Aboriginal land claims.

11 Q. Now, based on that experience and that background, would  
12 you say that getting limited glimpses of racial attitudes as  
13 through this case you've just elaborated that these kinds of  
14 glimpses are, indeed, significant?

15 A. Oh, yes, I think they're...to me they're significant  
16 when...because to me it appears that that's just one incident  
17 and that there are likely other incidents that we're not aware  
18 of or perhaps aren't quite as blatant as that.

19 Q. And indeed, that it's very difficult to get at racial attitudes.

20 A. Oh, very difficult. It's...the common thing you hear and which  
21 I had heard several times in Cape Breton is when you would  
22 talk with white people in terms of land claims that you acted  
23 for the Indians the first thing you would hear is "Well, one of  
24 my best friend is an Indian," where...and perhaps they didn't  
25 think of it in those terms, but I found myself somewhat

1 sensitive to that kind of a comment.

2 Q. What did you take by that comment?

3 A. Well, that somehow they wanted to say, "Look, I'm a...you  
4 know, I have friends that are Indians and I don't have  
5 anything against them."

6 Q. And so there is something significant about denying...

7 A. Yeah, sort of like taking an opposite kind of attack. But that's  
8 how it impresses me.

9 Q. Yes.

10 A. I don't want to suggest that that's, in fact, what other people  
11 would take from a comment like that.

12 Q. Well, something else you indicated yesterday and it's on page  
13 10126 in the transcript, when you were asked these kinds of  
14 questions by Mr. Orsborn you started out by referring to  
15 history. And you say in answer to his question, "Why would  
16 you reach a conclusion about an intolerant attitude towards  
17 Indians?" you say, "As much from historical research as from  
18 actual experience." Could you elaborate on why your  
19 historical research might be relevant?

20 A. Well, I think racism is something that you have...you do not  
21 have one day and then suddenly one has it the next day. It's  
22 built up through attitudes, through misunderstanding,  
23 through ignorance, that's developed over a fairly lengthy  
24 period of time. And I don't think one can say that if there  
25 was any racial tension or racial difficulties in Cape Breton that

1 it started on the night that Sandy Seale was stabbed in  
2 Wentworth Park. It had always...or it had been there for  
3 some period of time before that. When dealing with Indian  
4 people in Nova Scotia if one goes back to look at how...when  
5 Nova Scotia was a British colony how the Indians were dealt  
6 with in Nova Scotia, how the reserve system was set up in  
7 Nova Scotia, the pleas on the part of Indian people to treat  
8 them in accordance with the laws that the province had  
9 passed, to get the sheriffs to enforce their rights to their  
10 reserves, rather than helping the squatters. That there was  
11 a...they were not part of the system. They were outside the  
12 system and they were second class and that's historical  
13 treatment of Indians in the Province of Nova Scotia.

14 Q. Do you see any evidence to suggest a change?

15 A. I think perhaps some attitudes have changed. But I think it's  
16 perhaps less easily established today then it is in the  
17 historical record. I don't think people are going to get up on  
18 the stand or going to testify, "Yes, I'm a racist and I'm proud  
19 of it." I think that's a difficult thing to establish.

20 Q. Okay. Let me take you back to one other episode that you  
21 commented on yesterday and that was to do with Sydney and  
22 with the Sydney Reserve...or Sydney Indian Reserve case that  
23 appeared in the Exchequer Court Reports dealing with an  
24 expropriation not too long after the turn of the century. Can  
25 you help us out a little more as to what happened then and

1 | why that might be significant today?

2 | A. Well, in Cape Breton the reserve that was expropriated as a  
3 | result of the Exchequer Court decision is that part of the City  
4 | of Sydney on which the Holiday Inn currently exists. It's a  
5 | very valuable piece of land, was a very valuable piece of land  
6 | at that time. It's on the main road, Kings Road going into  
7 | Sydney. It's currently owned by, I believe, DEVCO. The re...

8 | Q. Is that on Sydney Harbour, on the waterfront?

9 | A. On Sydney River.

10 | Q. Sydney River.

11 | A. I think of it as where the Holiday Inn is because to me it's a  
12 | main landmark in the City. Sorry.

13 | Q. We're all familiar with that location.

14 | A. In any event, in the early part of this century the City was  
15 | developing and starting to encroach all around the reserve  
16 | and there was a section in the Indian Act, the federal Indian  
17 | Act at the time which permitted an application to be made by  
18 | the Exchequer Court to expropriate Indian reserve land for  
19 | such reasons, I think, as the Court thought just. The  
20 | application was taken and purported to remove Indians from  
21 | the influences of white people and liquor. Indians took no  
22 | part whatsoever in the case, in the hearing of the case, they  
23 | had a representative, a solicitor appointed to act on their  
24 | behalf and, as I recall the case, and it's a reported decision,  
25 | the court commented on how well counsel for the native

1 people had acted in the case. There was no testimony given  
2 by any Indian person. All the testimony was given by non-  
3 Indian people in terms of ministers or priests or business  
4 people, municipal leaders and so on saying that this was in  
5 the best interest of Indian people. The decision was to  
6 expropriate, the compensation was paid and the current  
7 Indian reserve or a large portion of the current Indian  
8 reserve in Sydney, which, by the way, is now also in the City  
9 of Sydney, was purchased with the proceeds of the sale of  
10 that land. The land is far less valuable and while there is  
11 greater size, the band itself has since that reserve was created  
12 expanded in population beyond the boundaries of that  
13 reserve.

14 Q. So, is it fair to think that that's a lingering source of  
15 discontentment on the part of the Indian people?

16 A. Certainly the Indian people in Cape Breton and in Sydney feel  
17 that way.

18 Q. Okay. Coming back to this difficulty of getting at racial  
19 attitudes. Is it fair to think that a kind of lack of  
20 responsiveness or a lack of cooperation on the part of people  
21 would be one sign or one indication that there may be a racial  
22 problem?

23 A. It's possible, yes.

24 Q. Are there other kinds of signs or forms of acting that you  
25 might take into account?

- 1 A. I don't think I can really think of any...I'm sort of a little  
2 vague on that question, I guess.
- 3 Q. Okay. It's a difficult issue to ask questions about. Let me  
4 direct your attention to volume 31, page 10. This is the letter  
5 that you received back from Chief John MacIntyre.
- 6 A. I don't think I've got it.
- 7 Q. It's coming. Volume 31.
- 8 A. I have it, thank-you.
- 9 Q. Okay. Page 10. It is Exhibit 123 though.
- 10 A. 124.
- 11 Q. Yes. Do you have that letter in front of you now?
- 12 A. I do.
- 13 Q. Yeah. I take it this is the response that you received to your  
14 enquiry for the City of Sydney Police Department to look into  
15 the new information in relation to Junior Marshall?
- 16 A. Yeah, that came after I had already received a phone call  
17 from the R.C.M.P. so I was aware of it.
- 18 Q. Did you have any particular reaction to the tone of the letter?
- 19 A. Other than the fact that it wasn't even signed, ah, it sort of  
20 made me wonder. I...just a short note just to indicate that it  
21 had been received.
- 22 Q. But it doesn't provide you with any information.
- 23 A. No, but as I've indicated when I had received...
- 24 Q. Yes.
- 25 A. ...this letter dated February 15th I had already spoken with

1 the R.C.M.P. on February, I think it was February 8th or 9th  
2 and knew that they had received the information. So, this is  
3 more or less confirmation, so I...it was of no great significance  
4 to me at the time.

5 Q. Okay. Fair enough. We also have some testimony that a man  
6 named Dan Paul paid a visit to Detective Urquhart in August  
7 of 1981, I believe. You know who Dan Paul is?

8 A. Yes.

9 Q. Because you copied some of your letters to Dan Paul.

10 A. That's correct.

11 Q. Did you ever have any discussions with him about his  
12 meeting with Detective Urquhart bringing forward Roy  
13 Ebsary's name?

14 A. I recall having had conversations with Danny Paul. I have no  
15 specific recollection of that particular conversation.

16 Q. Okay. Now, this is all leading up to really one question that I  
17 want you to respond to and that question is this, I'm  
18 wondering whether in your view the fact that Junior Marshall  
19 was an Indian had anything to do with the events that  
20 surrounded him, anything to do with what happened to him?

21 A. It's my belief that it did.

22 Q. Can you help us out as to why that might be?

23 A. I think perhaps the...well, the murder of Sandy Seale was no  
24 doubt a serious case in Sydney at the time. I believe that if it  
25 would have been other than...it would have been a person

1 other than an Indian, perhaps there would have been a  
2 greater amount of time and effort spent both on the part of  
3 the police and others in the system.

4 MR. PUGSLEY

5 I object to this, My Lord, I don't know how this witness can  
6 possibly give this kind of evidence.

7 MR. RUBY

8 Well, because it explains why this man worked the way he  
9 did, why he made the decisions he did, why he approached the  
10 problem in the way he did and without that kind of perception on  
11 his part you can't understand his evidence in a full way.

12 MR. WILDSMITH

13 Not only that, but Commission counsel asked the same  
14 question of Sergeant Wheaton.

15 MR. PUGSLEY

16 My objection goes to the fact that this witness does not have  
17 the background or the experience in Sydney in 1971 to speak  
18 knowledgeably and in an informed matter concerning those  
19 events.

20 MR. CHAIRMAN

21 I am treating what he is saying as an opinion of his based on  
22 his review of the events that occurred in 1971. He can't go any  
23 further than that.

24 MR. WILDSMITH

25 Indeed my question was broader than that though and I

MR. ARONSON, EXAM. BY MR. WILDSMITH

1 think goes to his own experience in working on behalf of Junior  
2 Marshall in this case.

MR. CHAIRMAN

4 Well, but as to what...obviously as to what happened in 1971,  
5 that is something beyond his direct knowledge but based upon his  
6 review of the files and, as you say.

MR. WILDSMITH

8 Yes.

MR. CHAIRMAN

10 ... subsequent involvement with Donald Marshall, Jr., as his  
11 counsel, and...

MR. PUGSLEY

13 No personal knowledge of Chief MacIntyre. I don't even  
14 know whether he's ever met him or Mr. Urquhart, how can he  
15 possibly say whether they would have...

MR. CHAIRMAN

17 I don't think he's...so far he hasn't said anything that I could  
18 directly attribute to an attitude on the part of your client or Mr.  
19 Urquhart.

MR. PUGSLEY

21 I think the witness was starting to say that...

MR. CHAIRMAN

23 Well, if he's...

MR. PUGSLEY

25 ...if Mr. Marshall had not been an Indian then the police would

1 have worked harder. I don't know what his basis...

2 MR. CHAIRMAN

3 But that's police, yes, but that's a more generalized statement.  
4 I'll listen very carefully to his answer. Now what...where were  
5 we...

6 MR. WILDSMITH

7 Q. Yes, I was asking you the question about whether the fact  
8 that Junior was an Indian had anything to do with any of the  
9 events that surrounded him and I think your answer is "yes".  
10 I asked for some elaboration and you started by referring to  
11 the work of the police.

12 A. And others in the law enforcement system, whether it was  
13 the...perhaps the Crown or other actors, perhaps would have  
14 taken it in my view more seriously.

15 Q. Yes. And moving into the time of your own experience in  
16 trying to get the system of justice to work on Mr. Marshall's  
17 behalf, what would you say about whether the system would,  
18 in your view, have been more responsive or the actors in the  
19 system more responsive if Mr. Marshall had not been an  
20 Indian?

21 A. I'm a bit more uncertain about that. I personally believe that  
22 it would have happened somewhat quicker in terms of the  
23 province's involvement in it, but I have no real basis to  
24 suggest that.

25

MR. ARONSON, EXAM. BY MR. WILDSMITH

1 3:20 p.m.

2 Q Let me direct you to one factor. I believe we will be hearing  
3 evidence later on that a common position taken by the  
4 Department of the Attorney General is that Indians were a  
5 federal responsibility and, therefore, they should not act. Can  
6 you tell us whether in your experience...

7 MR. SAUNDERS

8 But that's not the evidence, My Lords. I'd like to know where  
9 my friend gets that as being a common position throughout the  
10 Department. I don't know that to be the evidence.

11 MR. WILDSMITH

12 Well, it's evidence I'm anticipating but let me stop that and  
13 move back a stage and ask the witness whether this is part of a  
14 response that he received?

15 MR. CHAIRMAN

16 His evidence is that early he went to the Minister of Indian  
17 Affairs and asked if he would assume responsibility for his legal  
18 fees.

19 MR. WILDSMITH

20 Yes, that's one component.

21 MR. CHAIRMAN

22 Did you assume at that time that there was responsibility for  
23 the Department of Indian Affairs?

24 MR. ARONSON

25 Oh, I made no such assumption at all. What was involved

MR. ARONSON, EXAM. BY MR. WILDSMITH

1 | there was that the Union was saying that their funding came from  
2 | by and large Department of Indian Affairs and when we discussed  
3 | the issue of fees, it was in the company of the then president of  
4 | the Union of Nova Scotia Indians. I don't know if I've...

BY MR. WILDSMITH

5 |  
6 | Q. Well, my question to you, really, is, part of my question to  
7 | you is whether in your experience in working on Junior's  
8 | behalf whether a response that you received from the  
9 | Attorney General's Department was that you ought to look to  
10 | the federal government because Indians were a federal  
11 | responsibility?

12 | A. The departmental officers of the Attorney General never  
13 | made that statement. The then Attorney General made the  
14 | statement.

15 | Q. Okay, and what do you say about that kind of statement?

16 | A. I found it to be made perhaps out of, I found it difficult to  
17 | believe that an attorney general of a province would make a  
18 | statement like that, particularly given the constitutional fact  
19 | that the provinces are charged with responsibility for  
20 | administration of justice in a province and that does not  
21 | exclude Indian people.

22 | Q. Thank you. I'd like to move on now and direct your attention  
23 | to the work of the Appeal Division on that reference. I take it  
24 | that one of the issues that was not put to the Appeal Division  
25 | was this question of whether Marshall's race was a factor in

1 his conviction.

2 A. That's correct.

3 Q. When you suggested at the press conference on the date of  
4 this decision that there be a public inquiry, I take it you  
5 would have anticipated that allegations of racism would have  
6 been part of the work of that public inquiry.

7 A. I think that's a correct assumption. It would have been one  
8 aspect, certainly.

9 Q. Is it fair to think that the comments by the Appeal Division  
10 referring to any miscarriage of justice having been more  
11 apparent than real, would have the impact of diminishing the  
12 energy towards a public inquiry?

13 A. I guess one could read it that way. I certainly didn't.

14 Q. You did not. Okay. At one point in your testimony, you  
15 indicated a preference for Sec. 617(c) of the Criminal Code as  
16 being the appropriate course of action on the part of the  
17 Minister of Justice. That's correct?

18 A. That's correct.

19 Q. And I take it that one of the consequences of that provision in  
20 the Criminal Code is that the ultimate decision would rest  
21 then with the Minister of Justice.

22 A. That's right.

23 Q. Can you indicate why you had a preference for the Minister of  
24 Justice making the decision rather than the appeal division?

25 A. It was not the kind of remedy that would be available; that is,

1 a free pardon was only a prerogative that could be exercised  
2 by the Crown and a court could acquit. And perhaps it had  
3 the same technical effect but, personally, I was in favour of  
4 the free pardon which was available through the federal  
5 crown.

6 Q. Okay. One last question. When you came in front of the  
7 Appeal Division, we've had evidence that the make-up of the  
8 panel of the Appeal Division sitting then was different than  
9 on the application for fresh evidence.

10 A. Yes.

11 Q. And that difference was the presence of Mr. Justice Pace  
12 instead of Mr. Justice Morrison.

13 A. That's correct.

14 Q. Did you have any reaction to that change in the make-up of  
15 the panel?

16 A. I don't know how to make this into a short answer. When the  
17 panel walked in the morning of the reference, my client had  
18 not appeared and I realized because it was Mr. Justice Pace  
19 who was the first to enter the courtroom, I also realized that  
20 he had been the Attorney General of this province. I was not,  
21 it flashed through my mind that he had been Attorney  
22 General of the province but I just did not recall the period of  
23 time during which he was the Attorney General. To me, it's  
24 sort of like keeping track of regnal dates. I'm not too good at  
25 it. But as I say, I was more concerned with the fact that my

MR. ARONSON, EXAM. BY MR. WILDSMITH

1 client was not there as he was going to be the first witness.

2 That's the only comment I have on that one.

3 Q. So I take it you didn't, it didn't enter your mind to suggest  
4 something ought to be done at that particular point.

5 A. No.

MR. WILDSMITH

7 Thank you then. Those are my questions.

EXAMINATION BY MR. RUBY

9  
10 Q. I have one further question arising out of the Attorney  
11 General's question. The question is, the counsel for the  
12 Attorney General asked you were the Attorney General's  
13 officials as concerned as you with getting the acquittal and  
14 then going on to the compensation issue and you answered,  
15 "Yes, but I think they had other concerns as well." I'd like to  
16 ask, My Lord, what those other concerns were?

17 A. Oh, the concerns would have been directed primarily, I guess,  
18 at compensation, various other aspects of the case including...I  
19 had even raised, as I recall, the question of public inquiry at  
20 that time with the Attorney General's office. They were  
21 concerned about procedure and process, that type of thing.

MR. RUBY

23 Thank you.

MR. CHAIRMAN

25 Mr. MacDonald.

DISCUSSION

1 MR. MACDONALD

2 No questions.

3 MR. CHAIRMAN

4 I really haven't any questions to put to you, Mr. Aronson, but  
5 I'm intrigued by your response to Mr. Wildsmith's question about  
6 your studies in Australia. Could you tell us, and I have a reason  
7 for asking that, and it may become apparent over the months.

8 MR. ARONSON

9 How did I end up in Australia?

10 MR. CHAIRMAN

11 No, no, but the nature of the work you did there and where,  
12 what university?

13 MR. ARONSON

14 I attended Monash University which is in Melbourne,  
15 Australia.

16 MR. CHAIRMAN

17 What's the name again?

18 MR. ARONSON

19 Monash, M-O-N-A-S-H. It's named after an Australian  
20 general during the First World War who led the Australian  
21 Expeditionary Force. It was at the Faculty of Law at that  
22 university which claims to be the largest law school in the British  
23 Commonwealth. I studied under a woman named Dr. Elizabeth  
24 Eggleston, who was heading an institute, the Aboriginal Legal  
25 Affairs Institute, which was quite a small operation and she was

DISCUSSION

1 also a professor at the law school. She was my supervisor and my  
2 work was largely in the area of Aboriginal title, native land rights  
3 in Australia compared to the treatment in Canada and the United  
4 States. Because there had just been a generally well known  
5 decision in Australia called Miller v. Nabalco Proprietary Limited,  
6 which was a major land claim case in Northern Australian and it  
7 had happened approximately the same time as the Calder case in  
8 British Columbia, which the Supreme Court handed down its  
9 decision in 1973...No, I'm sorry, it would have been a little later  
10 than that, 1975 Supreme Court of Canada. The Miller decision was  
11 handed down by the Northwest Territories Supreme Court in 1974  
12 and it was an extremely lengthy and exhaustive decision, perhaps  
13 one of the most exhaustive discussions of the components of  
14 Aboriginal title claims and proof of Aboriginal title claims in the  
15 British Commonwealth. And that's the main reason why I was,  
16 that's what I was studying and the reason for it.

MR. CHAIRMAN

18 Thank you very much. Thank you so much for coming down  
19 from Ottawa.

20 THE WITNESS WITHDREW.

22 INQUIRY ADJOURNED UNTIL MARCH 16th AT 9:30 a.m.

## REPORTER'S CERTIFICATE

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



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Margaret E. Graham

DATED THIS 15 day of March 1988 at Dartmouth, Nova Scotia