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#2

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

Volume 57

Held: March 16, 1988, in the Imperial Room, Lord Nelson Hotel,
Halifax, Nova Scotia

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

Counsel: Messrs. George MacDonald, Q.C., Wylie Spicer, and David
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Mr. Donald C. Murray: Counsel for Mr. William Urquhart

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Attorney General of Nova Scotia

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

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

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

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

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

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

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

Court Reporting: Margaret E. Graham, OCR, RPR

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MR. GIFFIN, EXAM. BY MR. SPICER

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

2 MR. CHAIRMAN

3 Mr. Spicer?

4 MR. SPICER

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

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

8
9 EXAMINATION BY MR. SPICER

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

12 A. That's correct.

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

15 A. Yes.

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

17 A. Yes.

18 Q. Until when?

19 A. Until 1978.

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

21 A. Yes.

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

23 A. Yes.

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

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

3 A. Yes.

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

5 A. Yes.

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

8 A. Yes.

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

11 A. Yes.

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

14 A. Yes.

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

18 A. Yes.

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

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

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

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

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

3 Q. In respect of federal matters or provincial?

4 A. Provincial.

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

13 A. Yes, that's correct.

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

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

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

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

1 to Cabinet?

2 A. No.

3 Q. Why not?

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

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

8 A. That is correct.

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

12 A. No.

13 Q. Or with the Premier?

14 A. No.

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

19 A. Yes.

20 MR. SAUNDERS

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

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

MR. CHAIRMAN

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

MR. SAUNDERS

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

MR. CHAIRMAN

16 And the answer was "yes".

MR. SAUNDERS

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

MR. SPICER

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

MR. SAUNDERS

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

DISCUSSION

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

4 MR. CHAIRMAN

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

6 MR. SAUNDERS

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

9 MR. CHAIRMAN

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

14 MR. SAUNDERS

15 Very well, My Lord.

16 MR. CHAIRMAN

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

18 MR. SAUNDERS

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

20 MR. CHAIRMAN

21 Yeah, but close only counts in horseshoes.

22 MR. SAUNDERS.

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

25

DISCUSSION

1 MR. SPICER

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

7 MR. SAUNDERS

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

13 MR. CHAIRMAN

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

17 MR. SAUNDERS

18 Thank you, My Lord.

19 BY MR. SPICER

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

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

1 Q. And, more specifically, could you tell me what you
2 understood that phrase to mean, "the legal member of the
3 Executive Council"?

4 A. I'm not sure if you're looking for a legal interpretation of
5 that...

6 Q. No, I'm just asking you what you understood it to mean.

7 A. My understanding of it was simply that it really tied in with
8 the expression "law officer of the Crown", and that if matters
9 relating to, legal matters arose in Cabinet in the Executive
10 Council that I would be the Minister to whom the Executive
11 Council would turn for advice.

12 Q. So that if a legal matter arose in the course of a Cabinet
13 discussion, you would be the person or the Cabinet Minister to
14 whom others would turn to seek legal advice, is that correct?

15 A. That's correct.

16 Q. Do I take it that in your role as Attorney General, you had
17 certain relationships with the Royal Canadian Mounted Police?

18 A. Yes.

19 Q. There's been some evidence and some discussion during the
20 course of these hearings as to the relationship between the
21 R.C.M.P. and the Attorney General's Department. Would you
22 be of the view that you, as the Attorney General, had
23 authority to tell the R.C.M.P. not to continue an investigation?

24 A. I would put it this way, I think the ultimate authority that
25 the Attorney General has is with respect to prosecutions. The

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

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

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

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

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

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

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

2 A. Yes.

3 Q. Would you ever attend those yourself?

4 A. No.

5 Q. But you were kept advised.

6 A. Yes.

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

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

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

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

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

22 A. No.

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

MR. GIFFIN, EXAM. BY MR. SPICER

1 Attorney General at the time?

2 A. Yes.

3 MR. CHAIRMAN

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

11 MR. GIFFIN

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

20 BY MR. SPICER

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

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

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

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

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

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

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

1 occasions, you would be discussing fairly important matters?

2 A. Oh, yes.

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

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

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

15 A. Oh, yes.

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

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

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

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

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

12 9:52 a.m.

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

16 A. Yes.

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

19 A. Yes.

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

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

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

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

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

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

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

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

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

14 Q. Did you have any knowledge of that?

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

17 Q. Yes.

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

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

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

1 charge ought to be laid.

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

4 A. Yes.

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

7 A. Yes.

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

10 A. Yes.

11 Q. The position of the Crown.

12 A. That's correct.

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

16 A. On occasion, yes.

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

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

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

1 time of your tenure as Attorney General?

2 A. No, none that I can recall.

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

7 A. Yes.

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

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

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

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

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

25 A. Yes, I would.

1 Q. And if you...

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

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

6 A. Yes.

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

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

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

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

18 Q. Or from anybody else?

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

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

21

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

24

25 Were you aware of any circumstances when you were

25

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

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

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

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

12 Q. And on page 2 of that statement on page 17,
13

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

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

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

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

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

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

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

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

22 A. That's correct.

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

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

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

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

2 A. Yes.

3 Q. And that was the Weymouth Falls case?

4 A. Yes, that's correct.

5 Q. And was that matter resolved?

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

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

MR. GIFFIN, EXAM. BY MR. SPICER

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

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

COMMISSIONER POITRAS

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

16 A. I believe 1985, is my recollection.

MR. SPICER

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

19 A. Yes.

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

21 A. Yes.

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

24 A. Yes.

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

MR. GIFFIN, EXAM. BY MR. SPICER

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

MR. SAUNDERS

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

MR. SPICER

7 Finally?

MR. SAUNDERS

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

CHAIRMAN

12 Let's hear the question first.

MR. SPICER

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

COMMISSIONER EVANS

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

MR. SPICER

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

CHAIRMAN

23 All right.

MR. SAUNDERS

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

1 objection.

2 COMMISSIONER EVANS

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

4 MR. SPICER

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

7 MR. SAUNDERS

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

13 CHAIRMAN

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

25 MR. SAUNDERS

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

4 MR. SPICER

5 That requires a "yes" answer.

6 MR. SAUNDERS

7 Yes.

8 CHAIRMAN

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

10 MR. SAUNDERS

11 Well, then we're onto it again.

12 CHAIRMAN

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

15 MR. SAUNDERS

16 Yes. Well I'm ...

17 CHAIRMAN

18 If the answer is...

19 MR. SAUNDERS

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

22 CHAIRMAN

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

25

1 COMMISSIONER POITRAS

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

4 MR. SPICER

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

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

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

11 MR. SAUNDERS

12 Now I object for the third time.

13 CHAIRMAN

14 Now you make your objection.

15 MR. SPICER

16 Now we can have the argument.

17 CHAIRMAN

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

20 MR. SAUNDERS

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

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

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

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

10:15 a.m.*

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

MR. SAUNDERS - SUBMISSION

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

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

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

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

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

24 MR. CHAIRMAN

25 Mr. Spicer?

MR. SPICER

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

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

5 SUBMISSION BY MR. SPICER

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

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

MR. SPICER - SUBMISSION

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

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

MR. SPICER - SUBMISSION

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

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

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

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

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1 The same principle applies to oral
2 evidence.

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

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

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

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

25 657, the first full paragraph:

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

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

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

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

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

MR. SPICER - SUBMISSION

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

MR. CHAIRMAN

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

MR. SPICER

11
12 I'm not allowed to ask.

MR. CHAIRMAN

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

MR. SPICER

18
19 No.

MR. CHAIRMAN

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

MR. SPICER - SUBMISSION

1 Honourable somebody else say?

2 MR. SPICER

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

4 MR. CHAIRMAN

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

6 MR. SPICER

7 Yes.

8 MR. CHAIRMAN

9 The pros and cons.

10 MR. SPICER

11 Yes.

12 MR. CHAIRMAN

13 Of the issues.

14 MR. SPICER

15 Yes.

16 MR. CHAIRMAN

17 All right.

18 MR. SPICER

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

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

MR. SPICER - SUBMISSION

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

6 [It goes on.]

7 671, the first full paragraph:

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

11 [the evidence in this case, the discussions]

12 in the interest of the administration of
13 justice.

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

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

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

MR. SPICER - SUBMISSION

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

13 The next full paragraph:

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

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

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

MR. SPICER - SUBMISSION

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

MR. CHAIRMAN

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

MR. SPICER

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

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

MR. CHAIRMAN

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

MR. SPICER - SUBMISSIONCOMMISSIONER EVANS

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

MR. SPICER

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

COMMISSIONER EVANS

19
20 Mr. Ruby?
21

MR. RUBY

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

1 | you in dealing with this subject matter.

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

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

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

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

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

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

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

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

MR. RUBY - SUBMISSION

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

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

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

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

COMMISSIONER EVANS

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

MR. RUBY

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

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

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

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

MR. RUBY - SUBMISSION

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

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

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

17 MS. DERRICK

18 Terrance.

19 MR. RUBY

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

MR. RUBY - SUBMISSION

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

MR. CHAIRMAN

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

MR. WILDSMITH

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

DISCUSSION - COUNSEL

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

MR. CHAIRMAN

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

MR. WILDSMITH

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

MR. CHAIRMAN

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

MR. ROSS

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

DISCUSSION - COUNSEL

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

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

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

MR. BISSELL

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

DISCUSSION - COUNSEL

1 interest immunity.

2 MR. CHAIRMAN

3 Well, Mr. Pugsley?

4 MR. PUGSLEY

5 I have no representations to make, My Lord.

6 MR. CHAIRMAN

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

8 MR. SAUNDERS

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

REBUTTAL - MR. SAUNDERS

1 distinction I tried to make at the beginning.

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

MR. CHAIRMAN

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

MR. SPICER

22 Oh, yes.

MR. CHAIRMAN

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

MR. GIFFIN, EXAM. BY MR. SPICER

1 MR. SAUNDERS

2 Not at all, My Lord.

3 MR. CHAIRMAN

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

8 11:15 BREAK

9 MR. CHAIRMAN

10 Mr. Spicer?

11 EXAMINATION BY MR. SPICER

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

13 MR. CHAIRMAN

14 Pardon?

15 MR. SPICER

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

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

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

MR. GIFFIN, EXAM. BY MR. SPICER

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

3 A. That's right.

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

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

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

16 A. Yes.

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

24

25

One has to remember as well that Mr. Seale

MR. GIFFIN, EXAM. BY MR. SPICER

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

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

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

13 Q. Did you read the decision?

14 A. Yes.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

1 was the position of the government?

2 A. Yes.

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

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

19 And then Mr. How responds on 263:

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

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

MR. GIFFIN, EXAM. BY MR. SPICER

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

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

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

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

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

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

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

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

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

Was it your understanding that it was the position of the

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

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

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

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

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

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

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

1 been a miscarriage of justice?

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

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

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

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

12 A. Yes.

13 Q. Perhaps you could turn to Volume 32.

14 11:46 a.m.

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

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

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

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

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

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

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

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

1 A. Yes.

2 Q. And who is it directed to?

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

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

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

13 Q. Sure.

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

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

19 A. Yes, that's correct.

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

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

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

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

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

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

18 A. Yes.

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

21 A. Yes.

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

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

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

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

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

9 A. Yes.

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

12 A. Yes.

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

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

25 Q. In advance.

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

9 Q. Did this revelation annoy you?

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

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

14 A. Yes.

15 Q. Who was in attendance?

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

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

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

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

1 been the author of his own misfortune?

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

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

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

11 Q. Was anything concluded at the meeting?

12 A. No.

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

20 A. Yes.

21 Q. You say in the second paragraph,

22

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

MR. GIFFIN, EXAM. BY MR. SPICER

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

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

5 A. Yes.

6 Q.

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

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

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

1 my options open.

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

4 A. Yes.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

17 Q. The press release raises three matters.

18 A. Yes.

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

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

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

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

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

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

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

1 ex gratia payment.

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

5 A. That's right.

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

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

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

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

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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 He may contact Cacchione, Marshall's
23 lawyer, to ask if he feels such an Inquiry
24 would prejudice his case. MacGuigan feels
25 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.

25

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.

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- 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

MR. GIFFIN, EXAM. BY MR. SPICER

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

MR. GIFFIN, EXAM. BY MR. SPICER

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
26 about what goes on in Cabinet not to ask the second half of the
27 question.

28 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

MR. GIFFIN, EXAM. BY MR. SPICER

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...

CHAIRMAN

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

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 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.

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

24 Mr. Marshall may have a cause of action
25 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
advance.

23 Is that consistent with your view?

24 4:19

25 A. Yes.

MR. GIFFIN, EXAM. BY MR. SPICER

- 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.

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REPORTER'S CERTIFICATE

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



Margaret E. Graham

DATED THIS 16 day of March

19 88 at Dartmouth, Nova Scotia