

RG 44
Vol. 234
#2

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

Volume 57

Held: March 16, 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. Justice 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

P R E S S

MEDIA POOL COPY

INDEX - VOLUME 57

Mr. Ronald Giffin

Examination by Mr. Spicer	10337
Submission by Mr. Saunders	10361
10:15	10368
Submission by Mr. Spicer	10378
Submission by Mr. Ruby	10388
Discussion by Counsel	10394
Examination by Mr. Spicer Continued	10399
11:46	10407
12:07	10421
2:14	10437
2:29	10446
2:51	10460
3:11	10473
4:05	10488
4:19	10498

EXHIBIT LIST

<u>Exhibit</u>	<u>Description</u>	<u>Page</u>	<u>Volume</u>
92	Four pages of Mr. Smith's handwritten	6833	37
93	Mr. Smith's record of polygraph examinations	6833	37
94	Copy of Donald L. Burgess' job description dated 1983	7134	38
95	A-5 with related notes and RCMP correspondence	7150	38
96	Copies of pages of Sgt. Cole's notebook	7225	39
97	Copy of Melinda MacLean's file	7243	39
98	Volume 29	7484	41
99	Volume 34	7484	41
90A	Photocopy of handwritten notes by Staff Sgt. Wheaton (typed version in Exhibit 90)	7490	41
90B	Original of Staff Sgt. Wheaton's notes (original in Exhibit 90)	7491	41
100	Statement of G.A. Ebsary dated April 19, 1982	7492	41
101	Statement of Donald Marshall, Jr. to Cpl. Carroll dated Feb. 18, 1982, taken at Dorchester Penitentiary	7493	41
102	Affidavit dated September 1982 of Staff Sgt. Wheaton	7495	41

<u>Exhibit</u>	<u>Description</u>	<u>Page</u>	<u>Volume</u>
103	Statement of Roy Newman Ebsary February 23	7574	41
104	Cpl. Carroll's handwritten notes	7581	41
105	six excerpts from <u>Cape Breton Post</u> dated May 29, 31, and June 1, 2, 3, and 5, 1971	7656	42
106	Volume 37. Transcript of June, 1984 examination for discovery of Heather Matheson, <u>John F. MacIntyre v. Canadian Broadcasting Corporation.</u>	7656	42
100A	Original of Greg and Mary Ebsary's state- ment	8014	44
88A	Copy of Staff Sgt. Wheaton's written notes	8163	44
107	Calender for years 1800 to 2500	8229	45
108	Photocopy of Staff Sgt. Wheaton's notes	8230	45
109	Diagram drawn by Staff Sgt. Wheaton of John MacIntyre's office with seating plan of meeting of April 26, 1982	8231	45
110	Three pages from discovery evidence of Heather Matheson	8277	45
111	RCMP guide for contact with media	8280	45
112	Correctional Services records of Donald Marshall, Jr. (Volume 35)	8516	46
113	Stephen Aronson's correspondence re fees (Volume 27)	8530	46

			C
105A	Article from <u>Cape Breton Post</u> concerning Donald Marshall's remand	8587	47
114	Original of Donald Marshall, Jr.'s statement taken at Dorchester Penitentiary, March 9, 1982		50
115	Supt. Scott's notes, 1982	9251	50
116	<u>Cape Breton Post</u> issue, June 19, 1986 one page		50
117	R.C.M.P. Operational Manual, one page	9303	51
118	Letter January 8, 1980 from Inspector Scott to Chief A. Christmas	9453	51
119	Mr. Urquhart's resumé	9476	52
120	Criminal record and fingerprint records of Robert Patterson	9551	52
121	Mr. Roy Ebsary's fingerprint record from Sydney Police Department, April 9, 1970	9614	52
122	Copies of portions of Criminal Code of Canada	9651	53
123	Volume 30 of Marshall Inquiry docs.	9651	53
124	Volume 31 of Marshall Inquiry docs.	9651	53
125	Volume 32 of Marhsall Inquiry docs.	9651	53
126	Copy of letter dated May 10, 1983 from the Chief Justice of Nova Scotia to Minister of Justice	9651	53
127	Notes of Mr. Ron Fainstein	9693	53

D

128	Report of Federal-Provincial Task Force	9762	53
129	Brian Williston's telephone notes	9864	54
130	Collection of newspaper articles	9893	54
131	Volume 38 of Marshall Inquiry docs.	9899	54
132	Vol. 28 - Correspondence, October December, 1984, 1986	10081	55
133	Single sheet of paper in S. Aronson's Handwriting - "meeting with Junior" September 3, 1981	10081	55
134	Volume 39, compilation of material court of appeal files	10082	55
136	Copy of sec. 4. of the Public Service Act	10337	57
137	Cabinet documents	10456	57
135	Volume 33	10462	57
139	Letter June 1984 from F. Cacchione to Attorney General's Department	10486	57

MR. GIFFIN, EXAM. BY MR. SPICER

1 MARCH 16, 1988 - 9:35 a.m.

2 MR. CHAIRMAN

3 Mr. Spicer?

4 MR. SPICER

5 Good Morning, My Lord. The witness today is Ron Giffin.

6
7 RONALD GIFFIN, duly called and sworn, testified as follows:

8
9 EXAMINATION BY MR. SPICER

10
11 Q. Mr. Giffin, you're a member of the Nova Scotia Bar?

12 A. That's correct.

13 Q. Graduated from Law School in 1966 and were admitted to the
14 Bar in the same year.

15 A. Yes.

16 Q. Thereafter, you practiced law in Truro for a period of time?

17 A. Yes.

18 Q. Until when?

19 A. Until 1978.

20 Q. Since 1978, you've been in public life?

21 A. Yes.

22 Q. As an M.L.A. and Cabinet Minister.

23 A. Yes.

24 Q. And if I could just run through your various positions over
25 the years, can you tell me, and correct me if I'm wrong, from

1 October, 1978 until June 1979, you were the Minister of
2 Municipal Affairs?

3 A. Yes.

4 Q. And had responsibility for the Human Rights Commission?

5 A. Yes.

6 Q. June 1979 to December 1981, had responsibility for the
7 Management Board?

8 A. Yes.

9 Q. December 1981 to November 1983, you were Minister of
10 Transportation and Communication.

11 A. Yes.

12 Q. And then November 1983 until February 1987, you were the
13 Attorney General?

14 A. Yes.

15 Q. And from February 1987 to December 1987, Minister of
16 Vocational Training, and you're currently the Minister of
17 Education.

18 A. Yes.

19 Q. In your practice as a lawyer, did you have occasion to practice
20 frequently as a criminal lawyer?

21 A. Yes, I did quite a bit of defence work and also some
22 prosecutions.

23 Q. In the prosecution work that you did, were you doing that on
24 a part-time basis?

25 A. Yes, I was in private practice and I was an assistant

1 prosecutor in the Truro area to fill in for the regular crown
2 prosecutor when he wasn't available.

3 Q. In respect of federal matters or provincial?

4 A. Provincial.

5 Q. Before we deal specifically with the matters arising out of the
6 Donald Marshall case, I just wanted to ask you a series of
7 questions concerning your role in general terms as an
8 Attorney General? Perhaps if Mr. Giffin can have put in front
9 of him Exhibit 136, which is Sec. 4 of the Public Service Act.
10 Mr. Giffin, during the time that you were Attorney General,
11 would you agree that your functions and powers and duties
12 were governed by Sec. 4 of the Public Service Act?

13 A. Yes, that's correct.

14 **EXHIBIT 136 - COPY OF SEC. 4 OF PUBLIC SERVICE ACT.**

15 Q. Could you tell us with respect to some of these headings what
16 you understood your job to be? Let's take (a) first. It
17 indicates that "you shall be the law officer of the Crown."
18 What did you understand that to mean?

19 A. Well, that the Department, among other things, is responsible
20 for legal advice to all provincial government departments and
21 responsible for representing the Government of Nova Scotia in
22 legal matters generally.

23 Q. For instance, if you were as Attorney General had formed the
24 view that a prosecution should proceed in your role as law
25 officer, would that be the type of matter that you would take

1 to Cabinet?

2 A. No.

3 Q. Why not?

4 A. Because that's a role which is independent of the Executive
5 Council.

6 Q. Would there have been any, would there then be no occasions
7 on which you would take a prosecution matter to Cabinet?

8 A. That is correct.

9 Q. Would you discuss the question of whether or not there ought
10 to be a prosecution in any particular case with any other
11 members of Cabinet?

12 A. No.

13 Q. Or with the Premier?

14 A. No.

15 Q. With respect to the Donald Marshall situation, a case where
16 the government was called upon to make a decision about
17 making a payment to Donald Marshall, was that the sort of
18 thing that you would take to Cabinet?

19 A. Yes.

20 MR. SAUNDERS

21 I object at this point. My Lords, I can say on behalf of the
22 Department and the province that we take the position that there
23 is Crown immunity with respect to questions posed by Mr. Spicer
24 to a member of the Crown, a member of Cabinet. Our position will
25 not come as any surprise to my friend. He's been aware of it and

DISCUSSION

1 we've discussed it and we're prepared to make submissions to
2 Your Lordships this morning on that point. We have provided to
3 the Commissioners certain written materials with respect to
4 recommendations and reports and Orders-in-Council and Your
5 Lordships have determined which of those documents are
6 relevant and we have waived whatever privilege might have
7 attached to those paper documents. But we claim privilege on
8 behalf of this current Minister with respect to discussions had
9 between and among members of Cabinet on this case.

MR. CHAIRMAN

11 But so far we haven't reached that stage, have we?

MR. SAUNDERS

13 Well, getting very close. My friend asked "Is that the kind of
14 thing that would be discussed in Cabinet?"

MR. CHAIRMAN

16 And the answer was "yes".

MR. SAUNDERS

18 The answer was "yes" and I wish to alert the Commission the
19 claim of immunity that we're making on behalf of this Minister.

MR. SPICER

21 Do you object to the question, "Was this matter discussed in
22 Cabinet?"

MR. SAUNDERS

24 Yes, I do because...I object to it, My Lords, because I wouldn't
25 want it said later by any other individuals present that by failing

DISCUSSION

1 to object to that question I have left it open that people may ask,
2 well, what was discussed? Who said what to whom? And so I'm
3 making the objection to the first question posed by my friend.

4 MR. CHAIRMAN

5 But are you asking us to rule on that now?

6 MR. SAUNDERS

7 If Your Lordships are prepared to rule on the question, yes,
8 my friend and I are prepared to make submissions on the point.

9 MR. CHAIRMAN

10 It seems to me you're a little premature and maybe we
11 should note it as a caveat. I mean we can't stop you from
12 objecting, anyway. And leave it to you to raise the objection when
13 you reach the objectionable stage, objectionable in your mind.

14 MR. SAUNDERS

15 Very well, My Lord.

16 MR. CHAIRMAN

17 Which is a stage I don't think we've reached so far.

18 MR. SAUNDERS

19 I felt we were getting close and I...

20 MR. CHAIRMAN

21 Yeah, but close only counts in horseshoes.

22 MR. SAUNDERS.

23 That's right. That's right, but rather than have errors on the
24 record, I wanted to make that position known.

25

DISCUSSIONMR. SPICER

1
2 If I can just be sure of my friend's position, once we do get to
3 the objectionable point and you make your real objection, you're
4 not really objecting to the pure question itself, "Was that matter
5 discussed in Cabinet?" It's the next question, "Well, what was the
6 nature of the discussion?" that you really object to.

MR. SAUNDERS

7
8 Well, My Lord, I feel it incumbent upon me to object to the
9 first question as posed by my friend because by not doing so,
10 others may say, "Well, you've already allowed that that point was
11 discussed. Now I want to know what was discussed and by
12 whom."

MR. CHAIRMAN

13
14 All right, we have your objection and that will be borne in
15 mind. So that's, you're not...The failure of this Commission to deal
16 with the objection now is not, will not prejudice you.

MR. SAUNDERS

17
18 Thank you, My Lord.

BY MR. SPICER

19
20 Q. Mr. Giffin, what did you understand your role to be under
21 4(a) of the Public Service Act as a legal member of the
22 Executive Council?

23 A. Well, I understood the role of the Attorney General ultimately
24 to be responsible for the administration of justice in the
25 Province of Nova Scotia.

- 1 Q. And, more specifically, could you tell me what you
2 understood that phrase to mean, "the legal member of the
3 Executive Council"?
- 4 A. I'm not sure if you're looking for a legal interpretation of
5 that...
- 6 Q. No, I'm just asking you what you understood it to mean.
- 7 A. My understanding of it was simply that it really tied in with
8 the expression "law officer of the Crown", and that if matters
9 relating to, legal matters arose in Cabinet in the Executive
10 Council that I would be the Minister to whom the Executive
11 Council would turn for advice.
- 12 Q. So that if a legal matter arose in the course of a Cabinet
13 discussion, you would be the person or the Cabinet Minister to
14 whom others would turn to seek legal advice, is that correct?
- 15 A. That's correct.
- 16 Q. Do I take it that in your role as Attorney General, you had
17 certain relationships with the Royal Canadian Mounted Police?
- 18 A. Yes.
- 19 Q. There's been some evidence and some discussion during the
20 course of these hearings as to the relationship between the
21 R.C.M.P. and the Attorney General's Department. Would you
22 be of the view that you, as the Attorney General, had
23 authority to tell the R.C.M.P. not to continue an investigation?
- 24 A. I would put it this way, I think the ultimate authority that
25 the Attorney General has is with respect to prosecutions. The

1 Attorney General always has the power to issue a stay of
2 proceeding in a prosecution. That the R.C.M.P. could, for
3 example, conduct an investigation, lay a charge, and that the
4 Attorney General would have always the discretion to issue a
5 stay of proceeding and to stop the prosecution.

6 Q. My question, though, related to a stage prior to that. That is,
7 if an investigation was being conducted by the R.C.M.P. prior
8 to a charge being laid, would you be of the view that the
9 Attorney General had the right to tell the R.C.M.P. to not
10 continue with that investigation?

11 A. Yes, I think as the ultimate, as the person ultimately
12 responsible or the Minister ultimately responsible for the
13 administration of justice in the Province, that an Attorney
14 General would have that power.

15 Q. How would you, sir, as Attorney General, keep yourself
16 advised, if you did, of on-going police investigations?

17 A. The practice that was followed vis-a-vis the R.C.M.P. was that
18 Mr. Gordon Gale, the Director of Criminal Matters in the
19 Department met regularly with the R.C.M.P., usually once a
20 week to maintain communication with them on outstanding
21 matters and then he, in turn, and the Deputy Attorney
22 General and the Assistant Director of Criminal Matters would
23 keep me briefed on those matters that had to be brought to
24 my attention.

25 Q. Those once weekly meetings that you're referring to, would

1 those be the Thursday morning meetings with the R.C.M.P.?

2 A. Yes.

3 Q. Would you ever attend those yourself?

4 A. No.

5 Q. But you were kept advised.

6 A. Yes.

7 Q. Do you have any idea what matters were discussed at those
8 meetings other than the one you just mentioned?

9 A. I'm not sure that I can tell you what was discussed at those
10 meetings because I didn't attend them, but it was my
11 understanding that the...

12 Q. You were advised by Mr. Gale, were you?

13 A. Yes, that's right, that the communication between Mr. Gale
14 and the R.C.M.P. was on cases which were outstanding, I
15 assume, on the status of investigations and prosecutions and
16 that sort of thing.

17 Q. As Attorney General, would you, were you of the view that
18 the government would have had any, or the Crown would
19 have had any legal liability with respect to the activities of
20 municipal police forces? For instance, the Sydney Police
21 Department?

22 A. No.

23 Q. I'd like to ask you some questions now concerning the
24 functioning of your Department during the time that you
25 were Attorney General. Gordon Coles was the Deputy

MR. GIFFIN, EXAM. BY MR. SPICER

1 Attorney General at the time?

2 A. Yes.

3 MR. CHAIRMAN

4 Excuse me, Mr. Spicer. The question you put, you asked Mr.
5 Giffin whether in his view the, he as Attorney General would have
6 any legal liability for the Sydney Police Department and he said
7 "no". I'd be interested to hear his views as to whether or not he
8 would have, he has the power to direct the Sydney Police, if he
9 chose to so exercise it, in the area of enforcement of the criminal
10 law?

11 MR. GIFFIN

12 My Lord, I think that would flow from the ultimate authority
13 that an Attorney General has with respect to prosecutions in the
14 Province. I don't recall ever being faced with that particular
15 situation but it would appear to me that if a municipal police force
16 initiated a prosecution and that the Attorney General was of the
17 view that that prosecution ought not to proceed, that the Attorney
18 General could issue a stay of proceedings. So I think the ultimate
19 authority would be there.

20 BY MR. SPICER

21 Q. And I take it once again from that answer that not only with
22 respect to a stay of proceedings, but would your answer be
23 the same with respect to the Municipal Police Force as it was
24 with the R.C.M.P.; that is, that you could request an
25 investigation be stopped?

1 A. That's a very difficult question because, first of all, I never
2 faced that situation that I can recall when I was Attorney
3 General. And, secondly, the Municipal Police Forces do have a
4 certain degree of autonomy under the Police Act and they are
5 answerable at the local level to the local Police Commission
6 that is in place.

7 Q. So with respect to municipal police forces, at least, the power
8 of which you speak arises after the laying of the charge and
9 it's the general power of the Attorney General to enter a stay,
10 that's what you're talking about.

11 A. That would generally be my view. That's a difficult area, but
12 that would be my view.

13 Q. Can you tell us who the people were in your Department that
14 you met with on a regular basis and from whom you got
15 advice?

16 A. Well, first and foremost, of course, the Deputy Attorney
17 General, Mr. Coles. Mr. Gordon Gale as the Director in Criminal
18 Matters. Mr. Martin Herschorn, who is the Assistant Director
19 in Criminal Matters. There are other aspects of the
20 department on the civil sides, for example, Mr. Conrad as well
21 as other directors and senior solicitors in the Department. On
22 the administrative side, the person in overall charge of that
23 when I was there was Mr. Ronald MacDonald.

24 Q. I would take it with respect to meeting on the criminal side
25 with Coles or Gordon Gale or Martin Herschorn, that on some

1 occasions, you would be discussing fairly important matters?

2 A. Oh, yes.

3 Q. Could you tell us how you would make a decision as to
4 whether or not the results of a discussion would be
5 committed to paper? In other words, when you expect a file
6 memo to appear?

7 A. Well, generally after we had had a discussion and a decision
8 had been made, let's say, for example, a decision on whether
9 or not to proceed with an appeal, that once the decision had
10 been made, then I would leave that in their hands to do
11 whatever paperwork was involved in carrying that out.

12 Q. Would you expect that with respect to important decisions
13 that there would be some sort of paper generated reflecting
14 the decision that had been made?

15 A. Oh, yes.

16 Q. Would there be areas where the Attorney General himself,
17 that is, you, would actually make a decision and other areas
18 where you would leave the decision-making itself up to, say,
19 Gordon Coles? And can you give us any help as to where the
20 line would be with respect to those types of decisions?

21 A. That's a very difficult area to deal with. The ultimate
22 authority, of course, rests with the Attorney General. On the
23 other hand, it would not be practical for any Attorney General
24 to be personally involved in every matter that the
25 Department is dealing with. So it was, generally speaking,

1 any matter that the senior staff deemed to be of sufficient
2 importance to bring to the attention of the Attorney General
3 that my involvement would then come about. Or sometimes
4 there might be matters that I would learn about that for
5 whatever reason I would inquire into myself.

6 Q. But decisions that would have been made, for instance, by,
7 say, Mr. Coles, without your knowledge, it still would be the
8 case that the ultimate responsibility for that decision would
9 be yours?

10 A. That's correct. And I can think of one or two occasions when
11 I overruled decisions that Mr. Coles had made.

12 9:52 a.m.

13 Q. And would that be your practice, then, that if you found that
14 a decision had been made in the Department with which you
15 disagreed you'd take steps to overrule it?

16 A. Yes.

17 Q. There was some testimony earlier in the hearings in
18 connection with, I believe they were called green stripe files...

19 A. Yes.

20 Q. It was brought up by Mr. Veniot. Did you hear that testimony
21 or were you advised of it?

22 A. I didn't hear the testimony. I saw news reports about it.

23 Q. Can you tell us whether or not there were such files in the
24 Department?

25 A. I'm, not when I was there. I never saw any files like that.

- 1 Q. To your knowledge, were there such files at any other time?
- 2 A. I can't testify as to what practices might have been in the
3 Department when Mr. Veniot was there which, I think, was in
4 the early 1970s. But I was never aware of any such practice.
- 5 Q. And there was no such practice at the time that you were
6 Attorney General.
- 7 A. That's right.
- 8 Q. In your role as Attorney General, would you have some day-
9 to-day administrative contact with the courts?
- 10 A. Yes.
- 11 Q. And with the judges?
- 12 A. Yes. The mechanism for contact with the Provincial Court on
13 administrative matters would generally be either through Mr.
14 MacDonald or through communications between the Chief
15 Judge and myself.
- 16 Q. This would be in connection with provincially-appointed
17 judges?
- 18 A. Yes. There were also administrative matters vis-à-vis
19 federally-appointed judges.
- 20 Q. What sorts of matters, administrative matters, would you be,
21 would the Department be in touch with the federally-
22 appointed judges in respect of?
- 23 A. Essentially matters like office space, furnishings, that sort of
24 thing.
- 25 Q. Can you think of anything other than administrative matters

1 where there would be contact between the Attorney General's
2 Department and any of the federally-appointed judges?

3 A. No, not at least, nothing that comes to mind immediately.

4 Q. I'll give you an example to see whether it might help you a
5 bit. There is some information in the files, in the material
6 before us, and you don't need to look at it at the moment, in
7 Volume 32, in which there was discussion between the
8 Appeal Court and members of the Attorney General's
9 Department concerning whether or not a contempt charge
10 ought to be proceeded with against Parker Donham in
11 connection with an article he wrote about the Appeal Court
12 reference decision in June of 1982, sorry, in May of 1983.

13 A. Oh, yes, right. Yes, I'm aware of that.

14 Q. Did you have any knowledge of that?

15 A. My recollection is that that matter arose before I became
16 Attorney General.

17 Q. Yes.

18 A. But after I became Attorney General, in the course of
19 informing myself about the Marshall case, that I did become
20 aware that that matter had been in communication between
21 the Appeal Division and the Department.

22 Q. Would you consider that to be a proper communication and a
23 proper function for the Attorney General's Department to be
24 performing vis-à-vis the Appeal Court?

25 A. Yes, given that it raised the question of whether or not a

1 charge ought to be laid.

2 Q. As Attorney General, you had responsibility for the
3 prosecutors around the province.

4 A. Yes.

5 Q. Would it be fair to say that the prosecutors are really deemed
6 to be agents of the Attorney General?

7 A. Yes.

8 Q. And that the positions taken by them should reflect the
9 position of the government...

10 A. Yes.

11 Q. The position of the Crown.

12 A. That's correct.

13 Q. Have you had circumstances where you have found
14 prosecutors have taken positions that were not consistent
15 with what you considered to be the position of the Crown?

16 A. On occasion, yes.

17 Q. And have you taken steps to overrule those decisions or to
18 change things?

19 A. Yes, or at least to communicate with the prosecutor. If we
20 felt, for example, that a prosecutor was not following a policy
21 directive from the Department then that would, we would
22 communicate, or the staff would communicate with the
23 prosecutor to deal with the matter.

24 Q. Were there any such circumstances with respect to the
25 prosecutors involved in the Donald Marshall case during the

1 time of your tenure as Attorney General?

2 A. No, none that I can recall.

3 Q. In your role as Attorney General you were also, and perhaps
4 this is part and parcel of your responsibilities with the
5 prosecutors, issue directives to prosecutors respecting such
6 matters as disclosure, for instance, to defence counsel?

7 A. Yes.

8 Q. And, indeed, you have done that and I don't need to draw
9 your attention specifically to the volumes, but it's in Volume
10 28 at pages 14 and 16. You issued a directive on disclosure in
11 1984 and another one in 1986.

12 A. Yes. I don't specifically recall the directives but that would
13 be the procedure that would be followed.

14 Q. Well perhaps we ought to have a look at them, then, for a
15 second. If you just turn to the 1986 one, Mr. Giffin, which is
16 on page 16 of that volume. And I just had a couple of
17 questions about this. "The Crown shall make full disclosure of
18 its case to the accused, or counsel for the accused." Do you
19 consider that to be a positive obligation of a Crown Prosecutor
20 or a responsive one?

21 A. No, I would see it as a positive obligation.

22 Q. So do you then conceive the duty of a Crown Prosecutor to
23 disclose its case to the accused regardless of whether or not
24 the defence counsel comes and asks for it?

25 A. Yes, I would.

1 Q. And if you...

2 A. In fact, that was the practice I followed when I was a
3 prosecutor.

4 Q. And is that the practice that you understood your prosecutors
5 were following during the time you were Attorney General?

6 A. Yes.

7 Q. Do you have any knowledge as to whether or not that practice
8 has changed since the time you ceased to be Attorney
9 General?

10 A. No, I have no knowledge of that.

11 Q. Were you aware of any circumstances during the time that
12 you were Attorney General, were any complaints made to you
13 by defence counsel or by others, that this positive obligation
14 was not being adhered to?

15 A. It's difficult to assert a negative over that period of time. I
16 don't recall receiving any complaints from defence counsel
17 about non-disclosure.

18 Q. Or from anybody else?

19 A. No. At least I don't recall any.

20 Q. At the bottom of page 16 there's a paragraph which says,

21

22 In any case in which it is felt that full
23 disclosure should not be made, this must
24 be referred to the Director of Prosecutions
25 for decision and instructions.

24

25 Were you aware of any circumstances when you were

25

1 Attorney General where such a request was made or such a
2 referral.

3 A. I don't recall any. Obviously Mr. Gale would be in a better
4 position than I would be to give evidence on that point.

5 Q. Well, if such a situation had arose during your time as
6 Attorney General would you have expected to be advised of
7 it?

8 A. If there was any question about the matter, a serious
9 question about whether or not the policy directive could be
10 followed in a particular case, if it was a difficult matter, then I
11 would expect that senior staff would discuss it with me.

12 Q. And on page 2 of that statement on page 17,

13
14 Prosecuting officers are reminded that in
15 no case should a file be turned over to the
16 defence for perusal without the file having
17 first been checked to ensure that it does
not contain any confidential or extraneous
material or police reports.

18 Let me just deal with the first item of that for the moment.

19 What would you conceive to be confidential or extraneous
20 material?

21 A. That's a very broad question but I would think, for example, a
22 communication from a police officer expressing opinions on
23 legal matters which, of course, ordinarily would not be the
24 province of a police officer. There would also always be the
25 question of identifying witnesses where, for their protection,

1 their identity would have to be protected. That kind of thing.

2 Q. And you go on to say, "or police reports containing
3 expressions of personal views or opinions of the police
4 investigator which ought not to be disclosed to the defence."
5 For what reason should those reports not be disclosed to the
6 defence?

7 A. Well, there are confidential communications which proceed
8 from investigating officers to the Crown and communications
9 back from the Crown to investigating officers which are
10 confidential. The policy requirement there is that the police
11 must be able to communicate openly and frankly with Crown
12 Prosecutors and with the staff in the Department in order to
13 make their views known. Now, obviously, that type of
14 confidentiality has to be respected or the police would not
15 give us their views as fully and frankly as they should. But
16 on the other hand that policy of confidentiality ought not to
17 impede full and proper disclosure to the defence to enable the
18 counsel for an accused to prepare a defence.

19 Q. And would this admonition to not release police reports relate
20 to police reports that are prepared for the information and
21 instruction of people in the Attorney General's Department?

22 A. That's correct.

23 Q. Would it apply to any other police reports?

24 A. I'm not sure I understand the question.

25 Q. Well, the issue comes up a bit later in the context of a report

1 Q. And that was a reported case. It was well...

2 A. Yes.

3 Q. And that was the Weymouth Falls case?

4 A. Yes, that's correct.

5 Q. And was that matter resolved?

6 A. Well, the case in question, I'm not sure how much detail you
7 would want me to go into on it, was a prosecution involving
8 the death of the member of the Black community in
9 Weymouth Falls. The person who was charged was a member
10 of the White community. He was acquitted by a jury on a
11 defence of self-defence. The matter came to my attention
12 when the question arose as to whether or not there should be
13 an appeal from the jury's verdict. I reviewed the matter with
14 the senior staff in the Department and their advice to me was
15 that we had no grounds for an appeal. There was no question
16 of law upon which we could base an appeal and I, therefore,
17 instructed them not to appeal. The representatives of the
18 Black community in Weymouth Falls subsequently met with
19 me to express their concerns about the case and we had a
20 fairly long discussion one day at the Department here in
21 Halifax, but at that point in time, of course, the case was
22 already concluded. The appeal had not proceeded and the
23 case itself was, therefore, over.

24 Q. Other than that instance were there any programs, of which
25 you're aware, during the time that you were Attorney

MR. GIFFIN, EXAM. BY MR. SPICER

1 General, say for the provincial judges, to educate them with
2 respect to matters of race and the administration of justice?

3 A. I'm not aware of any. I should mention as well in connection
4 with the Weymouth Falls case that there was a matter
5 referred to the judicial council concerning comments made by,
6 or alleged to have been made, pardon me, by a judge of the
7 Provincial Court in connection with that case. But I'm not, to
8 answer your question, I'm not aware of any programs or
9 courses that have been offered to judges of either the
10 Provincial Court or the Family Court dealing with race
11 relations and that type of matter. I stand to be corrected on
12 that but I don't recall any.

COMMISSIONER POITRAS

14 How many years ago was that, please? The Weymouth Falls
15 case.

16 A. I believe 1985, is my recollection.

MR. SPICER

18 Q. You have been a member of Cabinet since 1978, I believe.

19 A. Yes.

20 Q. The Marshall case resurfaced early 1982...

21 A. Yes.

22 Q. When you would have been Minister of Transportation and
23 Communication at the time.

24 A. Yes.

25 Q. Can you tell us whether or not the Marshall case was

MR. GIFFIN, EXAM. BY MR. SPICER

1 discussed in Cabinet at any time prior to the reference being
2 handed down on June 16, 1982?

MR. SAUNDERS

4 Objection, My Lord, for the reason stated. I think we've come
5 to that place.

MR. SPICER

7 Finally?

MR. SAUNDERS

9 And if Your Lordships wish to hear us we're prepared to
10 make submissions.

CHAIRMAN

12 Let's hear the question first.

MR. SPICER

14 The question was whether or not the Donald Marshall case
15 was discussed in Cabinet, at any time, prior to the reference order
16 being handed down on June 16, 1982.

COMMISSIONER EVANS

18 I take it you mean the decision on the reference.

MR. SPICER

20 No. The reference being set up in June of 1982. I want to
21 know whether there was any discussion prior to that.

CHAIRMAN

23 All right.

MR. SAUNDERS

25 Yes, My Lord. In answer to the question posed by my friend

1 objection.

2 COMMISSIONER EVANS

3 I think that's what it is because..

4 MR. SPICER

5 And I don't want to argue it on the basis of "Was there a
6 discussion?"

7 MR. SAUNDERS

8 That is my real objection, My Lord, but I hope I have
9 explained my reason for objecting in the first instance so that I
10 didn't hear later, "Look, we've got this answer on the record,
11 therefore, that permits me to inquire of the Minister as to what
12 those discussions were."

13 CHAIRMAN

14 And that's, I don't quarrel with that, with your taking that
15 position to ensure that there aren't follow-up questions from
16 counsel saying, "Well," to us, "you allowed that first question,
17 therefore, we are entitled to amplify it" by them asking what was
18 discussed in Cabinet. Because I think they're two separate and
19 distinct issues and I would have, I thought from our earlier
20 discussion, Mr. Saunders, you were making that simply for the
21 purpose of, not only alerting us but to protect your client and
22 saying that, "My silence is without prejudice to my right to object
23 to any questions that pertain to discussions within the Executive
24 Council."

25 MR. SAUNDERS

1 Quite so, My Lord, and I was and I did. I thought my friend
2 would get to the very next question, "Now tell me of those
3 discussions." and so I thought we were...

4 MR. SPICER

5 That requires a "yes" answer.

6 MR. SAUNDERS

7 Yes.

8 CHAIRMAN

9 If the answer is "no" then...

10 MR. SAUNDERS

11 Well, then we're onto it again.

12 CHAIRMAN

13 No, but if the answer is, if the answer to the question just put
14 is "no" that's the end of the questioning.

15 MR. SAUNDERS

16 Yes. Well I'm ...

17 CHAIRMAN

18 If the answer is...

19 MR. SAUNDERS

20 Quite content to having made the initial blanket objection, My
21 Lords, and you're aware of it and...

22 CHAIRMAN

23 All right. So will you put that question again to this witness,
24 please?

25

1 COMMISSIONER POITRAS

2 So that for the time being the answer would be under reserve
3 of the objection made by Mr. Saunders, for the time being.

4 MR. SPICER

5 Q. And the question was, at any time prior to the reference
6 order being handed down on June 16, 1982, was the Donald
7 Marshall case discussed in Cabinet?

8 A. I'm trying to think back. I believe it was but I can't recall
9 specific discussions.

10 Q. Now we're there. What was the nature of those discussions?

11 MR. SAUNDERS

12 Now I object for the third time.

13 CHAIRMAN

14 Now you make your objection.

15 MR. SPICER

16 Now we can have the argument.

17 CHAIRMAN

18 Based on the fact that we didn't get a "yes" or "no" answer.
19 This is a third scenario that we hadn't anticipated.

20 MR. SAUNDERS

21 My Lord, the two cases that I believe my friend and I will be
22 making submissions to Your Lordships on this morning are
23 Carey v. The Queen in Right of Ontario, 35 D.L.R. (4th) 161,
24 decision of the Supreme Court of Canada. Page 161. I have
25 copies of that decision and, secondly, the decision, as well of

1 the Supreme Court of Canada in the matter of Smallwood v.
2 Sparling et al. And the citation I have for that is 141 D.L.R.
3 (3d) at 395. I say at the beginning, My Lords, and as I will
4 indicate in more detail as I review these cases, there is no
5 jurisprudence so far as I am aware dealing with the issue
6 before Your Lordships, no jurisprudence so far as I am aware
7 on the very issue that is before this tribunal this morning and
8 that is with respect to questions asked of a current Minister
9 as to discussion had during a presently sitting Cabinet or
10 Executive Council. Quite distinct from the matters that were
11 raised in Carey v. The Queen and Smallwood v. Sparling. And
12 the cases are also important not only for the general
13 principles that Mr. Spicer and I will be addressing this
14 morning, but also I submit, with respect, for what the cases
15 do not say.

16 And the issue before Your Lordships is this matter that I've
17 just mentioned, a current Minister before this tribunal being
18 asked questions to do with discussions that went on between
19 and among members of a presently-constituted Cabinet.

20 In the case of Carey v. Ontario I'm sure Your Lordships are
21 aware of the factual situation where Mr. Carey was bringing
22 an action against the Province of Ontario with respect to
23 agreements he alleged were in existence between himself and
24 the government with respect to a lodge in northern Ontario
25 and he said that he made certain expenditures as a

10:15 a.m.*

1 consequence of agreements made with him by government. I
2 think that, in a nutshell, is the thrust of the action that he was
3 bringing directly against the Province of Ontario and he supposed
4 that there were within Cabinet documents which would go to
5 prove the existence of those agreements between himself and the
6 government. And so it was an application brought, subpoena
7 duces tecum, to produce documentation, which is quite distinct to
8 the issue before Your Lordships. We are not challenging the
9 Minister being here. Obviously he is here and we have produced
10 documents. What we are saying is that this Commission, with the
11 greatest of respect, does not have the authority to go inside the
12 Cabinet room and inquire of this or any subsequent witness as to
13 what was said between Ministers during Cabinet meetings. In
14 those cases where documentation was required, the courts that
15 have compelled production of those documents would look at
16 them first and, after looking at the document and inquiring of the
17 content of the document, would then go through the process of
18 weighing the balance of interest as between the public interest
19 immunity on the one hand, which we are asserting on behalf of
20 Mr. Giffin, and the public interest of disclosure and full disclosure
21 of the facts before a body looking for the facts on the other.
22 That's not the situation here. The documents are before Your
23 Lordships. We have produced the material from our department
24 and material to do with the Orders-in-Council setting up this
25

1 Commission and the Commission on compensation. So Your
2 Lordships do not have that option or opportunity of looking at a
3 document, taking it away, reflecting on it, examining the content,
4 and weighing the interest. Here you are faced with a question
5 that's posed of a witness and an immediate expectation that that
6 witness, who is a current member of Cabinet, to be expected to
7 answer. So it's distinct on that basis.

8 And, as I said at the beginning, I'm not aware of any
9 jurisprudence that says or gives any commission of inquiry the
10 authority to compel answers from a current Minister on matters
11 that are presently and so current before the public. We say that
12 this is an exceedingly important principle to protect, and that is
13 the public interest, of joint responsibility among members of the
14 Cabinet, collegiality among members of the Cabinet, and that it's in
15 the public interest, fundamentally in the public interest to know
16 that their policy makers, their elected officials, are free to have
17 candid discussions between and among themselves without the
18 scrutiny of publicity looking in upon them.

19 Now in the Carey v. Ontario case, the events which led up to
20 the action brought by Mr. Carey were some 12 years before the
21 court in Ontario and eventually the Supreme Court of Canada had
22 to deal with it. Obviously a much greater span of time than is
23 between these incidents and the matters before Your Lordships.
24 And the span of time is a critical feature and I'll get to that in a
25 moment in more detail. We say in Carey that the Province of

1 Ontario was a party to the litigation. Obviously this department
2 and the Province of Nova Scotia is not a party to any matter in
3 disputes before this Commission. This Department, this
4 government, set up this present Commission and we're not a party
5 at odds as was the Government of Ontario in the Carey case where
6 Carey was saying that, "Look here, I know of agreements or I
7 suspect of agreements and the only way I can prove my case, the
8 only way I can try and establish a prima facie case against the
9 government is for me to know whether or not there exists
10 contracts between or agreements put to writing between myself
11 and the government. And only when I know what that
12 documentation is will I be able to present or pursue my case." So
13 we say that that is quite distinct from the matters before Your
14 Lordship.

15 Now as I said at the beginning, our claim goes to that
16 fundamental issue of it being in the public interest that decisions
17 of Cabinet are kept out of the glare of public scrutiny. Were it
18 otherwise, My Lords, I say with deference that any party present
19 could say that it matters a great deal for him or them to know
20 how Your Lordships consider the information that has come
21 before yourselves. What reflections you have with respect to
22 documents presented. What your attitude is to do with the
23 evidence that you've heard. What debate or reflections you've
24 gone on between and among yourselves. What deliberations
25 you've had with your own counsel. And we say that that's

1 precisely the same thing here. Obviously one would not grant
2 anyone permission to be part of those deliberations that you and
3 the other members of this panel go through from time to time in
4 your review of the evidence. And we say with deference that
5 that's precisely the same thing here with respect to Cabinet
6 discussions made in candor and made in private.

7 Now in the Carey decision at page 176 and following, some of
8 the arguments that have been raised in previous cases with
9 respect to the public interest immunity, as it is now known, are
10 reviewed. And you'll see at the top of page 176, the paragraph
11 that begins "In all events the government's counsel in his factum
12 put it on the following basis." I draw Your Lordships' attention to
13 those points because they have been argued in previous
14 jurisprudence on the matter. The principles are set forth. Joint
15 responsibility of members of Cabinet, Cabinet solidarity are basis
16 to Canadian Constitutional Law. That that would be prejudiced by
17 disclosure of documents and information sought to be produced
18 and that such documents have consistently been accorded a high
19 degree of protection against disclosure. We are making the
20 argument on behalf of elected officials who are elected to
21 determine policy and run the affairs of state. And that's why it's
22 a fundamental principle that we're addressing. The repercussions
23 that would flow from this kind of compelled disclosure are
24 examined, in part, at the bottom of page 177 of that case where
25 Lord Reid was commenting on a matter that was before the House

1 of Lords in Burma v. Bank of England and, in part, and I quote
2 from Lord Reid:

3
4 To my mind, the most important reason is
5 that such disclosure would create or fan ill-
6 informed or captious public or political
7 criticism. The business of government is
8 difficult enough as it is and no government
9 could contemplate with equanimity the
10 interworkings of the government machine
11 being exposed to the gaze of those ready to
12 criticize without adequate knowledge of
13 the background and perhaps with some
14 axe to grind.

15 So those certainly were persuasive comments in the mind of
16 Lord Reid who had to address the point. At page 179, we have a
17 commentary with respect to joint Cabinet responsibility. That is,
18 that it's a long held convention that any policy determined by
19 Cabinet has to be supported afterwards by the members of the
20 Cabinet. And so Cabinet proceedings ought not to be disclosed
21 which would tend to show attitudes or impressions or votes or
22 however other manner consensus is established. And at the
23 bottom of page 179, that convention of which I have just spoke is
24 referred to, that being that the attitude of individuals and
25 arguments preceding a decision would be grossly inhibited and
there would be no open discussion in Cabinet in future were such
information disclosed.

Another matter, another factor for Your Lordships, as
considered by the Supreme Court of Canada in the Carey case is

1 whether or not there's a keen public interest. And, obviously,
2 there is such in this case. At the bottom of page 186 of the
3 decision, and we talked about the time frame or the time span a
4 little earlier and I'm referring to the bottom two inches or so of
5 the page and I quote:

6
7 So far as the protection of the decision-
8 making process is concerned to, the time
9 when a document or information is to be
10 revealed is an extremely important factor.
11 Revelations of Cabinet discussion and
12 planning at the developmental stage or
13 other circumstances when there is keen
14 public interest in the subject matter might
15 seriously inhibit the proper functioning of
16 Cabinet, government, and so forth.

17 So I say that clearly this is a case where there is present and
18 current and have been for some years public interest in the
19 matters before Your Lordships.

20 And another factor is what is being solicited for disclosure.
21 The Supreme Court of Canada makes the comment at the top of
22 page 187, and I'm reading towards the end of the first paragraph:

23 In doing this, it is well to remember that
24 only the particular facts relating to the
25 case are revealed.

 Well, the facts are in the documents that we have provided on
behalf of this government and this Department. I'm quite
prepared to have the Minister speak to the position taken and had
by government at certain stages in this matter. But that's quite

1 different than permitting this kind of behind-the-door scrutiny
2 that I think my friend or others behind me may wish to pursue
3 with this Minister and that is impressions, discussions, who leaned
4 one way, who leaned the other, who expressed a view, who didn't,
5 who had a different opinion and so forth. So that one then gets
6 into the internal machinations or debate that go on in cabinet.

7 The time span in the Carey case was 12 years. The time span
8 in another case before the House of Lords where ministers' diaries
9 were published and the Attorney General for England sought a
10 prohibition against the publication of those diaries was some 20
11 years or 15 years after the fact. And I wish to refer Your
12 Lordships to some of those principles addressed in that case. But
13 the passage of time is a critical factor for you Commissioners to
14 consider and we say with respect that this is just too current, too
15 tied up in the public interest. We have a presently sitting
16 Member of Cabinet and presently sitting government and Cabinet
17 and we don't have a passage of time with intervening
18 circumstances and elections and what have you, which in other
19 cases have caused courts to order disclosure.

20 The other case, My Lords, is Supreme Court of Canada in
21 Smallwood v. Sparling, an earlier decision, this being a decision
22 written by Madame Justice Wilson in which she had to determine
23 an application brought by former Premier Smallwood to quash a
24 subpoena which would compel him to testify with respect to
25 certain documents prepared by ministries involved in the matter

1 in dispute. An inquiry launched to look into the affairs of Javelin
2 Limited and a subpoena issued to Mr. Smallwood to compel his
3 attendance. And he argued that he was immune from attending
4 on account of his history as Premier and former Minister of
5 several ministries. And Madame Justice Wilson said in a thorough
6 review of the changing law with respect to the doctrine of Crown
7 privilege that that had been eroded over the years, that there was
8 no absolute claim for Crown privilege, that a Minister of the Crown
9 ought to appear as a witness to give evidence within his
10 knowledge as any other witness could be compelled to give
11 evidence. And so that there could not be insisted upon, as was
12 Mr. Smallwood attempting to do, that he would declare his own
13 immunity and Madame Justice Wilson said it was not for him to
14 decide whether he was immune from attending these sessions. It
15 was for the court to decide. We have no quarrel with that. What
16 I say is that there is no authority saying that a current minister,
17 which Mr. Smallwood was not, he had retired. And Madame
18 Justice Wilson at the bottom of page 404 poses that question
19 where she said about Mr. Smallwood:

20
21 He is no longer a minister of the Crown in
22 right of Newfoundland. He is a private
23 citizen and called upon to testify as such.
24 It may be, as will be discussed later in
25 these reasons, that former Ministers can
claim public interest immunity in some
circumstances with respect to specific oral
and documentary evidence and so forth.

1 At the bottom of the paragraph immediately following, the
2 middle of page 405, Madame Justice Wilson says:

3 I do not prejudge the scope of his right to
4 claim privilege with respect to particular
5 oral or documentary disclosures if such is
6 legally available to him.

7 And we say that's the very matter before Your Lordships;
8 that is, whether any tribunal of inquiry can compel a currently
9 sitting minister to disclose discussions going on during cabinet
10 sessions with a presently sitting government. And we say with
11 the greatest of respect that there is no such authority.

12 The incident that I mentioned earlier about the ministers'
13 diaries and the Attorney General in England taking action to
14 prevent their publication was the Jonathan Cape case. At the
15 bottom of page 410 of the judgement of Madame Justice Wilson,
16 we see her reference to the arguments made by the Attorney
17 General for England in that case.

- 18 1. In my judgement, the Attorney General
19 has made out his claim that the
20 expression of individual opinions by
21 Cabinet ministers in the course of Cabinet
22 discussion are matters of confidence, the
23 publication of which can be restrained by
24 the court when this is clearly necessary
25 in the public interest.
2. The maintenance of the doctrine of joint
responsibility within the Cabinet is in the
public interest and the application of that

MR. SAUNDERS - SUBMISSION

1 doctrine might be prejudiced by
2 premature disclosure of the views of
3 individual ministers.

4 Those are the very notions that I am submitting for
5 consideration to the Commissioners today. And then they
6 determined that, because of the passage of time in that case and
7 the court's review of the content of the diaries, that they were
8 satisfied that there would be no harm for those materials to be
9 disclosed. At the top of page 411:

10 It is unnecessary to elaborate the evils
11 which might flow if at the close of a
12 Cabinet meeting, a minister proceeded to
13 give the press an analysis of the voting.
14 But we are here dealing in a case with a
15 disclosure of information nearly 10 years
16 later.

17 So I harken Your Lordships' attention to the passage of time
18 and that that being a distinctive feature between the Jonathan
19 Cape matter and the matter before Your Lordships.

20 So, in conclusion, My Lords, I say that we on behalf of this
21 Department and this government assert on behalf of this Minister
22 public interest immunity and say it's fundamentally important
23 and those are our submissions.

24 MR. CHAIRMAN

25 Mr. Spicer?

MR. SPICER

Thank you, My Lord. Mr. Orsborn is going to hand up to you

1 our copies of the same two cases. The reason we have to do that
2 is that it's a different report series and my page numbers are
3 different. So you'll have to bear with us in having two sets of
4 them.

5 SUBMISSION BY MR. SPICER

6
7 As Commission Counsel, we start from the proposition that
8 our mandate and our job is to investigate all aspects of the
9 administration of justice in Nova Scotia, not just those portions
10 that the government tells us we're allowed to look at. And we
11 have, I think, diligently pursued that goal in all areas. We've
12 looked at the activities of the police, lawyers, government, and
13 courts. And that is the reason why we pressed this point because
14 we think that our job being to look at everything, that it is not fair
15 or reasonable for us to agree not to look at discussions in Cabinet
16 concerning Donald Marshall. We want to know what happened
17 and we say that the law gives us the right to know what
18 happened.

19 Before I get to that, the history of what's happened with
20 respect to the Cabinet documents here is interesting. In June of
21 1987, the government forwarded to Commission Counsel or to the
22 Commissioners all Cabinet documents in connection with Donald
23 Marshall. And the government accepted the Commission deciding
24 on their relevance. At that time, the government was prepared to
25 accept the Commission's decision as to whether or not Cabinet

MR. SPICER - SUBMISSION

1 documents were relevant, a position which they do not now take
2 with respect to the Cabinet discussions. The reason I make that
3 point is because the test is exactly the same. The test as to
4 whether or not documents or evidence ought to be revealed is the
5 same, whether or not it's a document or whether or not it's oral
6 evidence. So with respect to the documents, they take the
7 position that you're entitled to make that decision. And then on
8 June 16th, the Attorney General's counsel advised us, that's
9 Commission Counsel, that they would not raise any question of
10 privilege with respect to the Cabinet documents.

11 I agree with my friend that there are two relevant decisions
12 of the Supreme Court of Canada in the last six or seven years--
13 Smallwood and Carey. Those cases now, in general, stand for the
14 proposition that information and documents should be disclosed
15 unless the party is seeking to withhold the disclosure, can satisfy
16 the adjudicating body that it is not in the public interest for that
17 material to be disclosed. The only argument we have heard really
18 is a blanket claim of candor. That is, that the effectiveness of
19 discussions will be somehow affected by the material being, the
20 information being released. That is, we won't be able to talk
21 about it as much. That's a claim of candor. That's a claim that has
22 not received much favour in the courts. I just want to draw your
23 attention to some of the matters that were dealt with in the
24 Smallwood case. My friend says that the question of a current
25 Minister is not a matter on which there is any authority. I draw

MR. SPICER - SUBMISSION

1 his attention and Your Lordships' attention in our version of the
2 report at page 704. No, I'll start later than that, at page 706, were
3 the claim in respect of Cabinet secrecy is advanced. My friend
4 referred to the same quote from the Jonathan Cape case. I want to
5 put emphasis on a different portion of the comments of Lord
6 [Woodjery?]. At the bottom of page 706:

7
8 In my judgement, the Attorney General
9 has made out his claim that the expression
10 of individual opinions by Cabinet ministers
11 in the course of cabinet discussion are
12 matters of confidence, the publication of
13 which can be restrained by the court when
14 this is clearly necessary in the public
15 interest.

16 Now what is clearly necessary in the public interest about not
17 telling this Commission what discussions were held by Cabinet
18 about the Donald Marshall case? This is the government that set
19 up the Commission to look into the Donald Marshall case. Earlier
20 in that report on page 704, I come back to my earlier point that
21 the test is the same--whether or not it's a document or whether or
22 not it's oral testimony. And there's a quotation from Halsbury
23 about halfway through 704:

24 Secrets of state, communications,
25 confidential official documents, et cetera
are inadmissible evidence if their
disclosure would be contrary to the public
interest.

MR. SPICER - SUBMISSION

1 The same principle applies to oral
2 evidence.

3 And then in the Carey case, a few years later in 1986,
4 Supreme Court of Canada, is faced with weighing the public
5 interest in disclosing information and documents and the public
6 interest in not disclosing. And I think the comments of Mr. Justice
7 LaForest are instructive. He does make a couple of comments
8 about the candor argument, which I heard my friend advancing.
9 At page 656 of the decision, the first full paragraph he says:

10 The principal argument for withholding the
11 documents described in the affidavit is
12 that their disclosure would lead to a
13 decrease in completeness in candor and in
14 frankness of such documents if it were
15 known that they could be produced in
16 litigation.

17 Now remember the test is the same for oral evidence.

18 And this in turn would detrimentally affect
19 government policy in the public interest.
20 The familiar candor argument is combined
21 with the need of completeness and the fear
22 that the freedom of Cabinet ministers to
23 discuss matters of significant public
24 concern and policy might be diminished.

25 657, the first full paragraph:

I am prepared to attach some weight to the
candor argument but it is very easy to
exaggerate its importance. Basically we all
know that some business is better

MR. SPICER - SUBMISSION

1 conducted in private but generally I doubt
2 if the candidness of confidential
3 communications would be measurably
4 affected by the off chance that some
5 communication might be required to be
6 produced for the purposes of litigation.
7 Certainly the notion has received heavy
8 battering in the courts.

9 And then later on in the decision, Mr. Justice LaForest refers
10 to some comments of Lord Scarman in the Burma Oil case, 668.

11 Lord Scarman eloquently set forth the
12 need for disclosure and distinguished
13 between objections on the basis of class
14 and content. A Cabinet minute it is said
15 must be withheld from production.
16 Documents relating to the formulation of
17 policy at a high level also are to be
18 withheld. But is the secrecy of the
19 interworkings of the government machine
20 so vital a public interest that it must
21 prevail over even the most imperative
22 demands of justice? If the contents of a
23 document concern the national safety,
24 affect diplomatic relations or relate to
25 some state secret of high importance, I can
understand an affirmative answer. But if
they do not, and as in this case it is not
claimed in this case that they do, what is so
important about secret government that it
must be protected even at the price of
injustice in our courts.

I've heard no argument from my friend other than that they
don't want to talk about what occurred in Cabinet. I've heard no
argument that there's an overriding public interest that's going to
be affected by disclosure of those communications other than the

MR. SPICER - SUBMISSION

1 fact that they don't want to talk about it. I haven't heard
2 anything that certainly would come within the test and the
3 comments that are now currently being made by the courts and
4 approved by Mr. Justice LaForest.

MR. CHAIRMAN

5
6 Mr. Spicer, when you're talking about discussions in Cabinet,
7 what do you mean by that? I can see two scenarios. There may
8 be others. I have noticed in some of these judgements there's
9 reference to voting. My understanding is that there's never a vote
10 in Cabinet in the British system.

MR. SPICER

11
12 I'm not allowed to ask.

MR. CHAIRMAN

13
14 Well, you'll find that. All you have to do is look at the writing
15 of one great Newfoundlander, Senator Eugene Forsey. That will
16 establish that. I believe he's also Canadian. So, you know, that's
17 not the issue, what was the vote.

MR. SPICER

18
19 No.

MR. CHAIRMAN

20
21 My understanding is that Cabinet ministers are selected by
22 the Prime Minister as advisers and a consensus is sought. Are you
23 saying we want to ask this witness of the nature of the discussions
24 in Cabinet as opposed to, well, what did the Honourable Mr. Jones
25 say? What did the Honourable Mr. Smith say? What did the

MR. SPICER - SUBMISSION

1 Honourable somebody else say?

2 MR. SPICER

3 I'm interested in the nature of the discussions.

4 MR. CHAIRMAN

5 The nature of the discussions. The issues that were discussed.

6 MR. SPICER

7 Yes.

8 MR. CHAIRMAN

9 The pros and cons.

10 MR. SPICER

11 Yes.

12 MR. CHAIRMAN

13 Of the issues.

14 MR. SPICER

15 Yes.

16 MR. CHAIRMAN

17 All right.

18 MR. SPICER

19 On page 670 of the Carey case, Mr. Justice LaForest sums up
20 the principles.

21
22 The foregoing authorities, and particularly
23 Smallwood case are, in my view,
24 determinant of many of the issues in this
25 case. That case determines that Cabinet
documents, like other evidence, must be
disclosed unless such disclosure would

MR. SPICER - SUBMISSION

1 interfere with the public interest. The fact
2 that such documents concern the decision-
3 making process at the highest level of
4 government cannot, however, be ignored.
5 The level of the decision-making...

6 [It goes on.]

7 671, the first full paragraph:

8 To these considerations and they are not
9 all, one must of course add the important
10 of producing the documents,

11 [the evidence in this case, the discussions]

12 in the interest of the administration of
13 justice.

14 The very task with which this Commission is charged--to look into
15 the administration of justice in this province.

16 And, finally, I want to quote from one other portion of the
17 decision on page 673. I hasten to add that Commission counsel do
18 not make the allegation that is contained in the reference in 673,
19 but it may be that others do, and it certainly would be another
20 reason why we should be allowed to ask about the discussion.

21
22 There is a further matter that militates in
23 favour of disclosure of the documents in
24 the present case. The appellant here
25 alleges unconscionable behaviour on the
part of the government. As I see it, it is
important that this question be aired, not

MR. SPICER - SUBMISSION

1 only in the interests of the administration
2 of justice, but also for the purpose for
3 which it is sought to withhold the
4 documents; namely, the proper functioning
5 of the executive branch of government.
6 For if there has been harsh or improper
7 conduct in the dealings of the executive
8 with the citizen, it ought to be revealed.
9 The purpose of secrecy in government is to
10 promote its proper functioning, not to
11 facilitate improper conduct by the
12 government.

13 The next full paragraph:

14 Divulgence is all the more important in our
15 day when more open government is sought
16 by the public. It serves to reinforce the
17 faith of the citizen in its governmental
18 institutions. This has important
19 implications for the administration of
20 justice.

21 So we would say, as Commission counsel, bearing those
22 principles in mind, that Your Lordships should order Mr. Giffin to
23 answer the questions concerning the discussions in Cabinet.

24 . My friend raises the argument of a time frame and says that
25 it has to be, you have to wait for a period of time. I remind my
26 friend that we're not asking about Cabinet discussions concerning
27 matters that are "developmental", which is the word that was
28 used in the decision. We're asking about Cabinet discussions
29 concerning matters that happened years ago. We're not talking
30 about discussions in Cabinet in 1988 and 1987, and we certainly
31 aren't talking about matters that have an ongoing life.

MR. SPICER - SUBMISSION

1 Compensation for Donald Marshall was decided in 1983 and 1984.
2 What was done by Cabinet with respect to the reference was, if
3 anything, was decided in 1982. So there's nothing developmental,
4 nothing current other than the interest of the public. And the
5 interest of the public doesn't relate to the current matters, it
6 relates to matters that were decided some years ago.

MR. CHAIRMAN

8 You're not seeking if per chance there's been any discussion
9 in the Cabinet since this Commission came into being.

MR. SPICER

11 No, we don't seek to inquire into that.

12 In summary, My Lords, I would say that we are charged with
13 the investigation of the administration of justice. These dis-
14 cussions should be revealed unless the government can satisfy
15 you that there is a real prejudice, an articulated real prejudice,
16 other than just a general statement "We don't want to talk about
17 it," to joint Cabinet responsibility. What is the real prejudice in
18 this case bearing in mind the matters that we want to ask about.
19 So that what I've heard from my friend does not come anywhere
20 near to meeting the tests that have been articulated by the
21 Supreme Court of Canada in the last few years and particularly
22 not in this case when our very job is to look at the administration
23 of justice.

MR. CHAIRMAN

25 Do other counsel wish to be heard? All right, Mr. Ruby.

MR. SPICER - SUBMISSIONCOMMISSIONER EVANS

1 Before you start, Mr. Ruby, I'd like to ask Mr. Spicer, do I
2 understand your position to be...or one of your positions is this
3 that how can the government, having asked for this particular
4 inquiry, now seek to restrict the actions of the inquiry?
5

MR. SPICER

6
7 Well, I'm saying that that's an argument that goes to Your
8 Lordship's exercising your discretion as to whether or not these
9 materials ought to...or the information ought to be disclosed. It
10 seems ironic that in the interests of having a very open inquiry
11 and providing us with the Cabinet documents, now for some
12 reason which has not been articulated to us in specifics as to why,
13 they're now saying to us, "We don't want you to look at this
14 aspect." I'm saying in light of the decisions of the Supreme Court
15 of Canada which talk about openness and fairness, you take those
16 and you add to that the fact that this government asked us to look
17 into these matters, but that's another factor that you ought to bear
18 in mind.

COMMISSIONER EVANS

19
20 Mr. Ruby?
21

MR. RUBY

22
23 Thank you, My Lord. I adopt the arguments made by Mr.
24 Spicer with one exception that I'll come to. It was the first or
25 format as I want to draw to your attention in an attempt to assist

1 | you in dealing with this subject matter.

2 | The first matter is that though Mr. Spicer has disclaimed an
3 | interest in particular discussions, I do indeed assert such an
4 | interest.

5 | Respectfully none of the cases disclose that it has ever been
6 | thought appropriate to give Cabinet documents without full access
7 | in abstract. There is a procedure whereby some information from
8 | documents or oral testimony can be withheld and that is the
9 | discretion of the Court to hear the evidence in camera, in the case
10 | of oral testimony, or read the documents, if they're Cabinet
11 | documents, and decide that some matters would not assist the
12 | inquiry but at the same time or at the same time were not
13 | sufficiently important that they ought to be disclosed and
14 | alternatively they would cause prejudice to on-going policies of
15 | the government. That kind of vetting process, in my respectful
16 | submission, should be made by the commissioners and not by
17 | counsel disclaiming in an abstract way "I don't want particular
18 | discussions. " Now I do. And as I understand Carey the procedure
19 | to follow of that is the case, is that you are to...in the case of oral
20 | testimony hear the evidence and decide what should be deleted
21 | based upon particular objections made by counsel. And you can
22 | see this in Carey starting at Page 670 of the Supreme Court
23 | Report. There's a reference in the last three lines to the particular
24 | content of the documents as being relevant. And at the top of
25 | Page 672 you'll see in the last...well, the first paragraph in

1 that...wait a minute, I'll start about three lines in on Page 672:

2 It is difficult to see how a claim can be
3 based on the policy or contents of the
4 documents. We are merely dealing with a
5 transaction concerning a tourist lodge in
6 northern Ontario. The development of a
7 tourist policy inevitably is of some
8 importance but it is hardly world-shaking.

9 Apart from this, are we really dealing
10 with the formation of policy on a broad
11 basis or are we simply concerned with a
12 transaction made in the implementation of
13 that policy? Such a distinction was
14 accepted by a majority of the House of
15 Lords in Burma Oil in relation to far more
16 sensitive policy issues; that is, major
17 financial and economic policies of the
18 nation. Policy and implementation were
19 [inevitably?] intertwined but a court is
20 empowered to reveal only so much of the
21 relevant documents as it feels is necessary
22 or expedient to do following an inspection.

23 And that's the procedure I say ought to take place when you are
24 faced, as you are here, by a request from me, though not from
25 your own counsel, for complete disclosure. Who said what?

Turning the page to Page 673, at the top again on the first
line, the Court goes on in a discussion of Burma Oil.

In the Burma Oil case, the Court inspected
the documents, but the transaction
concerned far more sensitive policy. That
had taken place three or four years before.
See also the Whitlam, Nixon and

MR. RUBY - SUBMISSION

1 Smallwood cases. Assuming there are
2 matters respecting the transaction that
3 could even feebly affect present policy, a
4 Court could, on weighing the competing
5 interests, simply refrain from having these
6 matters divulged.

7 And lastly with regard to disclosure, the summary of the Court's
8 opinion on inspection can be seen at the top of Page 674. Justice
9 La Forest says:

10 I would therefore order disclosure of the
11 documents for the Court's inspection. This
12 will permit the Court to make certain that
13 no disclosure is made that unnecessarily
14 interferes with confidential government
15 communications. Given the deference
16 owing to the executive branch of govern-
17 ment, Cabinet documents ought not to be
18 disclosed without a preliminary judicial
19 inspection to balance the competing
20 interests of government confidentiality and
21 the proper administration of justice.

22 So in this circumstance, on this first issue that I draw to your
23 attention, my respectful submission is I do want full disclosure,
24 not partial disclosure, and I commend this procedure as set out by
25 the Supreme Court of Canada for dealing with my request.

COMMISSIONER EVANS

26 Mr. Ruby, do I understand your question to be that you want to
27 know what each member of Cabinet said?

MR. RUBY

28 I want to know everything that the witness or other witnesses
29 who followed can remember about the discussion, including the

1 identity of the speaker. It may be very significant, for example, if
2 the Attorney General takes a particular position or if the Premier
3 takes a particular position as opposed to somebody who is a
4 Minister Without Portfolio. And that will help our understanding,
5 I think, of the way in which Cabinet dealt with those matters.
6 Now if I'm wrong in that, you'll have a chance to hear the
7 evidence or at least get an outline of it from counsel. I would
8 prefer you hear the evidence. I would ask that you hear the
9 evidence. And decide, if it doesn't assist, if it's of no significance,
10 then perhaps it can be deleted. But certainly someone has to hear
11 the evidence and decide that issue. And that's what the Supreme
12 Court of Canada, I think, says.

13 The second issue is that my friend has suggested that the fact
14 that this is a currently sitting Cabinet is a crucial factor in your
15 consideration and I suggest it's of minimal importance. The only
16 significance I can think of attaching to that, and he has suggested
17 none, is because it's a currently sitting Cabinet, there could be
18 political implications to bad decision-making or improper
19 decision-making some time ago, but by the same Cabinet. But that
20 political consideration is none of our real concern. If that be true
21 or if that not be true, it should not weigh in the interest of the
22 public, which is as the Carey case in the passage read by Mr.
23 Spicer indicates, an openness in the task that we have at hand.

24 The third point I want to read is length of time that's passed
25 and my friend focused on the short period of time. In Carey at

MR. RUBY - SUBMISSION

1 Page 672 the Court deals with this issue in the first complete
2 paragraph, halfway down Page 672:

3
4 I turn now to the length of time since the
5 transaction in question occurred. Recent
6 cases make clear that if Cabinet documents
7 may be given protection as a class, that
8 protection need not be continued until they
9 are only of historical interest. Rather these
cases indicate that the period of protection
solely for preserving the confidentiality of
the government decision-making process
will be relatively short.

10 And lastly, though my friend has not couched his argument in
11 terms, I want to put it to you directly. In my respectful
12 submission, there has been on behalf of this government, a waiver
13 of any privilege attaching to Cabinet discussions. We have, for
14 example, the report and recommendation to Executive Council
15 concerning the appointment of Commissioner, for example, the
16 Honourable Terry Donahoe. Terry, is it?

17 MS. DERRICK

18 Terrance.

19 MR. RUBY

20 Terrance Donahoe. And the appointment of Mr. Justice Campbell
21 as Commissioner. That is one half of the discussion in Cabinet. It's
22 the half that's reduced to writing. But once they have waived the
23 privilege over half the discussion, surely they cannot assert one
24 over the other half and say "Ah, yes, we're quite content that you
25

MR. RUBY - SUBMISSION

1 should have the portions we want you to see, what's reduced to
2 writing, but the other half we're going to keep secret." No. With
3 the greatest respect, they have in effect, by their conduct, waived
4 any privilege that might otherwise have attached and I've argued
5 that it does not, but even if I'd be wrong in that contention,
6 there's a clear waiver by conduct. Thank you, My Lord.

MR. CHAIRMAN

8 Mr. Wildsmith indicated he would like to address this.

MR. WILDSMITH

11 My Lords, I support the position taken by Commission counsel
12 but on a basis that hasn't yet been articulated and a basis which I
13 think is ultimately very favourable to the position of the Attorney
14 General. And that's that so far the discussion has been cast, been
15 put in constitutional terms, as a test between a judicial function on
16 the assumption that you're exercising a judicial function and an
17 executive function, which is what Cabinet exercises. And I would
18 put before Your Lordships the consideration that the function you
19 are exercising here in this Commission is an executive function,
20 that you are created by an Order-in-Council of Cabinet and
21 operate pursuant to that Order-in-Council. And so the point that
22 is ultimately, I think, that you ought to bear in mind and
23 ultimately favourable to the position of the Attorney General is
24 that Cabinet retains the power to influence the work of this
25 Commission by changing the terms of reference. In other words,

DISCUSSION - COUNSEL

1 that if the Attorney General, this Minister, or other members of
2 the government, wish to invoke a claim for privilege while on the
3 witness stand, surely they can ultimately do that through enacting
4 an Order-in-Council that directs Your Lordships to exclude that
5 from your considerations. And that you're not sitting here today
6 as judges of superior courts in Newfoundland, Ontario and Quebec,
7 but you're sitting here exercising, which in constitutional terms, is
8 cast as an executive function.

MR. CHAIRMAN

9 Well, presumably if this took place, we'd be in a position to resign
10 immediately.

MR. WILDSMITH

11 Yes. Those are all the comments that I wanted to make.

MR. CHAIRMAN

12 Are there any other counsel who have comments on issues that
13 have not been canvassed? Mr. Ross?

MR. ROSS

14 My Lord, there is just one thing I'd like to add to the record. First,
15 it's to indicate that I am fully in support of the position advanced
16 by Mr. Spicer. I haven't had the opportunity to review the Carey
17 and the Smallwood cases, but taking what I've heard this
18 morning, I would say that it could very well be argued that the
19 very concept of the public interest and the immunity associated
20 therewith, it presupposes that the person sought to be questioned
21 or the office sought to be reviewed has conducted itself in a
22
23
24
25

DISCUSSION - COUNSEL

1 manner consistent with a minimum standard of public
2 acceptability. And the granting of a blanket privilege by this
3 Commission would not only be difficult for the Commission to
4 justify itself, but would very likely be perceived by the public as
5 being a part of the problem which led to the creation of the
6 Commission and in fact an abandonment and abdication of part of
7 its own responsibilities.

8 Mr. Saunders, in his submission, compared the discussion in
9 Cabinet with what could be discussion as far as this Commission is
10 concerned and in response to that very narrow submission, I
11 would add, My Lords, that this commission has the right to be
12 wrong when exercising a proper judgment. However, if such
13 judgment is exercised in any way which could be classified as
14 being frivolous or reckless, then such a judgment itself comes
15 under review.

16 A quick look at the documents that's before this court right
17 now which have been released by the Department of the Attorney
18 General would at least suggest that there is some questions to be
19 answered. And if these answers can only come from this witness
20 and people like him, then such information ought to be put before
21 this commission. Thank you, My Lord.

MR. BISSELL

23 My Lord, I rise solely to indicate our agreement with the
24 arguments and principles advanced on behalf of the Attorney
25 General of Nova Scotia by Mr. Saunders on the question of public

DISCUSSION - COUNSEL

1 interest immunity.

2 MR. CHAIRMAN

3 Well, Mr. Pugsley?

4 MR. PUGSLEY

5 I have no representations to make, My Lord.

6 MR. CHAIRMAN

7 Mr. Saunders, you're entitled to injury time on this and soccer.

8 MR. SAUNDERS

9 My Lords, only two points in rebuttal. My friend Mr. Ruby has
10 addressed the very notion that I thought would come and that is
11 that he wasn't content with my learned friend's point that they
12 would get at the issues that were discussed by Cabinet, rather my
13 friend admits quite candidly that what he's after is to know
14 everything about who said what to whom. And what does that
15 mean? Does that mean that we parade before this commission
16 every member of Cabinet who ever sat to have any discussions to
17 do with this Marshall case? Do we have one Minister saying what
18 X, Y, and Z said and then X, Y, and Z coming another day to say
19 they didn't say that, they said this or that whatever they said
20 was misinterpreted? Where does that stop? It's one thing for
21 my friend, Mr. Ruby, to say "Look, we can submit documents to a
22 tribunal and let the tribunal go away and reflect and weigh and
23 balance the two interests competing." We're not talking about
24 documents, My Lords, we're talking about reflections and
25 discussions. They're quite different and that's the important

REBUTTAL - MR. SAUNDERS

1 distinction I tried to make at the beginning.

2 How does one get at oral communications between present
3 members of Cabinet and determine that Mr. Ruby mused that that
4 could in some fashion be done in camera. I just can't see it, with
5 the greatest of deference. And I can't see it as a workable solution.
6 Certainly it's one that would handle questions about documentat-
7 ion, but I can't see it at all, with the greatest of respect, having
8 any place in a review of in-Cabinet communications between
9 Ministers.

MR. CHAIRMAN

11 The Carey case was argued, I think, on October 2, 1985 and on
12 December 18, 1986, Mr. Justice LaForest, speaking for the Supreme
13 Court of Canada, filed a 36-page judgment. So I take it...and with
14 a lengthy review of the law as it pertains to this issue in the
15 United Kingdom and Canada and Australia and the United States.
16 So I assume that counsel are not anticipating an immediate ruling
17 on the issue raised which creates some problems in my mind
18 before we take a break as to are there other areas that
19 commission counsel intend to pursue with Mr. Giffin, not related
20 to Cabinet discussions?

MR. SPICER

22 Oh, yes.

MR. CHAIRMAN

24 Fine, so that I take it then that counsel will not object to us
25 reserving on this for a little while?

MR. GIFFIN, EXAM. BY MR. SPICER

1 MR. SAUNDERS

2 Not at all, My Lord.

3 MR. CHAIRMAN

4 And pursuing the other areas of examination. But I have to alert
5 counsel that there will be no questions concerning Cabinet
6 discussion until we've made our decision. With that rider,
7 nebulous qualification, we'll break for ten minutes.

8 11:15 BREAK

9 MR. CHAIRMAN

10 Mr. Spicer?

11 EXAMINATION BY MR. SPICER

12 Q. I think when we left, Mr. Giffin, I was just at the Cabinet door.

13 MR. CHAIRMAN

14 Pardon?

15 MR. SPICER

16 I was just at the Cabinet door when we left and...

17 Q. When you took over as Attorney General, did you have any
18 discussions outside of Cabinet with your predecessor in office,
19 Mr. How, concerning the government's position with respect
20 to Donald Marshall?

21 A. No, nothing that I can recall. He became Chief Judge of the
22 Provincial Court when he left the position of Attorney General
23 and that, of course, meant that there were a great many
24 matters on which we did not communicate because of the fact
25 that he held that position.

MR. GIFFIN, EXAM. BY MR. SPICER

1 Q. And would the Donald Marshall have been one of those on
2 which on which you did not communicate?

3 A. That's right.

4 Q. What steps then did you take to bring yourself up to date on
5 the situation regarding Donald Marshall?

6 A. I relied on the senior officials in the department, primarily
7 the Deputy Attorney General, Mr. Coles, Mr. Gale, and Mr.
8 Herschorn to inform me about the history and status of the
9 matter.

10 Q. And at the time that you took over in November of 1983,
11 there had been some public pronouncements by the
12 predecessor Attorney General, Mr. How, and there had been
13 some advice received by Mr. How. Were you made aware of
14 the public pronouncements and also the advice that had been
15 received by the predecessor, Mr. How?

16 A. Yes.

17 Q. I just want to draw your attention to a couple of those. You
18 have a pile of letters in front of you which are Exhibit 138. If
19 I could just ask you to turn to...well, you don't have to turn,
20 Page 1. There's a letter of August 29, 1983 from Mr. How to
21 Miss Ruth Cordy in which he's commenting on the appeal
22 court decision. In the second or third paragraph Mr. How
23 says:

24

25

One has to remember as well that Mr. Seale

MR. GIFFIN, EXAM. BY MR. SPICER

1 and Mr. Marshall were both in the park at
2 Sydney on the night of the murder and
3 planned to rob somebody and indeed were
4 in the course of robbing Ebsary when he
5 allegedly struck at both Seale and Marshall
6 with a knife and in the case of Seale, this
7 proved fatal.

8 Did you take any steps yourself to bring yourself up to date
9 as to what the evidence was before the appeal court and what
10 the material was that was before the appeal court that
11 enabled them to reach their decision in the reference?

12 A. No, I did not read the transcripts of evidence.

13 Q. Did you read the decision?

14 A. Yes.

15 Q. On Page 2, there's another letter from Mr. How. In the third
16 paragraph he says:

17 With respect to the Marshall case, you will
18 understand that most of the media, in their
19 simplistic approach, portray Mr. Marshall
20 as a victim of injustice. In fact our
21 Supreme Court, Appeal Division, in
22 reviewing his case and hearing evidence
23 from witnesses (et cetera) came to the
24 conclusion there was such a doubt on the
25 whole of the evidence that no jury would
convict and you'd have a retrial. The Court
therefore felt obliged to find Mr. Marshall
not guilty. This should not be interpreted
as in finding him innocent. And indeed,
the Court took pains to point out that had
he been truthful in the original trial and to
the police before the trial, his original
conviction might not have happened.

MR. GIFFIN, EXAM. BY MR. SPICER

1 Did you understand the position of the government to be at
2 the time you took over that to a degree, Mr. Marshall was the
3 author of his own misfortune?

4 A. Yes, that letter would be consistent with the statements that
5 Mr. How made publicly.

6 Q. Right, and would you understand that to have been the
7 government's position when you took over as Attorney
8 General?

9 A. Yes, he would have been speaking as Attorney General on
10 behalf of the government.

11 Q. Did you consider Mr. Marshall to be the author of his own
12 misfortune yourself?

13 A. No. After I read the decision of the Appeal Division and I
14 hesitate to interpret it because it speaks for itself, but my
15 view was that the comments about Mr. Marshall's conduct
16 were obiter dicta. They were not essential to the making of
17 the Court's decision. I simply took the situation as I found it,
18 that Mr. Marshall had been convicted in 1971, that his
19 conviction had been set aside in 1982.

20 Q. In Volume 38, which I believe you have in front of you, this
21 one here, with respect to the position of the government
22 regarding compensation at the time you took over as
23 Attorney General, if you could turn to Page 30 of that
24 material. It's an article in the Micmac News in May of 1983
25 and in the second...last couple of paragraphs:

1 How said in an interview he is anticipating
2 an application for compensation from
3 Marshall and will not determine before
4 then just what the province should do
5 about it. However, he said 'Any award the
6 province decides to offer could be reduced
7 by the finding that Marshall, while
8 innocent of the 1971 murder of Sandy Seale
9 in a Sydney park, contributed to his
10 conviction through his testimony and was
11 on an illegal mission when Seale was
12 stabbed.'

13 Was it your understanding of the government's position at the
14 time you took over as Attorney General that any requests for
15 compensation would have to be considered in the light of the
16 fact that Mr. Marshall was, to some extent, the author of his
17 own misfortune?

18 A. Yes, that was my understanding because those were the
19 statements that Mr. How had made to that point in time.

20 Q. And those sorts of statements are repeated on Page 34 in a
21 slightly different fashion and it purports to be a quote from
22 the Chronicle Herald on May 11, 1983, in the last paragraph:

23 Mr. How said that matter could also come
24 into play when the issue of compensation
25 is considered that is contributing to his
own problems. 'If you are partially the
author of your own misfortune, that is a
factor.'

And there's no dispute that at the time you took over, that

1 was the position of the government?

2 A. Yes.

3 Q. Also, if you could just turn to Volume 32, which I think you
4 also have. The two you're going to be using the most are 32
5 and 38. At Page 263 of that volume and again this is prior to
6 the time that you took over, but I just wanted to ask you a
7 question about it, 263. You really need 262 to put it in
8 context. It's a letter from Felix Cacchione, who was at that
9 time Junior Marshall's lawyer, writing to the then Attorney
10 General, asking for a public inquiry and making reference to
11 the fact that such an inquiry had been asked for at a press
12 conference following the decision of the Appeal Court in May
13 of 1983. Mr. Cacchione is saying

14 September to date, there has been no word
15 from your department regarding a public
16 inquiry into these matters. I would greatly
17 appreciate the opportunity of meeting with
18 you to discuss the possibility."

19 And then Mr. How responds on 263:

20 I have your letter of September 21 and I'm
21 not personally aware of any formal request
22 for a public inquiry into the Marshall case.

23 In September of 1983, were you aware of the fact that there
24 had been a request made by Junior Marshall's lawyers
25 following the decision of the Appeal Court for a public
inquiry?

MR. GIFFIN, EXAM. BY MR. SPICER

1 A. I don't believe so. My memory is not perfect on that, but this
2 correspondence I saw after I became the Attorney General.

3 Q. You're not able to tell us today whether or not you were
4 aware in September of '83 that that request had been made
5 in May?

6 A. No, no, I simply don't recall.

7 Q. If you could look in Volume 31. Do you have 31?

8 A. No, I don't have it.

9 Q. Volume 31. I'm going to come back to that. Were you aware
10 or did you take time after you became Attorney General,
11 were you aware of the position taken by Mr. Edwards at the
12 reference in his factum or otherwise?

13 A. No, I had not...prior to becoming Attorney General, no, I had
14 not read any of that.

15 Q. Perhaps you could have a look at Volume 38 again, Page 29.
16 It's an article in the Globe and Mail, February 17, 1983. In the
17 second last column from the right, in referring to Mr.
18 Edwards' argument at the reference, Mr. Edwards is quoted as
19 saying:

20
21 Mr. Edwards said there had been no
22 miscarriage of justice. He blamed Mr.
23 Marshall's lack of candor at the
24 critical...crucial time during his original
25 trial for his second degree murder
conviction.

Was it your understanding that it was the position of the

1 government at the time you took over that there had been no
2 miscarriage of justice in respect of Donald Marshall?

3 A. It's a difficult question to answer. I formed my own views on
4 the matter after I became Attorney General and began
5 learning about the matter reading the Supreme Court decision
6 and so forth. But it would certainly be correct to say that
7 when Mr. Edwards, as a Crown prosecutor, made that
8 statement, that he was doing so on behalf of the Crown, so
9 certainly at that point in time, that represented a statement
10 of the government's position.

11 Q. So that if I could summarize it, at the time that you took over
12 as Attorney General would have been (a) that there was no
13 miscarriage of justice in connection with the Donald Marshall
14 case, secondly, that to some extent Mr. Marshall was the
15 author of his own misfortune and thirdly, that if any requests
16 for compensation was made, it would have to be considered in
17 the light of the fact that he was partially to blame.

18 A. Yes, and also Mr. How's comment that any request will be
19 given sympathetic consideration.

20 Q. Sure. Was there a time when you, as Attorney General,
21 publicly disagreed with any of those three positions, that is,
22 that Donald Marshall was not...did you ever come out and say
23 "Donald Marshall was not the author of his own misfortune"?

24 A. No, I don't recall doing that.

25 Q. Did you ever publicly take the position that there in fact had

1 been a miscarriage of justice?

2 A. I don't believe that I ever stated that publicly.

3 Q. And thirdly, did you ever take the position publicly or
4 perhaps in giving instructions to your agents in connection
5 with compensation that the fact that Marshall had been
6 partially to blame should not be a factor to be considered in
7 considering compensation for him.

8 A. No, I did not give instructions of that type.

9 Q. At the time you took over as A.G. in November or so of 1983,
10 there was a fair amount of press and pressure at the time to
11 take steps towards some sort of inquiry, fair comment?

12 A. Yes.

13 Q. Perhaps you could turn to Volume 32.

14 11:46 a.m.

15 Q. Page 274. There's a memo from Reinhold Endres to Gordon
16 Coles concerning the civil action that had been instituted by
17 Mr. Aronson on behalf of Mr. Marshall. Was that memo
18 generated as a result of a request from yourself?

19 A. I can't recall. I was certainly informing myself about the case
20 along with a great many other matters when I became
21 Attorney General and that would be consistent with my usual
22 practice, that of asking questions by memo or personal
23 inquiry, and then getting information back. But I can't
24 specifically recall whether I asked for that memo.

25 Q. But it would be consistent with the sort of thing that you

- 1 might have done.
- 2 A. Yes.
- 3 Q. What was the actual date that you became Attorney General?
- 4 A. I believe it was November 9, 1983.
- 5 Q. And back to Volume 38, page 41. It's an article from the
- 6 Chronicle-Herald on Friday, November 23rd. There's a
- 7 reference to a discussion between yourself and Mr.
- 8 MacGuigan concerning responsibility for compensation for
- 9 Marshall. Do you have a recollection of that discussion?
- 10 A. I've had some difficulty with that. I know that the discussion
- 11 took place but I can't specifically recall the conversation itself.
- 12 But I certainly was made aware of the position of the
- 13 Government of Canada.
- 14 Q. What was the position of the Government of Canada at the
- 15 time?
- 16 A. As I understood, the position of the Government of Canada,
- 17 they were, they had stated, Mr. MacGuigan had stated that
- 18 the Government of Canada had no legal obligation to Mr.
- 19 Marshall and that the Government of Canada would not
- 20 participate in any payment of either legal costs or
- 21 compensation to Mr. Marshall.
- 22 Q. Did you have a view as to the correctness of that position?
- 23 A. Yes. I was concerned about that position. It seemed to me
- 24 that there were arguments that could have been made about
- 25 participation by the Government of Canada with respect to

1 the matter, particularly because Mr. Marshall had been
2 incarcerated in a federal institution. He had been denied
3 parole on a number of occasions and I felt that the
4 Government of Canada was taking a very narrow legalistic
5 position. On the other hand, I did not want to engage in a
6 great public dispute with the Government of Canada over
7 that. Mr. MacGuigan made his position very clear and there
8 was absolutely no indication that he was going to change his
9 position. And I felt that it would not help anybody in dealing
10 with this matter if we got into, as so often happens in this
11 country, a prolonged dispute between a provincial
12 government and the federal government over who was
13 responsible for what. So once I was satisfied that that was
14 the position of the Federal Government I didn't pursue the
15 matter with them.

16 Q. Did you ask any of the people in your Department to research
17 the matter to see whether or not there was anything to the
18 Feds' position that they had no responsibility?

19 A. I don't recall specifically asking for research but certainly we
20 did discuss it within the Department, my senior officials and
21 myself, and the advice that I received was that on the strictly
22 legal question of whether or not the Government of Canada
23 had a legal obligation to Mr. Marshall, that the Government of
24 Canada did not.

25 Q. On page 277 of Volume 32, is that a memo from yourself?

1 A. Yes.

2 Q. And who is it directed to?

3 A. I believe that would have been directed to one of my
4 secretaries although there's no indication on it to whom it
5 went.

6 Q. You say in the second sentence, "Would you get out the
7 Donald Marshall file for me?" What constituted the Donald
8 Marshall file at that time?

9 A. That would have, I believe, included, for example, the
10 decision of the Appeal Court, the correspondence, memos
11 from staff, that sort of thing. I can't begin to itemize what
12 was in the...

13 Q. Sure.

14 A. File, but just generally the material that I needed to have at
15 hand if I were going to respond to a lot a letters about the
16 Marshall matter.

17 Q. And that was a letter you'd been written by Alexa
18 McDonough...

19 A. Yes, that's correct.

20 Q. Pages 278 and 279 which we will get to in a minute but do
21 you have any recollection as to whether or not the Donald
22 Marshall file, at that time, contained any of the RCMP reports?

23 A. I don't believe that the file, to which reference is made in that
24 memo, would have contained the RCMP reports. I think that
25 was more in the nature of the office file, if you will.

1 Correspondence back and forth to the Minister, that sort of
2 thing. I don't recall if that file included the RCMP reports. I
3 think they would have been in a different file.

4 Q. So that there would have been at least a couple of files. One
5 that you would take with you and one which may contain
6 RCMP reports and other materials.

7 A. I would think. I hesitate to reply because the Attorney
8 General's Department, when I was there, had a centralized
9 filing system and if we start getting into that kind of
10 administrative detail I could be wrong in saying what files
11 were where and so forth. You might want to seek evidence
12 from people in the Department who were responsible for the
13 actual operation of the filing system.

14 Q. You're also requesting in your memo a copy of the originating
15 notice and a draft press release. Now the originating notice, I
16 take it, is the one against The City of Sydney and MacIntyre
17 and Urquhart.

18 A. Yes.

19 Q. And the draft press release, would that be the release that
20 occurs on page 280?

21 A. Yes.

22 Q. And that's dated November 22, 1983. Was that press release
23 issued?

24 A. I don't believe it was. I think it was drafted and then not
25 issued, that's my recollection.

1 Q. Would it be consistent with your views as to the Donald
2 Marshall, the request for a public inquiry?

3 A. I think at that point in time it reflected my thinking. I found
4 that as I continued to deal with my, with the entire matter
5 that as I learned more about it and dealt with it further that
6 my thinking tended to change.

7 Q. But as of this point in time, that is November 22, '83, it would
8 be, would reflect your thinking.

9 A. Yes.

10 Q. There's reference in that memo to, sorry, in the press release
11 to a meeting with Donald Marshall's lawyers.

12 A. Yes.

13 Q. Can you tell us how that meeting came to be and what
14 transpired at it?

15 A. Yes. It's my recollection that Mr. Cacchione who was
16 representing Mr. Marshall at that time, contacted my office to
17 ask for a meeting. I was aware of his earlier correspondence
18 to Mr. How in which he had asked for a meeting with Mr.
19 How. I don't recall if he and I spoke personally on the phone.
20 I believe that we did in setting up that meeting. And he
21 requested a meeting with me and I responded positively to
22 the request. I said that I was prepared to meet with him on
23 the condition that it be a private meeting and that the media
24 not be advised of the meeting.

25 Q. In advance.

1 A. That's right. And we scheduled the meeting for Wednesday,
2 November 23rd. On the weekend prior to Wednesday,
3 November 23rd I believe I was in the Yarmouth area on
4 government business. When I returned to my home in Truro
5 I was advised by my wife that she had heard news reports
6 that I was meeting with Mr. Cacchione the following week. I
7 then, when I went to the office in Halifax Monday morning
8 contacted Mr. Cacchione...

9 Q. Did this revelation annoy you?

10 A. Yes, very much. And advised him that if he wanted to meet
11 with me that we would do it that morning, the Monday
12 morning, immediately, and discuss the matter at that time.

13 Q. And did that meeting, in fact, take place?

14 A. Yes.

15 Q. Who was in attendance?

16 A. I believe that Mr. Cacchione and his partner, Mr. Lambert, I
17 believe was there. And that Gordon Coles and I were there.

18 Q. And do you have any recollection of what was discussed at
19 that meeting?

20 A. It wasn't a very productive meeting. The, Mr. Cacchione
21 outlined his concerns about the matter of compensation for
22 Mr. Marshall and about the holding of a public inquiry. There
23 was some discussion back and forth about that. Nothing was
24 resolved at the meeting.

25 Q. Was there any discussion of whether or not Mr. Marshall had

1 been the author of his own misfortune?

2 A. I can't recall that specifically. It may have been said but I
3 just, I can't recall.

4 Q. I think Mr. Cacchione will testify that the question of, or the
5 statement that Mr. Marshall had been the author of his own
6 misfortune was raised at that meeting, either by yourself or
7 presumably by Mr. Coles.

8 A. Well, I wouldn't quarrel with his recollection on that. It was a
9 fairly free-wheeling kind of discussion. It was not, there was
10 no set agenda. It was a pretty open discussion.

11 Q. Was anything concluded at the meeting?

12 A. No.

13 Q. I just want to ask you a couple of questions about this press
14 release on page 280. Mr Cacchione was asking for a public
15 inquiry into the police investigation. He was making inquiries
16 concerning the payment of Mr. Marshall's legal fees. And,
17 thirdly, he was raising the matter of compensation. I'm just
18 looking at the first paragraph of the press release seems to
19 refer to those three items. Correct?

20 A. Yes.

21 Q. You say in the second paragraph,

22
23 The Attorney General stated that it is the
24 function of the courts to determine
25 whether a person has a right to
 compensation in such circumstances and, if
 so, the appropriate amount. Mr. Giffin

MR. GIFFIN, EXAM. BY MR. SPICER

1 stated that Mr. Marshall has commenced
2 such civil proceedings...

3 And that would be the proceedings against MacIntyre,
4 Urquhart and the Town[sic] of Sydney, correct?

5 A. Yes.

6 Q.

7 And, therefore, having regard to the rights
8 of all the parties in such proceedings, he is
9 of the opinion that it would be premature
10 for him to consider such a request prior to
11 the determination by a court of the very
12 matters in respect of which Mr. Marshall
13 seeks relief.

14 Which, if I understand the press release correctly, are three.
15 I'd like you to tell us, if you could, what the connection was
16 between the civil suit which had been commenced and the
17 claim for compensation.

18 A. I think the general concern that I had about the civil suit was
19 simply that the matter was before the courts, that the parties
20 involved, both the plaintiff and the defendants, had their
21 rights as parties in that proceeding and that the Government
22 of Nova Scotia would have to exercise very great care in doing
23 anything that might adversely affect the interests of any
24 party to that proceeding. It is my recollection that this press
25 release was not made public and my recollection is that I did
not want to get into a position of saying a flat "no" to
compensation for Mr. Marshall. That I was still learning
about the matter and that I wanted to make sure that I kept

1 my options open.

2 Q. You did indicate to me a couple of minutes ago that it did
3 reflect your view at the time.

4 A. Yes.

5 Q. The civil suit, I want to ask you a couple more questions
6 about this connection between the civil suit and
7 compensation. The civil suit was commenced against
8 MacIntyre, Urquhart and the City of Sydney. Why was the
9 province concerned about that?

10 A. Well, only in the sense that I've indicated. That the matter
11 was before the courts, that the parties to the matter obviously
12 had their rights as parties before the court and, in addition,
13 that if the courts were dealing with that claim that action by
14 the Government of Nova Scotia might be construed as a
15 trespass upon the independence of the courts.

16 Q. Had you received any advice to that effect from people in
17 your Department?

18 A. We had discussed the matter generally. This was, if I may
19 put it this way, it was a situation for which I knew of no
20 precedent and the general attitude that I was taking was one
21 of extreme caution because I really wasn't sure what end
22 results might flow from particular courses of action and so I
23 took a very cautious approach, certainly initially.

24 Q. With respect to the connection between the civil suit and
25 compensation there, I don't need to refer you to the page, but

1 there's a letter from Aronson, from Mr. Aronson to Junior
2 Marshall at some point indicating that he started that action
3 because of a concern he had, amongst other things, for
4 limitation periods. Whether he was right or whether he was
5 wrong on that, I don't know. Is not the response, though, that
6 with the civil suit outstanding you can't consider
7 compensation are you not, then, putting Junior Marshall in the
8 position where in order to consider compensation he has to
9 drop the civil suit?

10 A. Well that was not my intention. The Government of Nova
11 Scotia was not a party to the suit so we had no vested interest
12 in whether the suit was sustained or dropped. It was simply
13 a case on my part of being extremely cautious because I just
14 didn't know where we might end up with this. The more I
15 examined it the, I found that my thinking changed. That that
16 concern about the civil suit declined and that my primary
17 concern about government actions very quickly became my
18 concern about the status of the criminal proceedings involving
19 Mr. Ebsary.

20 Q. But just to finish up on this, then, in the end of November
21 1983 the position of the government was that there was some
22 connection between the civil suit and the request for
23 compensation.

24 A. I think in my own mind it would be more accurate to say that
25 there, I was of the view that there could be and I just wasn't

1 sure how that might work out depending on what actions the
2 government decided to take.

3 Q. And the two other matters mentioned in the press release,
4 was it also the government's view that there was a connection
5 between payment of Mr. Marshall's legal fees and the civil
6 suit?

7 A. I don't think that I had that on my mind, that there was a
8 connection there. But I tended, in my own mind, to put the
9 question of his legal fees and the question of compensation
10 under the one heading.

11 Q. I see. And the other matter that's raised in the press release
12 is the question of the public inquiry into the police
13 investigation. Was it, then, your position in November of
14 1983 that there was a connection between that public inquiry
15 and the civil suit that had been started?

16 A. I'm not quite sure that I follow your question.

17 Q. The press release raises three matters.

18 A. Yes.

19 Q. Mr. Marshall's lawyers asked here that the representation is a
20 matter of a public inquiry, legal fees, compensation. The
21 press release says:

22
23 The Attorney General stated 'It is the
24 function of the courts to determine
25 whether a person has a right to
 compensation.' Mr. Giffin stated that Mr.
 Marshall has commenced such civil

MR. GIFFIN, EXAM. BY MR. SPICER

1 proceedings and therefore having regard to
2 the rights of all parties, he is of the opinion
3 that it would be premature for him to
4 consider such requests.

5 Plural. So I'm asking you whether or not at the time you
6 thought there was a connection between the request for a
7 public inquiry and the civil suit that had been commenced.

8 A. No, I didn't make a connection on that point in my own mind.

9 Q. What was the nature of the advice or the discussions that you
10 were having in the department at that time, in November of
11 '83, concerning the compensation issue?

12 A. Well, the strict legal advice that I received was that the
13 government of Nova Scotia, based on the information
14 available at that time, had no legal obligation to Mr. Marshall,
15 that his claim at law would lie against the police officers
16 involved or possibly against the city of Sydney and there was
17 certainly under the laws that existed at that time a very
18 serious question as to whether or not the city of Sydney
19 would even have been liable, although the law has been
20 changed in that respect since. Although it's been changed but
21 not proclaimed. I should correct that. But the strictly legal
22 advice I had within the department was that the government
23 of Nova Scotia had no legal responsibility to pay compensation
24 to Mr. Marshall. So the discussions that ensued with respect
25 to the question of compensation from the government of Nova
Scotia to Mr. Marshall were centered upon the concept of an

1 ex gratia payment.

2 Q. And an ex gratia payment would be a payment made by the
3 province voluntarily without any consideration of any
4 liability?

5 A. That's right.

6 Q. What was the...can you tell us what the attitude of your staff
7 was, from whom you were receiving advice, towards Mr.
8 Marshall? What was Mr. Coles' attitude towards Mr. Marshall
9 as you perceived it?

10 A. I would, in a sentence, say that his attitude was consistent
11 with the position that had been taken by the Crown, by Mr.
12 Edwards, before the Appeal Division. That the attitude that
13 Mr. Coles expressed to me was one that yes, Mr. Marshall was
14 at least in part the author of his own misfortune.

15 Q. Was there any consideration given in the department in
16 November of 1983 to saying "Look, this man has been now
17 found to be not to have committed the murder. We should
18 get on with this and try to move as quickly as we can to
19 providing him some form of compensation."

20 A. Well, that was one of the reasons why I agreed to meet with
21 Mr. Cacchione in November. It had been my hope that I might
22 be able to develop a line of communication with him, an open,
23 private, without prejudice line of communication and we
24 might then be able to have discussions that might lead to
25 some kind of resolution of those matters.