

MR. GIFFIN, EXAM. BY MR. SPICER

1 12:07 p.m.

2 Q Did you conclude from that meeting that you couldn't do that?

3 A. Yes.

4 MR. CHAIRMAN

5 Before we move away from the area you're covering, there's
6 something I'd like some clarification on, Mr. Giffin. Earlier you
7 had indicated that the position put by Mr. Frank Edwards before
8 the Court of Appeal and the statement in particular that had been
9 referred to, you've been referred to by Mr. Spicer was position of
10 the government of Nova Scotia.

11 MR. GIFFIN

12 Yes.

13 MR. CHAIRMAN

14 You've now indicated that Mr. Gordon Coles, the Deputy
15 Attorney General, his attitude was in conformity with that
16 expressed by Mr. Edwards.

17 MR. GIFFIN

18 Yes.

19 MR. CHAIRMAN

20 Now when you said, bearing in mind your earlier testimony
21 that on matters involving law enforcement and criminal law that
22 the Attorney General is not subject to direction from government,
23 is there a distinction here that I'm missing between Mr. Edwards
24 appearing before the Court of Appeal on a reference, on this
25 reference, and say if Mr. Edwards has been appearing before the

1 Court of Appeal on some other appeal from a conviction.

2 MR. GIFFIN

3 Yes, I take Your Lordship's point. As I understand it, the
4 position that was enunciated by Mr. Edwards before the Appeal
5 Division was the argument that was made by the Attorney
6 General's Department. Now there's danger here of getting into the
7 area of Cabinet discussions, but that was the position of the Crown
8 but that would not represent a policy statement by the
9 government of Nova Scotia. There is a distinction there that I
10 think I would have to make that obviously in a matter like that,
11 the Attorney General would not go to Cabinet to seek instruction
12 from Cabinet for the position to be taken by a Crown Prosecutor
13 on a matter before the Courts. That that is a function of the
14 Attorney General, the function which is independent of the
15 Executive Council.

16 MR. SPICER

17 Q. Just to follow up on that for a second, though, have you not,
18 regardless of this distinction, I understood your testimony to
19 be that the position taken by Mr. Edwards was consistent
20 with the position of the government of Nova Scotia at the
21 time?

22 A. Yes, I think the problem area we're getting into here is the
23 question again of where the Crown and the Attorney General
24 function in a manner which is independent of the Executive
25 Council. There was, for example, no directive from the

1 Executive Council to the Attorney General's Department to
2 adopt that position before the Appeal Division.

3 Q. No, but isn't the simple answer to the question that Mr.
4 Edwards' position was consistent with the position of the
5 government of Nova Scotia at the time, as you understood
6 that position to be.

7 A. Yes.

8 Q. Okay. In Volume 32 at page 285, it's a memo to yourself of
9 November 29, 1983 from Gordon Gale referring to a call that
10 he had received from Doug Rutherford. In the third line of
11 the memo, it says:

12
13 The message is that his [presumably
14 MacGuigan's] stance on Marshall doesn't
15 seem to be washing in public. He may feel
16 it necessary to launch a Commission of
17 Inquiry into the enforcement of the
18 criminal law by the police in Marshall's
19 case, if we don't make some resolution of
20 the case.

21 He then goes on:

22
23 He may contact Cacchione, Marshall's
24 lawyer, to ask if he feels such an Inquiry
25 would prejudice his case. MacGuigan feels
that an impending civil action where
nothing has been done except to take out
an Originating Notice, is not a sufficient bar
to an Inquiry. I gather he expects to hear
from you by word or action.

1 Were you in touch with Mr. MacGuigan as a result of this?

2 A. I believe so. I believe that's the conversation we referred to
3 before in which, I'm now satisfied the conversation took place
4 but I can't personally recall it, but I certainly wouldn't
5 quarrel with Mr. MacGuigan's evidence on that point, if he
6 gives evidence.

7 Q. And then at about the same time, on December the 2nd in
8 Volume 38 at page 44. That, in fact, is a report of an article in
9 the Globe and Mail. It's just that it came off our computer in
10 that fashion. It's not actually the Globe and Mail style. But
11 it's referring to a comment by the Premier, and I just draw
12 your attention to the second last full paragraph in that quote:

13 Mr. Buchanan said the Ebsary trial and the
14 civil suit will address questions that must
15 be answered before compensation can be
16 properly considered.

17 That, I think, is really the first reference to the Ebsary matter
18 being a factor in the mix as to dealing with compensation.

19 A. I believe so, yes.

20 Q. Did you have discussions with the Premier outside of Cabinet
21 as to the relevance of the Ebsary matter prior to him issuing
22 this statement?

23 A. Yes.

24 Q. What was your advice to him concerning the relevance of the
25 Ebsary matter?

1 A. My advice to him was that the Ebsary matter was still before
2 the courts. At that stage, the second trial had been concluded.
3 There was an appeal pending before the Appeal Division by
4 Mr. Ebsary's solicitors and I advised the Premier that since
5 that matter was still before the courts, that we would have to
6 exercise great caution in how we dealt with the matter and
7 that one of the options open to the Appeal Division on that
8 appeal was the direction of a new trial. And if that happened,
9 that could mean that all of the questions would arise with
10 respect to impaneling a jury and all that sort of thing, if there
11 was another trial. And so my advice to the Premier, in a
12 sentence, was that the Ebsary case was still before the courts
13 and might be before the courts for some time to come.

14 Q. And that the Ebsary case would relate to any claim for
15 compensation.

16 A. I didn't see that as a direct linkage but rather a concern on
17 my part, a very general concern in dealing with a totally
18 unprecedented situation. A concern that any action
19 undertaken by the government of Nova Scotia on any of these
20 matters would have to be carried out in such a way that we
21 did not trespass upon the Ebsary case.

22 Q. As we move into 1984, we have, if I understand your
23 testimony in the press clipping as correct, there are really two
24 matters that are standing related to compensation, two major
25 matters--the Ebsary trial, Ebsary matters, and the civil suit.

1 A. Yes.

2 Q. In that same Volume 38 at page 46, there's an article of
3 January 6, 1984 from the Cape Breton Post in which Mr.
4 Cacchione in the fourth line says:

5
6 He still hasn't been able to obtain another
7 meeting with Provincial Attorney General
8 Ron Giffin to discuss possible compensation
9 from the government for Mr. Marshall's
10 wrongful imprisonment.

11 Had Mr. Cacchione, to your knowledge, made any efforts to
12 have another meeting with you?

13 A. I don't recall whether he did or not but I came to the
14 conclusion after what had happened with respect to the first
15 meeting that I would not meet with Mr. Cacchione personally
16 to deal with the Marshall matter.

17 Q. What was Mr. Cacchione supposed to do then?

18 A. Well, as I saw it at that point in time, I had not been able to
19 get the kind of private communication that I wanted with Mr.
20 Cacchione which might have enabled us to resolve these
21 matters. I was also in a position where the government of
22 Canada had stated that they were not going to provide any
23 compensation or cost to Mr. Marshall and I therefore took the
24 situation as being one in which if we were to deal with these
25 issues, that it was going to have to be the government of Nova
26 Scotia that would deal with the issues and that we were going
27 to have to decide how best to approach these matters.

1 Q. Do you know whether or not any suggestion had been made
2 to Mr. Cacchione by this point in time as to how he might
3 proceed?

4 A. No, I hadn't made any suggestion to Mr. Cacchione about how
5 he might proceed. The civil action, of course, was still
6 pending and I suppose they could have pursued that but that
7 was not a realistic remedy in my mind. It seemed to me that
8 the responsibility, leaving aside the question of legal
9 responsibility, that the responsibility for dealing with the
10 situation was clearly in the hands of the government of Nova
11 Scotia and that we would have to address ourselves to the
12 question of how we could deal with these questions and what
13 decisions we would have to make.

14 Q. Do you know whether any steps were taken by persons in
15 your department between the time of your first meeting with
16 Mr. Cacchione and January the 5th or 6th, 1984, whether any
17 steps were taken to contact him and suggest to him, "Look,
18 this is what you might do. Let's get together and see if we
19 can't work something out."

20 A. No, not that I know of.

21 Q. In Volume 32 again at page 286, there's a memo or letter
22 there from Chief Superintendent Reid to Mr. Gale forwarding
23 a number of R.C.M.P. documents, included in which, and this is
24 the reason I wanted to ask you about this at this time, is the
25 1971 reinvestigation by Al Marshall, which starts at page

1 292. Do you recognize that as the R.C.M.P. reinvestigation in
2 1971?

3 A. Yes.

4 Q. Subsequent to that on January the 11th, if you look to page
5 298 of the materials in Volume 32, there's a transcript of a
6 C.B.C. Halifax First Edition broadcast in which there's some
7 comments concerning the Attorney General's Department
8 suppressing key evidence.

9 A. Yes.

10 Q. And various things, to which you responded at pages 301
11 through to 308, and there are a couple of drafts of press
12 releases there. And the last one that I have is "Third Draft"
13 on page 305. Is that a press release that was, in fact, issued,
14 Mr. Giffin?

15 A. I'm searching my memory. I don't believe that that was
16 released.

17 Q. You don't believe that the government responded to the C.B.C.
18 First Edition broadcast?

19 A. I don't recall that we did. I could be mistaken on that, but I
20 don't think that we did. I think generally I had come to the
21 conclusion by then that I was trying to make as little in the
22 way of public comment about the Marshall case as I could
23 until we could determine the best course of action to follow. I
24 could be mistaken on that, but I don't think it was released.

25 Q. Regardless of whether or not it's released, if I could just draw

1 your attention to page 308, and I'll read the three lines on
2 307 that get us there:

3
4 The assertion that the Department of
5 Attorney General suppressed evidence in
6 the case of Donald Marshall, Jr. is totally
7 inconsistent with the role played by the
8 Department in the reinvestigation of
9 Donald Marshall's 1971 conviction and
10 with the position taken by the Crown
11 throughout the subsequent legal
12 proceedings which resulted in the quashing
13 of Mr. Marshall's 1971 conviction--a
14 position predicated upon insuring that all
15 relevant and material aspects of the case
16 were presented before that court.

17 Was that your understanding of the government's position
18 with respect to the reference, that all relevant and material
19 aspects of the case had been presented to the court?

20 A. Yes, it was my understanding that the position taken by the
21 former Attorney General, Mr. How, in that matter was that
22 there was full cooperation in placing the necessary
23 information before the Appeal Division on the reference and
24 that there was full cooperation by the Crown Prosecutor, Mr.
25 Edwards, with the solicitors representing Mr. Marshall.

Q. Would you characterize the nature of the relationship
between your Department and the government and Mr.
Marshall and his counsel as essentially nonadversarial?

A. That was the way that I tried to approach it, recognizing that
there were different interests involved there. Mr. Marshall

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1 had not brought legal action against the government of Nova
2 Scotia. So, in that sense, we were not in an adversarial
3 relationship.

4 Q So that the relationship would not be as between a Crown
5 Prosecutor and a defence lawyer, for instance.

6 A. That's right.

7 12:25 p.m. INQUIRY RECESSED UNTIL 2:00 p.m.

8 2:02 p.m. INQUIRY RESUMES

9 Q Mr. Giffin, before we broke for lunch, we were in January of
10 1984. I'd just like to go through some documents with you
11 that begin at page 309 in Volume 32. Are you familiar with
12 that letter to Mr. Coles?

13 A. Yes.

14 Q Did you discuss with Mr. Coles prior to his letter of the 17th
15 his denial of the request for the information?

16 A. Yes.

17 Q Did Mr. Coles advise you on what basis he was going to make
18 the denial?

19 A. Yes.

20 Q Did Mr. Coles advise you as to whether or not he had
21 reviewed any of the documents that were requested by Mr.
22 Cacchione prior to making that denial?

23 A. I don't recall asking him whether he had reviewed the
24 documents personally.

25 Q Was it your understanding that the documents had been

1 reviewed prior to Mr. Coles refusing access on January 17th?

2 That's the letter at page 311.

3 A. Yes. I can't say whether the documents were reviewed by
4 Mr. Coles personally or by senior staff in the department.

5 Q. Was it your understanding, however, that they were
6 reviewed by somebody?

7 A. Yes.

8 Q. Prior to Mr. Coles' letter of January 17th, which is on page
9 311.

10 A. Yes.

11 Q. Mr. Cacchione then writes to yourself at page 313, I gather
12 pursuant to the Freedom of Information Act basically
13 appealing to you.

14 A. Yes.

15 Q. Making the same request. Are you able to tell us what
16 documents were in the possession of the department of the
17 sort that Mr. Cacchione was asking for?

18 A. It was my understanding that most of what he was asking for
19 was not in the possession of the department. Information
20 about the Canadian Penitentiary Service and federal
21 Department of Justice and things like that were obviously not
22 in the possession of the Attorney General's Department. It
23 was my understanding that the material that was in the
24 possession of the department was the material that had
25 accumulated since the reopening of the case in 1982.

1 Q. On page 315, there's a memo from yourself to Martin
2 Herschorn in connection with this matter.

3 Would you be good enough to look over the
4 file, in particular the letter I received from
5 Felix Cacchione dated January 18, 1984
6 appealing Gordon Coles' decision to me. I
7 believe I have 30 days in which to get
8 back to him after receipt of the request.
9 But as I have not had an opportunity to
10 review the whole file, I would appreciate it
11 if you would prepare a letter for my
12 signature rejecting the appeal citing the
13 sections involved and I will sign it
14 tomorrow.

11 What was your understanding at that point in time on the
12 date that you wrote that memo, February 7th, as to how much
13 Martin Herschorn knew about the request that had been
14 made by Mr. Cacchione?

15 A. It was my understanding that Martin was familiar with the
16 material that was in the file.

17 Q. And had Martin advised you that the request should be
18 denied?

19 A. Yes.

20 Q. Would there have been, in your view, discretion in the
21 government or in your office if you had so chosen? Instead of
22 denying to say, given the peculiar circumstances of this case,
23 "We will allow access to you of some of this information that
24 you've asked for"?

25 A. I think that I could have done that but, at that point in time, I

1 was still taking a very cautious approach to anything of this
2 sort until the government determined its course of action.

3 Q. What would be the relationship between the cautious
4 approach that you were taking and the release of information
5 to Mr. Cacchione?

6 A. Well, in the sense that to make a decision to release
7 confidential files from the Attorney General's Department
8 would be a very serious decision at any time and it would be
9 the general policy question of whether or not one ought to do
10 that and given that the government had not yet at that point
11 in time determined how we were going to address the
12 compensation issue, I didn't want to take a step like that out
13 of context. I wanted to know what the government's
14 approach, overall approach, would be to the issue of
15 compensation before contemplating something like that.

16 Q. Did you or to your knowledge anybody in your department
17 advise Mr. Cacchione that in part his request was misplaced
18 because your department wasn't in possession of a lot of this
19 information anyway?

20 A. I don't recall that that information was, that was not stated in
21 the letters and I don't know that anybody, as far as I know,
22 nobody communicated that to Mr. Cacchione. But in looking at
23 the letter, I would have assumed, in any event, that any
24 lawyer would know that much of that information would be
25 in the hands of the federal authorities and not the provincial

1 government.

2 Q Well, the request I'll just direct your attention at 313. He's
3 asking for, in the third line:

4 Access to any and all personal information
5 held by or for the Department of the
6 Attorney General. (And then refers
7 to))Correspondence between the said
8 department and Correctional Services
9 Canada. (And then) Correspondence
10 between the said department [being your
11 department] and the federal Department of
12 Justice. (And then the third item) All
13 correspondence whatsoever between the
14 said department and the National Parole
15 Board. (Fourth)) Correspondence
16 whatsoever between the said department
17 and the police department of Sydney.
18 (And again in 5) All correspondence or
19 communications between the said
20 departments.

21 So he was only asking for information that was passing
22 between the departments.

23 A. Right, and essentially there was, I don't think there was
24 anything in the department under those headings as
25 enunciated. But the response to him by both Mr. Coles and
the response by myself was couched in the terminology of the
Freedom of Information Act.

Q Yeah, you could, if you look at your response on page 316,
you certainly couldn't tell from that response that, indeed,
there was no material contained in some of the categories of

1 information Mr. Cacchione had asked for.

2 A. Yes, that's correct.

3 Q. And, again, would there have been anything to stop you from
4 telling him, "Look, we don't have anything."

5 A. No, it was just that the format of the letter followed the
6 Freedom of Information Act provisions. But there was
7 nothing to stop us from saying that to him.

8 Q. And do you think that in so telling Mr. Cacchione, he could
9 have gone off in another direction looking for that
10 information which he would now know wasn't in the
11 possession of the Attorney General's Department?

12 A. That's speculative, I suppose. He could have contacted those
13 agencies, in any event, but my overall approach was simply
14 that I didn't want to make any moves in any area like this
15 until we had determined the overall approach the
16 government was going to take to the question of
17 compensation.

18 Q. And that's a position that you had been taking since
19 November, and it's now the middle of January. What steps in
20 the interim was the government taking in order to consider
21 the way in which you were going to handle compensation?

22 A. Well, we were having discussions within, primarily in Cabinet
23 at regular weekly Cabinet meetings, as well as discussions in
24 the department between myself and my senior officials and it
25 was an ongoing topic of discussion for us to try to determine

1 the best way of approaching the issue.

2 Q. For the moment, other than the discussions that you were
3 having in Cabinet, can you tell us what sorts of discussions
4 you were having, the substance of them? What sorts of
5 things were you talking about with your senior staff?

6 A. Well, one issue that we discussed repeatedly throughout was
7 simply the question of what impact any actions by the
8 government of Nova Scotia might have on the, particularly in
9 the Ebsary case. We mentioned the civil proceedings, but as I
10 continued to deal with the matter, my focus ended up almost
11 entirely on the criminal proceedings involving Mr. Ebsary. So
12 the discussions were looking at possible scenarios, whether
13 we could, whether we should just do absolutely nothing or
14 whether we could set up a mechanism for dealing with the
15 question of compensation, whether we ought to appoint a
16 commissioner under the Inquiries Act. If we were going to
17 appoint a Commissioner, should it be a member of the Bar?
18 Should it be a judge? Should it be somebody from out of the
19 province? There were discussions like that that went on
20 intermittently really through January and February.

21 Q. Are you able to tell us at this point in time in January or so
22 from your conversations or observations with Mr. Coles, what
23 his attitude was as to whether or not you ought to set up
24 some sort of compensation scheme for Mr. Marshall?

25 A. I'm not sure if one could characterize it as an attitude. It was

1 more a case of having discussions in which we were exploring
2 options, having free-wheeling discussions, saying what if we
3 did this, what if we did that, where would that take us and
4 what would the consequences be? So, in that sense, I always
5 encouraged people if I was talking within the department on
6 the matter not just to take a single position and say that's it.
7 But rather just to explore all of the options and what might be
8 the best way of approaching the problem.

9 2:14 p.m.

10 Q Did you have a sense at that time, though, of what Mr. Coles
11 thought you ought to do in January?

12 A. It's difficult to answer that because we had so many
13 discussions and they were discussions which tended to travel
14 in different directions as we looked at the variety of options
15 and concerns. I'm not quite sure what, where your question is
16 heading or what your, I'm most hesitant to presume to testify
17 about what somebody else was thinking.

18 Q I'm not asking you what he was thinking. I'm asking you
19 whether or not Mr. Coles was suggesting you go in a certain
20 direction at this particular point in time. What advice was he
21 giving you?

22 A. I'm having difficulty being specific on that because we went
23 through a period in January and February in which there
24 were all sorts of discussions going on within the Provincial
25 Government, both within the Department and in Cabinet and,

1 on some occasions, in the government caucus as well. And it's
2 difficult to look back now and pick that out and say, " Well,
3 this person recommended this specific course of action." I
4 was, at that point, I had an open mind. I was really trying to
5 find the best way of dealing with the situation.

6 Q. Would your answer, then, be that at this point in time, that is,
7 today you don't, you can't recollect any specific advice you
8 would have been given by Gordon Coles at that point in time?

9 A. Right.

10 Q. On page 321 of Volume 32 Mr. Cacchione writes and indicates
11 that he's dropped the civil suit. And he indicates in the last
12 paragraph, "It's my client's hope that a just and speedy
13 resolution of this matter can be forthcoming. A reply at your
14 earliest convenience would be greatly appreciated." Do you
15 remember getting that letter?

16 A. Yes.

17 Q. And what was your view upon receiving that letter as to
18 where you now stood in terms of the obstacles to a
19 compensation method?

20 A. Well we had, both the Premier and I had mentioned the civil
21 proceeding earlier on. But, as I've said, the longer I dealt
22 with the matter the more I became focused on the Ebsary
23 case. I felt that if we, for example, became engaged in a
24 public inquiry into the compensation issue that the area that
25 was of greatest concern to me was not the civil proceeding,

1 but it was the criminal proceeding. I did not, at any time,
2 state to Mr. Cacchione that it was a condition precedent to the
3 Government of Nova Scotia dealing with the compensation
4 issue, that this civil proceeding be dropped.

5 Q. Did you ever have any discussions with Mr. Cacchione at all
6 about a connection between the civil suit and compensation?

7 A. The only discussions that I had with Mr. Cacchione were at
8 the meeting in November. And the civil suit was certainly
9 mentioned in those discussions. I believe Gordon Coles raised
10 a concern about whether a governmental inquiry into all or
11 some aspects of the case would, in effect, be functioning as a
12 discovery exercise in aid of a civil proceeding. But there was
13 that kind of discussion back and forth. Nothing was
14 resolved.

15 Q. Did you have any concern about the civil suit functioning as a
16 discovery?

17 A. No, I didn't say that. I said the, Mr. Coles had raised the
18 concern about a government inquiry into the compensation
19 issue...

20 Q. The other way around.

21 A. Functioning, or being used, in effect, as a discovery
22 proceeding.

23 Q. Did you share that concern?

24 A. Not to the extent that Gordon Coles did. He was, I think, I
25 think more concerned about that than I was. My primary

1 concern was to try to find a way of addressing the
2 compensation issue without trespassing on the Ebsary case.

3 Q. But up until this point in time, until the civil suit is dropped, I
4 take it you would agree that the question of the civil suit had
5 been raised.

6 A. Yes.

7 Q. Had been mentioned.

8 A. Yes

9 Q. I'm interested in your comments about the relevance of the,
10 or the relationship between the inquiry and the civil suit in
11 terms of the inquiry functioning as some sort of a discovery
12 procedure. The civil suit was a suit between Marshall and the
13 City of Sydney, MacIntyre and Urquhart.

14 A. Yes.

15 Q. What possible concern could it be of the Government's that
16 the inquiry would function as a discovery process in relation
17 to a civil suit in which it's not a party.

18 A. Well, the point was simply raised by Gordon Coles at the
19 meeting which we had in November, but that was not a
20 decisive point as far as I was concerned.

21 Q. Was it a point?

22 A. It was just a point, that's all.

23 Q. And since it was a point, I'm going to come back, I want to
24 come back the question again. If it was a point, why was it a
25 point? I mean what difference does it make to the

1 Government of Nova Scotia when they're not a party to the
2 civil action, that there might be an inquiry?

3 A. Well, I think the question of an inquiry would, any type of
4 inquiry, would have to do much more than simply support a
5 civil action. Obviously we were talking here about a serious
6 matter dealing with the administration of justice as well as
7 the narrower question of compensation and I think it was just
8 a discussion along the lines that an inquiry of any type that
9 was authorized by the Cabinet ought to be recognized that it
10 would be far more than just something to aid in a particular
11 civil proceeding.

12 Q. On the first page of Volume 33 there's a memo from yourself
13 to Martin Herschorn concerning your file retention scheme.
14 Was that the first day of the new session, or about that time,
15 wasn't it?

16 A. It would have been, I think ever since we've been in
17 Government the House has opened on the first, on the last
18 Thursday in February.

19 Q. Okay. And if you could now have a look at Volume 38, page
20 56, this is the Hansard account of the question period on
21 February 28th. And without going through it in detail I
22 suggest to you that there's a fair number of people asking a
23 fair number of questions and making a fair number of
24 resolutions about the Marshall case.

25 A. Sure. Yeah.

1 Q At that point in time.

2 A And it is my recollection that would have been the first
3 question period of that sitting of the House.

4 Q Then on page 64 there's a answer that perhaps you can help
5 us with. There's a question from Vince MacLean.

6
7 Would the Minister inform the House as to
8 whether or not he has sought and secured
9 the files of the RCMP which were
10 conducted from 1972 onwards with
11 reference to the Donald Marshall case,
12 obtain copies of those files to be placed
13 within his system in the Attorney General's
14 office?"

15 Then you say,

16
17 No, Mr. Speaker, I am satisfied that the
18 RCMP files which are the responsibility of
19 and maintained by the RCMP are in their
20 hands. I can get copies but I'm satisfied
21 they have their files.

22 I don't understand whether you're saying you have the RCMP
23 files or you don't have the RCMP files.

24 A I understood the request or the inquiry from Mr. MacLean to
25 be that we would take over whatever files were in the
26 possession of the RCMP and put them into the possession of
27 the Department. I just didn't see any need to do that.

28 Q And is your answer intended to indicate, though, that your
29 Department did not have any of the RCMP files?

30 A Well, we certainly had the material, the reports, for example,

1 which we had received from the RCMP which were in our
2 Departmental files. I understood the question to be that he
3 was asking us to take files which were then in the possession
4 of the RCMP and move them into our possession.

5 Q. In other words, physically take them away and make them
6 yours.

7 A. Yes. Yes. And I didn't see any need to do that.

8 Q. Over on the next page, on page 65. Again, you're asked a
9 question by Mr. MacLean. And you're talking generally about
10 the reinvestigation. You say,

11
12 Mr. Speaker, the appropriate response to
13 that question is that this Government has
14 absolutely nothing to hide with respect to
15 the Marshall matter. The fact is that the
16 reinvestigation was begun in February
17 1982 after the Federal Minister of Justice
18 referred the matter to my predecessor
19 Attorney General under the provision of
20 the Criminal Code.

21 I'd just like to ask you what you think happened in February
22 1982 after a referral from the Federal Minister of Justice.

23 A. Well it was my understanding that the RCMP then conducted
24 the reinvestigation of the case which led to the hearing before
25 the Appeal Division.

Q. Did you not know, though, in February of 1984, that the way
in which that reinvestigation was commenced was as a result
of initiation by the Sydney Police Department?

1 A. No. No, I didn't.

2 Q. So you understood in February of 1984 that the whole
3 process was commenced in 1982...

4 A. Yes.

5 Q. By a referral from the Federal Government?

6 A. Yes, that was my understanding. That the reference was
7 made from the Federal Minister of Justice to the Appeal
8 Division.

9 Q. Yes. The reference, but that was in June of 1982. I'm talking
10 now about the investigation itself which preceded the
11 reference.

12 A. Oh, I'm sorry. No, I wasn't aware that that, at that time, in
13 1984, I was not aware that that had originated with the
14 Sydney City Police force.

15 Q. Where did you think it did originate?

16 A. At that point I had not read the material that went back to
17 what had happened that led to the re-opening of the case.
18 And it was just my understanding that the case had been re-
19 opened and that the Federal Government had referred it, that
20 the investigation had taken place. But I wasn't involved in
21 those matters at the time so I didn't really have a firsthand
22 knowledge of how that all took place.

23 Q. And at the time, then, in February of 1984, insofar as the
24 investigation in 1982 was concerned you didn't really know
25 how it had been restarted, is that a fair statement?

1 A. That's right.

2 Q. Okay.

3 A. In fact, I'm not even sure if that date is correct but I was just
4 responding off the top of my head to a question in the House.

5 Q. You then say in the next sentence, "The fact is that this
6 Government and the RCMP conducted that reinvestigation."
7 What was the involvement of your government in that
8 reinvestigation?

9 A. Well, in the sense that the reinvestigation proceeded and led
10 to the reference, the hearing before the Appeal Division. And
11 that the Crown was involved in that. Mr. Edwards was
12 involved in it.

13 Q. Okay, so you're making reference there to Mr. Edwards'
14 involvement.

15 A. Sure.

16 Q. Then over on page 66, still in the same question period, about
17 halfway down the page. Again this question of the inquiry
18 and various other things is being raised and you say in the
19 third paragraph of your answer,

20
21 We are not talking about an academic
22 exercise here. I'm talking about the rights
23 of an accused person before the courts of
24 this province. As long as I am Attorney
25 General I can guarantee you that I am not
going to do anything to prejudice the rights
of an accused person before our courts.

1 I take it at that point in time you're focussing now on the
2 Ebsary matter.

3 A. Yes, that's correct.

4 2:29 p.m.

5 Q. And again on page 67, paragraph before the question from
6 Alexa McDonough, the last three or four lines of a quote from
7 myself:

8
9 It is my view, I'll express it as clearly as I
10 can, that while Mr. Ebsary is still before
11 the criminal courts on a very serious
12 charge of manslaughter, that I must not
13 take any chances with his position before
14 the courts that is fundamental.

15 And that was your position on February 28th, 1984?

16 A. Yes.

17 Q. And to complete that on page 68, towards the end of the first
18 paragraph of your answer, after referring to Ebsary, you say:

19
20 I do not have the same concerns about civil
21 proceedings that I have about this
22 particular criminal proceeding.

23 A. Yes.

24 Q. But at that point in time there was no civil proceeding. The
25 civil proceeding was dropped.

26 A. Yeah, I was just talking about civil proceedings generally.

27 Q. In general, yeah. And then the next day, on page 71, again,
28 this time it's the Premier and he says:

1
2 Mr. Speaker: I wish to inform the House
3 that the government over the last number
4 of months has been actively considering all
5 aspects of the Donald Marshall matter and
6 all requests made on his behalf. As a
7 result of those deliberations, the
8 government is preparing a statement on
9 the matter which I will deliver to the
10 House next week.

11 Other than the matters you've already mentioned to me, can
12 you tell me in what respects the government was "actively
13 considering all aspects of the Donald Marshall matter"?

14 A. Well, in the sense that I've outlined that we were having
15 ongoing discussions both in Cabinet and in the department
16 and on one or two occasions in the government caucus about
17 how we ought to attempt to deal with these issues and what
18 procedures we ought to follow.

19 Q. We'll just follow along this volume, on page 81, an article in
20 The Chronicle Herald of March 2, 1984 about six lines in
21 where Mr. MacGuigan condemned the Buchanan government
22 for persistent stonewalling regarding the matter of
23 compensation for Marshall. Did you have any discussions
24 with Mr. MacGuigan about compensation at about this time?

25 A. Not that I recall. I believe that he was in the City at a liberal
convention. I don't believe I had any discussions with him
while he was there.

Q. If I could take you back to Volume 33, page 340.

MR. GIFFIN, EXAM. BY MR. SPICER

- 1 A. Yes.
- 2 Q. Memo from yourself to Martin Herschorn dated March 1,
3 1984. Was March 1, was that a Thursday? It was. Would
4 that have been a day of a Cabinet meeting?
- 5 A. I can't recall. I'd have to check a calendar.
- 6 Q. I checked it and I think my recollection from looking at it
7 now is that that was a Thursday.
- 8 A. It would have been a leap year, yes, so that would have been
9 a Thursday, yeah.
- 10 Q. "Did Donald Marshall, Jr. and Sandy Seale have criminal
11 records prior to the incident of May, 1971?" Why did you
12 want to know that?
- 13 A. I'm not sure. I would think that I must have known myself
14 what the situation was in that regard, you know, well before
15 March 1st. Now whether that was an inquiry from Cabinet
16 colleagues, I'm just not sure. I can't recall.
- 17 Q. Do you recall whether or not you got an answer to the
18 question?
- 19 A. I didn't get anything in writing. Any answer I got must have
20 been by word of mouth.
- 21 Q. Okay, then in that same volume, Mr. Giffin, on page 342, a
22 statement by the Premier announcing compensation
23 commission, Mr. Justice Campbell. What was it that changed
24 the situation from February 28th when you indicated that Mr.
25 Ebsary's position before the courts was fundamental, to this

1 point on March 5 when you announced the setting up of the
2 Commission headed by Mr. Justice Campbell?

3 A. Well, the discussions that had taken place within Cabinet and
4 within the government generally over that period of time,
5 January/February of 1984, we had gradually been moving in
6 that direction. We had, and I couldn't put dates on this but
7 we had eventually come to the conclusion that the best way
8 to go, the most appropriate way to go in dealing with the
9 compensation issue was through an inquiry conducted by a
10 judge. We decided that it should be a judge from outside
11 Nova Scotia and, in addition, it was, I thought, advantageous
12 when Mr. Justice Campbell's name came up that he had also
13 had experience in government. I thought that would be an
14 asset for anybody conducting that kind of an inquiry. There
15 were, one could never pinpoint and say, well, on this day the
16 government made that decision. These were discussions that
17 we had back and forth in the Cabinet room and elsewhere
18 over a period of many weeks until we finally came to the
19 conclusion that this was the most appropriate way to go.
20 There's one matter that I will mention which I conveyed to
21 my Cabinet colleagues, and that concerned the question of
22 how long the Ebsary case might be before the courts. I can
23 recall somewhere in that time frame or late February that I
24 telephoned Mr. Luke Wintermans, who was the solicitor, the
25 Legal Aid solicitor representing Mr. Ebsary, just to try to get

1 some indication from him about where he was with that case
2 and whether he would be proceeding with the appeal and so
3 on. And in that telephone conversation, I think I reached
4 him, I think he was in Florida, and in that telephone
5 conversation he indicated to me very vigorously that he
6 believed his client was innocent, that they would be pursuing
7 that appeal and whatever other avenues were open to them,
8 that he was very strongly committed to that. And so I can
9 certainly recall in our discussions in Cabinet that that was one
10 of the things that I pointed out to my colleagues was that the
11 Ebsary case might be before the courts for many months to
12 come and that, particularly if another trial was ordered, and
13 that if we were to leave the question of compensation
14 unresolved, that that certainly wouldn't be acceptable to
15 leave it unresolved for that period of time. And so that was
16 certainly a factor in my thinking.

17 Q. Had you received any advice from your staff between
18 February 28th and March 5th as to the setting up of the
19 Campbell Commission?

20 A. I'm sure we discussed it. I'm trying to think back as to
21 whether there were any written memos, but, yes, once
22 Cabinet made the decision to proceed with this type of
23 inquiry, then of course we had to get into the question of
24 drafting terms of reference, doing all of the necessary
25 paperwork that had to be done to get the inquiry started. So

1 certainly my staff were involved in that.

2 Q. On page 344, you write to Mr. Cacchione. I just wanted to
3 draw your attention to a couple of things. On the first page
4 you indicate that you're going to be making available to Mr.
5 Justice Campbell files, documents and other materials in your
6 possession, including those files to which you had requested
7 access and which access had been denied. Was it your view
8 that Mr. Justice Campbell would, in turn, make those files
9 available to Mr. Marshall's solicitors?

10 A. I felt that was something on which I was prepared to rely on
11 his judgement, that if he received material which was
12 confidential and which was not, which did not have to be
13 turned over to Mr. Cacchione, that at least that would
14 constitute an independent review by someone outside the
15 department as to what ought appropriately to be handed
16 over. That seemed to me in the circumstances to be a
17 reasonable way of getting around the problem which was
18 created by the denial under the Freedom of Information Act.

19 Q. So that if Mr. Justice Campbell had decided in his own mind
20 that he would turn the material over to Cacchione, that
21 wouldn't be a problem from your point of view.

22 A. That's right. We were prepared to rely completely on his
23 judgement.

24 Q. And you say at the top of page 345:
25

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1 I also want to emphasize that the manner
2 in which Mr. Justice Campbell will
3 discharge his task will be entirely up to
4 him.

5 I take it then that once the terms of reference are set up, it
6 then becomes Mr. Campbell's ballgame, essentially.

7 A. Yes, although I threw out, I think, in everything I wrote like
8 that or statements I made, I still emphasized my concern that
9 nothing be done that would trespass on the Ebsary case. That
10 was a consistent concern that I had.

11 Q. Also contained in that letter is a reference to information
12 which you, I guess, had received from the Minister of Labour
13 at the time in connection with a job offer for Mr. Marshall.
14 You refer to that at 345 and 346. And I take it, in essence,
15 what you're doing is communicating that job offer to Mr.
16 Marshall through his solicitor.

17 A. Yes, the then Minister of Social Services, Mr. Morris, had, his
18 department had had some contact with Mr. Marshall in that
19 area of employment and those were direct contacts between
20 people in the Department of Social Services and Mr. Marshall.
21 And Mr. Cacchione had objected to that. I believe he wrote a
22 letter in which he indicated that he wanted any
23 communications with his client to be through him. Of course,
24 any communications from the Attorney General's Department
25 were always through Mr. Cacchione. But he was expressing
the concern that this communication had been directly

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1 between the Department of Social Services and Mr. Marshall
2 and he didn't want that to be done. He wanted the
3 communications to be through him. And so when I, when the
4 question of Mr. Marshall's employment situation had come up
5 and it was in a Cabinet discussion that the Minister of Labour
6 and Manpower, Mr. Nantes, advised me of this possible
7 opportunity and gave me that information, and I then
8 incorporated the information in this letter so that it would be
9 communicated to Mr. Cacchione for his client.

10 Q. Your letter is dated March 6th. The letter to which you refer
11 and which Mr. Cacchione complains about, Mr. Morris, is
12 March 7th. Page 348. The reason I raise that is because I
13 thought I understood you to say that your putting the job
14 offer through your letter of March 6th was in response to
15 Cacchione being upset about what had happened with Mr.
16 Morris.

17 A. Yes, this is the letter to Mr. Morris dated March 7.

18 Q. March 7.

19 A. Well, I was certainly aware. Whether I had seen that letter
20 or not, it was my understanding that Mr. Cacchione had
21 objected to that direct communication from the Department of
22 Social Services to his client. I may have learned about that
23 orally from Mr. Morris or some other source, but I was
24 certainly aware of it.

25 Q. Volume 38 at page 99, is an article in The Mail Star which is

MR. GIFFIN, EXAM. BY MR. SPICER

1 dated March 7th, in the second column, about halfway down,
2 quotes from Mr. Morris:

3 Our head office then called Donald Marshall
4 and said they had a job for him, a domestic
5 appliance repair job. That was a
6 Wednesday and he was told he could start
7 at nine o'clock. Donald Marshall said he
8 would show up at ten o'clock to talk about
9 it with Human Resources Development
10 Association. I called at ten and found out
11 he wasn't there. We called and found him
12 still in bed. He said he decided not to take
13 the employment...

14 Et cetera.

15 I think it was that comment that angered Mr. Cacchione.

16 A. Yes.

17 Q. At the time. Were you aware that Mr. Morris was going to
18 talk to the newspapers concerning job offers being made to
19 Donald Marshall before he did it?

20 A. I can't recall if he indicated that he was going to be talking to
21 the press. I do recall him advising Cabinet about these
22 contacts with Mr. Marshall. I can't recall whether he stated
23 he was also going to speak to the newspapers about them.

24 MR. SPICER

25 It's difficult, My Lord, when Mr. Giffin volunteers information
about what goes on in Cabinet not to ask the second half of the
question.

MR. RUBY

MR. GIFFIN, EXAM. BY MR. SPICER

1 This is the second time, I thought it was a waiver because my
2 friend is usually very fast on his feet, he let the other disclosure
3 of Cabinet material just go past. Am I wrong?

MR. SAUNDERS

5 We've heard the argument, Mr. Ruby.

MR. RUBY

7 You had no [quota?]

MR. SAUNDERS

9 Pardon me?

MR. RUBY

11 The [quota?] hadn't been heard.

MR. SPICER

13 We can come back to that when that matter is resolved.

BY MR. SPICER

15 Q. At about the same time, Mr. Giffin, on page 347, now I'm back
16 again in Volume 33, memo to Mr. Coles, which I gather is in
17 connection with a visit by Mr. Justice Campbell to Nova Scotia.
18 In the third paragraph, you say:

19
20 I have advised him that we are prepared
21 to make available to him all material in our
22 possession pertaining to this matter.

22 Now would that have included all the R.C.M.P. reports?

23 A. Yes, I had indicated all the material tat we had at the
24 department.

25 Q. Okay, so this is, I'm sure, that would then include the R.C.M.P.

1 reports of the reinvestigation in 1982.

2 A. Yes.

3 Q. Everything that you had.

4 A. Yes.

5 Q. On page 355, a letter from Mr. Stevens to Mr. Clarke:

6
7 The Honourable Ron Giffin has the attached
8 but has not signed it or returned it to me.

9 I take it that "attached" is the draft of the report and
10 recommendation to Executive Council.

11 A. Yes.

12 Q.
13 I understand that he [being yourself]
14 wishes to confirm the terms of reference
15 with the Premier before Cabinet considers
16 it.

17 Did you, indeed, confirm the terms of reference with the
18 Premier before it was considered by the Cabinet?

19 A. Yes.

20 Q. And there is a separate volume, or not a volume but a
21 separate exhibit 137. Exhibit 137, My Lords, is a package of
22 all the documents which we have been told are relevant to
23 this matter which were discussed or brought up at Cabinet.
24 So Exhibit 137 are the cabinet documents.

25 EXHIBIT 137 - CABINET DOCUMENTS

Q. The first document dated March 8, 1984. Perhaps, first of all,
you can tell us what the process is by which this matter

1 would get to cabinet?

2 A. Well, we had, as I've indicated, had numerous discussions in
3 the Cabinet room about the matter. Once the final decision
4 had been made to proceed with the inquiry and once Mr.
5 Justice Campbell had agreed to undertake it, we then had the
6 report and recommendation prepared and Mr. Hal Stevens,
7 who is the Clerk of the Executive Council, worked on that and
8 it was then presented to Cabinet for Cabinet's approval and
9 that, in turn, would lead to the issuing of an Order-in-Council
10 which would set up the inquiry and give it the legal authority
11 to proceed.

12 Q. And is the report and recommendation to Executive Council
13 on the first couple of pages of Exhibit 137, that's the method
14 by which the matter gets before Cabinet for consideration?

15 A. Yes.

16 Q. And in that box, the sort of rectangle on the left-hand side
17 with the four squares in it which says "Approved Date March
18 8/84", what would that indicate?

19 A. Well, when a matter like this is being considered in the
20 Cabinet room, whichever Minister is in charge of the book,
21 and I think that's, those are Mr. Thornhill's initials, that once
22 it's had formal Cabinet approval, then the Minister who is
23 dealing with that would do what he's done there, initial it and
24 sign it.

25 Q. I might just direct your attention to the second page.

MR. GIFFIN, EXAM. BY MR. SPICER

1 A. Or initial it and date it, I'm sorry.

2 Q. Okay, I might just direct your attention to the second page of
3 that report and recommendation. There's at the end of the
4 document an omnibus clause, "Power and authority of the
5 Commissioner shall extent to and include all matters which he
6 considers relevant to the inquiry," which has been crossed
7 out.

8 A. Yes.

9 Q. Are you able to tell us why that was crossed out?

10 A. Well, that would have been...

MR. SAUNDERS

12 I wonder if the witness is able to give that answer to my
13 friend's question without revealing discussions had in Cabinet, My
14 Lords, in light of your ruling this morning.

MR. CHAIRMAN

16 My understanding is that this is a submission to Cabinet, the
17 formal paper that any Minister in any Cabinet must sign in order
18 to bring it before Cabinet.

MR. SAUNDERS

20 That's my understanding.

MR. CHAIRMAN

22 Regardless of what discussions there had been, and I suspect
23 that the Cabinet paper itself, at least ostensibly is of the Minister's
24 doing and it's the Minister putting his recommendation to Cabinet.
25 Some ministers may be more prudent than others and discuss it in

MR. GIFFIN, EXAM. BY MR. SPICER

1 advance, but I doubt if that's a requirement. So I don't think that
2 impinges upon Cabinet...This will be a ministerial decision, I would
3 presume.

MR. SAUNDERS

5 That may be so, My Lord. If that is so, then fine. If not, then
6 I'm in trouble.

MR. CHAIRMAN

8 Well, then, can be Mr. Giffin tell us?

MR. GIFFIN

10 A. Well, My Lord, I think I could answer the question this way
11 by saying that the removal of that provision was consistent
12 with my intent that Mr. Justice Campbell's inquiry be limited
13 to the compensation issue and that it not become the broadly
14 based type of inquiry that we're dealing with here now.

15 Q. Just continuing along with that exhibit to page three.

MR. RUBY

17 I wonder if it's possible to find out whether or not that
18 deletion was made or after the submission to Cabinet, the deletion
19 on page two? I'm not sure on that.

BY MR. SPICER

21 Q. Can you tell us at what time the deletion of the omnibus
22 clause at the end was made?

23 A. I wasn't physically present at the time. I believe I was in
24 Ottawa at the First Ministers Conference on Aboriginal Rights
25 and Mr. Donahoe was the acting Attorney General. So I can't

1 say when physically those lines were drawn in there. But
2 certainly it was consistent with the intent that the
3 government had with respect to the inquiry. Mr. Stevens
4 might be able to help on this, but I couldn't be that specific.

5 Q. You're not able to tell us one way or the other whether it was
6 before Cabinet, during Cabinet, or whenever?

7 A. That's right.

8 Q. The document which appears on page three, which is dated
9 13th of March, would that then be the document that would
10 flow from the decision of Cabinet to set up the Commission?

11 A. Yes, that's correct.

12 Q. Okay, and its terms of reference in the second full paragraph:

13
14 Respecting ex gratia payments of
15 compensation including legal costs which
16 will be paid to Donald Marshall, Jr. as a
17 result of his incarceration in jail for a crime
of which he was subsequently found to be
not guilty.

18 Those were the terms of reference.

19 2:51 p.m.

20 A. Yes.

21 Q. And those were what you expected the terms of reference to
22 be, is that correct?

23 A. Yes.

24 Q. Did you consider that any pre-incarceration matters were
25 relevant to the questions before Mr. Justice Campbell?

1 A. That would have presented me with real difficulties. The, it's
2 difficult because we're dealing here with something that was
3 so totally unprecedented. It was difficult to determine how
4 an inquiry like that could be conducted that would deal with
5 compensation and yet would not trespass upon the Ebsary
6 case and while we tried to focus it on compensation as clearly
7 as we could I don't mind saying that we were very much
8 placing our confidence in Mr. Justice Campbell, that he would
9 so conduct his inquiries as not to trespass on the Ebsary case.
10 I did not, at that time, specifically address the question in my
11 own mind whether it would include anything that was pre-
12 incarceration. But if anybody had put the question to me
13 then I think my answer would have been that what we were
14 looking at, and what the Government had in mind, was
15 something that would be, I suppose, closest to an assessment
16 of damages.

17 Q. Would it have been the Government's position at this time,
18 then, that the, whatever might have happened to Mr.
19 Marshall during the investigation and the time leading up to
20 his incarceration was simply not relevant to an assessment of
21 his claim for compensation insofar as that claim was to be
22 decided by Mr. Justice Campbell?

23 A. That's right. I just took it as given. That Mr. Marshall had
24 been convicted and his conviction had been set aside and I
25 was quite prepared just to take that as the starting point and

1 say, "All right, given that, given that he's spent 11 years in
2 prison and all of the other things that happened to him as a
3 result of that, that that was certainly the Government's
4 intention. Was that we wanted Mr. Justice Campbell to
5 explore those issues and to make a recommendation to the
6 Government of Nova Scotia on an appropriate level of
7 compensation.

8 Q. Starting at the point in time when he's in jail.

9 A. Yes.

10 EXHIBIT 135 - VOLUME 33

11 Q. On page 379 of that Volume 33, it's a letter from Mr.
12 Campbell to yourself. The last sentence or so of the second
13 paragraph.

14 It is understood that Mr. Marshall's case
15 would assert that the police investigation
16 that led to his prosecution is relevant to
the terms of the inquiry.

17 Were you aware that that was the position that was being
18 taken by Mr. Marshall's counsel?

19 A. Yes, I was at that point in time. And my view of that quite
20 simply was that that was one of the issues that Mr. Justice
21 Campbell would have to address and my concern was, and I'm
22 repeating myself here but I think I have to to place it in its
23 appropriate context. My concern was not that there be an
24 arbitrary cut-off point and say, "You can entertain no
25 evidence prior to this particular date." Rather, my concern

1 was that however he explored it and whatever evidence he
2 received, that it be done in such a way that it would not
3 trespass on the Ebsary case. I know it's a very difficult
4 proposition to put but that's what we were, in effect, asking
5 him to do.

6 Q. Is it fair to say, though, that if Mr. Justice Campbell had
7 decided that looking at pre-incarceration matters wouldn't
8 trespass on the Ebsary case that you would have been
9 prepared to live with that?

10 A. Yes.

11 Q. On page 383 a memo to Gordon Coles. Presumably the
12 attachment is that letter of March 26th that you just received
13 from Mr. Justice Campbell.

14 A. Yes.

15 Q. And you say in the second paragraph,

16
17 It would appear to me that if he takes this
18 approach we would want to have counsel
19 representing the Attorney General's
20 Department.

19 Can you enlighten us as to what that approach was?

20 A. Well, in the sense that suggesting that there might be areas of
21 disagreement between Mr. Cacchione on the one hand and the
22 Provincial Government on the other hand in terms of
23 procedure and the scope of the inquiry, that then it seemed to
24 be appropriate that the Government of Nova Scotia ought to
25

1 be represented before the inquiry as one of the parties before
2 the inquiry and that's why we would require counsel.

3 Q. Then on page 386 there's a statement made by yourself
4 concerning the payment to Donald Marshall of the \$25,000.

5 A. Yes.

6 Q. Was there any discussion between the Government and
7 Mr. Justice Campbell prior to Mr. Justice Campbell making that
8 recommendation?

9 A. I didn't have any discussions with him and I don't recall any.
10 My understanding is that he based that recommendation on
11 representations that were made to him by Mr. Cacchione.

12 Q. And you didn't have any with him and you're not aware of
13 any by anybody in your Department.

14 A. No. No. Not that I can recall.

15 Q. And you don't need to turn to this but just to complete that
16 picture that money was paid to Mr. Cacchione on April the
17 13th, by a letter which appears at page 398. And I'd like you
18 to turn now to page 407 of this volume. It's a letter to Mr.
19 MacIntosh from Mr. Coles on which you're copied.

20 A. Yes. Yeah. I've seen that before.

21 Q. And you can see, were you aware at the time that that letter
22 was sent and did you read it?

23 A. Yes.

24 Q. Would you be in accord with the submissions being made by
25 Mr. Coles in that letter?

1 A. Yes. Yes, he was dealing with a large number of matters
2 there in that letter but, yes, I saw it as an attempt to set out
3 the position of the Government in terms of how the inquiry
4 ought to be dealt with and procedures to be followed and that
5 sort of thing.

6 Q. And Mr. Coles is making it fairly clear, is he not, on page 2 of
7 that letter that as far as he is concerned, the mandate of the
8 Commission does not extend to pre-incarceration matters.

9 A. Yes.

10 Q. And on page 6, the last paragraph, it says,

11
12 I understood that you will be
13 communicating these concerns to the
14 Commissioner and hopefully he will agree
15 that everything be put on hold until he had
16 had an opportunity to speak to the
17 Attorney General in respect to these
18 matters.

19 Would you have understood one of those matters of be the
20 scope of the inquiry itself?

21 A. I think the foremost concern at that point was, well, certainly
22 there's always the question of the scope of the inquiry
23 because of my concern about the Ebsary case. There was
24 questions there about the cost of the inquiry and that sort of
25 thing.

Q. Was one of the matters that Mr. Coles was raising, as you
understood it, that should be put on hold until he's had an

1 opportunity to speak to... Mr. Justice Campbell has had an
2 opportunity to speak with you... was the scope of the inquiry
3 itself, the matters that he raised on page 2 of his letter on
4 page 408.

5 A. I'm sorry, I missed the last part of your question.

6 Q. The question is directed to this point really. The last
7 paragraph of the letter,

8
9 I hope you will be communicating these
10 concerns to the Commissioner. Hopefully
11 he will agree that everything be put on
12 hold until he has had an opportunity to
13 speak to the Attorney General in respect to
14 these matters.

15 What I'm asking you is whether or not, in your
16 understanding, one of the matters that Mr. Justice Campbell
17 was to speak to you about and in the meantime he was to put
18 on hold, was the very scope of the inquiry itself.

19 A. Yes. That was certainly an issue that was on our minds
20 because of the Ebsary case.

21 Q. Was it not the case, though, that, a couple of minutes ago you
22 indicated to me that you would be satisfied that if Mr. Justice
23 Campbell had decided that pre-incarceration matters could be
24 looked at without treading on the Ebsary matter, you'd be
25 happy to have him make that decision himself.

A. Yes, but I think by the same token that we had a
responsibility to make representations to him about those

1 matters.

2 Q. Mr. Coles is going a little farther than that, isn't he? He's
3 asking that everything be put on hold.

4 A. Well, that was not a suggestion that the inquiry be stopped.
5 That was simply, as I understood it, a request that we have
6 further discussions to make sure that we were not going to
7 get into problems vis-à-vis the Ebsary case.

8 Q. Do you know whether or not a copy of this letter was sent to
9 Mr. Cacchione? Are you aware?

10 A. No, I'm not aware.

11 Q. On page 3 of that letter, Mr. Giffin, there's a reference to, by
12 Mr. Coles,

13
14 In my opinion, parties having a direct
15 interest and whose interests are relevant
16 are Donald Marshall...[and then] the
17 Attorney General, representing the public
18 interest rather than the Crown in its
19 prosecutorial capacity.

20 What did you understand that to mean?

21 A. Well, that the Department of the Attorney General would, in
22 effect, be representing the Government of Nova Scotia which,
23 in turn, is charged with the responsibility of representing the
24 public interest.

25 Q. So that, and this is apropos of your comment this morning this
is sort of nonadversarial relationship.

A. Yes.

1 Q. And on page 410 Mr. Coles is making some reference to, at
2 the bottom of the page, "In respect to compensation for legal
3 costs I would not think any testimony would need to be
4 given." And he continues, talks about legal aid and scales and
5 that type of thing. My question really is this. Was there
6 anything at any time that was preventing the Government
7 from just agreeing to pay Donald Marshall's legal fees, quite
8 apart from the legal aid tariff. Did you have the discretion to
9 do that if you'd chosen to so do?

10 A. There would not have been any legal impediment to the
11 Government doing that as an ex gratia payment under the
12 Finance Act.

13 Q. And prior to the setting up of this Commission, the Campbell
14 Commission, there had been considerable correspondence
15 concerning the payment of Aronson's account and the
16 Government had not paid it. Were you privy to any of those
17 discussions as to why?

18 A. Well I do recall discussions about the legal fees that were
19 outstanding.

20 Q. Yes.

21 A. And we had not come to any resolution of that matter.
22 However, I proceeded on the assumption that that was
23 something that would fall under Mr. Justice Campbell's
24 mandate.

25 Q. Once you got into the mandate.

1 A. Yes.

2 Q. And once Mr. Campbell got going.

3 A. That's right.

4 Q. But prior to that, either during the time when you were
5 Attorney General from November on or at any time preceding
6 that, when Mr. Aronson was making representations to
7 having his account paid. Do you remember any, did you have
8 any knowledge as to why the Government was not acceding to
9 that request?

10 A. Well, when, I can't testify as to what happened before I
11 became Attorney General. But in my view the question of
12 legal costs generally was that it was something that really
13 came under the same heading as compensation and that
14 whatever procedures we followed in dealing with the
15 question of compensation that that was where we should deal
16 with the question of legal costs as well.

17 CHAIRMAN

18 If Mr. Justice Campbell had recommended as a separate item
19 that the Government of Nova Scotia pay all outstanding legal
20 fees of Donald Marshall, Jr., you felt that was within his terms
21 of reference and in his competence so to do.

22 A. Yes, My Lord.

23 MR. SPICER

24 Q. On page 425, Mr. Giffin, there's notes of a meeting which, I
25 understand these notes to have been made by Reinhold

1 Endres.

2 A. I can't verify that as to whether it's his handwriting or not
3 but...

4 Q. No. It's our understanding...

5 A. That would be my understanding.

6 Q. And the notes of a meeting with Hugh MacIntosh who was
7 counsel to the Campbell Commission, Gordon Coles, Felix
8 Cacchione and Mr. Endres. And if I understand correctly what
9 it had occurred was that this was the first meeting, really,
10 amongst the people involved with the Commission to talk
11 about how it was going to be handled.

12 A. Yes.

13 Q. And subsequent to that meeting of those parties there is, on
14 page, we'll get to that in a minute, on page 434...

15 CHAIRMAN

16 I may have missed this but who is Mr. Endres?

17 MR. SPICER

18 Mr. Endres is the counsel for the AG's Department. He's
19 employed with the AG's Department.

20 Q. On page 434 notes of a meeting of the same day, May 16, '84,
21 between yourself, Gordon Coles, and we're given to
22 understand, Mr. Endres.

23 A. Yes.

24 Q. I just want to ask you a few questions about the first set of
25 notes. I recognize you weren't at the meeting. I want to ask

1 you whether or not some of the views expressed would be
2 consistent with yours. On page 425, item number 3, and this
3 we would be given to understand is a reference to something
4 that Mr. Coles would have been saying.

5 "We're talking about an inquiry, not an ordinary adversarial
6 hearing." Now that would be consistent with your views, I
7 take it.

8 A. Yes.

9 Q. And further on down under item 6, "The AG's lawyer would
10 protect the public interest." Once again, consistent with your
11 views.

12 A. Yes.

13 Q. And on page 426 another reference to Gordon about three-
14 quarters of the way down. "Read from...[I take it that's Order-
15 in-Council]..."

16 A. Yes.

17 Q. "Says that starting point is with the incarceration. We cannot
18 agree that Commission may consider police involvement and
19 the matter of conviction." That would be consistent with
20 your views at the time?

21 A. Yes.

22 Q. And then again on 428 Mr. Coles raises the same issue of the
23 AG's involvement not being adversarial. And then on 429, for
24 the first time, I believe, in these notes Felix Cacchione raises
25 the issue of just dealing with it in some other fashion. It says,

1 "Why spend all this money with the inquiry? Why not settle
2 an amount we can all agree on and close the book?" Now was
3 it your understanding that the question of settling the matter
4 was first raised by Donald Marshall's lawyers?

5 A. That's my understanding, yes.

6 Q. To which Mr. Coles responds, "I don't reject this but rationale
7 for the inquiry was to distinguish Marshall from the ordinary
8 case of a person acquitted by the Court of Appeal, for
9 example." So it's at that point, on May 16th, that the question
10 of handling this matter in some other fashion, other than by
11 the hearings of the Commission was first raised by Marshall's
12 lawyers.

13 A. Yes.

14 Q. Over on page 430 there's reference to some comments made
15 by Mr. Cacchione when he's asked by R., by Reinhold, I guess,
16 "Then you better quantify your case." And Mr. Cacchione
17 says, "New Zealand, 1.3 million; Zimmerman, 1 million;
18 actuarial figures are short of 400,000, but then there are all
19 these nebulous areas." Were you made aware, or were you
20 aware of the settlement, or of these awards in other
21 jurisdictions?

22 A. Just in a very general way. I had not read the material in
23 detail but I was aware of those general numbers.

24 Q. But that was information that was available in the
25 Department.

1 A. Yes.

2 Q. Then Mr. Cacchione again on 431. It says, one, two, the third
3 dash into comments that he was making. "His figure off the
4 top of his head is 1 million inclusive of everything." Did you
5 understand that to be the opening position of Donald
6 Marshall's lawyers?

7 A. I wasn't sure how serious that was as a stated position. That
8 was, it was indicated to me in meetings which I had with Mr.
9 Endres and Mr. Coles that these discussions had been initiated
10 but that it was not at the stage of anybody putting a hard and
11 fast bottom-line figure on the table.

12 Q. Would you have any reason to think that the figure of \$1-
13 million was not serious?

14 A. Well no, I'm not suggesting it was not serious but I just didn't
15 see that at this stage really the question that was posed to me
16 by Mr. Endres and Mr. Coles was, "A possibility of a
17 negotiated settlement has developed, do you want us to
18 pursue it?" So it was still at a preliminary stage.

19 3:11 - BREAK

20

21

22

23

24

25

MR. GIFFIN, EXAM. BY MR. SPICER3:40 p.m. INQUIRY RESUMES

1
2 Q. Mr. Giffin, before the break, you were talking about the
3 notion that the compensation matter would consider only the
4 point in time after which Junior Marshall was convicted.

5 A. Yes.

6 Q. Bearing that in mind, if that's, and had that always been, at
7 least since the time you took over as Attorney General, had
8 that always been the government's view; that is, that the
9 compensation that you were talking about was compensatino
10 that would cover that period of time when Mr. Marshall was
11 in jail.

12 A. Essentially, yes.

13 Q. Bearing that in mind, can you tell me what possible
14 connection there would be between the Roy Ebsary matter
15 and compensation for Mr. Marshall arising solely out of the
16 time that he spent in jail?

COMMISSIONER EVANS

17
18 Could you clarify? When you say "in jail", that takes up some
19 period of time prior to his conviction.

MR. SPICER

20 Q. Did you consider it to be just post-conviction?

21 A. On the question of determining an appopriate level of
22 compensation, the approach that I supported was one which
23 said, in effect, he's been convicted. The conviction has been
24 set aside and proceed as if it were an assessment of damages.
25

1 That was the approach that I had in mind.

2 Q. Okay, and would that be dealing with the period of time that
3 started with the conviction and ended with the acquittal?

4 A. That's, I'm not sure that I would want to be that arbitrary
5 about it. I would certainly have recognized that Judge
6 Campbell might have wanted to look at more than that. For
7 example, the time that he spent being on trial prior to being
8 convicted, for example.

9 Q. What about the period...

10 A. I certainly didn't get that rigid about it.

11 Q. What about the time period to trial? And I guess Mr. Justice
12 Evans raises the question because Junior Marshall was in jail
13 on remand from the time that he was arrested on June 4 to
14 the time of the trial in November. Was it your intention to
15 consider that period of time in considering compensation?

16 A. I don't recall addressing my mind to that specific point at that
17 time, but I would have had no problems with that.

18 Q. Well, then I'm confused. I thought the position that was
19 being taken by Mr. Coles was that the only period of time that
20 was relevant would have been the time subsequent to his
21 conviction, am I wrong on that? Let's go back to that letter
22 that was written on May the 8th, which is page 407. On the
23 second page of that, in particular.

24 The starting point [in the third line] is with
25

1 the subsequent Court of Appeal judgement
2 which directed the not guilty verdict and
3 the resultant decision of the governor-in-
4 council to determine whether in the
5 absence of any tort action...[goes on and
6 then he says] I think it important for me to
7 express this opinion in my interpretation
8 of the Order-in-council since I do not think
9 the mandate to the Commissioner extends
10 to an inquiry into the processes whereby
11 Mr. Marshall had been found guilty of the
12 crime for which he was subsequently
13 found not guilty.

14 And then on 426, note of May 16th meeting again, Mr. Coles
15 reading from the Order-in-council:

16 The starting point is with the
17 incarceration. We cannot agree that the
18 Commission may consider police
19 involvement and the matter of conviction.

20 What I'm trying to get from you is what was the position then
21 at the time of the government? What was the government's
22 position? Were you prepared to consider as part of the
23 compensation to be paid to Donald Marshall matters that
24 arose prior to his going on trial?

25 A. Well, the position, as far as I was concerned, at the risk of
repeating myself, is that we were prepared to place the
matter in Mr. Justice Campbell's hands and trust to his
judgement that in the pursuit of his inquiries that he would
not do anything to trespass upon the Ebsary case. Now I
certainly did not at that time address points as narrow as the

MR. GIFFIN, EXAM. BY MR. SPICER

1 question of whether we were dealing with the time of his
2 incarceration in Dorchester or going back to when he was on
3 remand awaiting trial. I certainly in my own mind did not
4 have it defined to that very precise point. My concern
5 throughout was that whatever inquiries he make that they
6 not do anything to trespass upon the Ebsary case.

COMMISSIONER EVANS

7
8 Does not the Order-in-council say what should be paid to
9 Donald Marshall, Jr. as a result of his incarceration in jail for a
10 period, for a crime of which he was subsequently found to be not
11 guilty. Throughout that, that is the reference and he was placed
12 in jail as a result of a charge being laid against him. That charge
13 was the murder for which he was subsequently acquitted.

MR. GIFFIN

14
15 Yes, My Lord. If the question had arisen ought he to be
16 compensated for the time that he had spent on remand prior to
17 conviction, I would have had no problems with that.

COMMISSIONER EVANS

18
19 And you were leavnig that then to, it was open then to
20 Justice, the_Chief Justice Campbell to look at that period of time,
21 too? You didn't restrict...

MR. GIFFIN

22
23 Yes, I think it would be more accurate, My Lord, to say that at
24 that point in our discussions, we had not addressed that issue in a
25 meaningful way. The discussions which had taken place up to

MR. GIFFIN, EXAM. BY MR. SPICER

1 that point were in preparation for the establishment of Mr. Justice
2 Campbell's inquiry. So there were a lot of issues like that that
3 hadn't really been fully canvassed at that point. We were still
4 involved in the process of leading up to getting that inquiry
5 underway.

MR. SPICER

7 Q. There's another letter of Mr. Coles on page 435 and 436 of
8 Volume 33 which may be of some assistance. This is
9 subsequent, obviously, to your meeting of the 16th and Mr.
10 Coles is writing again to Mr. MacIntosh, the second paragraph:

11 3:49 p.m.

12 Q.

13 (Middle) without intending to be repetitive
14 of the view which I have expressed the
15 terms of reference are those set out in the
16 Order-in-Council. These terms are
17 uncertain, ambiguous or otherwise not
18 sufficiently clear for the Commissioner to
19 understand the intent, purpose or nature
20 intended then it seems to me incumbent on
21 him to request clarification and, if
22 necessary, an amendment to the Order-in-
23 Council so as to make the intent and
24 purpose, or if you wish, the scope of his
25 mandate sufficiently explicit.

He then goes on in the second page of that letter, and in
particular, the second paragraph.

Mr. Marshall may have a cause of action
for damages as a result of events prior to

MR. GIFFIN, EXAM. BY MR. SPICER

1 being sentenced to jail. However, I
2 respectfully submit that the Order
3 appointing Mr. Justice Campbell does not
4 direct him to inquire into such events, nor
5 to consider compensation in respect to Mr.
6 Marshall other than as a result of, and
7 consequential upon his incarceration.
8 [Which he has already predicated by
9 saying being sentenced to jail.]

10 Can we understand from that that the position of the
11 Government at the time, then, was that the compensation
12 would relate to the period of incarceration subsequent to
13 conviction?

14 A. Well, I don't want to presume to speak for Mr. Coles but from
15 my own recollection I did not, or had not at that point in time
16 addressed, for example, the question of remand time. And
17 those were issues, things that would have had to have been
18 worked out if the inquiry had, indeed, proceeded. But, of
19 course, that was the point at which the negotiations for a
20 settlement began so there were still a number of issues like
21 that that would have required further discussion and
22 clarification. But I would have, I don't recall directing my
23 mind to that particular question but to use it as an example, if
24 I had been asked, "Is the Government of Nova Scotia prepared
25 to include in compensation compensation for the remand
time, I would have had no problem with that?" But I don't
recall if the question came up.

Q. In any event, whether or not that particular question came

1 up, on page 408 Mr. Coles had taken the position which I
2 understand to be consistent with the position of the
3 Government, about halfway down 408,

4 I do not think the mandate to the
5 Commissioner extends to an inquiry into
6 the processes whereby Mr. Marshall had
been found guilty.

7 A. That is correct.

8 Q. All right.

9 A. And that's reflective of the concern which I had about the
10 Ebsary case.

11 Q. Okay. If, and had that been the Government's view all along,
12 that if compensation was to be paid to Mr. Marshall it was not
13 going to take into account the processes whereby Mr.
14 Marshall had been found guilty?

15 A. That is correct. It was certainly my view that if the inquiry
16 conducted by Mr. Justice Campbell, if it had become a very
17 broadly based inquiry something along the lines of this one,
18 then we would have been into real problems vis- à-vis the
19 Ebsary case.

20 Q. I come back to my original question. If that was the case,
21 then, that it was the Government's view all along that the
22 compensation for Junior Marshall would not take into the
23 account the processes by which he was found guilty, perhaps
24 the remand but not the processes by which he was found
25

1 guilty, can you tell us in a more specific way what, in your
2 view, the relationship was between the Ebsary matter and
3 compensation for Junior Marshall? Bearing in mind what
4 you've already told us was the scope of compensation
5 contemplated for Mr. Marshall.

6 A. Well, my concern was procedural more than anything. That if
7 an inquiry got underway that started to explore areas that
8 could impinge on the Ebsary case and it's, I had no specific
9 scenario in mind. It was more a question of not wanting to
10 run the risk of impinging on the Ebsary case, that that was
11 the underlying concern. I'm not sure if I'm, if we're...

12 Q. We're not getting more specific which is what I want.

13 A. If I'm being fully responsive to your question but I'm, it's a
14 difficult area because we were in a situation of, a very large
15 extent, speculation. We just didn't know once an inquiry got
16 underway of any type, what impact it might have on the
17 Ebsary case. We'd never been involved in a case like this
18 before.

19 Q. Had you received any advice from the people in your
20 Department that even where the compensation was only to
21 cover the period of incarceration, not to take into account the
22 processes, that notwithstanding that fact that there was some
23 possibility that it might overstep into the Ebsary matter in
24 some way.

25 A. Well, there was always that possibility and that's...

1 Q I guess what I'm trying to get at is why did you think that
2 that was a possibility?

3 A. Well, it would have involved, for example, the conduct of a
4 full inquiry on the compensation issue. It would have
5 involved the presentation of evidence to the inquiry on a
6 number of issues. And it's difficult to say whether or not at
7 some point that kind of exercise would have impinged upon
8 the Ebsary case. But the inescapable fact was that the, that
9 Mr. Marshall's conviction was a result of the death of Mr.
10 Sandy Seale and that the prosecution of Mr. Ebsary involved,
11 arose out of the death of Mr. Sandy Seale. So I mean it was a
12 common starting point, obviously, and I would have great
13 difficulty sketching out scenarios and saying this would
14 happen or that would happen. The question in my mind was
15 the extent to which we could run risks that we might get into
16 something that would trespass on the Ebsary case. I was
17 being very cautious about it because this was a totally
18 unprecedented situation. Certainly the entire matter would
19 have been much different, much more straightforward if the
20 Ebsary case had not been before the courts. Then it's a totally
21 different scenario.

22 Q. Let's go back to May 16th, then, on page 434, Volume 33. I
23 think they're Mr. Endres' notes of a meeting with yourself and
24 Mr. Coles.
25

MR. GIFFIN, EXAM. BY MR. SPICER

1 Gordon informed Minister of proposal to
2 get together to see if we can agree on a
3 figure. He was agreeable.

4 I take it from that that you didn't have any problem with an
5 attempt to reach a settlement of the compensation matter.

6 A. Oh, none whatsoever.

7 Q.

8 And told Gordon to go ahead to negotiate in
9 confidence and without prejudice towards
10 a settlement. We have no particular
11 mandate, no figures were mentioned.

12 What instructions were given to Mr. Coles and Mr. Endres
13 with respect to what they were supposed to do?

14 A. The instruction I gave them at that point was simply one of
15 giving them authority to sit down with Mr. Cacchione and
16 discuss the possibility of a settlement. There were no
17 numbers put forward at that point.

18 Q. Were any requested? Did Mr. Endres say, "Well, how much
19 money have we got here?"

20 A. Not at that point. I felt that was too early. Really all that I
21 was giving them at that point was an authority to enter into
22 discussions and see where the discussions led.

23 Q. Then on 437, the notes of, I think, Mr. Endres. May 17.

24 Minister spoke to his colleagues...

25 Would that have been in Cabinet?

A. Yes.

1 Q

2
3 And advised to go ahead to determine if
4 negotiated settlement is possible. I [being
5 Endres] should contact Felix, ask that he
6 give us his position in writing and tell him
7 that we are prepared to try and negotiate a
8 settlement by way of ex gratia payment.

9 Now, again, would the ex gratia payment would be a payment
10 to Mr. Marshall totally devoid of any consideration of any
11 wrong-doing on the part of the Government, I presume.

12 A. That's correct.

13 Q

14 Understood that all communication to be
15 private and confidential without prejudice.
16 Settlement to be all inclusive. No punitive
17 damages claim. And to cover period
18 starting with date of incarceration
19 following conviction.

20 Was that the instruction that you gave to Mr. Endres?

21 A. Yes.

22 Q. So at that point in time, May 17, is it fair to say that there
23 was no doubt in your mind that the compensation coverage
24 was to start with the date of incarceration following the
25 conviction?

A. Right. Subject, I think in fairness to the caveat, that at that
point in time I don't recall that any of us addressed our minds
to the question of time, for example, spent in jail on remand

1 awaiting trial.

2 Q. All right. But that was your view, in any event, on May 17th
3 as to what the period of time was to be covered.

4 A. Yes.

5 Q.

6 Final figures to take account of the interim
7 ex gratia payment, \$25,000...[and then at
8 the end] We should require a complete and
9 final release if payment can be agreed
 upon.

10 If there was no question of liability on the part of the
11 Government, if the payment was being made ex gratia
12 without consideration of liability, why would you require
13 release in respect of claims for damages?

14 A. I would just regard that as normal prudence.

15 Q. And then on May the 18th, on the next page, 438, it seems to
16 be a note of Mr. Endres' conveying to Mr. Cacchione the sense
17 of the meeting he had with you the day after and I just want
18 to direct your attention to the second paragraph.

19 All negotiations are to be in confidence,
20 without prejudice. The claim is to start
21 from date of imprisonment and to exclude
22 punitive damages.

23 A. Yes.

24 Q. That would be consistent with your instructions?

25 A. Yes.

MR. GIFFIN, EXAM. BY MR. SPICER

1 Q I'd like to go now to page 453 and also page 457. They're two
2 copies of the same letter and because there was some notes,
3 some marginal notes on the version of the letter which starts
4 was page 457, I've got another copy of the letter I've had
5 made up and distributed to counsel so that we can see better
6 what those marginal notes are and that's been introduced as
7 Exhibit 139.

8 EXHIBIT 139 - LETTER - June 1984 - FROM F. CACCHIONE TO
9 ATTORNEY GENERAL'S DEPARTMENT

10 Q Have you seen that letter before, Mr. Giffin?

11 A. Yes.

12 Q Were you advised by, or did you discuss with Mr. Coles the
13 figure mentioned by Mr. Cacchione on the third page of his
14 letter, that is, "a global award of \$550,000."

15 A. Oh, yes. I'm sure we did discuss it.

16 Q And I guess in fairness, to complete it, it's really more than
17 550 because he says in the next paragraph that, "This figure
18 is over and above the interim payment already made."

19 A. Yes.

20 Q So you're really talking 575.

21 A. Right.

22 Q Did you receive any advice from your staff as to whether or
23 not that figure was reasonable or unreasonable?

24 A. Well, given the enormous difficulty of arriving at any
25 appropriate figure in the case my attitude towards this was

1 that this was a part of a negotiating process and that we
2 would respond to it and continue discussions and see where
3 those discussions ended up and whether or not an agreement
4 could be reached.

5 Q. How would you decide the manner in which you would
6 negotiate without have some idea of what a reasonable figure
7 would be in the circumstances?

8 A. Well, I was quite flexible on that. It was a question of just
9 seeing what the negotiating process would yield up and the, I
10 assumed that we were talking in this range or, at least, that
11 this, I took this to be Mr. Cacchione's opening position in the
12 commencement of those negotiations and so I just saw it as a
13 negotiating process. That if the two sides could discuss it
14 back and forth and reach agreement then that was fine with
15 me.

16 Q. But when this letter was brought to your attention were you
17 advised by your staff, "Look, this figure is too high and these
18 are reasons why it's too high."

19 A. I don't recall receiving a memo to that effect but we certainly
20 discussed the matter. Mr Coles and Mr. Endres and myself.
21 And my concern, given that we were in a range here of, we'll
22 say, half a million dollars, in that range, that my concern
23 related more to the process than to the actual final amount.
24 If we had ended up with a settlement of \$270,000 or
25 \$350,000 that was not the foremost concern in mind. The

MR. GIFFIN, EXAM. BY MR. SPICER

1 foremost concern was that of process. That is, that it would
2 obviously have to be a settlement that was agreed to by both
3 sides and not only counsel, of course, but the clients they
4 represented. And as well, that that would have at least a
5 formal approval from Mr. Justice Campbell.

6 Q. Let me come back to my question. At the time that you
7 discussed this figure of \$550,000 with your staff, were you
8 advised by them that in their view it was too high? And if so,
9 what reasons did they give you?

10 A. I'm trying to cast my mind back to that discussion. I can't
11 recall that it was done in that structured a fashion between
12 Mr. Endres and Mr. Coles and myself. It was simply a
13 discussion along the lines that this was the opening proposal
14 from Mr. Cacchione and that we should then pursue that. My
15 experience, as a solicitor, was that once one is involved in a
16 negotiation which may lead to a settlement, that then it
17 becomes less a question of arguing the merits of the case and
18 more a question of just seeing whether or not there is
19 common ground upon which a settlement can be reached.

20 4:05 p.m.*

21 Q. I don't think you've answered my question yet, though. My
22 question was whether or not you received advice from your
23 staff that that figure was too high.

24 A. I can't recall that specifically except to say that we discussed
25 it back and forth and, as far as I was concerned, they had

MR. GIFFIN, EXAM. BY MR. SPICER

1 authorization to continue to pursue the negotiations with Mr.
2 Cacchione.

3 Q. Would they have had authorization, for instance, to settle at
4 550?

5 A. Well, the matter had not yet reached the stage of being a final
6 type of figure from Mr. Cacchione. My reading of the letter
7 was that this was his opening position in the negotiation.

8 Q. Well, it certainly was what he was asking for...

9 A. Yes.

10 Q. \$550,000. And I guess what I'm struggling with is in the
11 peculiar circumstances of this case, what sort of advice you
12 were receiving as to the reasonableness or unreasonableness
13 of this figure of \$550,000? And I still don't have an answer
14 to that.

15 A. Well, it's difficult to answer because there were no precedents
16 upon which advice could be given in the sense of doing, we'll
17 say, an assessment of general damages of looking up awards,
18 you know, which are there by the thousands. This was an
19 unique situation and I certainly didn't know of any precedent
20 that, you know, that was on all fours with this case and upon
21 which my staff could give me that kind of precise advice.

22 Q. Your staff did have the Crewe Report from New Zealand?

23 A. Yes.

24 Q. Your staff did have the Hunter Report involving Rachael Ross
25 from the U.K.?

MR. GIFFIN, EXAM. BY MR. SPICER

1 A. Yes.

2 Q. Your staff had also made inquiries from the Ontario
3 Government.

4 A. Oh, yes.

5 Q. To receive some information from them.

6 A. Yes.

7 Q. So there was a body of information.

8 A. There was, yes, there was a body of information.

9 Q. Were you being advised that on the basis of that body of
10 information the amount proposed by Mr. Cacchione was
11 unreasonable?

12 A. I can't recall that it was put to me in those terms. We had
13 discussed the matter back and forth and my attitude was just
14 to continue the discussions with Mr. Cacchione and see if a
15 settlement could be reached.

16 Q. Well, surely you only continued the discussions with Mr.
17 Cacchione to see whether a settlement can be reached.

18 A. Yes.

19 Q. If you're saying to him, "the figure you put to us is
20 unreasonable." I mean if you think it's reasonable, surely you
21 just say, "It's reasonable. We'll take it." My question to you
22 is, what advice were you receiving from the people in your
23 department as to the reasonableness of this figure or its
24 unreasonableness?

25 MR. SAUNDERS

MR. GIFFIN, EXAM. BY MR. SPICER

1 My Lords, my friend has asked the question and I've heard
2 the answer given that he cannot recall any discussions like that, or
3 as strict or structured as my friend has advanced it. That's the
4 answer I've heard on more than one occasion.

MR. SPICER

6 Well, My Lord, with respect, I don't think that I've had an
7 answer to that question, whether or not he received advice
8 concerning the reasonableness or unreasonableness of that figure.
9 That's what I'm looking for.

MR. CHAIRMAN

11 My recollection is that his answer is that he can't recall
12 whether he received advice or not. The presumption is that there
13 must have been some advice.

BY MR. SPICER

15 Q. Is that your answer? That you can't recall what advice you
16 received?

17 A. I'm not sure I would put it that way because we discussed the
18 matter throughout as the settlement negotiations proceeded.

19 But now as to whether somebody said to me this particular
20 figure is totally unreasonable or is within range, I can't
21 specify that because these were discussions that were oral
22 discussions. There's some notes reflective of some of the
23 discussions but that's about as far as it goes.

24 Q. At any time during these negotiations...Sorry.

MR. CHAIRMAN

MR. GIFFIN, EXAM. BY MR. SPICER

1 I direct the witness's attention to page 473 of Volume 33. It
2 looks like somebody was giving advice there.

3 MR. SPICER

4 That's some time later, June 26th.

5 MR. CHAIRMAN

6 Oh, all right. So we're still back in...

7 MR. SPICER

8 We're back before that, I think, at this point.

9 MR. CHAIRMAN

10 June the 7th.

11 MR. SPICER

12 Letter of June the 7th.

13 MR. CHAIRMAN

14 In response...

15 MR. SPICER

16 Which was responded to by Mr. Endres, I think on the 13th.

17 MR. CHAIRMAN

18 Okay. Do you know whose handwriting these notes are in?

19 MR. SPICER

20 I haven't got to that yet, My Lord.

21 BY MR. SPICER

22 Q. With respect to the copy of the letter that we've had
23 introduced as Exhibit 139, do you recognize the handwritten
24 marginal notes on that?

25 A. No. I can say they're not mine, but I don't know whose they

MR. GIFFIN, EXAM. BY MR. SPICER

1 are.

2 Q We've been advised that those are Mr. Coles' notes, yeah,
3 notes made by Mr. Coles. I just wanted to ask you about a
4 couple of them and ask you whether you have any knowledge
5 of these. On that page of the letter, page three which refers to
6 the "global award of 550", there's a paragraph following that,
7 it says:

8
9 This figure is over and above the interim
10 payment already made and arriving at it,
11 we have attempted to be reasonable and
12 realistic, recognizing that it's probably in
13 the public interest that Mr. Marshall's
14 claim be settled this way thus avoiding the
15 full expense of conducting the Commission
16 hearings, but as well recognizing that the
17 public outrage which has manifested itself
18 over Mr. Marshall's claim will only be
19 satisfied by an award of this proportion.

20 Then the marginal note, which I understand was written by
21 Mr. Coles:

22 The public is also outraged about
23 Marshall's alleged activities on that night
24 in question.

25 Would you have discussed that with Mr. Coles?

A. Oh, I'm sure I had. I don't know if I discussed that specific
note but that was certainly an opinion that he had expressed
to me on more than one occasion.

Q Was it an opinion that you shared?

MR. GIFFIN, EXAM. BY MR. SPICER

1 A. No, my view of the matter, as I indicated earlier, was that the
2 comments in the decision of the Appeal Division of the
3 Supreme Court were obiter dictum. I simply took the matter
4 as I found it, that he had been convicted, that the conviction
5 had been set aside, and that we would have to address the
6 question of compensation.

7 Q. During the process of negotiation of the compensation, were
8 you kept fairly closely advised as to what was going on?

9 A. Yes.

10 Q. Perhaps now we could turn now to page 473. Again, notes of
11 a meeting of June 26, 1984 involving yourself, I presume
12 that's "Deputy", and Mr. Endres.

13
14 Figure of \$275,000 plus legal fees of
Aronson is in ballpark.

15 Would that have been consistent with your view?

16 A. Yes.

17 Q. And that would have been, Mr. Aronson's fees at that time
18 had been submitted some time ago of about \$78,000. And
19 that account is in Volume 27 at page 40. So that would bring
20 the figure that we're talking up to about \$350,000. Is that
21 fair to say?

22 A. Yes, oh, yes.

23 Q.

24 Try and settle. Start offer at 250 all
25 inclusive minus the 25 already paid and
leave options open to return for more

MR. GIFFIN, EXAM. BY MR. SPICER

instructions. All subject to Cabinet approval, of course.

At that point in time, on June 26th, 1984, is it fair to say that the person negotiating on your behalf or on behalf of the part of the government, had an authorization, subject to Cabinet approval, of about \$350,000?

A. Yes. That was not etched in stone. We were in a negotiating process but certainly we were in that range.

Q. And had you been advised that that figure of 275 plus the legal fees of Stephen Aronson, that that was a reasonable amount?

A. I can't say that it was put to me on that basis. Rather the discussion that we were having was more along the lines of, well, is this acceptable to Mr. Marshall and is this acceptable to Mr. Cacchione? That was in other words, was there going to be a settlement or not?

Q. In other words, will he take it?

A. Yeah.

MR. CHAIRMAN

Before we leave there, is it right to assume from these notes that your solicitor was authorized to continue negotiations with Mr. Cacchione and go up to \$325,000 without further instructions subject only to Cabinet approval.

MR. GIFFIN

Yes, My Lord.

MR. GIFFIN, EXAM. BY MR. SPICERBY MR. SPICER

1
2 Q. During this process, now that it's become a question of
3 negotiations, was the notion of what's reasonable an operating
4 factor or was it now a case of what can we settle this for?

5 A. I think at that point it was a case of saying, all right, if they
6 are prepared to agree, then we'll agree to that and that will
7 be the settlement. As I've said before, it was very difficult to
8 know what was reasonable and appropriate in this particular
9 case.

10 Q. What I'm searching for, I guess, is whether or not at this point
11 in time whether what was reasonable was even something
12 that mattered or whether at this point in time what mattered
13 was trying to settle this for a figure?

14 A. I think I would answer it this way by saying that I was not in
15 pursuit of a settlement in the sense that the government had
16 not opened that discussion initially. We had the inquiry set
17 up and we were quite content to let the inquiry proceed and
18 to get a recommendation from Mr. Justice Campbell. So we
19 were not taking the attitude that getting a settlement at that
20 point in time was a high priority. If a settlement could be
21 reached that Mr. Cacchione and Mr. Marshall agreed with,
22 then fine we would do it. But we already had the, we had the
23 inquiry set up and that would have gone ahead. So, in that
24 sense, no, I didn't have any great urgency about getting a
25 settlement. If a settlement could be reached, fine, but

MR. GIFFIN, EXAM. BY MR. SPICER

1 otherwise I was perfectly prepared to have the inquiry go
2 ahead.

3 Q. My question really didn't relate to urgency. It related to the,
4 I'm interested to know what it was that was motivating the
5 negotiations from the government side. That is, whether or
6 not the motivating factor was, let's reach a reasonable figure
7 based on what we understand the case is to say, the material
8 we have, the Crewe Commission, the various other ones. Or,
9 at this point, was it just simply a set of negotiations between
10 two parties?

11 A. I saw it at that point as the latter. A set of negotiations
12 between two parties, both represented by competent counsel
13 and that if a settlement could be reached, then we were
14 prepared to pay it.

15 Q. Mr. Endres, I believe, will testify that his view was that it was
16 in the public interest and he was the person who was
17 negotiating on your behalf, that it was in the public interest to
18 pay as little as possible. Would you agree with that
19 characterization?

20 A. I would see that as the normal function of somebody
21 representing the government of Nova Scotia in attempting to
22 reach an agreement on an amount of money to be paid out.

23 Q. Would you then agree that it was in the public interest to pay
24 as little as possible to Junior Marshall?

25 A. No, I would put it this way, that my concern in reaching a

1 settlement was that it would have to be a settlement that was
2 satisfactory, obviously, to Mr. Cacchione and to Mr. Marshall.
3 And so I saw that as simply a negotiation between two
4 parties who were both represented by competent counsel and
5 who could either settle or not settle, as they saw fit.

6 Q. Let me come back to that again for a second, though. Mr.
7 Endres, I believe you agreed, what Mr. Endres will testify that
8 his view was that it would have been in the public interest to
9 pay as little as possible, given that we're really negotiating
10 here between two parties. Was that your view?

11 A. Oh, yes, I saw that as a normal negotiating process and if that
12 the two sides could agree on a figure, then that was that.

13 Q. And do I understand you then to say that you considered at
14 this point in time that this was nothing more than an ordinary
15 negotiation back and forth between two parties?

16 A. Yes, at that point in time, yes.

17 Q. If you could turn over to page 476, Mr. Giffin. That seems to
18 be a meeting yourself, the Deputy, and with Mr. Endres and a
19 number of notes that I wanted to ask you about.

20

21 The Minister is prepared to recommend to
22 Cabinet 235 in addition to the 25 paid in
23 advance.

24 Is that consistent with your view?

25 4:19

A. Yes.

- 1 Q. And this is in full, number 2, "This is in full settlement,
2 including Aronson's fee..."
- 3 A. Yes.
- 4 Q. And then third, "Releases from Junior and parents for Crown,
5 not police." Why would there be any, why would the Crown
6 be requesting a release from Junior Marshall's parents, they
7 weren't getting anything?
- 8 A. I can't recall where that particular suggestion originated, but
9 obviously there would have been the possibility, I suppose, of
10 a claim being advanced at some point. My attitude towards
11 that was that if Mr. Marshall's parents were prepared to sign
12 releases, then fine. But if they were not prepared to sign
13 releases that that should not stand in the way of a settlement.
- 14 Q. Given that the original terms of reference of the Commission
15 and the compensation mandate itself was related to Mr.
16 Marshall, and I refer you to the Order-in-Council which says,
17 "Ex gratia payments including legal costs which should be
18 paid to Donald Marshall, Jr. as a result of his incarceration in
19 jail..." why would you even ask his parents?
- 20 A. Well, I'm assuming here that that would have just been a
21 precaution against some possible future claim. But as I've
22 said, I didn't regard that as essential and, indeed, in the event
23 they did not sign releases.
- 24 Q. Was that advice that you received from your staff that you
25 should ask for a release from Mr. Marshall's parents?

MR. GIFFIN, EXAM. BY MR. SPICER

1 A. Oh, yes, I'm sure I was.

2 Q. Then on 483 the note doesn't indicate that you were in
3 attendance and I just want to ask you whether or not you
4 were aware of this, that Mr. Endres, apparently, is meeting
5 with the Deputy, Mr. Coles, on July the 18th. "Told him about
6 Felix's new position and advised him we should not move
7 substantially. That we might settle yet. But that there was a
8 risk of failure if we do not meet their demands for 300 to 325
9 plus Aronson's account." Were you aware that Mr. Cacchione
10 was taking that position?

11 A. I believe I was, yes. I'm sure that I was, I was kept posted
12 by Mr. Coles and/or Mr. Endres about the negotiations
13 throughout.

14 Q. And what we're really seeing here in these notes now is the
15 back and forth of the negotiations between Mr. Endres and
16 Mr. Cacchione.

17 A. Yes.

18 CHAIRMAN

19 Why would Mr. Endres have to come back to the Deputy
20 Minister if he already had authorization, if necessary, to go up to
21 325,000?

22 A. My Lord, the matter was of great importance and I certainly
23 wanted to be kept fully advised on developments as the
24 negotiations proceeded.

25 Q. Then on 484, again, this one seems to be a note again from

MR. GIFFIN, EXAM. BY MR. SPICER

1 Mr. Endres. "Spoke with Felix. Told him that we cannot go
2 that far." We'll have to ask Mr. Endres what that was. "That
3 we have a limit." Did he have a limit at that point in time?
4 He had 325, didn't he?

5 A. Yes, I think that would be the limit that he was operating
6 under at that time.

7 Q. Mr. Endres is then saying that, "I spoke to my people and that
8 subject to approval by Cabinet I was authorized to offer an
9 additional 10,000 for a total of 270,000, minus 25, 245 to be
10 paid."

11 A. Right.

12 Q. And that, in fact, was the amount that was finally agreed
13 upon.

14 A. Yes.

15 Q. Would you agree with me that that amount was about 40 or
16 \$50,000 less than the amount that Mr. Endres had authority
17 to go to?

18 A. Yes.

19 4:25 - ADJOURNED TO 17 March 1988 - 9:30 a.m.

20

21

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23

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