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Vol 254
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**ROYAL COMMISSION ON THE
DONALD MARSHALL, JR., PROSECUTION**

Volume 58

Held: March 17, 1988, in the Imperial Room, Lord Nelson Hotel,
Halifax, Nova Scotia

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Court Reporting: Margaret E. Graham, OCR, RPR

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1 MARCH 17, 1988 - 9:51 a.m.

2 MR. CHAIRMAN

3 Before we proceed with the further examination of this
4 witness, Mr. Spicer, it would be appropriate for us to make a
5 ruling at this time on the issue raised yesterday.

6 We have been asked to rule whether questions may be put to
7 witnesses who are now or who have been members of the
8 Executive Council of Nova Scotia, relating to Cabinet discussions on
9 the Marshall case. Arguments have been made by Commission
10 counsel, and counsel for Donald Marshall, Jr., the Union of Nova
11 Scotia Indians, the Black United Front and Oscar Seale in support
12 of admitting such evidence, and from counsel for the Attorney
13 General and the R.C.M.P. against the proposition.

14 Two decisions of the Supreme Court of Canada are relevant to
15 the issue and have been considered by us in making our rulings:

16 Smallwood v. Sparling et al., [1982] 2 S.C.R.

17 686

18 Carey v. Ontario, [1986] 2 S.C.R. 637.

19
20 These were the only two cases referred to us by counsel.
21 Both cases clearly state that there is no absolute immunity
22 attaching to Cabinet documents which could prevent, in all cases,
23 their introduction as evidence. While these cases recognize that
24 such documents must be protected in certain circumstances, they
25 make quite clear that the public interest is a paramount factor

1 that must be considered in deciding the extent of the protection
2 afforded in particular cases. Lafortest, J. at p. 670 of the Carey
3 case articulates factors that must be considered. He said:
4

5 (The Smallwood) case determines that
6 Cabinet documents like other evidence
7 must be disclosed unless such disclosure
8 would interfere with the public interest.
9 The fact that such documents concern the
10 decision-making process at the highest
11 level of government cannot, however, be
12 ignored. Courts must proceed with caution
13 in having them produced. But the level of
14 the decision-making process concerned is
15 only one of many variables to be taken
16 into account. The nature of the policy
17 concerned and the particular contents of
18 the documents are, I would have thought,
19 even more important. So far as the
20 protection of the decision-making process
21 is concerned, too, the time when a
22 document or information is to be revealed
23 is an extremely important factor.
24 Revelations of Cabinet discussion and
25 planning at the developmental stage or
other circumstances when there is keen
public interest in the subject matter might
seriously inhibit the proper functioning of
Cabinet government, but this can scarcely
be the case when low level policy that has
long become of little public interest is
involved.

To these circumstances, and they are not
all, one must, of course, add the importance
of producing the documents in the

1 interests of the administration of justice.

2
3 Here, we are not asking for disclosure of Cabinet documents.
4 Cabinet documents relating to the Marshall case have been
5 provided to the Commissioners, who have determined which are
6 relevant to the work of this Inquiry. The Attorney General's
7 Department have been supportive of our attempts to bring
8 relevant documents, from Cabinet and from other Government
9 offices, to this Inquiry. Counsel for the Commission has now asked
10 that in addition to the Cabinet documents, questions be put to a
11 former Attorney General relating to discussions held in Cabinet to
12 give a sense of the general views being expressed in those
13 discussions, but without "naming names" or attributing particular
14 points of view to particular individuals. Counsel for Mr. Marshall
15 has gone a further step and has asked the Commissioners to rule
16 that there is no privilege attached to any Cabinet discussions.
17 Thus counsel would be free to ask for specifics of Cabinet
18 discussions attributable to individual ministers.

19 In determining whether the relative immunity relating to
20 Cabinet secrecy will be extended to the oral evidence requested in
21 this case, we must first look to the Terms of Reference of this
22 Commission. Our task is to look at matters relating to the
23 wrongful conviction of Donald Marshall, Jr. and "such other related
24 matters which the Commissioners deem relevant to this Inquiry".
25

1 Among those matters which the Commissioners deem relevant are
2 the reference to the Appeal Division of the Nova Scotia Supreme
3 Court and the process by which compensation was granted to
4 Donald Marshall, Jr. Surely, it was in recognition of the public
5 interest in airing the Marshall matter once and for all, that the
6 Government appointed this Inquiry. It is our view that it is
7 clearly in the public interest that these matters concerning the
8 administration of justice of Nova Scotia - and the extremely
9 important consideration that the public have confidence in their
10 justice system - must be raised.

11 While the most recent Carey case deals with the production of
12 Cabinet documents, the Smallwood case deals with a subpoena
13 issued to a former provincial Cabinet member to testify before a
14 federal commission. In that case, Madame Justice Wilson says at
15 p. 706:

17 It appears to me that, in the absence of
18 any statutory provision which would
19 override the common law, the rule with
20 respect to oral testimony is the same as the
21 rule with respect to documents, i.e., it is
22 the rule of "relative immunity".

22 In that case, the Supreme Court of Canada decided that Mr.
23 Smallwood's claim to blanket immunity must fail. In our view,
24 the position of counsel for the Attorney General's Department in
25

1 | invoking absolute privilege as against the Commission which it
2 | established, is similar to the approach taken by Mr. Smallwood,
3 | which was rejected by the Supreme Court of Canada when it said
4 | that he "cannot be the arbiter of his own immunity".

5 | We are sympathetic to the "candour" argument (as was the
6 | Supreme Court of Canada) but find that it, when weighed against
7 | the public interest argument put by Mr. Spicer, must fail. We note
8 | specifically the comments of Mr. Justice Laforest at p. 673 of
9 | Carey. His comments might have been spoken by the
10 | Commissioners in this case:

11 |
12 | As I see it, it is important that this
13 | question be aired not only in the interests
14 | of the administration of justice but also for
15 | the purpose for which it is sought to
16 | withhold the documents, namely, the
17 | proper functioning of government. For if
18 | there has been harsh or improper conduct
19 | in the dealings of the executive with the
20 | citizen, it ought to be revealed. The
21 | purpose of secrecy in government is to
22 | promote its proper functioning, not to
23 | facilitate improper conduct of the
24 | government...

25 | Divulgence is all the more important in our
26 | day when more open government is sought
27 | by the public. It serves to reinforce the
28 | faith of the citizen in his governmental
29 | institutions. This has important
30 | implications for the administration of
31 | justice, which is of prime concern to the

1 courts. ...It has a bearing on the
2 perception of the litigant and the public on
3 whether justice has been done.

4 The limited immunity which now attaches to Cabinet
5 documents and discussions in this case is outweighed by the
6 public interest in the Commission having this evidence before it.
7 In as much as we now wish to know the general nature of Cabinet
8 discussions on the Marshall case, we will not permit questions
9 relating to the views of individual Cabinet members, as this would
10 lead to the possibility of hearing evidence from all ministers to
11 "set the record straight". Not only would such individual views be
12 irrelevant to this Inquiry, but this process would so encumber this
13 Commission as to lead to absurdity. Further, Cabinet members
14 should be protected from public scrutiny in their discussions
15 leading to the formulation of government policy and in other
16 matters such as, for example, national security. In this case, the
17 public interest argument is such that the limited protection
18 granted should enable this Commission to hear evidence relating
19 to what issues dealing directly with the Marshall case were
20 discussed in Cabinet, and what views were considered in arriving
21 at particular decisions or policies. We feel that this maintains the
22 appropriate and necessary balance between the interests
23 protected by Cabinet secrecy and our interest in the proper
24 administration of justice.
25

1 In summary, while former and present members of Cabinet may
2 be asked questions dealing directly with the Marshall case, they
3 will not be required to reveal the opinions or comments of
4 individual members of Cabinet expressed during Cabinet
5 meetings.

6 MR. SAUNDERS

7 My Lords, in light of your ruling, I would respectfully urge
8 the following the procedure upon my learned friend, counsel
9 for the Commission, that is, that his questions be put to the
10 witness with respect to the issues that Your Lordships have
11 identified, that my objections stated yesterday be noted, and
12 that no answers to those questions be required in order to
13 permit me time to apply to the Supreme Court of Nova Scotia
14 to challenge the legitimacy of Mr. Spicer's questions. And I
15 would ask for my friend's concurrence in that process.

16 10:02 a.m. *

17 MR. CHAIRMAN

18 Would you go over that again, Mr. Saunders?

19 MR. SAUNDERS

20 Yes, My Lord. That my friend ask his questions of Mr. Giffin.
21 I would take it that I would not have to record an objection after
22 each question but rather my objection, as stated yesterday, would
23 have already been noted, and that answers would not be required
24 this day of this witness in order to permit me time to apply to the
25 Court to challenge the legitimacy of those questions posed by Mr.

1 Spicer.

2 MR. CHAIRMAN

3 That strikes me as creating somewhat of a problem in this
4 sense, Mr. Saunders, that if Mr. Spicer puts a question to this
5 witness concerning a particular area of discussion in Cabinet, you
6 know, did Cabinet discuss the question of compensation or the
7 negotiations of compensation, or a host of other questions, and the
8 question is put and then stopped, that leaves everything up in the
9 air, and the room for speculation would seem to be almost unten-
10 able. It...

11 COMMISSIONER POITRAS

12 I think the problem arises from this, Mr. Saunders, that an
13 objection was made. It was ruled upon by this Commission.

14 MR. SAUNDERS

15 Yes, My Lord.

16 COMMISSIONER POITRAS

17 I think other questions will be posed as we go along. I think
18 at that point you ought to object again. It is on that basis that
19 perhaps what you recommended could be implemented. But I
20 think it would be necessary for you to object again inasmuch as
21 there has been a ruling on your objection.

22 MR. SAUNDERS

23 Yes, I'm certainly quite prepared, My Lord, to make my
24 objections again when such questions are put, but I did want to
25 suggest that process and urge that my friend concur...

1 MR. CHAIRMAN

2 I'm not sure that makes...I'll hear other counsel on that, but
3 I'm really concerned about leaving a question up in the air
4 unanswered, because the implications would be rather
5 devastating I should think.

6 MR. RUBY

7 If I can just very briefly make a suggestion. It seems to me
8 there has been a ruling, that as a matter of courtesy we all ought
9 to extend to my friend in the ordinary course, we should refrain
10 from asking any questions on this subject matter until he has had
11 an opportunity to move elsewhere. I think it's just a perfectly
12 normal courtesy and we should afford him that.

13 COMMISSIONER EVANS

14 What you're suggesting is that he appeal the ruling.

15 MR. RUBY

16 He's indicated he's going to appeal it and I think he should be
17 given time to do it and we should simply refrain from entering
18 into the area so that the issue doesn't become moot and he doesn't
19 become prejudiced.

20 MR. CHAIRMAN

21 All right. What I understand from you, Mr. Saunders, is that
22 pursuant to instructions from your client you will be initiating
23 forthwith an appeal by way of the appropriate procedure to the
24 Trial Division of the Supreme Court of Nova Scotia against the
25 ruling we've just made.

1 MR. SAUNDERS

2 That's correct, My Lord.

3 MR. CHAIRMAN

4 Well, it seems to me that with that advice given to us by an
5 officer of the Supreme Court of Nova Scotia and an undertaking to
6 proceed with the utmost dispatch, that the appropriate way to
7 proceed is to continue the examination of Mr. Giffin, but to refrain
8 from asking any questions with respect to the discussions in
9 Cabinet. There would be no questions. Hopefully, this issue can
10 be disposed of very quickly by the appropriate Court. If our
11 decision is upheld then Mr. Giffin would have to be recalled and
12 these questions put to him.

13 MR. SAUNDERS

14 That's right.

15 MR. CHAIRMAN

16 If on the other hand we are overruled the...Mr. Giffin would
17 not have to come back.

18 MR. SAUNDERS

19 Thankyou, My Lord.

20 MR. CHAIRMAN

21 So, we proceed on that basis, Mr. Spicer

22 MR. SPICER

23 Thank-you.
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MR. GIFFIN, still sworn, testified as follows:

EXAMINATION BY MR. SPICER [Cont'd.]

Q. Mr. Giffin, when we left off yesterday we were around the end of July, 1984, in connection with compensation. Perhaps if I could ask you to turn to page 488 of Volume 33. Again, that seem to be notes of a meeting or at least of a conversation with yourself, "Spoke with Minister. He wanted update." I think, again, that these are notes made by Mr. Endres.

A. As far as I know, yes.

Q. Okay.

Told him we offered total of two hundred and seventy thousand, added ten thousand to original offer to give Felix something to go back with. Advised Minister that we should hold the line, that if they settle they would take this and if they don't it would be because of other pressures.

Do you have any idea what those "other pressures" would have been?

A. I'm not sure what that reference means, whether it was pressures to proceed with the Inquiry, I'm not clear just...

Q. Had you...

A. It's not clear to me.

Q. Had you at this point in time, that is by July of 1984, had you

1 received any advice from Mr. Endres or Mr. Coles or other
2 people in your Department as to Donald Marshall Jr.'s mental
3 condition, how he was handling things at the time?

4 A. No. No, I hadn't been...I don't recall being told anything about
5 his mental condition.

6 Q. Mr. Cacchione will testify that he would mention that
7 frequently to Mr. Endres. I take it you're telling us that Mr.
8 Endres didn't convey that information on to yourself.

9 A. I certainly don't recall it and I, of course, had no personal
10 contact with Mr. Marshall.

11 Q. Right. "If they don't it would be because of other pressures,
12 not the adequacy of the offer. Minister agreed." Does that
13 refresh your memory at all as to what these other pressures
14 were as opposed to the adequacy of the offer?

15 A. No. No. My recollection is simply that we were discussing the
16 bottom-line number of a settlement and that my view of it
17 was, as I indicated yesterday, that if agreement could be
18 reached on that number that was fine. If agreement could
19 not be reached then the Inquiry would proceed.

20 Q. And on the next page, 489, letter from Mr. Cacchione to Mr.
21 Endres, in the third...second paragraph "Accepting the
22 government's offer of \$270,000." Do you know whether or
23 not Mr. Cacchione had been advised that this whole
24 settlement was subject to approval by Mr. Justice Campbell?

25 A. I can't testify to that personally. Certainly I indicated to my

1 staff that any settlement would have to be approved by Mr.
2 Justice Campbell otherwise I wouldn't take it to Cabinet.

3 Q. Okay. The \$270,000 figure, would that, in your mind in
4 agreeing to that figure, would that have included any claims
5 that might arise with respect to damages, for instance, any
6 legal claim that he might have against the Government of
7 Nova Scotia?

8 A. Yes, I would have seen it that way. That's why a release was
9 prepared and signed.

10 Q. Has it then now been...the settlement been transformed from
11 an ex gratia payment to a payment that in addition to ex
12 gratia is money to take into account that any claim that Mr.
13 Marshall may have for damages against the Province?

14 A. I saw it as simply a matter of ordinary prudence that we
15 were paying out money. I was not aware at that point in
16 time of any legal liability on the part of the Government of
17 Nova Scotia to Mr. Marshall, but I saw the execution of a
18 release, a release as simply a routine step that would be
19 taken in a settlement.

20 Q. And is the answer to my question is then at this point when
21 Mr. Cacchione accepts the offer of \$270,000 it was your
22 understanding that that amount would include, would be an
23 ex gratia payment but would also taken into account any
24 claim that he might even though you thought he didn't have
25 one against the Government with respect to damages?

1 A. Yes.

2 Q. On page 492, again I believe it's Mr. Endres notes which
3 should be August the 9th. "Deputy wants to see me tomorrow
4 morning. Cabinet gave green light, but there a couple of
5 things he wants to discuss with me." Down at the bottom of
6 492, it's hard to see the page numbers. Yeah, that's the one.

7 A. Yes, I'm sorry, I missed that.

8 Q. Do you have any idea what the "couple of things" were that
9 Mr. Coles wanted to discuss with Mr. Endres?

10 A. I would assume that would certainly concern the obtaining of
11 Mr. Justice Campbell's approval. I don't know if that would
12 also have included the release, I don't know.

13 Q. Then on the next page, same date, "Met with Minister and
14 Deputy. He will take proposal to Cabinet today and get back
15 to us." I suspect these two pages are in reverse order in the
16 volume by the looks of things, in terms of the order of this
17 but...

18 A. I have the page here.

19 Q. Yeah, okay. And you did, indeed, take the question of the
20 \$270,000 to Cabinet.

21 A. Yes.

22 Q. And it was approved.

23 A. Yes.

24 Q. On August the 9th.

25 A. Yes.

1 Q. And is that reflected in your note on page 494?

2 A. Yes.

3 Q. Now, without trespassing on the Chairman's comments a few
4 minutes ago, you say in your note:

5
6 Cabinet has given us authorization to settle
7 at the amount indicated. The general
8 feeling is that we should just make the
9 settlement and perhaps issue a press
statement confirming it. Nobody appears
to want to go very high profile on this.

10 Does that relate to anything other than discussions in Cabinet?

11 A. I think that would also have reflected Mr. Cacchione's
12 expressed desire that the settlement be private. We could not
13 make a settlement like that privately because the
14 expenditure of public funds would require an Order-in-
15 Council, which would be a matter of public record. But, by the
16 same token, I believe that related to that as well as to my
17 own tendency as much as possible to minimize public
18 comment about any aspects of the case because the Ebsary
19 case was still before the courts.

20 10:14 a.m. *

21 Q. Was any further Cabinet action required once the \$270,000
22 figure had been approved?

23 A. Well, there still would have been an Order-in-Council would
24 have to go through Cabinet.

25 Q. Right.

MR GIFFIN, EXAM. BY MR. SPICER

1 A. Our report and recommendations followed by an Order-in-
2 Council and the necessary paperwork to enable the
3 Department of Finance to issue the cheque.

4 Q. Now, would it be fair to describe that as just the formalistic
5 part of the process, that the operative meeting was August
6 the 9th when the figure was approved?

7 A. Yes.

8 Q. You say in your notes on 494, "It was also felt that the
9 settlement should be okayed in some fashion or other by Mr.
10 Justice Campbell," and you say, "We should discuss these
11 points further." In what sense did you regard it as necessary
12 to have the settlement okayed by Mr. Justice Campbell?

13 A. Well, because he had been appointed by the government to
14 conduct the Inquiry into the issue of compensation and in
15 order to complete the...from a legal point of view that Inquiry
16 was still extant and, therefore, the work of the Inquiry had to
17 be brought to a conclusion and ended, and it also was
18 important to me that Mr. Justice Campbell approve the
19 settlement. If for any reason he had not been prepared to
20 approve the settlement, then the settlement would not have
21 gone ahead.

22 Q. And the following page, at 495, there's a reference again to...it
23 looks like a meeting with the Deputy and it's got "Deputy"
24 written at the top. And, item 2, "Deputy to draft report to
25 Governor-in-Council from commissioner incorporating

MR. GIFFIN, EXAM. BY MR. SPICER

1 settlement." What would you understand that to mean?

2 A. Well, that was my understanding was that Mr. Coles was to
3 draft, and indeed did draft, the report and recommendation
4 that went to Cabinet. It would be in the documentation and
5 the final formal disposition of the matter.

6 Q. And indeed, as it transpired, the...Mr. Coles drafted, with the
7 exception of one paragraph which we'll get to a few minutes,
8 but drafted the report that was signed by Commissioner
9 Campbell.

10 A. That's correct.

11 Q. Did that seem a normal thing to be done at the time, to have
12 your department writing the Commissioner's report for him?

13 A. Well, I had never been involved in a case like that before so I
14 wasn't sure what was the correct procedure or not. I didn't
15 see any harm in, where settlement had been agreed upon, I
16 didn't see any harm in Mr. Coles preparing the document, but
17 obviously the decision on whether or not to sign the
18 document would be that of Mr. Justice Campbell.

19 Q. Are you aware of any discussions between members of your
20 staff and Mr. Justice Campbell as to whether or not he felt
21 comfortable with that approach?

22 A. I don't recall any, no.

MR. CHAIRMAN

23
24 Mr. Giffin, in your view, was it open to Mr. Justice Campbell
25 to...upon a detailed review of the facts surrounding the settlement

MR. GIFFIN, EXAM. BY MR. SPICER

1 to come back and recommend that the settlement was
2 inadequate?

3 MR. GIFFIN

4 Yes, in my view that was still open to him. I didn't presume
5 to give him directions on how he might want to deal with the
6 proposed settlement. But in my view that was open to him.

7 MR. SPICER

8 Q. Do you know whether or not members of your staff had
9 discussions with Mr. Justice Campbell as to the adequacy of
10 the amount?

11 A. I do not know if they discussed the adequacy of the amount.

12 Q. What did they discuss with him?

13 A. It's my understanding that he was advised of the settlement
14 and while I was not present at the discussions, that the
15 discussions involved the drafting of the documents and so
16 forth to finalize the settlement.

17 Q. Do you know whether or not Mr. Justice Campbell had any
18 involvement in terms of inquiring as to the criteria upon
19 which the settlement was reached or...

20 A. No, I don't believe he did.

21 Q. You don't believe...

22 A. As far as I know he didn't.

23 Q. On pages 499 and 500 is a draft of his...the report which was
24 proposed to be signed by Mr. Justice Campbell. I gather that
25 was prepared by Mr. Coles?

1 A. Yes.

2 Q. And on page 502 I just note in passing that the copy of the
3 proposed report was forwarded to Mr. Cacchione for his
4 comments, and he made one change to it on page 2, where the
5 handwritten "of the Province".

6 A. Yes.

7 Q. Do you know...did you have any involvement at all in the
8 preparation of the final version of Mr. Justice Campbell's
9 report?

10 A. I did not draft the document but I did see it after it was
11 drafted.

12 Q. In its final version?

13 A. Yes.

14 Q. Were you aware of the amendment that Mr. Cacchione sought
15 to introduce in the draft that was forwarded to him?

16 A. That is the one on page...

17 Q. ...of the province.

18 A. ...504.

19 Q. Yes, that's right.

20 A. I can't recall whether or not I was aware of that at the time.
21 If I had been I wouldn't have had any problems with it.

22 Q. On August the 14th on page 505, Mr. Endres is sending a
23 release to Mr. Cacchione. Would you agree with me that there
24 is nothing in this document which indicates to Mr. Cacchione
25 that the settlement figure of \$270,000 is contingent in any

- 1 way on any approval by Mr. Justice Campbell?
- 2 A. You're talking now about the letter from Mr. Endres to...
- 3 Q. Yeah, on 505.
- 4 A. ...Mr. Cacchione. Yes, that's correct. There's no reference to
- 5 that in the letter.
- 6 Q. Do you think Mr. Cacchione was aware of that, that that was
- 7 the government's position?
- 8 A. I can't speak for Mr. Cacchione.
- 9 Q. No.
- 10 A. I certainly made that clear both to my own staff and to my
- 11 Cabinet colleagues. But I can't say what precisely was
- 12 communicated to Mr. Cacchione.
- 13 Q. Did you instruct your staff to advise Mr. Cacchione that the
- 14 settlement was tentative in a sense, pending approval by Mr.
- 15 Justice Campbell?
- 16 A. I don't recall instructing my staff to say that to him. I simply
- 17 said to my staff that Cabinet...I will not recommend the
- 18 settlement to Cabinet if it is not approved by Mr. Justice
- 19 Campbell.
- 20 Q. But had you not already recommended it to Cabinet and had
- 21 it approved by Cabinet on August the 9th?
- 22 A. Yes, but subject to approval by Mr. Justice Campbell. If he
- 23 had not approved it, then I would have gone back to Cabinet
- 24 and recommended that the settlement not be approved.
- 25 Q. Then on page 520, Mr. Giffin, the report of Mr. Justice

1 Campbell, I just want to ask you a couple of questions about
2 it. Would you agree that the...that the settlement that was
3 reached, the total sum of \$270,000 was in respect of matters
4 beyond what you considered to be the scope of the Inquiry in
5 the first place? In other words, you had taken the position
6 we talked about yesterday that the scope of the Inquiry
7 really was to consider incarceration, time in jail. You've now
8 settled the matter for \$270,000 and told us that that would
9 include claims for damages. Would you...would you be of the
10 view that that settlement, in fact, went beyond your
11 conception of the original scope of the terms of the
12 compensation Inquiry?

13 A. I think I understand your question. I certainly didn't think of
14 it that way at the time, but I think I would agree with the
15 way you have put that that it, in fact, ended up going beyond
16 the original scope of the Inquiry.

17 Q. So, that when Mr. Justice Campbell says on 521 in the last
18 three or four lines of the first paragraph,

19
20 The said settlement will be paid by the
21 Province to Donald Marshall in
22 consideration of a full release of all or any
23 demands, claims or actions for damages of
24 all kinds including legal fees up to and
25 including the agreed settlement.

24 In the government's view that initially would have been
25 something beyond the terms of reference?

1 September, 1984, it would be a matter of interest to bring to
2 the Deputy's attention that Mr. Marshall had been arrested on
3 another charge?

4 A. No, I can't speak for Mr. Endres on that. I recall reading the
5 article in question in Daily News but I...I think that's a
6 question you'd have to direct to Mr. Endres.

7 Q. Did you have any discussions with Mr. Endres about it?

8 A. I honestly can't recall one way or the other.

9 Q. Did you have any discussions...

10 A. I don't know if we discussed that or not.

11 Q. Okay. Did you have any discussions with Mr. Coles about it?

12 A. Again, I can't...under oath I can't say whether or not I did. I
13 was certainly aware of the article, whether it was from
14 reading by photocopy in the Department or if I read it in the
15 Daily News just as a casual reader, I can't recall.

16 Q. Then on page 543 is a press release, press announcement,
17 543. I think in conjunction of that...with that if you have
18 Volume 38, I'd just like you to turn to page 120. First of all,
19 just look at the press release. The last paragraph,

20
21 'The government's approval of Mr. Justice
22 Campbell's final recommendation
23 completes the work of the Commission,' Mr.
24 Giffin said, 'And on behalf of the
25 Government of Nova Scotia I wish to
express sincere thanks to him for his
untiring efforts in dealing with this
matter.'

1 Mr. Justice Campbell in the volume...in Volume 38 at page
2 120, seems to take issue with the way in which that press
3 release is phrased and in the second clip underneath where it
4 says, "Probe of Marshall," in the left-hand column.

5
6 In a telephone interview from his
7 Summerside home Thursday, Mr. Justice
8 Campbell would not say whether he thinks
9 an Inquiry should be established, nor
10 whether he would head such an Inquiry.
11 But contrary to information in the
12 Government statement, Mr. Justice
13 Campbell said he merely approved the
14 amount of compensation agreed by the
15 parties in the dispute; namely, the
16 provincial government through the
17 Attorney General's office and Mr. Marshall.

18 He seems to be taking issue with the notion that he really
19 recommended anything.

20 A. I don't see any conflict between the statements. The way he
21 put it was exactly my understanding of it that he approved
22 the settlement, that he did not make any independent inquiry
23 into the adequacy of the settlement, and the reference in the
24 press release to his final recommendation was because that
25 was the document that went to Cabinet.

Q And the actual...the final Order-in-Council or document
reflecting the settlement is on page 549 of Volume 33.

COMMISSIONER EVANS

What page was that?

1 MR. SPICER

2 549.

3 Q And that's dated the 28th of September, 1984, and that would
4 have been the final thing that was required by the
5 government in order to effect the settlement?

6 A. Yes.

7 Q Did you have to take the Campbell report back to Cabinet, I
8 mean did you have to take it to Cabinet in order to confirm
9 the...confirm the settlement?

10 A. Yes, I believe that I did, yes.

11 Q And you would have done that prior to September 28th.

12 A. Yes.

13 Q And, at this point in time when the \$270,000 figure is agreed
14 upon, the position of the federal government is that's all to be
15 paid by the province.

16 A. Yes.

17 Q As it turned out later on the province only ended up having
18 to pay \$135,000.

19 A. Yes, that's correct.

20 Q Were you aware at the time that the payment was made to
21 Mr. Marshall on October the 2nd that ninety-seven-odd
22 thousand dollars of that amount would be deducted from the
23 settlement figure in order to pay Mr. Aronson and Mr.
24 Cacchione's fees?

25 A. I don't recall being aware of the precise amount of the two

1 solicitors' fees but I knew that it was a substantial amount.

2 Q. Did you have any discussions with your staff as to whether or
3 not bearing in mind the reduction of...taking into account the
4 legal fees that were being deducted whether or not about
5 \$173,000 was a reasonable figure?

6 A. No, I don't recall the discussions proceeding on that basis. My
7 attitude throughout with respect to the negotiation of the
8 settlement was that we were dealing with an experienced
9 barrister, in Mr. Cacchione, and that if he and his client were
10 prepared to settle at that amount, then I was satisfied with
11 that.

12 Q. Had the process changed in terms of the way it was perceived
13 by the parties from your letter or Mr. Cole's letter, or is it
14 yours of March 6th, in which you refer to the non-adversarial
15 nature of the process, to become an adversarial process
16 whereby you really just have a set of negotiations between
17 two parties?

18 A. It's difficult to put that kind of label on it because we were
19 not adversarial in the sense of litigation, but on the other
20 hand it was a settlement negotiation. I think the analogies
21 are always dangerous. But based on my own experience in
22 the practise of law that it was akin to the kind of situation in
23 which liability was not an issue and it was an negotiation
24 on...on a settlement for damages.

25 Q. Certainly it's become more adversarial than it was originally

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1 contemplated by the time the Inquiry was set up though, isn't
2 that fair to say?

3 A. Yes, I think that's a fair comment, yes.

4 Q. On page 16 of Exhibit 138. I just want to make sure that
5 you've got the right one. Yeah. Just to conclude the
6 compensation matter, that's a telex to yourself from Mr.
7 Crosbie in April of 1985.

8 EXHIBIT 138 - TELEX FROM R. GIFFIN TO MR. CROSBIE APRIL,
9 1985

10 A. Yes.

11 Q. And did you...at the end of it it said, the last three lines, when
12 they're agreeing to pay a hundred and thirty-five or half, "As
13 part of a federal involvement, vis-a-vis the complex issue of
14 compensation of persons who are wrongfully convicted." Did
15 you understand that to mean that the federal government
16 was assuming some responsibility in connection with
17 compensation for persons wrongfully convicted?

18 A. Yes.

19 Q. Did you have any discussions with Mr. Crosbie about that?

20 A. I recall that the general subject matter was discussed at the
21 federal and provincial ministerial meeting in St. John's,
22 Newfoundland, and I'd have to check, but I think it was also
23 discussed at one or two other ministerial meetings during that
24 general time frame, and it was my understanding that the
25 Government of Canada was indicating that they would be

1 prepared to become involved in this type of case in the
2 future. It's also my recollection that there was a committee of
3 officials struck to give consideration to guidelines that might
4 be used in future cases, and I believe that committee included
5 representation from the Government of Canada.

6 Q And the operative factor between the time that the
7 government said "No" and the time the government said "Yes"
8 was that the government had changed.

9 A. Yes.

10 Q You wrote back to Mr. Crosbie, and that's page 17 of that
11 same...

12 A. Yes.

13 Q So, you can't resist getting a kick in in the second paragraph.

14 A. I thought I had done a pretty good job of biting my tongue
15 about Mr. MacGuigan's position, but I guess I felt I wanted to
16 put it on record somewhere that I had not been happy with
17 the approach he had taken.

18 Q Okay. So, the net outcome of the whole compensation matter
19 is that \$270,000 is paid to Donald Marshall and it's split
20 fifty/fifty between the province and the federal government.

21 A. Yes.

22 Q I just want to go back in general terms for a minute to the
23 compensation negotiations. Can you give me any information
24 as to who in the department was really the architect of the
25 way that the negotiations proceeded? In other words, was it

1 Endres?

2 A. Essentially it involved the three of us. We were...Mr. Coles
3 and Mr. Endres kept me abreast of developments from the
4 initial indication from Mr. Cacchione that he wanted to discuss
5 settlement right through until the final conclusion. So, it was
6 really the three of us. I didn't attempt to govern that process
7 on a day-by-day basis, as I had confidence that Mr. Endres
8 could certainly conduct the negotiations. I saw my role as
9 being that of giving general direction and of advising them of
10 the Cabinet's position on the matter and advising Cabinet on
11 the matter as well.

12 Q. You indicated to us yesterday, you made a couple of
13 comments as to what you perceive Mr. Coles' attitude to be.
14 Can you give us any idea from your discussions with him
15 what Mr. Endres' attitude was?

16 A. I think Mr. Endres attitude was simply that he wanted to
17 make the best settlement that he could on behalf of the
18 provincial government.

19 Q. Did he ever express to you any views or attitudes
20 towards...concerning Donald Marshall?

21 A. It's difficult to recall conversations like that.

22 Q. Did you have a sense...

23 A. Certainly Mr. Coles did. But I have some difficulty in recalling
24 precisely what Mr. Endres said.

25 Q. And Mr. Coles was Mr. Endres' boss.

1 A. Yes.

2 Q. What would have been some of the things Mr. Coles would
3 have said?

4 A. Well, consistent with the note that he made on one of the
5 documents, that he...and quite consistently throughout
6 expressed concerns about Mr. Marshall's own conduct and
7 that was certainly a point that Mr. Coles mentioned to me
8 repeatedly.

9 Q. Did he ever mention to you the fact...did he ever say anything
10 to you about Mr. Marshall's...the fact that Mr. Marshall was an
11 Indian?

12 A. I believe there was mention made in the context of potential
13 involvement by the Government of Canada, but that...apart
14 from the fact that Mr. Marshall had been incarcerated in a
15 federal institution and had dealt with the federal parole
16 authorities, that as an Indian under the Constitution, of
17 course, primary responsibility for dealing with native peoples
18 in Canada rests with the federal government. So, it's my
19 recollection that he raised it in that context.

20 Q. Any comments concerning his...by Mr. Coles concerning his
21 future employability as a result of the fact that he was
22 Indian?

23 A. I don't recall him relating his future employability to his
24 status as an Indian. I think it was more in the nature of more
25 general comments about whether or not he would be able to

1 get employment, and I know that was an issue of concern to
2 me and that was why I dealt with it in that letter to Mr.
3 Cacchione about the Department of Labour and Manpower.

4 Q. I just want to take you back for a moment to Exhibit 139,
5 that's the letter from Lambert and Cacchione. I ask you
6 whether you would have any knowledge as to what Mr. Coles
7 was getting at, and perhaps he might have said something to
8 you about it. On page 2 of that letter going through the
9 various criteria that Mr. Cacchione had set out. Item 11 says,
10 "One of the criteria will be adverse effects on future
11 advancement, employment, marriage, social status and social
12 relations generally." and the comment in Mr. Coles' writing on
13 the left-hand side of the page is "Probably the opposite." Did
14 you have any discussions with Mr. Coles about that particular
15 item?

16 A. I believe we had general discussions about the issue of, I'm
17 trying to find the right term for this, but to project ahead for
18 Mr. Marshall to see what his employment opportunities would
19 be, or perhaps to reverse that and say what his opportunities
20 would have been if he had not been incarcerated for the
21 eleven years. There were certainly discussions along those
22 lines.

23 Q. And what sort of view were you getting from Mr. Coles as to
24 what he thought Mr. Marshall's future would have been if he
25 hadn't been incarcerated for eleven years?

1 A. I hesitate to attribute statements to other people because...

2 Q. Well, you can tell us what he said.

3 A. I'm sure Mr. Coles will testify himself. But the general
4 concern that he expressed was that prior to this entire matter,
5 that is prior to the conviction and sentencing to prison, that
6 Mr. Marshall had already had difficulties with the law, had
7 been incarcerated and did not have a strong employment
8 record. Now, keeping in mind that he was only, I believe,
9 seventeen years old at the time, that was not a matter that
10 weighed heavily with me. I felt he was too young at that
11 time for anybody really to make that kind of assessment, but
12 I do recall discussions on that general area.

13 Q. Looking back on the way the compensation matter was
14 handled, Mr. Giffin, having now been through it yourself,
15 what can you say as to whether or not you think that that
16 negotiation method of dealing with compensation was
17 satisfactory?

18 A. Looking back on it now, I think if I had that to do over again
19 that I would not have entered into those negotiations.

20 Q. Why not?

21 A. Because I don't think I fully appreciated it at the time, but by
22 entering into those negotiations we, in effect, took the issue
23 away from the Commission of Inquiry, and I think in the long
24 run that it would have been preferable, and I say this with
25 the enormous advantage of hindsight and second guessing my

1 own judgement, but if I had that to do over again I think that
2 that's the way I would want to go because then it would have
3 been a recommendation based upon hearings, upon adducing
4 evidence, and upon all of the things that would have
5 happened in an Inquiry. Then I think whatever figure was
6 finally arrived at would have been hopefully beyond
7 criticism.

8 10:44 a.m.

9 Q. And do I take it that from what you're saying that would
10 have been a figure that would have been arrived at in
11 consideration of the various sorts of factors, some of which, I
12 suppose, are set out in Mr. Cacchione's letter.

13 A. Yes, that's right.

14 Q. If you could a look at Volume 28. Page 1. In general terms I
15 want to deal now with the question of the release of the RCMP
16 report to Aronson and then your reaction to that in, when it
17 was released to Kirby Grant in 1984.

18 A. Yes.

19 Q. There's a letter from Mr. Gale to Frank Edwards on October
20 23, 1984. Did you direct, did you have any direction in
21 getting Mr. Gale to send this letter?

22 A. I'm sure that I did. I was concerned about how a report,
23 which otherwise would have been confidential, had gotten in
24 the hands of somebody who was not, to my knowledge,
25 authorized to have it and had been made public. I knew the
report had been given or had been told that the report had

1 been given or made available to Mr. Aronson at the time of
2 the hearing before the Appeal Division, but I was concerned
3 about how a report of that type could have gotten into the
4 hands of somebody who should not have had it.

5 Q. And there's some correspondence back and forth. Were you
6 kept advised of Mr. Edwards' reaction to the suggestion that
7 he had done the wrong thing by Mr. Gale?

8 A. Yes, I saw the correspondence.

9 Q. What was your view of that? Mr. Edwards is essentially
10 saying that, amongst other things, that Mr. Aronson was
11 entitled to full disclosure and in the particular circumstances
12 of the case, should have had the R.C.M.P. report.

13 A. Well, it was my view that Mr. Edwards should have exercised
14 judgement with respect to all of the contents of the file. That
15 obviously all material needed by Mr. Aronson in pursuing the
16 matter had to be given to him, but that there could be memos
17 or information there that was not only confidential but that
18 was not necessary to be given to Mr. Aronson for that
19 purpose. So I think it would be a case of going through the
20 file and exercising that kind of judgement on each item in it.

21 Q. At the time that that report was handed over to Mr. Aronson
22 in the summer of 1982, were you aware that, and you don't
23 need to flip to this, but for counsel, it's Volume 1, page 63.
24 Jean Chrétien when he wrote to Mr. How enclosing the
25 reference, in his final paragraph says:

1 I understand, however, that your officials
2 intend to meet with Mr. Aronson and make
3 available the necessary information to
4 enable the appropriate evidence and
5 witnesses to be brought before the court in
6 an effective manner.

7 Did you not think that that would include the reports that you
8 had in your possession?

9 A. Yes, as a general proposition, but I think there would still be a
10 responsibility to, not to just hand the file over without
11 making an examination of the material in it and determining
12 whether there was material there that was, did not have to be
13 handed over that was confidential.

14 Q. Do I take it from what you're saying then that you wouldn't
15 have had any objection to the statements that were attached
16 to the R.C.M.P. reports of the various witnesses being handed
17 over to Mr. Aronson?

18 A. No.

19 Q. And your objection relates only to the opinion material which
20 may have been contained in those reports.

21 A. Or it could have involved something like the, I believe that
22 was the file which included the memo from Mr. Gale to the
23 R.C.M.P.

24 Q. That's right.

25 A. And something like that I would have had serious doubts,
first of all, about whether or not it would have been

1 necessary to give that to Mr. Aronson for the purpose of his
2 conduct of the matter before the Appeal Division and, at the
3 very least, I would have wanted a Crown Prosecutor doing
4 that to have examined each item in the file and made the
5 judgement as to whether or not it had to be handed over and
6 whether it should remain confidential.

7 Q. And, indeed, those reports did include the comment about
8 holding the matter in abeyance.

9 A. Yes, that's correct.

10 Q. And perhaps we can deal with that if Mr. Giffin can be given
11 Exhibit 116. It's an article in the Cape Breton Post, June 19,
12 1986. In connection with the hold in abeyance issue, I just
13 want to ask you two or three questions. The beginning of the
14 article says:

15
16 The R.C.M.P. did investigate the Sydney
17 Police Department's role in the wrongful
18 conviction of Donald Marshall, Jr., Attorney
19 General Ron Giffin said Wednesday.

19 Do you hold that position today that the R.C.M.P. did, in fact,
20 investigate?

21 A. Well, what I was referring to was the memorandum that, and
22 perhaps I'll have to back up a minute and place it in context.
23 I was concerned that the material that was made public in
24 October, 1984 did not tell the whole story. That subsequently
25 to June of '82, it would have been in 1983, that Mr. Gale had

1 sent the memo to the R.C.M.P. asking them to review the
2 investigative procedures and so forth followed by the Sydney
3 City Police Force, and they did that...

4 Q. Perhaps to help you with that, Mr. Giffin, if he could have
5 Volume 20, page 4. Would that be the memo to which you
6 are referring?

7 A. That's correct.

8 Q. The R.C.M.P. evidence to date has been that there was no
9 investigation, in a normal sense of the word, as a result of this
10 letter from Mr. Gale.

11 A. Yes, I think they're correct in that. My use of the word
12 "investigation" in the formal sense was not accurate. I was
13 referring to this memo from Mr. Gale to the R.C.M.P. asking
14 them to, as outlined in the letter there, to review the practices
15 that were followed by the Sydney City Police Force in the
16 original investigation and then to report back to the
17 Department. So that's what I was referring to.

18 Q. Later on in the same column, about halfway down, there's
19 another quote from yourself:

20
21 The R.C.M.P. are always at liberty as an
22 investigative police force to pursue any
23 matter they feel appropriate to investigate.

23 And in conjunction with that, I just want to also read the very
24 last paragraph of the article:
25

1 He added that if the R.C.M.P. uncovered
2 new evidence and reopened the
3 investigation, they might tell us they were
4 doing it but they wouldn't ask our
5 permission.

6 I thought you told us yesterday that the R.C.M.P. basically
7 were controlled, at the end of the day, by the Attorney
8 General's Department.

9 A. No, well, let me explain. My reason for saying that was that
10 the R.C.M.P. already had been involved in the reinvestigation
11 of the Marshall case and the investigation of the Ebsary case
12 and that it was my view that since they had already been
13 involved, that if new evidence were brought to their attention
14 that they could, as a matter of normal investigative practice,
15 pursue that evidence to see where it took them.

16 Q. And they wouldn't need permission to do that.

17 A. That's right. Now if the question arose about their
18 investigating the activities of a municipal police force, then
19 permission is required from the Attorney General's
20 Department. But, there again, they were already involved,
21 had been involved in the entire matter. So that certainly
22 wouldn't have presented any problems.

23 Q. But just to take your hypothetical for a second then, if they
24 wanted, if they came along and said that we want to
25 investigate a municipal police force, out of the blue, do you
say that they would require permission from the Attorney

1 General's Department to do that?

2 A. Yes, because otherwise, generally speaking, that would be
3 outside their jurisdiction under the contract because the
4 responsibility for policing in the province obviously does not
5 include those areas that are policed by municipal police
6 forces.

7 Q. Would it then be the case that the Attorney General's
8 Department would have the authority to order that a police
9 investigation not be started? In other words, if they came to
10 you and said "We want to have a look at this."

11 A. Oh, yes, if they asked for permission, obviously that would
12 carry with it the implication that we could deny them
13 permission, yes.

14 Q. And can you tell us what sorts of criteria you would apply in
15 deciding whether or not to permit an investigation to proceed
16 or not?

17 A. It's difficult to speculate in the absence of a particular fact
18 situation. I would assume if the question arose, if the R.C.M.P.
19 approached us about carrying out an investigation of a
20 municipal police force that we would have to examine the
21 information that they had to determine whether or not there
22 was sufficient grounds there to authorize such an
23 investigation. But it's difficult to answer that question in the
24 abstract.

25 Q. But do I understand you to be saying that what you would be

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1 doing is looking at the material that the R.C.M.P. has and then
2 making up your own mind as to whether or not there's
3 sufficient grounds to proceed?

4 A. Yes, I think it's correct. The final permission there would
5 have to be from the Attorney General's Department.
6 Obviously, we would not give that permission without
7 informing ourselves on the matter to the extent necessary to
8 make the decision.

9 10:55 a.m. INQUIRY RECESSED UNTIL 11:18 a.m.

MR. SPICER

10
11 Q. Mr. Giffin, at some later day in September or so of 1985, there
12 was some consideration given to the initiation of a charge of
13 perjury against Donald Marshall, Jr. Do you have any
14 recollection of that?

15 A. Yes, I recall that we received a letter from one of the lawyers
16 that I believe had been representing Mr. Ebsary.

17 Q. Right, and that's in Volume 33 at page 568.

18 A. Yes, that's the letter I'm referring to.

19 Q. And then there's a memo from Dana Giovannetti to Gordon
20 Gale on page 570, in which he concludes a 573:

21
22 Whether or not we decide to lay a charge
23 against Marshall, I think we must seriously
24 consider the propriety of a fourth trial
where the Crown's case is so dependent on
a witness of dubious veracity.

25 And then on 574, a letter back to Alan Nicholson from Gordon

1 Gale essentially saying we're not going to do it.

2 A. Yes.

3 Q. Were you involved at all in the decision-making process?

4 A. I recall discussing it with my staff. I can't say precisely when
5 but certainly it was my view that perjury charges ought not
6 to be laid against Mr. Marshall.

7 Q. Why was that your review?

8 A. Well, there was the point that was made by staff about
9 whether or not the evidence in support of the laying of the
10 charge would have been worth putting before the court. But
11 there was also the broader consideration. I think obviously
12 this was a case where one had to exercise judgement and
13 recognize that Mr. Marshall had, indeed, spent eleven years in
14 prison for a crime which he had not committed and that any...
15 assuming for the sake of argument that he would have been
16 convicted of perjury, any sentence that he might have
17 received for perjury under the extraordinary circumstances
18 of the case certainly would have come nowhere near to the
19 eleven years that he spent in prison. To me, it just would
20 have been so totally, I'm groping for a word here, in my own
21 mind it would have been a travesty of justice for us to have
22 prosecuted Mr. Marshall for perjury, given all the
23 circumstances of the case.

24 Q. On page 575 of that volume, Mr. Giffin, there's a letter from
25 Donald Marshall, Jr.'s mother. I just wanted...Do you recollect

1 getting that letter?

2 A. Yes, I do.

3 Q. I just want to refer...

4 A. That's my handwritten note at the top.

5 Q. "Please do a reply."

6 A. Yes.

7 Q. In the first paragraph, she says:

8 I asked if I could talk to you on the
9 telephone. You refused.

10 Do you have any recollection of that?

11 A. No.

12 Q.
13 I also asked for an appointment to visit
14 you. You refused again.

15 Do you have any recollection of that?

16 A. No, I don't recall that. I remember receiving the letter. I did
17 not have any conversations with Mrs. Marshall.

18 Q. So your evidence would be that as far as you remember, you
19 don't have any recollection of having had any discussions
20 with her preceding this letter, is that right?

21 A. That's correct. I would assume that she must have talked to
22 somebody in the office, but I have no recollection of speaking
23 to her personally.

24 Q. If she had requested to see you, do you think you would have
25 seen her at that point in December of '85?

1 A. I don't think I would have had any problems with seeing her.
2 I can recall meeting with Mr. Oscar Seale when I was in the
3 Cabinet office in Sydney on one occasion. I can also recall
4 another occasion when I met Grant Chief Donald Marshall at
5 the Millbrook Indian Reserve in Truro, which I believe is in
6 the spring of 1986. So I think that what happened here was I
7 received the letter and then the reply was prepared and sent
8 out to her and she was expressing a concern in the letter
9 about wanting us to do something about Mr. Ebsary and the
10 reply back to her was that that was before the courts and not
11 within, it certainly wasn't within my power to determine
12 whether or not Mr. Ebsary should be incarcerated.

13 Q. And just to complete that, your reply is on page 580.

14 A. Yes, that's correct.

15 Q. If I can ask you to have a look now at Volume 20.

16 A. Yes, I have it here.

17 Q. There's a note from Gordon Gale on page 55 dated May 14
18 instructing "H" Division R.C.M.P. to turn the Sydney Police
19 Department files over to Mr. Pugsley. And a couple of pages
20 prior to that on page 53, there's a note that Don Murray of Mr.
21 Pugsley's firm had been down looking to see City Police files.
22 That note was the 12th of May '86.

23 A. Yes, it's my recollection that that related to the civil
24 proceeding by Mr. MacIntyre against the C.B.C.

25 Q. Were you involved in the decision to direct the R.C.M.P. to

1 turn the files over to Mr. Pugsley?

2 A. I was aware that it was done. I can't remember if I directed
3 that it be done but I was certainly aware that it was done and
4 did not countermand the order or the direction.

5 Q. Did you have any concern that those files would have
6 contained confidential police information?

7 A. No, I don't recall having any concern on that point.

8 Q. And you probably appreciate the reason I'm asking the
9 question is that I'm wondering if you can give me some
10 understanding of why it would be that you would turn the
11 police files over to Mr. Pugsley a couple of days after Mr.
12 Murray had come looking for them and seemingly been so
13 upset at the turning over of R.C.M.P. files by Frank Edwards to
14 Steve Aronson?

15 A. No, my concern about the file that Mr. Edwards turned over to
16 Mr. Aronson was simply with respect to the fact that the file
17 was turned over without any attempt to assess the material
18 in it and to see if there was material in it that should not have
19 been turned over. That was the concern that I had about
20 that.

21 Q. Do you know whether or not any such attempt was made in
22 connection with the files turned over to Mr. Pugsley?

23 A. I didn't do that myself. I assume that the, Mr. Gale and the
24 R.C.M.P. would have been familiar with the contents of the
25 file.

1 Q And you would assume that that would have taken place.

2 A Yes.

3 Q On page 101 of Volume 20, there's a letter to Mr. Gale from
4 Supt. Vaughan in August 1, 1986.

5 A Yes.

6 Q And, again, involving a discussion of the Sydney Police
7 Department. Can you tell us how this correspondence came to
8 be written August of 1986? What was it that precipitated it?

9 A It's my recollection that that was precipitated by statements
10 made or attributed to Staff Sgt. Wheaton. I can't be very
11 precise on that, but that's my recollection.

12 Q Did you direct Mr. Gale to ask the R.C.M.P. to have another
13 look at the matter?

14 A I can't recall whether I specifically directed him to do that,
15 but certainly I was concerned that if there was anything
16 that...Well, let me back up a moment. I had seen the material
17 which had come from the R.C.M.P. in 1983 in response to Mr.
18 Gale's memo to them asking them to review the investigative
19 practices carried out by the Sydney City Police Force in 1971
20 and there seemed to be a suggestion, and that material which,
21 of course, is, I'm sure, part of the record here indicated that...
22 two things to me after I read it. One was that the R.C.M.P.
23 were not requesting any further investigation at that time
24 into the 1971 investigation. Secondly, there was no
25 recommendation in that material that anybody, that any

1 charges be laid against anybody. Now that actually was
2 received by the Department before I became Attorney
3 General. So it wasn't something that I had to make a decision
4 on. But nonetheless, in the course of informing myself about
5 the Marshall case, I did read that material and that was my
6 understanding of it. And then my recollection is that in 1986,
7 there was some suggestion that Staff Sgt. Wheaton felt
8 differently about the matter than had been reflected in the
9 material which the Department had received from the R.C.M.P.
10 in 1983.

11 Q. And then on page 100 of that volume, Mr. Coles is writing
12 back to Supt. Vaughan indicating that he agrees with
13 Vaughan's conclusions. Did you have any discussions with Mr.
14 Coles at the time about the question raised in Vaughan's
15 letter, which was "further investigation of John MacIntyre for
16 counseling perjury"?

17 A. I'm sorry, which letter is that? I'm on Mr. Coles' letter to Mr.
18 Vaughan.

19 Q. Yeah, they're out of order.

20 A. Or to Supt. Vaughan.

21 Q. Yes, right. And that letter refers to the letter that I just
22 mentioned, that we just talked about, the August 1 letter,
23 which is actually after it in the materials.

24 A. Yes.

25 Q. My question is whether or not you had any discussions with

1 Mr. Coles concerning the conclusions reached by Vaughan in
2 his letter to Gale.

3 A. I can't recall whether or not Gordon Coles and I discussed that
4 at that time.

5 Q. Did you have discussions at or about that time with Mr. Coles
6 concerning investigation of John MacIntyre for counseling
7 perjury?

8 A. No, I don't recall discussing it at that time. It's my
9 understanding that what happened in this exercise was that
10 the R.C.M.P. confirmed the advice that they had
11 communicated to the Department in 1983, that there was no
12 change in their position.

13 Q. Just one other area that I wanted to ask you about. Staff Sgt.
14 Wheaton, when he was giving testimony, referred to your
15 attendance at a regimental dinner held at the Oak Island Inn.
16 I'm just going to read from the transcript, and for counsel it's
17 at page 7937 of the transcript and for the next couple of
18 pages:

19
20 This was a regimental dinner held at the
21 Oak Island Inn, I think approximately '85
or '86.

22 Do you remember attending that dinner?

23 A. Yes, I do.

24 Q. I'm skipping a little bit, but over on 7938:
25

MR. GIFFIN, EXAM. BY MR. SPICER

1 Mr. Giffin was addressing the members of
2 Halifax Subdivision and he opened his
3 remarks and then said that this was an
4 opportunity to speak without the press
5 being present. And I'm precluding that
6 right now, undoubtedly. Then he
7 proceeded into approximately five to ten
8 minutes of slapstick comedy in reference
9 to the Marshall case which received polite
10 laughter from the Subdivision members.

11 Do you have any comment to make on that allegation?

12 A. Well, I saw Staff Sgt. Wheaton's testimony on television. I
13 didn't see it all but I saw a portion of it on a news report and,
14 needless to say, it upset me a good deal. It caused me a great
15 deal of concern and I had to search my memory to try to
16 recall what I could about that particular function, and that's
17 not easy to do in this business when you attend as many
18 functions as I do and speak at them. And I think all I can do
19 at this point is give you my best recollection of what
20 transpired. It was a function at the Oak Island Inn in
21 Lunenburg County. I believe it was in the winter of 1986 and
22 I was invited to it by "H" Division, which was a common
23 practice. I attended many of those and I was asked to speak
24 at some point in the proceedings. This was not a formal
25 occasion or using a prepared text or anything like that. I can't
recall any specific comments that I made. I recall that the
gist of the remarks that I made at that time concerned the
difficulties of dealing with matters like that of the Marshall

1 case and other matters while one is being subjected to very
2 intense scrutiny by the media. That was the gist of the
3 remarks that I made. I certainly don't recall making any
4 humorous or trivializing remarks about the Marshall case.
5 Now I have difficulty with this because, of course, one
6 searches one's memory and tries to come up with phrases
7 spoken several years ago at that kind of an occasion. It's just
8 not possible to do that and, indeed, if I felt today that I had
9 done something like that, I would be the first to apologize for
10 it. But that's simply not my recollection.

11 Q. Is your recollection that you have no recollection? Is that
12 what you're essentially saying?

13 A. No, I'm saying I have a partial recollection. That I can recall
14 the gist of my comments as dealing with the difficulties of
15 dealing with matters like the Marshall case when one is being
16 subjected to intense and continuing scrutiny by the media. I
17 don't recall those remarks as being critical of the media but
18 rather simply stating that as a fact of life that one has to deal
19 with when one holds public office. But I certainly don't recall
20 making any remarks that were intended to trivialize the
21 Marshall case.

22 Q. The specific comment which Staff Sgt. Wheaton referred to
23 was to this effect, and he was purporting to quote from you:

24 One of the senior members of my
25 Department often compares the Marshall

MR. GIFFIN, EXAM. BY MR. SPICER

case to being the longest running show since Bonanza.

1
2 A. I don't recall making that statement.

3 Q. Is that the sort of statement that you might have made?

4 A. That's really an impossible question to answer. I think all
5 that I can do is give you my best recollection of the remarks
6 that I made at the time.

7 Q. I take it from what you're saying that you would not want to
8 trivialize the Marshall matter.

9 A. That's correct.

10 Q. And having said that, are you able...Let me ask the question
11 again. Are you able then to tell us that that comment is the
12 sort of comment that you, there's no way you could have
13 made that comment or a comment like that.

14 A. That's right. I'm saying that that is, I simply do not recollect
15 making a comment like that. My recollection of the remarks
16 that I made at that function were that they dealt with the
17 subject matter I've indicated and I don't recall saying
18 anything that was particularly humorous, because to me as a
19 person in public office, dealing with the media is a serious
20 matter.

21 Q. Are you further saying that that's not the type of comment
22 that you would have made in any event?

MR. SAUNDERS

23
24 That's the third time my friend has asked that question and I
25

MR. GIFFIN, EXAM. BY MR. SPICER

1 think he has answered it.

2 MR. SPICER

3 I haven't got an answer yet.

4 MR. SAUNDERS

5 I thought his answer was "It's impossible for me to say."

6 MR. CHAIRMAN

7 I think that was the question, not the answer.

8 BY MR. SPICER

9 Q The question was whether or not that was the type of
10 comment that you might have made or that you could have
11 made? Are you telling us that you don't recollect making that
12 comment?

13 A. Yes.

14 Q I'm asking you whether or not that type of comment, "One of
15 the senior members of my Department often compares the
16 Marshall case to being the longest running show since
17 Bonanza," is the type of thing that wouldn't be inconsistent
18 with something you might have said?

19 A. No, I think I would answer your question this way by saying
20 that that type of comment would be inconsistent with the
21 attitude that I've had towards the Marshall case throughout,
22 which is that I had to deal with it for three years and several
23 months as Attorney General. It was certainly the most
24 difficult challenging matter that I've ever dealt with and I
25 took it very seriously.

1 Q. Are you then further satisfied that that is the type of
2 comment that you would not have made.

3 A. Yes.

4 Q. Mr. Wheaton goes on in his comments to say on page 7940.
5 He's asked whether:

6 Q. Did you take offence to that comment?
7

8 A. Yes, I took offence to it and I spoke to
9 him (being yourself) afterwards very
briefly.

10 Q. What did you say?
11

12 A. (Wheaton says) That I took offence to it.

13 Q. How did he respond to it?

14 A. He smiled at me.

15 Q. Did he say anything?
16

17 A. No, as a matter of fact, I turned and
18 walked away. I knew Mr. Giffin as a
19 defence lawyer casually in Sydney and
Truro. I had been stationed there in
plain clothes and he had defended cases.

20 Do you remember that encounter with Staff Sgt. Wheaton?

21 A. Not specifically. I, as I mentioned earlier, I saw his
22 testimony, that portion of it on television. The best
23 recollection that I have about that is that I do recall a
24 member of the force saying something to me about the
25 Marshall case as I was leaving. But I cannot say under oath

MR. GIFFIN, EXAM. BY MR. RUBY

1 whether or not that was Staff Sgt. Wheaton. I may have met
2 him some time in the past but I did not know him as a, you
3 know, as an acquaintance or a friend.

MR. SPICER

4 Thank you.

5 11:38 a.m.*

MR. CHAIRMAN

6 Mr. Ruby.

EXAMINATION BY MR. RUBY

7 Q. Mr. Giffin, if I go too quickly for you, as sometimes I do, will
8 you stop me and we'll go over it again?

9 A. All right.

10 Q. The first thing I want to ask you about, if I may, is that
11 you've told us that early on assuming office, after you made
12 an appointment to meet with Mr. Cacchione, you came home
13 and your wife heard radio reports revealing the date and the
14 fact of a meeting, and you called him up and you moved the
15 meeting up, you insisted that it be moved up to the next day.
16 I don't understand why that is. Can you explain that to me?

17 A. Yes. I wanted to meet privately with Mr. Cacchione. I felt
18 that that might provide us with a realistic chance to open a
19 line of communication that might lead to some resolution or
20 some agreement on the matters that were outstanding with
21 respect to Mr. Marshall. I specifically requested that the
22 meeting be private and that the media not be informed. And,
23 And,
24 And,
25 And,

1 when I learned over the weekend that the media had learned
2 about the meeting then I came to the conclusion that Mr.
3 Cacchione had broken his word to me and I did not want to
4 have a meeting with him with the media waiting outside the
5 door. And, so I then called him on the Monday morning, after
6 the weekend, and we met immediately, that is that morning,
7 the Monday morning, rather than on the Wednesday as
8 originally scheduled.

9 Q. Did you ask Mr. Cacchione whether or not the leak had come
10 from him or his office?

11 A. I don't recall asking him that question, but I was certainly
12 satisfied in my own mind that it had not come from me or
13 from my office.

14 Q. Did you make enquiries in your own office?

15 A. No, I didn't think that was necessary.

16 Q. Then how could you know whether it came from your office
17 or his office?

18 A. Well, that was simply the conclusion that I reached knowing
19 the people that work in that office and knowing too that they
20 were used to respecting confidences and not leaking matters
21 to the press. I had never had any difficulty of that sort in
22 that office in the entire time that I was there, and, indeed, I
23 don't think Mr. Cacchione would quarrel with the statement
24 that he did, in fact, advise a journalist that the meeting was
25 taking place.

1 Q. Tell me what's wrong with the public knowing that you're
2 meeting Mr. Cacchione? Why is that something to be
3 avoided?

4 A. There is nothing intrinsically wrong with it, but my
5 experience as a practising lawyer has been that if one wants
6 to try to resolve or deal with a difficult matter that direct
7 communication, private communication, on a face-to-face
8 basis is the best way to go rather than to attempt to deal with
9 the matter through the media.

10 Q. But no one is suggesting at this point you're attempting to
11 deal with the matter through the media. You're going to meet
12 face to face. All that's happened is the media knows you're
13 going to meet which I think you'll agree with me, the public
14 would expect in any event that you and counsel for Mr.
15 Marshall would meet and discuss the matter.

16 A. Well, it was my view that we should meet privately and it
17 doesn't square with my idea of a private meeting that you
18 would have the television cameras and the microphones
19 waiting outside the door. That, indeed, discussions that would
20 take place in a meeting like that probably at least in an initial
21 meeting would not resolve anything. But that it would be
22 better to have that communication privately and see if we
23 could come to some resolution of the issues that were out
24 there.

25 Q. You thought it preferable not to meet with him and have the

1 press reporting that rather than risk them being at the door
2 and reporting the fact that you were meeting, is that correct?

3 A. Well, I didn't want us to get into a situation in which we had a
4 private meeting and then you step out the door and all of the
5 microphones are there and, of course, all the questions start
6 about what did you discuss and what did you decide at a time
7 when it probably would have been totally premature for
8 either of us to be making public statements.

9 Q. You told my friend that you didn't want to adversely affect
10 the interests of either party to the lawsuit between Mr.
11 Marshall and the City of Sydney and Mr. MacIntyre and Mr.
12 Urquhart. Has that always been government policy?

13 A. I can't make that a statement that something like that has
14 always been government policy in the broadest sense. I was
15 simply...I did have a concern that that civil litigation was
16 before the Courts and that we did not want to trespass on it,
17 but I was thinking purely in the context of that particular
18 case.

19 Q. I take it it would be wrong for the government to take sides
20 in that litigation, correct, that was your view?

21 A. Yes, that was civil litigation between Mr. Marshall and those
22 three defendants.

23 Q. I'm concerned because if you look at Volume 32, page 239,
24 you see that under your predecessor, Mr. How, in August of
25 '83 a lengthy memorandum was prepared on the liability of a

1 municipality for the wrongful acts of its police officers, which
2 seems to suggest that the Attorney General's office was
3 researching the law for the City of Sydney concerning that
4 particular lawsuit. Can you comment on that?

5 A. I'm not...I haven't seen this memo before, and I don't know
6 whether it was in relation...I'm just reading it now, I don't
7 know whether it was in relation to that action or if it was in
8 relation to the review of the Police Act which was being
9 carried out at that time, and we subsequently carried out
10 extensive amendments to the Police Act here in Nova Scotia,
11 although I don't believe those amendments have been
12 proclaimed yet. So, I don't know. I'm seeing this for the first
13 time. I don't know if it was prompted by the Sydney case or
14 if it's in connection with review of the Police Act.

15 Q. If you turn to page 238, you'll see a memorandum to Gordon
16 Coles from Martin Herschorn, and the title of that
17 memorandum is "Civil Proceedings Instituted by Donald
18 Marshall, Jr., against the City of Sydney, John L. MacIntyre
19 and William Urquhart."

20
21 In early August when we last discussed
22 the above-noted matter you suggested that
23 Jim Fanning, our articled clerk, prepare a
24 memorandum on the liability of a
25 municipality for wrongful acts of its police
officers. I now enclose a copy of Jim's
memorandum.

1 And that went into the file, and I'm surprised you didn't see
2 it if you reviewed the file.

3 A. No, I had never seen this memorandum before.

4 Q. Do you agree with me that it is morally wrong for the
5 government to be interfering in favour of one party to an
6 action when it is not part of the litigation?

7 A. That is correct. The government should never interfere in
8 litigation, but on the other hand I don't see anything wrong in
9 doing research on the question, because indeed I would think
10 that that would raise the question of if there was not a
11 realistic prospect of Mr. Marshall succeeding in an action
12 against the City of Sydney because of the wording of the
13 Police Act that then that...that would raise the question of
14 whether or not the Government of Nova Scotia should have
15 any part in that.

16 Q. Would you say that again for me? I didn't understand that.
17 Would raise the question that...?

18 A. Well, my assumption, and I'm making assumptions here about
19 something that other people did before I became Attorney
20 General. My assumption is that the question was already out
21 there about what the Government of Nova Scotia ought to be
22 doing vis-a-vis the question of compensation for Mr. Marshall.
23 And, the litigation was before the Courts. I wouldn't see
24 anything wrong with staff in the Attorney General's
25 Department examining the law in order to advise the

1 Attorney General about the status of that litigation inasmuch
2 as the solicitor for Mr. Marshall, at the same time this
3 litigation was proceeding, was also requesting the
4 Government of Nova Scotia to consider the question of
5 compensation for Mr. Marshall.

6 Q. You never were advised of this.

7 A. No. I can quite honestly say that's the first time I've seen
8 these memos.

9 Q. So, obviously whoever prepared it didn't think it was of much
10 importance in terms of determining the provincial obligation,
11 didn't bother telling you about it, correct?

12 A. Well, I can't speculate about what other people thought. All I
13 can tell you is that I...this is the first time that I've seen those
14 memos.

15 Q. Had they thought the issue was significant in terms of the
16 provincial responsibility, surely they would have told you
17 about it.

18 A. My recollection is that I was advised orally by staff in the
19 department that it was their opinion that there was no
20 liability on the part of the City of Sydney to Mr. Marshall.

21 Q. You don't know whether or not that was communicated to the
22 City of Sydney or their lawyers?

23 A. No. No, I have no idea.

24 Q. And certainly there is no direct provincial interest in that
25 question, agreed?

1 A. That's correct. The Province of Nova Scotia was not a party to
2 the litigation. The interest would be indirect inasmuch as the
3 question had been raised about whether or not the
4 government of Nova Scotia would be providing compensation
5 for Mr. Marshall.

6 Q. Let me turn to the Freedom of Information Act request by
7 Mr. Cacchione. He applies under the Freedom of Information
8 Act and is refused. Correct?

9 A. Yes.

10 Q. What information did you have that had to be kept from him?
11 I don't understand that.

12 A. Well, the response was really based on the general policy
13 question of whether or not we would pass over a file which
14 was confidential within the department.

15 Q. I understand that. But you're dealing with a very unusual
16 situation you said.

17 A. Yes.

18 Q. Why would you not simply have made the information
19 available to him to assist him in the process of his decision-
20 making as he dealt with the issue which you know that he
21 found as difficult as you?

22 A. Yes. I...when we turned down the request under the Freedom
23 of Information Act, I did not regard that as the final step in
24 the matter. That was one of the matters that I was
25 considering as we discussed how to go about dealing with the

1 compensation issue. I wanted to find a mechanism by which
2 that information could be made available and I dealt with
3 that when we set up the Campbell Commission.

4 Q. You viewed the Campbell Commission then as the forum in
5 which he would be given documents.

6 A. Yes.

7 Q. He never was given any documents.

8 A. Well, that...the Campbell Commission did not complete its
9 work in the sense of conducting hearings and that sort of
10 thing because of the settlement negotiation.

11 Q. You never said to him, "Look, I'm turning you down on the
12 Freedom of Information Act request but as soon as I
13 determine a mechanism for dealing with the compensation
14 problem you'll get full access, I'll give you stuff, don't worry."

15 A. That's right. I didn't say that.

16 Q. Do you think that was a little unfair?

17 A. There was no intention on my part to be unfair, but I didn't
18 want to start making statements, either publicly or to Mr.
19 Cacchione until the government had made a clear decision on
20 how we were going to proceed with the entire matter.

21 Q. Why should Mr. Cacchione have no information until you
22 decided how you were going to deal with the entire matter? I
23 don't understand that. Would you explain that to me? What
24 public interest is served by that?

25 A. Well, the basic question of public policy concerned the

1 disclosure of information that ordinarily would be treated as
2 confidential within the Department and I didn't want to make
3 any hasty or premature judgements on that. But it was
4 certainly very much on my mind as we were working out
5 how to deal with the compensation issue and I addressed it at
6 that time.

7 Q. I'm not sure that I...that I have an answer to the question. I
8 understand they're ordinarily kept confidential. I ...

9 A. Yes.

10 Q. ...understand you were working on it. What public interest is
11 served by keeping Mr. Cacchione in the dark regarding this
12 kind of information?

13 A. But I wasn't saying that he was going to be kept in the dark
14 continually. I just needed time to...for the Cabinet to complete
15 its deliberations on the matter for us to determine how we
16 were going to approach the compensation issue, and then we
17 would be able to deal with that. But I didn't want to start
18 making decisions in bits and pieces here and there on the
19 matter. I wanted to have direction from Cabinet on the
20 overall approach to the compensation issue and then I saw
21 this type of thing as a matter that would be resolved in that
22 context.

23 Q. You appreciate, of course, that as you're trying to formulate
24 your position with respect to the compensation issue so is he.
25 You understand that.

1 A. Yes, yes.

2 Q. Is it not unfair that you should formulate your position
3 knowing that you've got significant information which would
4 help him?

5 A. I...

6 Q. And yet he doesn't know that you've got it or what it is.

7 A. It would have been...it would have been unfair if that
8 situation had continued and that was why I addressed the
9 issue when we set up the Campbell Commission.

10 Q. On of the things contemplated by the Freedom of Information
11 Act request that was made by Mr. Cacchione was the report of
12 Staff Sergeant Wheaton of May 30th of 1983. That's the one
13 that was critical of the procedures of the Sydney police. Do
14 you remember that one?

15 A. Yes.

16 Q. I understand that was sent to the Attorney General's office in
17 June of '83, the reference there for anybody who wants it is
18 Volume 20, page 26. Clearly if you were acting on behalf of a
19 client you'd want to know that kind of information, would you
20 not?

21 A. Certainly.

22 Q. Because it meant that the police activities were a significant
23 potential liability for the government. Correct?

24 A. Yes, or for the police officers.

25 Q. Involved.

1 A. Yes.

2 Q. You said it would be wrong if it was never disclosed but I
3 suggest to you it was never disclosed to Mr. Cacchione.

4 A. Well, the answer to that is one I've already given. That it was
5 certainly my intention that that material would be given to
6 Mr. Justice Campbell, that he would then be in a position to
7 assess the material and to make a determination on what
8 material would then be passed over. I was perfectly prepared
9 to trust his judgement on that. As far as I know the only
10 reason that material was not moved by that means was the
11 fact that the Commission of Inquiry was, in effect, stopped by
12 the settlement negotiation.

13 Q. If what you say is true and it would have been unfair to carry
14 through to the end without that, when you go into the
15 settlement negotiations surely you had a moral obligation to
16 say to Mr. Cacchione, "I am holding in my file information
17 about police conduct that would significantly affect the
18 amount of damages that we're talking about, the amount of
19 money we're talking about, morally, therefore, and ethically I
20 have an obligation to give it to you and I do give it to you
21 before you make this settlement for \$270,000." Why not?

22 A. No, I don't see it that way at all. The Government of Nova
23 Scotia was making the payment of money to Mr. Marshall and
24 that was an ex gratia payment. The advice that I had from
25 the senior officials in the Attorney General's Department was

1 that the Government of Nova Scotia was not legally liable to
2 Mr. Marshall based on the information that we had at that
3 time, and when the negotiations for a settlement took place
4 then I certainly didn't direct my mind to that item. We were
5 simply discussing an appropriate figure or a figure that both
6 sides were prepared to agree to.

7 Q. Well, surely you understood as a practising lawyer that he'd
8 be less likely to agree to a low figure if he had the evidence
9 you had in the Wheaton report about police misconduct,
10 agreed?

11 A. Not necessarily.

12 Q. He'd be more likely or just as likely to agree with a low figure
13 if he knew what you knew.

14 A. Well, it's a speculative question. I certainly didn't direct my
15 mind to that at that point in time. We were simply...I was
16 taking the matter on the basis that we were not exploring a
17 question of liability, but that we were simply discussing a
18 question of damages or a settlement.

19 Q. Well, that contradicts what we've just said. If you're
20 exploring a question of damages or settlement then surely
21 this information which increases the liability of the officers
22 involved, as you've told me, and the province would have
23 been very significant to Mr. Cacchione.

24 A. Well, I...all I can say on that point is that I did not direct my
25 mind to that at the time.

1 Q. Had you directed your mind to it you'll agree that your course
2 of action was not fair in respect of that particular item.

3 A. I think I would have to respond this way by saying that there
4 was certainly no intention on my part to be unfair. That was
5 why I had decided upon the approach of preparing...of
6 turning the material over to Mr. Justice Campbell and then
7 leaving it to his judgement as to how that material would be
8 made available, what material would be made available. But
9 as I said, that process stopped when the discussions arose
10 about a possible settlement, and I did not at any time direct
11 my mind to the question of turning over information to Mr.
12 Cacchione in the course of those negotiations.

13 Q. Leaving aside the question of your intent, would you agree
14 with me that the effect of this action is to work an unfairness
15 on Mr. Marshall in that regard, in regard to the non-disclosure
16 of that significant material.

17 A. I'm not sure that one can say that that was the effect because
18 for one thing there had already been two trials, the rehearing
19 of the case and the trials of Mr. Ebsary. So, there was a good
20 deal of information already available and before the Courts
21 about the activities of the Sydney City Police force.

22 Q. But you had extra information that he didn't have, right?

23 A. Yes, although I didn't think of it that way. But that's...you can
24 put it that way, yes.

25 Q. And all I want to ask you to agree with me is that the effect

MR. GIFFIN, EXAM. BY MR. RUBY

1 of your keeping that from Mr. Marshall worked an unfairness
2 on him, that was the effect because it would have helped him
3 to have that.

4 A. Well, I can agree with you that that was the effect, but if that
5 was the effect it was certainly not intended by me.

6 Q. Thank-you. Let me pause for a moment...

COMMISSIONER EVANS

8 Mr. Ruby, there is one item. Was there any...is there not a
9 right of appeal when there is a denial?

MR. RUBY

11 I'm going to come to that. But for the moment let me just
12 raise this matter. Yesterday my...sorry, this witness volunteered
13 the fact that he had had a legal opinion from presumably his staff
14 that the Government of Canada was not liable in the Marshall
15 matter. Today and just a few moments ago in the course of
16 answering a question he volunteered the opinion that he also had
17 a legal opinion that his government was not liable to Mr. Marshall.
18 I ask for production of those legal opinions on the ground that
19 there has been a waiver of privilege. Do you have Xerox copies of
20 the material that I've...you've got them there, would you give
21 them to his Lordship...Lordships? [Documents distributed.] I
22 have brought along a number of cases that deal with the subject
23 matter, but since the cases do not seem to be in conflict, I'm going
24 to rely solely on two texts unless someone wants further
25 information. First dealing with Wigmore on Evidence, Volume 8,

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1 1961, the MacNaughton version. This is the latest edition that was
2 available in the library last night.

COMMISSIONER EVANS

4 What is the issue here?

MR. RUBY

6 I'm asking for production of the legal opinions given to Mr.
7 Giffin concerning the liability, as he asserts, the non-liability of
8 the federal government and his government to Mr. Marshall in
9 law. He volunteered that those were the legal opinions. The
10 federal opinion was volunteered yesterday. The legal opinion
11 regarding the Government of Nova Scotia was volunteered just a
12 few moments ago.

MR. CHAIRMAN

14 Are we talking about a written legal opinion?

MR. RUBY

16 Whatever it is. Oral or in writing.

MR. CHAIRMAN

18 Secondly, has there been a refusal?

MR. RUBY

20 No.

MR. SPICER

22 Well, at least insofar as a written legal opinion is concerned,
23 My Lord, subject to confirmation from my friends we certainly
24 understood that we, as Commission counsel, had received
25 everything. We have no written legal opinions one way or the

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1 other and I think my friend will probably confirm that as far as
2 he knows, they don't exist.

MR. SAUNDERS

4 Absolutely, My Lord. That is the position. There is not an
5 opinion, and I thought my friend was advised of that yesterday,
6 but that was a different issue.

MR. RUBY

8 No.

MR. SAUNDERS

10 There is none.

MR. RUBY

12 Then may I explore that orally.

COMMISSIONER EVANS

14 Pardon?

MR. RUBY

16 May I explore the opinion he got orally?

COMMISSIONER EVANS

18 If he got any. I think he said he did.

MR. RUBY

20 Thank-you.

21 Q. Who gave you the legal opinions? I think he said...

22 A. Yes.

23 Q. Did you get the opinions?

24 A. Ah, well, perhaps I can clarify that. I was advised in
25 discussions with my senior official that it was their view that

1 there was no legal liability on the part of the Government of
2 Canada to Mr. Marshall, that there was no legal liability on the
3 part of the Government of Nova Scotia to Mr. Marshall. I
4 don't recall seeing any written legal opinions on that point,
5 but that was what they conveyed to me in various discussions
6 that we had about the Marshall case.

7 Q. Did they explain...who are the officials we're talking about?

8 A. Primarily that would have been the Deputy Attorney General,
9 Mr. Coles.

10 Q. All right. And, did he indicate to you the legal reasoning
11 involved in either of those opinions?

12 A. We did not discuss it in great detail. My impression, I wasn't
13 that concerned about the Government of Canada. I felt that
14 was...that was, you know, a concern of the Government of
15 Canada rather than the Government of Nova Scotia. But my
16 understanding of the law at that time, and as they advised
17 me, was that any liability would rest on the police officers
18 involved, Mr. MacIntyre and Mr. Urquhart. That there was
19 only a remote possibility of liability resting upon the City of
20 Sydney because of the wording of the Police Act at that time
21 and that there was no legal liability on the part of the
22 Province of Nova Scotia. That was in discussions that we had
23 over the period of time in which they were informing me
24 about the status of the case.
25

1 12:03 p.m.

2 Q. It says, "The Province of Nova Scotia prosecuted Mr. Marshall
3 and called the evidence." Did he explain to you why there
4 was no legal liability?

5 A. Well, because at that point, there was no evidence of
6 malfeasance or wrongdoing on the part of any agent of the
7 Province of Nova Scotia.

8 Q. I take it as a factual matter you do not know whether there
9 was or was not, no one had ever investigated that, correct?

10 A. That's correct. I was taking the advice of the senior officials
11 in the Department on that.

12 Q. Do you not find it strange that they would do a legal
13 memorandum of some length with regard to the liability of
14 City of Sydney, and yet do no legal research or memorandum
15 apparently on the question of your own liability?

16 A. Well, I can't explain that because that memorandum that
17 you've referred me to earlier was done before I was in the
18 Department. So I don't know who requested it or why it was
19 done.

20 Q. The appeal went to you, as I understand it, to write a decision
21 from the refusal initially by the Department under the
22 Freedom of Information Act request, is that correct?

23 A. That's correct.

24 Q. And I think at Volume 32, page 315, we can see a
25 memorandum on the subject. Would you turn to that with

1 me? Volume 32, page 315.

2 A. Yes.

3 Q. What you say in the middle of the paragraph is:

4
5 I believe I have 30 days in which to get
6 back to him after receipt of the request,
7 but as I have not had an opportunity to
8 review the whole file, I would appreciate it
9 if you would prepare a letter for my
10 signature rejecting the appeal and I will
11 sign it tomorrow.

12 Correct?

13 A. Yes, that's correct.

14 Q. Why would you make a decision on the appeal? How could
15 you make a decision on the appeal if you hadn't read the full
16 file?

17 A. We had discussed the matter in the Department. I had simply
18 not had the time up to that point to review the entire file.
19 But at the same time, my senior staff had advised me in a
20 general way of the contents of the file.

21 Q. But I think you'll agree with me that the appellate function
22 here involves you not really rubber stamping Gordon Coles'
23 decision but actually reviewing it.

24 A. The problem with that is in the drafting of the legislation. It's
25 impossible, given the relationship between a Minister and a
Deputy Minister to have what you are talking about, a
genuinely independent kind of review. It simply doesn't, it's

1 not realistic. It's just not the way the system works.

2 Q. I've never worked in government but I want to understand
3 why it's not realistic.

4 A. Well, simply because the constant dealings back and forth.
5 Mr. Coles and I had had any number of discussions about the
6 Marshall case back and forth, including what information was
7 available at the Department and so on. And a Deputy
8 Minister simply would not make a decision without having
9 some discussion with the Minister. So when the legislation
10 sets out a form of appeal, it simply doesn't reflect the reality
11 of government and the relationship between a Minister and a
12 Deputy Minister.

13 Q. You're saying that the right of appeal is elusory.

14 A. That's right.

15 Q. You, Attorney General, responsible for that legislation.

16 A. Let me respond in this way. The legislation in question was
17 originally introduced and passed in the 1970's by Mr. Pace
18 when he was Attorney General. When our government took
19 office, we reviewed legislation and when I was Chairman of
20 the Management Board, we came to the conclusion that any
21 changes in that legislation ought to be the responsibility of
22 the Chairman of the Management Board rather than a single
23 Minister in a single department, because the legislation runs
24 across the entire gamut of the government and involves a lot
25 of administrative and managerial aspects which we felt were

1 more properly addressed by the Chairman of the
2 Management Board. And when I was Chairman of the
3 Management Board, I did introduce a new Freedom of
4 Information Act in 1981 which completely rewrote that piece
5 of legislation. We took it through second reading...

6 Q. Sorry, I don't want to interrupt you. What did it have to do
7 with regard to the appeal question I'm concerned with?

8 A. Yes, on the question of appeal, that legislation would have
9 provided for an appeal to the Ombudsman. In other words,
10 getting outside the executive side of government to the
11 Ombudsman, who is a servant of the legislature. I believe
12 there was then further provision in there for a further appeal
13 to the courts and I think also the possibility of the
14 appointment of an independent commissioner under the
15 Public Inquiries Act. The fate of the legislation was
16 unfortunate. I introduced it, took it through second reading,
17 was referred to the Committee on Law Amendments with the
18 intention that public hearings would be held in the fall of
19 1981. The Premier called an election in August of 1981, so all
20 legislation that was before the House automatically ended and
21 after the election in 1981, I was moved to the Department of
22 Transportation and so I didn't follow up on that legislation.
23 But I did at the time of debate on the legislation, which would
24 have been around May of 1981, state in the House of
25 Assembly that it was my view that because of the

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1 relationship between a Minister and a Deputy Minister, that
2 that particular appeal process was simply not an independent
3 review and by the very nature of those, the relationships
4 between those positions could not be an independent review.

MR. CHAIRMAN

5
6 Can we conclude then that what you're saying, Mr. Giffin, is
7 that the legislation under which this application was made by Mr.
8 Cacchione is still in full force and effect?

MR. GIFFIN

9
10 Yes, it is.

MR. CHAIRMAN

11
12 Just tell me, the Chairman of the Board of Management, was
13 that the title?

MR. GIFFIN

14
15 Yes, Chairman of the Management Board.

MR. CHAIRMAN

16
17 Is he or she, or must he or she be a Cabinet Minister? That's
18 a Cabinet portfolio?

MR. GIFFIN

19
20 Yes, under legislation passed in 1980.

MR. CHAIRMAN

21
22 Is that the equivalent of what is known in most governments
23 in Canada as President of Treasury Board?

MR. GIFFIN

24
25 Yes.

1 MR. CHAIRMAN

2 Thank you.

3 BY MR. RUBY

4 Q. At the end of the day, as Attorney General, you took no
5 further steps to see that that was changed?

6 A. That's correct.

7 Q. Such reviews are going on to this day?

8 A. As far as I know, yes.

9 Q. You were not a prisoner of Mr. Coles?

10 A. No.

11 Q. Mr. Coles might have been wrong in his refusal. You couldn't
12 know that unless you read the file.

13 A. It's possible, sure, that he could have been wrong but it was
14 my view at that point in time, because I was trying to
15 approach the entire matter as cautiously as I could, that I
16 didn't want to make a decision like that until I knew the
17 direction that the government was going to take in the entire
18 question of compensation.

19 Q. You couldn't know whether it was right or wrong unless you
20 read the file.

21 A. That's correct.

22 Q. And knowing that, you deliberately chose not to read the file.

23 A. I didn't deliberately choose not to read the file, simply that I
24 had not at that point in time had a chance to read all of the
25 file and there had to be a response within that period of time.

1 Q. You started your obligations in connection with this in
2 November of 1983?

3 A. Yes.

4 Q. This is February 7th of '84.

5 A. Yes.

6 Q. It was a priority for your ministry?

7 A. It was one, yes.

8 Q. A high priority?

9 A. Yes.

10 Q. But you still hadn't read the whole file?

11 A. That's correct.

12 Q. And though you had 30 days to do it, you didn't choose to
13 take the time.

14 A. Correct.

15 Q. Instead you sent out a letter which, you'll agree with me,
16 essentially misleads Mr. Cacchione into thinking that this was
17 a real review and a decision based on evidence.

18 A. Well, the letter was simply based on the wording of the
19 statute.

20 Q. Turn to page 316, second complete paragraph:

21
22 I am satisfied that the information which
23 your client has requested would be likely
24 to disclose information obtained or
25 prepared during the conduct of an
investigation and so forth in which access
is not permitted.

1 In fact, you hadn't read the material and you were not
2 satisfied, because you couldn't be.

3 A. But I had been advised by senior staff in the department of
4 the contents of the file.

5 Q. Right, but you had no idea what was really in that file.

6 A. I was prepared to rely upon the information that they gave
7 me.

8 Q. So instead of getting an appeal from the Deputy Minister,
9 what he got was the Deputy Minister, only this time you
10 signed the letter instead of him, correct?

11 A. Yes, that's correct.

12 Q. Unfair?

13 A. No, I don't believe it was unfair.

14 Q. Fair?

15 A. No, I'm simply going to have to repeat what I said earlier,
16 that I just wanted to deal with the matter in this fashion until
17 such time as we could devise an appropriate mechanism for
18 dealing with the question of compensation.

19 Q. And once you devised that, I think it was May of 19...March
20 of 19...

21 A. '84.

22 Q. '84, did you tell Mr. Cacchione, "Look, now that I've devised
23 that, I want to tell you this letter I wrote you on February
24 8th, '84 really misleads you"?

25 A. No, I didn't see any need to do that. The letter which I sent

1 him in March of '84, I think spelled out quite clearly what our
2 intention was in that regard and the means by which we
3 would deal with the confidential material.

4 Q. You agree that the wording of this letter indicates or would
5 lead our reader to believe that you had personally reviewed
6 this matter? "I am satisfied," correct?

7 A. Well, I can only qualify that by saying that I was satisfied on
8 the basis of the information given to me by my senior staff.

9 Q. And when you say at page 317 at the top:

10
11 Accordingly, I must uphold the denial of
12 Mr. Marshall's request for the information
referred to in your letter.

13 You didn't really mean that. What you really meant to say, if
14 you were telling the truth, was the original decision was
15 really mine. I'm upholding it because of that reason.

16 A. Well, that would be a more accurate way of putting it, yes.

17 Q. And you never told Mr. Cacchione that that was the truth, did
18 you?

19 A. No.

20 Q. You've said many times that this proceeding was, certainly at
21 this stage, nonadversarial, correct?

22 A. Yes, that's correct.

23 Q. Let me ask you for your views on a contrast between this
24 nonadversarial proceeding and the nondisclosure of that
25 report with a true adversarial proceeding, criminal

1 proceeding? And I suggest to you that your own guidelines
2 about disclosure in that a truly adversarial proceeding,
3 criminal law, criminal prosecutions, provides for much fuller
4 disclosure than you, in fact, gave Mr. Cacchione?

5 A. The guidelines do, yes. My concern was that I was dealing
6 here with a, my view was a unique situation unprecedented
7 and I was being extremely cautious in any decisions that we
8 made as to how we should deal with any aspect of the matter.

9 Q. And, in effect, I'm not talking about your intent, but in effect
10 with regard to the disclosure of information, you were acting
11 in a very adversarial manner.

12 A. Well, I think that you're taking that out of context because
13 when you say that, you're ignoring the fact that very shortly
14 thereafter after we had established the Campbell Commission,
15 that I then addressed that issue in that context.

16 Q. But if you're really taking into account the full context, let's go
17 a step further. Once you entered into negotiations to do away
18 with the Campbell Commission and dispense with their
19 judgement, you still didn't disclose, isn't that so?

20 A. Yes, that's factually correct. I did not address my mind to
21 that when we were having the communications with Mr.
22 Cacchione about the possibility of a settlement.

23 Q. Let me ask you again to contrast the treatment given by Mr.
24 Cacchione on behalf of Mr. Marshall asking for information.
25 He has go through the Freedom of Information Act. He gets

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1 turned down once. It's appealed to you. It's turned down
2 again. With the treatment given Mr. Pugsley in 1986 on
3 behalf of Mr. MacIntyre in the lawsuit of C.B.C. v. MacIntyre,
4 he just calls up and asks and he gets everything. Why is
5 there this change?

MR. PUGSLEY

7 I don't know if it would be a comfort to the present witness,
8 but for you to say "I get everything", is not accurate. I got what
9 was said, the Sydney Police files.

COMMISSIONER EVANS

11 You did not get everything.

MR. PUGSLEY

13 I got what I requested, was the Sydney Police files. I did not
14 get everything.

MR. RUBY

16 Sorry.

BY MR. RUBY

18 Q If you turn to Volume 33, page 583.

COMMISSIONER EVANS

20 Mr. Ruby, if Mr. Cacchione felt that he wanted these files, he
21 had a procedure on the appeal. That's all he had to do. He could
22 have, there is a procedure for an appeal from the refusal by the
23 Minister. If he wanted it, if he felt that he wanted it, all he had to
24 do was to take those proceedings.

BY MR. RUBY

1 Q. Let me explore that, if I may. What is the appeal procedure
2 from the refusal by the Minister under that...

3 A. Under that legislation, the appeal is to the House of Assembly.

4 Q. Any particular grounds? Any particular terms of...

5 A. I don't believe there has ever been an appeal. There are no
6 terms set out that I can recall in the statute. I assume that if
7 one were to make that type of appeal...Pardon me, there may
8 have been one. I may stand to be corrected on that, but I
9 don't recall the House ever making a decision on one. I think
10 there may have been one or two that were directed to the
11 House and then proceeded with. My understanding of the
12 procedure would be that it would be necessary to get a
13 member of the Legislature to raise the matter on the floor of
14 the House as an appeal to the House from the refusal.

15 Q. And without commenting on the adequacy of that provision, I
16 suggest to you that no one, so far as you can recall, has ever
17 successfully negotiated that appeal provision through to a
18 conclusion.

19 A. I think that's correct. I reviewed my remarks in Hansard
20 1981 and I stated that to be the case at that time.

21 Q. Thank you. Turning to page 583 in Volume 33, Mr. Gale
22 there instructs the R.C.M.P. to turn over a file in their
23 possession; namely, the Sydney Police Department files on the
24 Donald Marshall, Jr. case to him. And I assume that's in
25 connection with litigation he was then conducting against the

1 C.B.C.

2 A. Yes.

3 Q. You didn't have any difficulty. Why?

4 A. I think the only explanation that I could give would be that in
5 1984, I was still very uncertain about how to deal with many
6 of the aspects pertaining to the Marshall case. I took an
7 extremely, or at least tried to take an extremely cautious
8 approach on any issues of this type. By 1986, I think
9 certainly at least in my own mind, a lot of the uncertainties
10 had disappeared. I began to realize after awhile that the sky
11 wouldn't fall in if information was being made available. But
12 I don't mind saying that in the first few months that I was
13 Attorney General, I tried to be extremely cautious in anything
14 that I did with respect to the Marshall case because I just
15 didn't know where particular decisions or particular actions
16 might take us.

17 Q. And it wasn't because given the information that Mr.
18 Cacchione would have put the government at risk at paying
19 out more money, that was not the motivation.

20 A. No, that was never on my mind, no.

21 12:30 INQUIRY RECESSED UNTIL 2:00 p.m.

22

23

24

25