ROYAL COMMISSION ON THE DONALD MARSHALL, JR., PROSECUTION

RG 44 Vol 254 # 3

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

MR. CHAIRMAN

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

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

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

> Smallwood v. Sparling et al, [1982] 2 S.C.R. 686
> Carey v. Ontario, [1986] 2 S.C.R. 637.

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

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

> (The Smallwood) case determines that Cabinet documents like other evidence must be disclosed unless such disclosure would interfere with the public interest. The fact that such documents concern the decision-making process at the highest level of government cannot, however, be ignored. Courts must proceed with caution in having them produced. But the level of the decision-making process concerned is only one of many variables to be taken into account. The nature of the policy concerned and the particular contents of the documents are, I would have thought, even more important. So far as the protection of the decision-making process is concerned, too, the time when a document or information is to be revealed is an extremely important factor. Revelations of Cabinet discussion and 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

interests of the administration of justice.

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

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

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

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

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

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

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

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

> As I see it, it is important that this question be aired not only in the interests of the administration of justice but also for the purpose for which it is sought to withhold the documents, namely, the proper functioning of government. For if there has been harsh or improper conduct in the dealings of the executive with the citizen, it ought to be revealed. The purpose of secrecy in government is to promote its proper functioning, not to facilitate improper conduct of the government...
>
> Divulgence is all the more important in our day when more open government is sought by the public. It serves to reinforce the faith of the citizen in his governmental institutions. This has important implications for the administration of justice, which is of prime concern to the

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

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

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

MR. SAUNDERS

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

10:02 a.m. *

MR. CHAIRMAN

Would you go over that again, Mr. Saunders?

MR. SAUNDERS

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

24

25

1
2 MR. GIFFIN, still sworn, testified as follows:
3 EXAMINATION BY MR. SPICER [Cont'd.]
4 Q. Mr. Giffin, when we left off yesterday we were around the
5 end of July, 1984, in connection with compensation. Perhaps
6 if I could ask you to turn to page 488 of Volume 33. Again,
7 that seem to be notes of a meeting or at least of a
8 conversation with yourself, "Spoke with Minister. He wanted
9 update." I think, again, that these are notes made by Mr.
10 Endres.
11 A. As far as I know, yes.
12 Q. Okay.
13
14 Told him we offered total of two hundred
15 and seventy thousand, added ten thousand
16 to original offer to give Felix something to
17 go back with. Advised Minister that we
18 should hold the line, that if they settle they
19 would take this and if they don't it would
20 be because of other pressures.
21 Do you have any idea what those "other pressures" would
22 have been?
23 A. I'm not sure what that reference means, whether it was
24 pressures to proceed with the Inquiry, I'm not clear just...
25 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.

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

A. Yes.

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

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

Does that relate to anything other than discussions in Cabinet?

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

10:14 a.m. *

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

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

Q. Right.

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

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.
23 MR. CHAIRMAN
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

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

way on any approval by Mr. Justice Campbell?

A. You're talking now about the letter from Mr. Endres to...

Q. Yeah, on 505.

A. ...Mr. Cacchione. Yes, that's correct. There's no reference to that in the letter.

Q. Do you think Mr.Cacchione was aware of that, that that was the government's position?

A. I can't speak for Mr. Cacchione.

Q. No.

A. I certainly made that clear both to my own staff and to my Cabinet colleagues. But I can't say what precisely was communicated to Mr. Cacchione.

Q. Did you instruct your staff to advise Mr. Cacchione that the settlement was tentative in a sense, pending approval by Mr. Justice Campbell?

A. I don't recall instructing my staff to say that to him. I simply said to my staff that Cabinet...I will not recommend the settlement to Cabinet if it is not approved by Mr. Justice Campbell.

Q. But had you not already recommended it to Cabinet and had it approved by Cabinet on August the 9th?

A. Yes, but subject to approval by Mr. Justice Campbell. If he had not approved it, then I would have gone back to Cabinet and recommended that the settlement not be approved.

Q. Then on page 520, Mr. Giffin, the report of Mr. Justice

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

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

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

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

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

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

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

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

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

Q. Did you have any discussions...

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

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

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

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

> 'The government's approval of Mr. Justice Campbell's final recommendation completes the work of the Commission,' Mr. Giffin said, 'And on behalf of the 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
Summerside home Thursday, Mr. Justice
7 Campbell would not say whether he thinks
an Inquiry should be established, nor
8 whether he would head such an Inquiry.
But contrary to information in the
9 Government statement, Mr. Justice
10 Campbell said he merely approved the
amount of compensation agreed by the
11 parties in the dispute; namely, the
provincial government through the
12 Attorney General's office and Mr. Marshall.
13
He seems to be taking issue with the notion that he really
14 recommended anything.
15
A. I don't see any conflict between the statements. The way he
16 put it was exactly my understanding of it that he approved
17 the settlement, that he did not make any independent inquiry
18 into the adequacy of the settlement, and the reference in the
19 press release to his final recommendation was because that
20 was the document that went to Cabinet.
21
Q. And the actual...the final Order-in-Council or document
22 reflecting the settlement is on page 549 of Volume 33.
23
COMMISSIONER EVANS
24
What page was that?
25

MR. SPICER

549.

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

A. Yes.

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

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

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

A. Yes.

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

A. Yes.

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

A. Yes, that's correct.

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

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

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:

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

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

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

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

A. No.

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

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

Q. That's right.

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 Police Department's role in the wrongful
17 > conviction of Donald Marshall, Jr., Attorney General Ron Giffin said Wednesday.
18
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

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

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

A. That's correct.

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

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

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

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

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

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
doing it but they wouldn't ask our
4 permission.
5 I thought you told us yesterday that the R.C.M.P. basically
6 were controlled, at the end of the day, by the Attorney
7 General's Department.
8 A. No, well, let me explain. My reason for saying that was that
9 the R.C.M.P. already had been involved in the reinvestigation
10 of the Marshall case and the investigation of the Ebsary case
11 and that it was my view that since they had already been
12 involved, that if new evidence were brought to their attention
13 that they could, as a matter of normal investigative practice,
14 pursue that evidence to see where it took them.
15 Q. And they wouldn't need permission to do that.
16 A. That's right. Now if the question arose about their
17 investigating the activities of a municipal police force, then
18 permission is required from the Attorney General's
19 Department. But, there again, they were already involved,
20 had been involved in the entire matter. So that certainly
21 wouldn't have presented any problems.
22 Q. But just to take your hypothetical for a second then, if they
23 wanted, if they came along and said that we want to
24 investigate a municipal police force, out of the blue, do you
25 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

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.
10 MR. SPICER
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 against Marshall, I think we must seriously
23 > consider the propriety of a fourth trial where the Crown's case is so dependent on
24 > 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 nowheres 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
9 > I asked if I could talk to you on the 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 you. You refused again.
14 Do you have any recollection of that?
15 A. No, I don't recall that. I remember receiving the letter. I did
16 not have any conversations with Mrs. Marshall.
17 Q. So your evidence would be that as far as you remember, you
18 don't have any recollection of having had any discussions
19 with her preceding this letter, is that right?
20 A. That's correct. I would assume that she must have talked to
21 somebody in the office, but I have no recollection of speaking
22 to her personally.
23 Q. If she had requested to see you, do you think you would have
24 seen her at that point in December of '85?
25

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 he 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
Oak Island Inn, I think approximately '85
21 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 was addressing the members of Halifax Subdivision and he opened his remarks and then said that this was an opportunity to speak without the press being present. And I'm precluding that right now, undoubtedly. Then he proceeded into approximately five to ten minutes of slapstick comedy in reference to the Marshall case which received polite laughter from the Subdivision members.

Do you have any comment to make on that allegation?

A. Well, I saw Staff Sgt. Wheaton's testimony on television. I didn't see it all but I saw a portion of it on a news report and, needless to say, it upset me a good deal. It caused me a great deal of concern and I had to search my memory to try to recall what I could about that particular function, and that's not easy to do in this business when you attend as many functions as I do and speak at them. And I think all I can do at this point is give you my best recollection of what transpired. It was a function at the Oak Island Inn in Lunenburg County. I believe it was in the winter of 1986 and I was invited to it by "H" Division, which was a common practice. I attended many of those and I was asked to speak at some point in the proceedings. This was not a formal 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

case to being the longest running show since Bonanza.

A. I don't recall making that statement.

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

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

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

A. That's correct.

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

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

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

MR. SAUNDERS

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

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
7 Q. Did you take offence to that comment?
8 A. Yes, I took offence to it and I spoke to him (being yourself) afterwards very
9 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 walked away. I knew Mr. Giffin as a
18 defence lawyer casually in Sydney and Truro. I had been stationed there in
19 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

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.
4 MR. SPICER
5 Thank you.
6 11:38 a.m.*
7 MR. CHAIRMAN
8 Mr. Ruby.
9 EXAMINATION BY MR. RUBY
10 Q. Mr. Giffin, if I go too quickly for you, as sometimes I do, will
11 you stop me and we'll go over it again?
12 A. All right.
13 Q. The first thing I want to ask you about, if I may, is that
14 you've told us that early on assuming office, after you made
15 an appointment to meet with Mr. Cacchione, you came home
16 and your wife heard radio reports revealing the date and the
17 fact of a meeting, and you called him up and you moved the
18 meeting up, you insisted that it be moved up to the next day.
19 I don't understand why that is. Can you explain that to me?
20 A. Yes. I wanted to meet privately with Mr. Cacchione. I felt
21 that that might provide us with a realistic chance to open a
22 line of communication that might lead to some resolution or
23 some agreement on the matters that were outstanding with
24 respect to Mr. Marshall. I specifically requested that the
25 meeting be private and that the media not be informed. 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.

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

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

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

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

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

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

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

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

A. Yes.

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

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

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

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

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

A. Not necessarily.

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

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

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

A. Well, I...all I can say on that point is that I did not direct my 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

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

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

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

COMMISSIONER EVANS

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

MR. RUBY

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

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

COMMISSIONER EVANS

What is the issue here?

MR. RUBY

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

MR. CHAIRMAN

Are we talking about a written legal opinion?

MR. RUBY

Whatever it is. Oral or in writing.

MR. CHAIRMAN

Secondly, has there been a refusal?

MR. RUBY

No.

MR. SPICER

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

1 other and I think my friend will probably confirm that as far as
2 he knows, they don't exist.
3 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.
7 MR. RUBY
8 No.
9 MR. SAUNDERS
10 There is none.
11 MR. RUBY
12 Then may I explore that orally.
13 COMMISSIONER EVANS
14 Pardon?
15 MR. RUBY
16 May I explore the opinion he got orally?
17 COMMISSIONER EVANS
18 If he got any. I think he said he did.
19 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

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

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

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

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

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

12:03 p.m.

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

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

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

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

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

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

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

A. That's correct.

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

me? Volume 32, page 315.

A. Yes.

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

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

Correct?

A. Yes, that's correct.

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

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

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

A. The problem with that is in the drafting of the legislation. It's 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

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

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

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

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

MR. CHAIRMAN

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

MR. GIFFIN

Yes, it is.

MR. CHAIRMAN

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

MR. GIFFIN

Yes, Chairman of the Management Board.

MR. CHAIRMAN

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

MR. GIFFIN

Yes, under legislation passed in 1980.

MR. CHAIRMAN

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

MR. GIFFIN

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

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

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

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

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

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

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

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

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

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

A. No.

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

A. Yes, that's correct.

Q. Let me ask you for your views on a contrast between this nonadversarial proceeding and the nondisclosure of that 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

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?
6 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.
10 COMMISSIONER EVANS
11 You did not get everything.
12 MR. PUGSLEY
13 I got what I requested, was the Sydney Police files. I did not
14 get everything.
15 MR. RUBY
16 Sorry.
17 BY MR. RUBY
18 Q. If you turn to Volume 33, page 583.
19 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.
25 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

DISCUSSION

2:06 p.m.

MR. RUBY

My Lords, before I commence the cross-examination again may I simply draw to your attention that there is a letter from this witness to Arthur Donahoe concerning the Billy Joe MacLean prosecution. Now we have, the Billy Joe MacLean prosecution. It's a letter dated April 18, 1984. And it's in the materials. But I thought I'd seek direction from you as to regards to raising it now or raising it at a later stage. I thought it might well be appropriate to do so at a later stage but I wanted to alert you to the fact that I would like to go into it.

CHAIRMAN

Yeah. Where is it?

MR. RUBY

I don't have a page reference. It's, I'm sorry, it is in the materials but I haven't got the page reference. But the letter, well this generally advises no prosecution of Billy Joe MacLean for the items in which he was later on, I understand, found guilty.

MR. SPICER

Are you sure that's in the materials we have before us now?

MR. RUBY

Yeah, it's somewhere in the materials. That letter. Sorry I don't have the reference to it.

MR. SAUNDERS

I can't recall its presence in the materials. If it was, if it's

1 there it's a mistake.

2 MR. RUBY

3 Well, in any event, it's a letter to Arthur Donahoe, dated April
4 18th, 1984, but I take it that's something that you would prefer to
5 have raised at a later stage and that we can have the witness back
6 for that purpose? Am I correct on that?

7 CHAIRMAN

8 I'm not sure we can have the witness back. We haven't ruled
9 on the admissibility of any of these extraneous issues at this time,
10 as yet. We have commissioned some fairly intensive research into
11 the role of the various offices and officers in the criminal justice
12 system and have insisted that they have an unrestricted right of
13 examination of documents, et cetera. We won't be dealing with
14 that until we complete all of the evidence directly related to the
15 prosecution and incarceration of Donald Marshall, Jr., so I...

16 MR. RUBY

17 Let me correct myself. The reason I have no page reference
18 for it is because I have a copy loose. It's not in the materials. But
19 I would propose to argue, to cross-examine on that, and I can
20 either raise the matter now and argue it now or I can defer it.

21 CHAIRMAN

22 You'll have to defer it because I'm not going to deal with it
23 today.

24 MR. RUBY

25 All right. Thank you very much.

1

2 Q. You said before the break, sir, that we were, when were
3 dealing with the question of releasing of files that in the
4 beginning you were cautious and simply wanted not to make
5 any firm policy decision, if I have it correctly. And it's been
6 maintained it would have been done before. And later on you
7 decided that it really was possible to live with full disclosure.
8 Have I correctly put your position?
9 A. Yes. I'm not sure that's totally on all fours with what I said.
10 Q. Why don't you correct it for me then?
11 A. Well, I'll try and put it in my own words. In the first few
12 months that I was serving as Attorney General I was just
13 taking an extremely cautious approach to anything to do with
14 the Marshall case. Some would say I was cautious to a fault
15 but that was the approach that I took initially. But certainly
16 by 1986, when that particular matter arose about making
17 material available, in that case my recollection is that I
18 discussed it with my staff and they indicated that it was okay
19 to do that and I didn't see any problems with it.
20 Q. Would you look with me at the document at Volume 38, page
21 64, which is an extract from the Legislative debates and tell
22 me whether or not the passage I'm going to refer you to is
23 consistent with what you've described to me. Caution about
24 the Marshall case as opposed to a definitive policy statement.
25 Page 64 in Volume 38, bottom. It's a question from Mr.

1 Vincent MacLean concerning release of files regarding Mr.
2 Marshall. And at the bottom of that you say,
3
4 > Well, Mr. Speaker, we're getting into an area of considerable importance here and
5 that is the access to investigative files which the Honorable Member is referring
6 to. Let me make it very clear to that Honorable Member, through you, Mr.
7 Speaker, and anybody else that's interested in this matter, that I do not
8 make public investigative files that are held by the RCMP or held by my
9 Department. That's never been done and
10 I'm not going to start doing it.
11
12 A. Yes, that was consistent with the approach that I was taking at that time. I was being extremely cautious.
13
14 Q. It looks to me like a definitive policy statement. "...that's never been done and I'm not going to start doing it."
15
16 A. Well, my concern about meeting that policy requirement and at the same time dealing with the request for information
17 from Mr. Cacchione was the matter that we addressed when
18 the Campbell Commission was set up. But certainly, I wasn't
19 just going to, on my own, and without a great deal of thought,
20 start making confidential investigative files public.
21
22 Q. You weren't making a pronouncement about the policy of the Department, in general, about the files.
23
24 A. Yes.
25 Q. You were just being cautious about Marshall, is that what

1 you're telling me?
2 A. I'm saying that I was making that as a statement of general
3 policy in response to the question that was asked. Now, by
4 the same token, I wanted to try, within reason, to
5 accommodate the request from the Mr. Cacchione and that's
6 why we ended up on the compromise approach of making the
7 material available to Mr. Justice Campbell.
8 Q. You said yesterday that there had been discussions of the
9 Marshall case in the Government caucus. I'm interested in
10 knowing what the submissions and issues were as they
11 presented themselves to you and how you responded. So I
12 want to know what was said and by whom in Government
13 caucus about the Marshall case.
14 A. It was discussed in caucus...
15
16 MR. SAUNDERS
17 Unless, my Lords, there are certain members who are
18 participating in the caucus that are the same members who would
19 have been participating in the Cabinet, I don't see my friend
20 getting at the same information through another door, with the
21 greatest of respect...
22 CHAIRMAN
23 Well, my understanding is that there's no difference between,
24 there's a great deal of difference, rather, between Cabinet and
25 caucus...

MR. SAUNDERS

Yes.

CHAIRMAN

And caucus is an assembly of elected members who support a particular political party, in this instance, supporting the Government of the day.

MR. SAUNDERS

Yes.

CHAIRMAN

The caucus cannot make any decisions that are binding on Government or could be articulated as Government policy.

Mr. SAUNDERS

Yes.

CHAIRMAN

They're mostly there, well, caucus is an unusual, I think, assembly of ladies and gentleman who have been elected to public office and they let their views known. My recollection is that there are no minutes kept and that sensitive governments listen carefully to what their caucus say. The caucus members say they seldom act on it. But I'm not sure that would happen in Nova Scotia. But it certainly is a separate and distinct institution from government.

MR. SAUNDERS

I understand it to be so as well, My Lord, and I have no quarrel with your description of caucus.

CHAIRMAN

And in this case, well maybe other counsel wish to be heard.

MR. SAUNDERS

My point being, My Lord, just before Mr. Spicer speaks is that I wouldn't think it appropriate for my friend to try and find out what members of Cabinet may have said at caucus meetings when, through our discussions this morning, Your Lordship has instructed that no such questions be put.

CHAIRMAN

Well you mean individuals, well it would certainly surprise me if anybody can remember from one day to next day who said what and the context.

MR. SAUNDERS

That may be so. It may be so, My Lord, but I just saw this as way to get at that information a different way.

CHAIRMAN

We shall watch very carefully and listen very carefully but I don't interpret it as being that approach.

MR. SAUNDERS

Very well, My Lord.

Mr. SPICER

I don't really see any necessity to say anything at this point. You're not objecting at this stage of the game, I don't think.

CHAIRMAN

We just, you just wanted a lecture on political science, that's

1 all.

2 MR. RUBY

3 Just to complete the discussion. My position is that if a
4 Member of Cabinet chooses to repeat what he may or may not
5 have said in caucus, in Cabinet in caucus, that the caucus
6 discussion has no privilege.

7 CHAIRMAN

8 And I'll listen very, with great interest and see who
9 remembers what happened in any caucus in Canada.

10

11 MR. RUBY

12 Q. Tell me about caucus, what was said?

13 A. It's, with all due respect, going to be very difficult because it's
14 hard to remember. The subject came up for discussion in the
15 Government caucus certainly from the time that I became
16 Attorney General. I couldn't begin to say how many times the
17 Marshall case and the various aspects of it were discussed but
18 it was brought up because caucus is the one forum in which
19 Members of the Government, who are not members of
20 Executive Council, can discuss issues of that nature with
21 Ministers and get information and some sense of where the
22 Government is headed on a particular issue. I don't know
23 that I could ever recall specific conversations, or who said
24 what at what point in time, but the matter was raised.
25 Generally, my experience in caucus is that when matters are

being raised by members of caucus, particularly by the private members as distinguished from the Cabinet ministers, that it's often to seek information. To try to determine just where the Government is headed. And by the same token, to offer opinions on how a matter ought to be dealt with. But I can certainly recall that it was discussed at caucus meetings after I became Attorney General. The sense of those discussions, as I recall it, was along the lines of, "What is going to be done about the Marshall case?" "How can we deal with it?" Members of the caucus, of course, had inquiries from their constituents about the case. It had attracted a great deal of public interest so a common question would be, "What should we say in reply to inquiries that we get from constituents?" So there was that kind of discussion. And then as the matter progressed, at the same time we tried to keep the caucus members informed of developments as they came. Now, I'm not being very specific and with good reason. There are no minutes kept of caucus meetings and the discussions are very informal and it would impossible to start attributing specific statements or quotations to specific individuals. I really couldn't do it.

2:17 p.m. *

Q. Is there not a single statement that you can remember attributed to a single individual?

A. It would be...no, I don't think that I could safely do that under

1 oath. One specific I can recall, and it comes later in 1986, and
2 perhaps that why I remember it, is that when we were
3 having a caucus meeting at the White Point Beach Lodge in
4 Queens County, which would have been in June of 1986, that
5 discussion began at that point again about the question of an
6 Inquiry of this nature into the Marshall case, and for some
7 reason it sticks in my memory that the person who first
8 raised the matter at that caucus meeting was the Speaker of
9 the House, but it's...it would be very difficult to go back to
10 1983, '84 and try to attribute statements to people and it
11 would be very, very risky because my memory just isn't that
12 good.
13 Q. When you got round to discussing with the caucus the amount
14 of money that Marshall was to be paid do you recall that
15 happening?
16 A. No. My recollection on the amount of the settlement that that
17 was a case of simply advising the caucus of what had been
18 done. In other words, the caucus was not consulted about
19 their views as to what they might have thought was an
20 appropriate amount of the settlement. They were not
21 involved in the negotiation process.
22 Q. Did any of them comment on the appropriateness of the
23 amount after it was learned?
24 A. I can't recall any specific individual. My recollection is that
25 as...a statement of a generality that the...that there were no

1 objections to the amount from the caucus. There was a
2 general satisfaction that the matter had been dealt with.
3 That's my recollection of the reaction in caucus.
4 Q. Any mention in caucus of the fact that Mr. Marshall was
5 Indian?
6 A. No, not that I can recall.
7 Q. Any mention of the Marshall case as a political problem?
8 A. Oh, yes.
9 Q. Tell me about that?
10 A. Well, just in a general sense, that as with any difficult matter
11 that's before a government and that is still unresolved, it is
12 the concern and this was certainly expressed in a general way
13 by members of the caucus, that we would have to try to find
14 a way of dealing with it, that it was not a situation that could
15 be left unresolved.
16 Q. Why? What were the political dangers that the caucus
17 perceived?
18 A. I think the political danger would have been one of the
19 government being perceived as being indecisive, as being
20 unprepared to act, as being unfair to Mr. Marshall. That those
21 certainly could have been damaging political...damaging
22 perceptions in a purely political context.
23 Q. Let me take you to the action of Edmund Morris, then your
24 colleague, who disclosed to the press Mr. Marshall's job offer,
25 do you recall that?

1 A. Yes.
2 Q. You talked about that yesterday.
3 A. Yes, I do.
4 Q. He offered a job as a plasterer and I...sorry, as a repairman of
5 small appliances.
6 A. I thought it was as a...I could be mistaken on that. I
7 understood that his training was as a plumber or a plumber's
8 apprentice.
9 COMMISSIONER EVANS
10 He offered him a job in small...
11 MR. RUBY
12 He's trained as a plasterer and he's offered a job as a small
13 appliance repairman.
14 MR. GIFFIN
15 I'm sorry, for some...I thought...
16 MR. CHAIRMAN
17 He's a plumber.
18 MR. RUBY
19 Plumber, all right, My Lord, I said plasterer.
20 MR. GIFFIN
21 A. Yes. That was my recollection. His father was a plasterer.
22 Q. Plasterer. He does that as well, that's why it's sticking in my
23 mind.
24 A. Yeah. Yes, I do recall Mr. Morris making that statement to the
25 press, yes.

1 Q. So, the job, you'll agree, would have been a job that was
2 unsuited to his skills, correct?
3 A. Yes, my understanding was that his...he had worked
4 seventeen hundred hours in the field of plumbing.
5 Q. Yes.
6 A. And that that would have been the area in which he would
7 have had an opportunity to move ahead.
8 Q. And nothing as a repairer of small appliances.
9 A. Not that I know of. Like I don't know that Mr. Marshall had
10 any training in that area.
11 Q. Okay. Now, it seems that that was leaked to the newspaper
12 by Mr. Morris, is that correct?
13 A. It's my understanding that he told the press about it, yes.
14 Q. And you were very upset with Mr. Cacchione when he leaked
15 the date of your meeting. Were you equally upset with Mr.
16 Morris when he leaked this job offer?
17 A. It's my recollection that Mr. Morris did that in response to
18 statements that were made by Mr. MacGuigan and Mr. Munro
19 when they came to Halifax at about that time about the
20 Government of Canada offering employment to Mr. Marshall.
21 Q. So, you were not upset by it.
22 A. Well, I was concerned about the concern which Mr. Cacchione
23 expressed which was that there had been a communication
24 with his client that had not gone through Mr. Cacchione, and
25 that was the point that caused me concern and that's why I

1 dealt with that issue when I wrote to him in early March.
2 Q. And did you also object to Mr. Morris about that which
3 concerned you, and the raising it to the press rather than
4 through Mr. Cacchione?
5 A. No, I didn't make any objection to Mr. Morris having done
6 that.
7 Q. Why not?
8 A. Well, it just didn't...didn't occur to me to do that. The concern
9 that I had was the one that Mr. Cacchione had expressed.
10 Now, I will add that in the light of the Supreme Court decision
11 in the Brenda Thompson case that if something like that
12 happened now I would certainly be concerned about that
13 kind of thing.
14 Q. Mr. Morris has since been convicted of a similar release of
15 information and that's what you're referring to.
16 A. Yes.
17 Q. And that would be a breach of the Freedom of Information
18 Act, Section 6(2),
19
20 > A department maintaining personal
21 > information files shall not make the
22 > personal information contained therein
23 > available to another department or person
24 > for another purpose without the person's
25 > consent.

Correct?

A. That's the section. I don't know that I should sit here and

1 offer a legal opinion on whether or not what Mr. Morris did
2 back then violated that Act. But the point that I wanted to
3 make was that if the decision in the Thompson matter had
4 been ...had taken place prior to that, then I certainly would
5 have had a very real concern.
6 Q. I want to know why you didn't. I mean you were aware of
7 that provision of the Act. Correct?
8 A. Yes.
9 Q. You were the chief law enforcement officer of the Crown,
10 correct?
11 A. Yes.
12 Q. Why did you not at least consider charging Mr. Morris for that
13 breach of the Act?
14 A. I think the short answer is that to that point in time there
15 had never been a prosecution of that type with respect to the
16 Freedom of Information Act. It was just something that I
17 never directed my mind to.
18 Q. It's not a case of not looking because the man involved is a
19 member of the government, that's not what is happening?
20 A. No.
21 Q. You said that you thought the Attorney General has the right
22 to tell the Royal Canadian Mounted Police to stop an
23 investigation on the grounds that the Attorney General was
24 the person ultimately responsible for the administration of
25 justice in the province.

1 A. Yes.
2 Q. That was, I think, the position you put yesterday...
3 A. Yes.
4 Q. ...to Mr. Spicer. That troubles me a bit. If you act before the
5 investigation is complete how on earth can you know whether
6 it's proper to stop it because you haven't got a full picture of
7 what's going on or what it will uncover? How could you ever
8 cut off an investigation before it's complete?
9 2:28 p.m. *
10 A. Well, I think it's a speculative question. I would have to be in
11 possession of the facts relative to a particular situation. Just
12 to deal with it in the abstract is very difficult. I would have
13 to have a concrete fact situation and then see whether or not
14 there was some reason why there ought to be an intervention.
15 But obviously that is something that would be done only
16 under the rarest of circumstances.
17 Q. You'll agree with me that the danger of so doing is that you
18 prevent coming to light the very criminality which an
19 investigation is supposed to deal with in which you as chief
20 law officer are supposed to consider in making your decision.
21 A. Yes, that's correct.
22 Q. As to whether or not to prosecute.
23 A. That's correct.
24 Q. So, it is a logical impossibility, you agree?
25 A. I wouldn't say it's a logical impossibility, but I would say that

1 the ultimate power does exist in the Attorney General, the
2 exercise of the power would be enormously difficult and
3 fraught with...on the dangers that you've just pointed out.
4 Q. And, as you sit here today I take it you cannot think of any
5 example where it would appropriate to do that.
6 A. That's right.
7 Q. And, if you allow such a power would you agree with me that
8 it is fraught with possibilities for abuse?
9 A. Oh, yes.
10 Q. For example.
11 A. Very much so.
12 Q. There's a tendency to exercise that kind of discretion in
13 favour of friends of the government as opposed to ordinary
14 citizens. That would be one kind of abuse that's possible if
15 that power exists.
16 A. Yes. Any kind of abuse is possible where a power exists.
17 Q. And that kind particularly.
18 A. Oh, yes, very much so.
19 Q. As Attorney General you were aware that people do want the
20 Attorney General to exercise that power in favour of their
21 friends and associates, just generally, people want that
22 discretion exercised in their favour.
23 A. I'm sure there would always be people who want that, yes.
24 Q. And lots of pressure is placed on an Attorney General,
25 correct?

1 A. I wouldn't exaggerate that. My attitude always would have
2 been that if somebody approached me and asked me to do
3 something improper such as stopping an investigation that
4 ought to continue, that I would view that as a totally
5 improper request to be directed to an Attorney General or to
6 interfere with a prosecution before the courts or what have
7 you.
8 Q. Do you know John MacIntyre?
9 A. I don't believe I've ever met him. I may have met him when
10 I was Minister of Municipal Affairs and traveled to Sydney
11 and met a number of people at the City's building in Sydney.
12 But I can't...the mayor introduced me to a lot of people that
13 day and it's possible I may have met him, but I certainly am
14 not acquainted with him.
15 Q. Did you read the report which contains the advice that we've
16 talked about a lot here of Mr. Gale, the holding of the case in
17 abeyance, referring to the investigation of the Sydney police?
18 A. Yes.
19 Q. When had you read that report?
20 A. When did I read it?
21 Q. When?
22 A. I can't give you a precise date. It was sometime after I
23 became Attorney General, but I can't give you a precise date.
24 Q. Early, middle, late.
25 A. I think fairly early. I think it was part of the process of

1 informing myself about the Marshall case.
2 Q. What did you take that to mean when you read it?
3 A. I took it to mean that Mr. Gale was asking the R.C.M.P. to hold
4 off on their...any inquiries with respect to the Sydney City
5 Police until the matter that they were then dealing with,
6 principally the re-opening of the Marshall case before the
7 Appeal Division, and also the possible prosecution of Mr.
8 Ebsary, that my understanding of it was that Mr.Gale was
9 priorizing those matters, saying let's get this done first before
10 we turn our attention to the other.
11 Q. And did you agree with that?
12 A. Yes, I had no quarrel with it. It was actually, the memo was
13 issued before I became Attorney General. But after I read it I
14 had no quarrel with it.
15 Q. Why would you want to wait? For example, surely there was
16 enough manpower in your office to proceed with the
17 prosecution of Sergeant MacIntyre and Sergeant Urquhart if
18 that was deemed warranted after an investigation.
19 A. I don't think it was a question of manpower in the Attorney
20 General's Department to conduct a prosecution. My
21 understanding of the memo from Mr. Gale dealt with the
22 inquiries and investigative work being done by the R.C.M.P..
23 Q. Did you not think the R.C.M.P. had enough manpower to carry
24 on any investigations of Ebsary, which were already
25 completed in any event, according to the memo, and at the

1 same time investigate MacIntyre and Urquhart? Were they
2 short of men?
3 A. Pardon me?
4 Q. Were they short of men?
5 A. I know they have heavy demands on them in certain
6 divisions, but the R.C.M.P. could tell you more about that than
7 I could. I certainly wasn't reading that memo in terms of
8 manpower shortage.
9 Q. Then what is the problem? Why couldn't it go ahead? You've
10 got the manpower, they've got the manpower. What's the
11 problem?
12 A. Well, I didn't see it as a situation of Mr. Gale telling them not
13 to go ahead. I saw it as simply a situation in which he said
14 "Let's deal with these matters first, and then you can look at
15 the situation, vis-à-vis the Sydney City Police force."
16 Q. He's telling them not to go ahead for the time being.
17 A. Yes, that's right.
18 Q. Until we finish other matters.
19 A. Yes.
20 Q. Why? Why couldn't it all go ahead at once? Why shouldn't
21 the investigation of MacIntyre and Urquhart proceed at pace?
22 A. Well, I suppose in fairness you'd have to direct the question
23 to Mr. Gale because that happened before I became Attorney
24 General.
25 Q. But you said you approved of that.

A. Yes, I had no quarrel with it, provided that putting the matter in abeyance did not mean never dealing with the matter, rather that I took it as read that when a matter is put in abeyance that means that it's...that it is going to be dealt with, not at that time but at a later time and as it was.

Q. If you agree with that policy tell me why it made sense not to have that investigation commence immediately? Why hold it in abeyance?

A. Well, I can't presume to speak for Mr. Gale but I can only tell you that as far as I was concerned I had no problems with that. It was simply a matter of setting priorities and as I understood the memo he was saying that let's get these...these other matters are urgent, particularly the re-hearing of the Marshall case, let's get that dealt with first. That's all. I didn't read anything into it beyond that.

Q. You practised law.

A. Yes.

Q. You know that if you don't do investigations promptly the evidence vanishes, witnesses die, memories fade, it's a real danger, you understand that.

A. Yes.

Q. You knew it then.

A. Yes.

Q. As chief law officer of the Crown that was one of your concerns no doubt.

1 A. Yes.
2 Q. To see that evidence did not vanish in that way.
3 A. Right.
4 Q. So, that militates in favour of a quick investigation even if
5 you decide to hold the prosecution for some reason, does it
6 not?
7 A. Well, I think it should be pointed out that the memo from Mr.
8 Gale to the R.C.M.P. asking them to hold that in abeyance was
9 about eleven years after the original investigation and then
10 the following year he sent the memo asking the R.C.M.P. to
11 review the practises and procedures of the Sydney City Police
12 force.
13 Q. Do you agree with me that you cannot now think of a single
14 reason why holding in abeyance made good sense or good
15 policy?
16 A. To mean the reason was simply that the most urgent matter
17 was the re-hearing of the Marshall case, and that the most
18 urgent matter ought to be dealt with first.
19 Q. Why was that inconsistent with going ahead with the
20 investigation? What was the conflict?
21 A. I'm not sure that I see it as a conflict. We're talking here
22 about the R.C.M.P. officers who had already been involved in
23 the re-investigation and who presumably were also involved
24 in giving testimony and that sort of thing. And...
25 Q. They weren't in the Marshall reference.

1 A. Sorry. No, that's correct. I stand corrected on that. But, no, I
2 didn't seen anything sinister in it, that it was just a setting of
3 priorities and saying, "Let's get this done first and then we'll
4 move on to the other."
5 Q. But there's no reason that you can now assign why that's a
6 good idea. Correct?
7 A. No, I can't purport to speak for Mr. Gale on that.
8 Q. To your own mind as you read it you can think now of no
9 reason why that would be a good idea, fair?
10 A. I think that's a fair comment.
11 Q. You do accept...
12 A. It was a setting of priorities.
13 Q. And you do accept that there's at least one good reason why
14 it's a bad idea, namely evidence fades and vanishes. Correct?
15 A. I think where you have a matter that's already eleven years
16 old that problem is already there in abundance.
17 Q. Doesn't that make it more urgent to move while witnesses are
18 still alive after eleven years, not less?
19 A. No, I think the most urgent matter that had to be dealt with
20 at that time as I've said was the re-opening of the Marshall
21 case.
22 Q. But you've also said there's no reason why they couldn't have
23 both gone on together.
24 A. Well.
25 Q. Correct?

1 A. I have a couple of problems with this. One, is that Mr. Gale's
2 testimony obviously would be of help on this point, and
3 secondly in terms of the question of R.C.M.P. manpower and
4 resources I did not make enquiries into that, so I don't know
5 what the situation was and whether or not that was a factor.
6 Q. You seriously thought or considered that the R.C.M.P. in all of
7 Nova Scotia might not have sufficient manpower to do an
8 investigation of MacIntyre and Urquhart. Are you telling me
9 that that's what you considered?
10 A. No. No, I didn't say that that what's I considered. I said that
11 I did not make enquiries into that.
12 Q. All right. So, you can't see any reason why they couldn't have
13 gone ahead, correct?
14 A. Well, I'm sitting here answering these questions, no, but I
15 don't want to make that a blanket statement because Gordon
16 Gale may come in and offer...
17 Q. Sure. He may have a wonderful reason.
18 A. ...perfectly good reason for that.
19 Q. But I'm talking about your mind now. You cannot think of
20 any reason why it could not have gone ahead.
21 A. That's right.
22 Q. And you could think of at least one good reason why it should
23 have gone ahead, namely the passage of time and the fading
24 of memories and evidence.
25 A. Well, that was already obviously a major problem in the case.

1 Q. Yes. And that was also a factor why it should go ahead,
2 correct?
3 A. Yes.
4 Q. Were you aware that that investigation never went ahead?
5 A. It was my understanding that what happened was that Mr.
6 Gale in 1983, I think just after the decision of the Appeal
7 Division was handed down, sent a memo to the R.C.M.P. and
8 asked them to review the information that they had, to
9 review the investigative procedures that were followed by
10 the Sydney City Police force in 1971 and to make a report on
11 those matters.
12 Q. Were you aware, I'll make it clearer, that the investigation of
13 MacIntyre and Urquhart, the criminal investigation of
14 MacIntyre and Urquhart, talked about by Wheaton, never
15 went ahead? Were you aware of that?
16 A. That's correct. There was no criminal investigation of Mr.
17 MacIntyre and Mr. Urquhart that I know of. The Inquiry that
18 was carried out was the one that I've indicated.
19 Q. Were you aware through your tenure that that inquiry, that
20 criminal investigation never got going?
21 A. That's right. There was no criminal investigation of Mr.
22 MacIntyre and Mr. Urquhart.
23 Q. And you knew that.
24 A. Yes.
25 Q. You also knew that the whole reason why Marshall had been

granted a reference and acquitted was because witnesses said they lied under oath because they were pressured by the police. You knew that.

MR. PUGSLEY

I object. The indication of the Appeal Division...

MR. RUBY

Yeah.

MR. PUGSLEY

The Appeal Division based upon new evidence, as I recall it, they discounted the evidence that my friend refers to.

MR. RUBY

Q. You knew that one of the major reasons why the reference was granted and called and why the Court of Appeal from reading their reasons acquitted Mr. Marshall was the fact, together with other facts such as MacNeil's evidence, that these witnesses said that what they said earlier was false and that they had been pressured by the Sydney Police. Is that not true?

A. Well, I was certainly aware that that was the evidence that was placed before the Court. The report that came back from the R.C.M.P. to the department in response to Mr. Gale's memo or letter in 1983 contained no recommendation for criminal prosecutions of anybody.

Q. You're anticipating my next question. If you knew that and you knew there had never been a criminal investigation, why

1 didn't you as, Attorney General, ask that one take place so
2 that you could be satisfied that the people of Sydney were
3 being served by an honest police force?
4 A. When I read the reports back from the R.C.M.P. to Mr. Gale
5 that was the information upon which I based my view of the
6 matter, and those reports did not request or recommend an
7 R.C.M.P. investigation of the Sydney City Police force, nor did
8 they recommend criminal prosecutions of anybody. Now,
9 when I was reading that material I was not reading it for the
10 purpose of making a decision. I was simply reading it for the
11 purpose of informing myself about the case. But that was
12 what I took from that material, was that the R.C.M.P. were
13 recommending neither of those courses of action, and so I did
14 not pursue it further.
15 Q. When you read it I take it alarmed you as Attorney General
16 that these things were being said about the City of Sydney
17 police force.
18 A. No, when I read the reports from the R.C.M.P., first of all, as I
19 say, I was reading them for information and not for the
20 purpose of making decisions. But when I read them I saw
21 nothing in there that indicated that the R.C.M.P. were
22 recommending either a further investigation or criminal
23 prosecutions. And, I therefore did not see that there were
24 any steps that I had to take in connection with those reports.
25 Q. You didn't see any need for you to act on your own initiative.

1 A. That's right.
2 Q. There's a matter that I want to move on to if I can, and it's
3 this, you said that on occasion you disagreed with or
4 overruled Mr. Coles and one example you gave us was that his
5 view that Mr. Marshall was the author of his own misfortune.
6 Were there any other respects ink which you disagreed with
7 or overruled Mr. Coles respecting his views in the Marshall
8 matter, any other respects at all?
9 A. I think it's fair to say that Mr. Coles had reservations about
10 the calling of this type of a public inquiry, and he was always
11 willing to express his views to me quite openly and quite
12 frankly, and he did express reservations to me about the
13 calling of this inquiry. It wasn't a case of my overruling him.
14 It was simply a case that he was expressing his views that
15 there would be problems about calling an inquiry because
16 there had been witnesses who had committed perjury,
17 because of the passage of time and because of the potential
18 cost. But those were just views that he communicated to me
19 as Deputy Attorney General. But once the Cabinet decision
20 was made to proceed with this Inquiry then he did what
21 work he had to do in connection with that.
22 Q. Any other respects in which you disagreed with... with Mr.
23 Coles with regard to his ideas concerning Marshall?
24 A. It's difficult to state a blanket yes or no, or a blanket no, if
25 you will, to that kind of question. I can't recall any at the

1 moment, but my memory is not infallible, but nothing else
2 comes to mind at the moment.
3 Q. Are you aware from the conversations with him what Mr.
4 Coles' views were of Indians?
5 A. He was not racially prejudice. He certainly never gave any
6 indication of that.
7 Q. You told Mr. Spicer yesterday that there were no green
8 striped files as far as you knew during your tenure as
9 Attorney General. Were there any political or other files
10 during your tenure as Attorney General that were kept
11 separate and apart from the files to which ordinary staff
12 lawyers had access?
13 A. No, none that I know of. The Department has a central filing
14 system and as far as I know every file went into that central
15 filing system.
16 Q. My friend will rise, and would you just not answer this
17 question for a moment to give him an opportunity to do so.
18 A. All right.
19 Q. Are there any minutes or notes kept of Cabinet meetings and
20 are there any record of any kind or any secretary present?
21 Just give my friend a moment to see if he wants to object.
22 MR. SAUNDERS
23 With respect to?
24 MR. RUBY
25 Cabinet minutes, Cabinet meetings, any minutes, notes,

1 records, secretary's recording, were there any kind of record at
2 all. That's the question.
3 MR. SAUNDERS
4 I don't know that that question is objectionable, My Lord. I'm
5 quite happy for my friend to pose the question.
6 MR. RUBY
7 Thank-you.
8 Q. Could you answer that for me?
9 A. Yes. Essentially the answer is no. There are no recordings of
10 discussions either mechanical or written. What emanates
11 from a Cabinet meeting is documentation, Orders-in-Council,
12 these are the formal documents that are done after the
13 meeting. I'm not sure how far you want to go with this, but I
14 can describe the procedures that go on in the Cabinet room.
15 There is a Cabinet book which has a agenda and has in it the
16 reports and recommendations or memoranda to Cabinet,
17 proposed appointments and then a host of other things. And,
18 at each Cabinet meeting we deal with the items in that book.
19 One Minister is responsible for noting in the book what the
20 disposition is with respect to each particular matter, and then
21 after we've gone through that book, which may take several
22 hours, we then...we then would deal with non-agenda items or
23 urgent matters that Ministers did not have time to put on the
24 agenda and they had to bring in. In those discussions there
25 would not be any keeping of minutes or anything of that sort.

1 Q. Do you keep notes or do other Ministers keeps notes of these
2 meetings?
3 A. No, I very seldom...I never kept notes of things that happened
4 at Cabinet. There are a lot of notes moving around the
5 Cabinet room from one Minister to another on matters that
6 they're dealing with, but not for the purpose of a record, and
7 any scribblings like that in the course of a day would be
8 disposed of at the end of the meeting.
9 Q. You never took notes on discussions about Marshall, for
10 example, and kept those notes.
11 A. No.
12 Q. All right. In November of '83, shortly after you took office,
13 you asked for the inventories, I recollect, of the file. Did you
14 ever get such a thing?
15 A. The...I'm sorry I don't recall.
16 Q. The inventory to the Marshall file, you dictated off a memo to
17 your secretary.
18 A. I'd have to see that memo. I don't recall asking for an
19 inventory.
20 Q. All right. Let me leave it then. I take it you have no memory
21 of getting anything as a result.
22 A. No, I don't remember.
23 Q. Halifax City Police, do they have a regimental dinner?
24 MR. SAUNDERS
25 What was that?

MR. RUBY

Regimental dinner.

A. They have two or three different types of functions that I recall. I think there is a Halifax...there is one for retired members of the Halifax force, and I think there's another large one each year which is more of a banquet and a...

Q. Yeah.

A. ...dance to follow kind of thing.

Q. You've attended and spoken at that particular function.

A. My wife and I attended that two or three times, but I think the years that we attended we attended the reception beforehand and other commitments prevented us from going on to the dinner. But now I...if you're asking me about what functions I've attended over the years I'd really have to go back and check my calendars because there literally have been hundreds.

2:50 p.m.

Q. I want to know if you've ever spoken to the Halifax City Police at a dinner. Do you recollect that?

A. No, I just don't recollect. I'd have to check.

Q. Perhaps we can do this, My Lord. It looks like we will not complete the witness today. I may not be here Monday but Ms. Derrick will be here and if you could give us an answer to that we'll follow through on further questioning.*

A. Yes. We'd have to, I keep my office calendars so we can

1 check back and see if I ever did.

2 MR. SAUNDERS

3 My Lords, I wonder if my friend can give me a little more
4 detail on dates and exact location, years so that we can embark on
5 that search.

6 MR. RUBY

7 It was around the time of the RCMP dinner. But I have no
8 further information about the exact date.

9 COMMISSIONER EVANS

10 Around the time...I'm sorry, I didn't even get...

11 MR. RUBY

12 Around the time of the RCMP dinner.

13 MR. ROSS

14 RCMP what?

15 MR. SAUNDERS

16 Dinner.

17 MR. RUBY

18 The regimental dinner. It's around that time but I'm not sure
19 of the exact date.

20 MR. SAUNDERS

21 We'll undertake to look.

22 MR. RUBY

23 Thank you.

24 CHAIRMAN

25 I'd like to know the relevancy. I was not aware that the

1 Halifax Police force had anything to do with the Marshall case but
2 we learn something every day here. Maybe they did.
3 MR. RUBY
4 Well, let me just indicate that I think the fairest thing to do is
5 to take this one step at a time and see how it goes. I won't take
6 much time of the Commission with it. Let's see how the answer
7 comes back.
8 COMMISSIONER EVANS
9 Except if you're going to do a lot of looking, what are you
10 looking for?
11 MR. RUBY
12 I don't want to embarrass the witness by telling you what I'm
13 looking for. Let's just see if there's a foundation.
14 COMMISSIONER EVANS
15 Well, I wouldn't think you'd be concerned about embarrassing
16 the witness, Mr. Ruby.
17 MR. RUBY
18 As Your Lordship knows there are proper ways of
19 embarrassing witnesses and ways which are not so proper and
20 I'm just trying to proceed cautiously.
21 COMMISSIONER EVANS
22 I'm sure you know them all.
23 MR. RUBY
24 To take the witness' language, I have no firm policy decision
25 on this.

1 Q. You realize it, I take it, when you examined the file that in
2 1971 Mr. MacNeil came forward with an account of what took
3 place which was subsequently not acted upon and, more
4 importantly, was apparently so we've learned, passed on to
5 your office, probably to Len Pace, by the local Cape Breton
6 prosecutor, but was never communicated to Marshall's lawyer
7 on the appeal, Mr. Rosenblum. You're familiar with that.
8 A. I'm familiar with it. Obviously, I can't testify to it personally
9 but I'm familiar with that.
10 Q. I take it you knew, as Attorney General, that this information
11 had not been passed on to the appeal lawyer.
12 A. Yes, that's right.
13 Q. What steps did you take to commence an investigation to find
14 out exactly what went wrong and why it wasn't passed on to
15 that appeal lawyer?
16 A. Well I think the problem with that matter, as I recollect it, is
17 that the Crown Prosecutor who was involved in that case, Mr.
18 Donald MacNeil, had passed away in 1978 and so it would
19 have been very, very difficult to ascertain what might have
20 happened.
21 Q. Are you saying you did nothing?
22 A. That's correct. Well, with the caveat that as I dealt with the
23 Marshall matter throughout, certainly there were problems
24 and question marks of that sort. But I always had it in the
25 back of my mind that if there were any matters that required

1 further inquiry, that if the Government decided to go ahead
2 with an inquiry like this one that then all those matters
3 would be explored.
4 Q. You did nothing.
5 A. That's correct.
6 Q. You were appointed Attorney General in November of '83.
7 Had your predecessor done anything about dealing with these
8 issues that were remaining? The compensation issues, for
9 example, and the calling of inquiry?
10 A. No, nothing that I know of. There was nothing I, perhaps I
11 could put it this way. When I went into the Department,
12 there was nothing there that indicated any steps had been
13 taken.
14 Q. You set up the compensation inquiry on March 5, 1984. Let's
15 take it month-by-month. I want to know what you did in
16 those months. First of all, in November of '83. What did you
17 do regarding the Marshall matter in respect of setting up and
18 formulating the policy that you told us you were doing over
19 that period.
20 A. Well, it's perhaps arbitrary to take it month-by-month but as
21 I, once I entered the Department I entered upon a process of
22 learning about the Marshall case. I think it's important to
23 understand that that was not done in isolation. That when a
24 Minister enters a new Department there is an enormous
25 amount of information that one has to acquire in a short

1 period of time on everything from Departmental estimates to
2 legislation to being briefed on the operations and all the
3 things that you're responsible for. So I wouldn't want to
4 leave the impression that this was being dealt with in
5 isolation. But the process on which I embarked was one of
6 having discussions with senior staff to become informed
7 about the matter and as the opportunity presented itself to
8 the look at the material and the first specific step that I can
9 recall taking was that of responding to Mr. Cacchione's
10 request for a meeting.
11 Q. I take it, then, that you cannot now go through it month-by-
12 month and tell me what you did, is that correct?
13 A. I do not keep a diary so I don't have that kind of day-by-day
14 information available to me.
15 Q. All right. You decided you wouldn't meet with Cacchione
16 after that first meeting again.
17 A. Yes, I decided if there were going to be any future meetings
18 that I would have staff solicitors meet with him rather than
19 meet with him personally.
20 Q. Why?
21 A. Because I felt, as I indicated earlier, that he had broken his
22 word to me. And, in particular, that my request that that
23 initial meeting not be made known to the media had been
24 made known to the media. My concern was that if I were to
25 have meetings with Mr. Cacchione and to have the kind of

1 open and without prejudice discussion that might have helped
2 us to move ahead on some of these issues, my concern, quite
3 honestly, was that I might be reading about it in the
4 newspaper the next day.
5 Q. Did you wind up reading about the meeting you did have in
6 the newspaper the next day?
7 A. Pardon me?
8 Q. Did you wind up reading about the meeting that you did have
9 in the newspaper the next day?
10 A. No.
11 Q. So you had no grounds for that fear.
12 A. I had grounds for the fear in the sense that Mr. Cacchione did
13 not keep his word to me and then once somebody has done
14 that I find I have to be very cautious in my dealings with
15 them.
16 Q. And you've told me that you've assumed that he didn't keep
17 the word.
18 A. Yes, but I think that you will find that Mr. Cacchione will
19 acknowledge that he told a journalist about that meeting.
20 Q. What was Mr. Cacchione supposed to do in that interval
21 period? You won't meet with him, the Department's not
22 meeting with him, you won't even tell him your position
23 because you haven't got one. What's he supposed to do?
24 A. Well, I think a solicitor representing a client is not completely
25 without resources. He could have pursued the action against

1 the City of Sydney and Urquhart and MacIntyre. That, the
2 conduct of that action was in his hands.
3 Q. He couldn't get the information that would have helped him
4 to prosecute the lawsuit from you because you weren't
5 releasing it to him. Correct?
6 A. Well, at that point I was not. We'd been through this before
7 but at that point I was not. Now of course he had...
8 Q. So that's not a very viable alternative, is it.
9 MR. SAUNDERS
10 Well, My Lords, I'm not sure that's an accurate representation
11 either. After all, some two years earlier, June '82, material was
12 given to Mr. Aronson which, presumably, he passed on to Mr.
13 Cacchione. So I think there was ample information that Mr.
14 Cacchione had with which to pursue a civil action. I don't think
15 it's fair or accurate for my friend to say that he had nothing.
16 MR. RUBY
17 No, he didn't have the May 30th report and that's what I'm
18 talking about.
19 Q. You understand that.
20 A. Pardon me?
21 Q. You know that I'm talking about the May 30th report of
22 Wheaton.
23 A. Yes.
24 Q. Yeah, that's what he didn't have. You understood that.
25 A. Yes. By the same token a lawyer can pursue a civil action and

1 go to discoveries and so forth. There are certainly options
2 open there.
3 Q. Was the Government, in fact, saying to him publicly, to the
4 press, that the lawsuit was one of the reasons why they
5 couldn't deal with him on the issue, why they couldn't move
6 ahead?
7 A. No. No, I wasn't saying that. I indicated, and the Premier
8 indicated that we were concerned that any steps taken by the
9 Government, or any decisions that we made might, in some
10 way, impact on either the civil proceeding or, more
11 importantly, on the criminal proceeding. But I, at no time,
12 said to Mr. Cacchione, nor did anybody in the Department,
13 that it was a condition precedent to our dealing with these
14 matters. That the action against the City of Sydney and Mr.
15 MacIntyre and Mr. Urquhart be discontinued. The Province
16 had no vested interest in that proceeding one way or the
17 other.
18 Q. No, I agree. But the Premier made it clear, did he not, that
19 that was one of the impediments to the Government dealing
20 with the matters?
21 A. Well as I understand his statement, and certainly this was my
22 own recollection of it, is that we were expressing the concern
23 that any action taken by the Government had to be
24 considered very carefully on the light of the fact that those
25 matters were before the courts. I took that to be just a

1 statement of caution, but we, at no time, said that we were
2 going to do nothing.
3 Q. Let me move to the issue of the settlement discussions, if I
4 can. You've said that you didn't want to do anything that
5 would trespass on the Ebsary case. Could you explain to me,
6 concretely, what you mean by trespass? Give me an example
7 perhaps
8 A. All right. If, for example, I had issued a public statement
9 which dealt with some of the matters that were, that might be
10 considered by the jury at any later trial, or if I made any
11 statements or did anything that perhaps implied a statement
12 on my part that I was of the view that Mr. Ebsary was guilty,
13 in order words, if I did something like that that either
14 expressly or by implication or even inadvertently created
15 problems in terms of either selecting a jury or conducting a
16 trial, I just felt that I had to be extremely cautious in that
17 whole area.
18 Q. But surely you could have dealt with the Marshall case
19 without suggesting that Ebsary was guilty.
20 A. And ultimately, we did. But I did not, it was not a decision
21 that I, or the Government, as it was a Government decision,
22 made overnight.
23 Q. When it comes to the position that your Ministry put before
24 Chief Justice Campbell, that a fair and, "The hearing ought to
25 proceed on the basis," that is Mr. Coles said, "the police

1 investigation is not relevant," and you'll see that in Volume
2 33, page 411, if you want to look at that again. Page 411 of
3 Volume 33, My Lord. And you'll see that in the third
4 complete paragraph on that page, page 411. The comment
5 briefly...
6 A. Oh, I' m sorry, I was looking at the wrong one.
7 Q. Page 411.
8 A. Yes. Yes, I see that.
9 Q. At page 436, when the Commissioner seems about to expand
10 the reference to include that, 435 and 6, he writes a very
11 strongly worded letter trying to put him back on the rails. At
12 the bottom of 435,
13
14 > It is my understanding when the matter
15 > was discussed with Mr. Justice Campbell it
16 > was understood there was no intention or
17 > expectation that his inquiry would extend
18 > into any consideration of events affecting
19 > Donald Marshall, Jr. prior to his
20 > incarceration in jail for a crime of which he
21 > was subsequently found to be not guilty.
22 > The starting point, therefore, is to be Mr.
23 > Marshall's incarceration.
24 Now, you've said that you accepted that position and I want
25 to ask you how it is that there could be a fair and full
26 assessment of the harm done to Marshall if the police
27 investigation is kept out of it. How could that take place?
28 A. Well, our concern at that point was that, again, that if the
29

1 inquiry conducted by Judge Campbell became too broadly
2 based that then there was a danger that it was going to get
3 into areas that related to the Ebsary case which was still
4 before the court. It was just part of a general approach of
5 asking Mr. Justice Campbell to address the issue of
6 compensation without trespassing upon the Ebsary case. It
7 was a difficult situation but that was what we were trying to
8 do.
9 Q. See, I'd like to accept that as the truth but if it's the truth
10 then I don't understand why, at page 437, of Volume 33, and
11 now we're dealing with notes from private negotiations that
12 are not going to be public, these are private negotiations. No
13 hearing being contemplated. In the middle paragraph,
14
15 > I understood that all communications were to be private and confidential, without
16 > prejudice, settlement to be all inclusive, no punitive damages claim, and to cover
17 > periods starting with stay of incarceration following conviction.
18
19 I mean if that's the rationale why do you have to carry it on
20 in the private negotiations when there's no possibility of any
21 statement being made that will influence the Ebsary trial. I
22 suggest to you, and I want you to consider this, that the only
23 rationale for having that position both in public and in private
24 is that you were trying to get out of this as cheaply as you
25 could and that's it.

1 A. Well I think that's an oversimplification.
2 Q. Explain that to me.
3 A. Yes, I will. First of all, the Government did set up the inquiry
4 which was to be conducted by Mr. Justice Campbell. The
5 approach about negotiating a settlement was not made by the
6 Government of Nova Scotia. That approach was made by Mr.
7 Cacchione, it was first raised by Mr. Cacchione in the meeting
8 that's referred to in this notes. So my attitude towards the
9 settlement was that if it were to be a negotiated settlement
10 then we would try to get the best deal we could. But if
11 agreement could not be reached on a negotiated settlement
12 then the inquiry would proceed.
13 Q. So then you accept that the purpose of keeping that provision
14 in during the private negotiations was to get out as cheaply as
15 you could.
16 A. Well, that's not a, not the best way to put it but my view was
17 that if Mr. Cacchione wanted to negotiate with us then we
18 would negotiate with him and I was proceeding on the
19 assumption that that was a negotiation between equals. That
20 Mr. Cacchione is and was a competent, experienced lawyer
21 and that it was that type of negotiation. Nobody was saying
22 to Mr. Marshall or Mr. Cacchione that they had to accept any
23 proposed settlement. I would have been perfectly content to
24 have had the inquiry proceed.
25 Q. Am I right in suggesting to you that the high-minded purpose

1 that was publicly adduced, namely not to interfere with the
2 Ebsary trials, as soon as the negotiations commenced changes
3 to the purpose of getting out as cheaply as you could.
4 A. Well, we were certainly trying to negotiate the best
5 settlement that we could.
6 Q. You don't like the word "cheaply".
7 A. No, I don't.
8 Q. Why not?
9 A. No.
10 Q. Why not?
11 A. Well, because I think it suggests a state of mind that I
12 certainly didn't have. This was a very difficult matter and we
13 were trying to deal with it as best we could. And we did not,
14 for example, put any limits on Mr. Justice Campbell in terms
15 of dollar amount if he had proceeded with his inquiry. And,
16 but once the approach was made to us to negotiate a
17 settlement, then I treated it as a negotiation between two
18 equal parties in which we were trying to get the best
19 settlement that we could.
20 Q. The word "cheaply", I take it, does not misrepresent the facts,
21 it's just not a word you'd choose?
22 A. Well, we were trying to get the best deal we could.
23 Q. Is that fair?
24 A. Yes, that's fair. Sure.
25 Q. You were trying to get the best deal you could.

1 A. Yup.
2 Q. And it's fair to say that you were trying to get out as cheaply
3 as you could.
4 A. Yeah.
5 Q. But that has a denigrative tone to it so you don't like it.
6 A. That's right.
7 Q. All right. When Mr. Cacchione gives you the offer of
8 $550,000, you were questioned about that by Mr. Spicer. It
9 was the first written offer, as I recall.
10 A. Yes.
11 Q. And you told him that you can't recall the terms in which the
12 advice of your law officers regarding that amount was put. I
13 think it was regarding the fairness of it or nonfairness of it.
14 A. That's correct.
15 Q. I want to know what the substance of that advice was, even if
16 you can't recall the terms.
17 A. Well...
18 Q. On the issue of being fair or not fair.
19 A. I don't recall that we discussed it in terms of fairness or
20 unfairness. We simply discussed it in terms that an approach
21 had been made for a negotiated settlement, that that had
22 been put forward as an opening position by Mr. Cacchione and
23 that we would then proceed with negotiations and see where
24 that took us.
25 Q. You directed your mind at no time to the issue of the fairness

1 of this offer.
2 A. Well, I assumed that Mr. Cacchione would represent his
3 client's best interests and that if the settlement was too low
4 that they would not accept it.
5 Q. Didn't you, as Attorney General, in your role as chief law
6 officer of the Crown and representative of the people in that
7 regard, all the people, also have an obligation to Donald
8 Marshall?
9 A. It would be difficult to define that obligation. My view of it
10 was that Mr. Cacchione was representing Mr. Marshall and
11 that it was his responsibility to represent Mr. Marshall's best
12 interests.
13 Q. And not yours.
14 A. That's right.
15 Q. And you were not concerned with Mr. Marshall.
16 A. I don't want to say that I was not concerned with him, but I
17 was acting on behalf of the Government of Nova Scotia.
18 Q. And not Mr. Marshall.
19 A. That's correct.
20 Q. And you were not looking out for his best interests.
21 A. No, if you want to put it that way. I didn't see that as my
22 responsibility. I saw that as Mr. Cacchione's responsibility.
23 Q. And it was not your concern.
24 A. I was certainly concerned about what was going to happen to
25 Mr. Marshall as an individual. I had not met him, so I don't

1 want to state that as being that kind of a concern of a
2 personal nature. But I was certainly concerned because that
3 was why I was particularly interested in the matter of his
4 future employment and the course at NSIT and so forth
5 because it seemed to me that, in the long run, the most
6 important thing for him would be to get the necessary job
7 training and to become productively employed.
8 3:12 p.m. *
9 Q. If you'd turn with me to Volume 33, page 473. It's one of
10 those unmarked pages that's blacked out, so it's just prior to
11 475. This is a memo June 26, 84, the top left. Do you have
12 that one?
13 A. Yes, yes.
14 Q. And it's a meeting with yourself and the Deputy. The first
15 entry is that the figure of $270,000 plus Aronson's legal fees
16 which were $78,000 for a total, I guess, of about three fifty
17 "Is in ballpark".
18 A. Yes.
19 Q. And I take it in the ballpark means that that was a
20 reasonable amount to pay, yes.
21 A. Yes.
22 Q. A fair amount to pay.
23 A. Yes. I would have been prepared to recommend that to
24 Cabinet.
25 Q. Right. If it was reasonable and fair, then, why would you

1 after that try and deprive Marshall of $100,000 by offering
2 $250,000 total instead of accept that fair and reasonable
3 offer?
4 A. I saw this as just a normal negotiating procedure. That when
5 one engages in a negotiation towards a settlement that one
6 does not place ones final figure on the table first. I simply
7 saw this as a normal negotiating procedure.
8 Q. Is there no principle involved beyond that, just a negotiation?
9 A. That was the way I saw it, and I assumed that Mr. Cacchione
10 would represent Mr.Marshall's best interests and that if the
11 government's offer was not acceptable then we would
12 proceed with the Inquiry.
13 Q. Are you really saying there's nothing important but the
14 process of negotiation. It's important the process should be
15 fair.
16 A. Yes.
17 Q. Yes. It should be honest and open and conducted in a
18 forthright manner, is that all true?
19 A. Yes.
20 Q. But that you're not looking at principles beyond that, the
21 process itself.
22 A. That's right. As far as I was concerned it was a process of
23 negotiation towards a settlement.
24 Q. Let's turn to page 484 if we could. You told us originally
25 that though you talked about an original figure of, what was

1 it, three hundred and thirty thousand, with your staff? There
2 was no...
3 A. I think it was three hundred and twenty-five.
4 Q. Three and twenty-five, but there was no real fixed figure in
5 your mind.
6 A. That's right. We were just in that range.
7 Q. Right.
8 A. In the ballpark, so to speak.
9 Q. It was not a limit in any real sense, correct?
10 A. That's right.
11 Q. And, the memorandum here, and I think this is in Mr. Endres'
12 writing, "Spoke to Felix," 484, "Told him that we cannot go
13 that far, that we have a limit." Let me first of all take you to
14 that?
15 A. Yes.
16 Q. Mr. Endres knew that you didn't have a limit, that you had
17 never imposed one, true?
18 A. Well, except that we were speaking in that range that I've
19 indicated, or in the ballpark which would have been up to say
20 three hundred and twenty-five or $330,000.
21 Q. But you've also said you made it quite clear...
22 A. There was not any rigid limit that said you must not go
23 beyond this line.
24 Q. Nothing fixed in stone, was your language.
25 A. That's right.

1 Q. There was no limit, you made it clear.
2 A. Yes. Now, you know, I'm not talking about $10-million, but,
3 no, he had not been given that type of rigid line and said you
4 must not cross that line.
5 Q. Well, isn't that misleading then for him to tell Mr. Cacchione
6 "We have a limit," when, in fact, you don't?
7 A. Well, I wasn't present at that conversation and I think the
8 question would really have to be directed to Mr. Endres.
9 Q. Assuming for a moment that he told him we have a limit
10 that's not true, correct?
11 A. That's certainly not my recollection of it.
12 Q. The truth would have been we have a figure at which we've
13 started, we would hope to come within that area, but we have
14 no fixed limit.
15 A. Yes, I was taking a flexible approach in that regard. I
16 certainly wasn't hung up as to whether we ended up with the
17 number of, say, two hundred and seventy thousand or three
18 hundred thousand. We were operating in that range.
19 Q. That's right.
20 MR. SAUNDERS
21 With respect, My Lord, I think to put it in context, in fairness
22 to the witness, perhaps my friend would turn to the previous page
23 where it notes, other numbers are recorded, in the centre of the
24 page, plus Aronson's account, and whether or not that's the
25 context in which Mr. Endres recorded his notations during his

1 discussions with Mr. Cacchione.

2 MR. RUBY

3 That's Mr. Endres' writing I take it.

4 MR. SAUNDERS

5 Yes.

6 MR. RUBY

7 That's a meeting with the Deputy at 483 and the advice was
8 "We should not move substantially, we might settle yet, but that
9 there was a risk of failure if we do not meet their demands for
10 $300-325,000 plus Aronson's account." The Deputy says, "Add
11 another $15,000 for a total of $275,000 minus the $25,000 paid
12 on account provided we get a full release from Marshall and his
13 parents."

14 Q. Are you now familiar with that?

15 A. Yes.

16 Q. All right. That doesn't affect the discussion we've had about
17 their being a limit or no limit, does it?

18 A. No.

19 Q. All right. The next item I want to take you to on 484 is he
20 says, and this is his note of a conversation with Cacchione,
21 that, "I spoke to my people and that, subject to approval by
22 Cabinet, I was authorized to offer an additional $10,000 for a
23 total of $270,000 minus the $25,000." Did you read that?

24 A. Yes.

25 Q. And quite clearly that's not the full truth. The full truth on

1 page 483 that we've gone through is you offered another
2 $15,000 and instead he just jiggles him a little bit for an extra
3 five. Telling him, "I was authorized to add ten," when, in fact,
4 he had been authorized to add fifteen. Isn't that so?
5 A. Yes, I'm not quarreling with what you said. It's there.
6 Q. Well, isn't it unconscionable for the Government to mislead in
7 negotiations, to say, for example, we have a limit when we
8 have none, to say "I'm authorized to add $10,000," when, in
9 fact, he's been authorized to add fifteen? Isn't that wrong?
10 A. I think that's really a question you'd have to take up with Mr.
11 Endres because he was doing the actual negotiating with Mr.
12 Cacchione. He was the one that was going to the meetings and
13 having the conversations with him.
14 Q. See, I'm taking it up with you because you're responsible.
15 A. Right.
16 Q. It's being done in your name, right?
17 A. Yes.
18 Q. Under your authority, right?
19 A. Yes. Right.
20 Q. And if you don't know what's right and wrong about
21 negotiating who is to answer? Is it wrong to mislead the
22 other side when you're negotiating?
23 A. Oh, yes, of course it is.
24 Q. And it's particular wrong, I put it to you, when the other side
25 is a weaker individual than the Government of Nova Scotia, a

1 weaker party.
2 A. No, I certainly did not see those negotiations as being
3 negotiations on an unequal basis. As far as I was concerned
4 Mr. Cacchione was and is a tough, competent, experienced
5 lawyer, and I expected that he was representing his client's
6 interests.
7 Q. I'll come to that in a moment. As I understand this process
8 you take the position that there was no inequality because of
9 Mr. Cacchione's presence.
10 A. That's correct.
11 Q. And, I understand from what you said earlier that you were
12 not told that Mr. Cacchione had disclosed to Mr. Endres that
13 Marshall was in a bad emotional state.
14 A. That's correct.
15 Q. You can see, if you're interested, at Volume 33, page 431, in
16 his notes Mr. Endres marked that down as being a matter of
17 sufficient importance to note, page 431 under the first
18 heading "Felix". "Marsh. now in need of psychological
19 assistance. It maybe advantageous for him to settle now."
20 Was that ever communicated to you?
21 A. No, I did not see these notes until we began preparations for
22 my testimony here.
23 Q. It would be morally wrong to take advantage of that, would it
24 not?
25 A. It would depend on what was meant by that statement.

1 There is not much information there. But certainly it would
2 be morally wrong to take advantage of a situation in which, if
3 a client were unable to cope with the stress of dealing with
4 the matter to take advantage of that and to get a low
5 settlement. That's certainly something that I never did when
6 I practised law.
7 Q. You knew, however, that he had no money with which to pay
8 his past legal bills let alone his present lawyers.
9 A. Well, the first money that we paid out was the $25,000 which
10 was the interim recommendation made by Mr. Justice
11 Campbell, and one of the reasons why I recommended that to
12 Cabinet and we paid it as quickly as we could was that I did
13 not want anybody to suggest that we were trying to put Mr.
14 Marshall or Mr. Cacchione under financial pressure and that
15 at least since that was the initial recommendation, the
16 $25,000, that we wanted to pay that so that...and I assumed
17 that the reason for that was because, ah, since Mr. Marshall to
18 that point in time had received no compensation whatsoever
19 that this would at least ease whatever immediate financial
20 pressure he had.
21 Q. You knew that the $25,000 would not come close to paying
22 even his past legal bills, which you knew were $78,000
23 because it has been in negotiations, right?
24 A. Yes.
25 Q. You knew that Mr. Cacchione had commissioned and

1 expensive actuarial research to be done because, once again,
2 that was presented to you as part of the negotiations.
3 A. Right.
4 Q. So, you knew the $25,000 was going to be of no real
5 assistance in providing him with the legal fees necessary to
6 pay his past bills or to carry on the present negotiations.
7 A. Well, I think the short answer to that is that that was the first
8 recommendation that we received from Mr. Justice Campbell.
9 When we received it we complied with it. He did not
10 recommend any further interim payments.
11 Q. Let me put it differently. You knew he was hard up for
12 money and in trouble financially.
13 A. I didn't know the...
14 Q. You had to know that.
15 A. ...details of his financial situation, but I certainly knew that he
16 owed legal bills.
17 Q. Large legal bills.
18 A. Yes.
19 Q. For a man eleven years in prison, hopeless legal bills.
20 A. Right.
21 Q. Never going to get a job to be able to pay those off in years
22 and years and years, right?
23 A. Yes.
24 Q. All right. So, you knew you had him hard pressed.
25 A. Well, I don't think that's completely fair, because the

1 payment of the interim request of $25,000 as far as I was
2 concerned was the first recommendation that we had from
3 Mr. Justice Campbell, which I understand he made after
4 communication with Mr. Cacchione, and we responded to that
5 immediately and if a further request for a further interim
6 payment had been made I certainly would have been
7 prepared to recommend that. I certainly...by making the
8 interim payment I was hoping that we were easing whatever
9 immediate financial problems he had. Now, obviously the
10 $80,000 was a financial problem, but it was a long-term
11 problem. And his immediate financial needs, I assumed, were
12 being met by the $25,000.
13 Q. You knew he had serious financial problems.
14 A. Yes.
15 Q. All right. You didn't...you had unlimited resources.
16 A. Not unlimited, but certainly very substantial resources if
17 you're talking about the Government of Nova Scotia.
18 Q. Unlimited for practical purposes.
19 A. Yes.
20 Q. For bringing to bear in this lawsuit or this litigation or this
21 negotiation unlimited.
22 A. I'm sorry, this was not a lawsuit or litigation. We were
23 prepared to spend money on the conduct of the Inquiry.
24 Q. You had no limit to the amount of money you were prepared
25 to spend to bring this Inquiry or this negotiation to a

1 conclusion, fair enough?
2 A. Well, that...yes, that's correct, sure. I won't say no limit.
3 Obviously that's not accurate, but in the context in which
4 you've put it the answer is yes.
5 Q. No practical limit.
6 A. Yes.
7 Q. You knew that Marshall would have difficulties associated
8 merely with the eleven years of wrongfully imprisonment,
9 correct?
10 A. Oh, certainly just as a general perception, yes.
11 Q. The Government didn't have that problem.
12 A. That's right.
13 Q. You knew that he was an Indian without education.
14 A. Yes.
15 Q. Whose only experience in the world at that point was narrow,
16 unsophisticated...
17 A. Yes.
18 Q. ...because of his eleven years of imprisonment.
19 A. Right.
20 Q. The Government didn't have that problem.
21 A. That's right.
22 Q. You'll agree with me that all those respects are important.
23 A. Yes.
24 Q. Significant.
25 A. Yes.

1 Q. And in each and every one of them the relationship between
2 you and Marshall was fundamentally unequal.
3 A. No, I don't subscribe to that.
4 it was my view that the negotiation was a negotiation
5 between equals and Mr. Marshall was well represented by
6 counsel and that he was under no obligation to accept the
7 settlement. We were prepared to proceed with the inquiry. I
8 would like to think that by responding to the first request for
9 a payment of $25,000 that we had indicated at least some
10 degree of good faith and there were no further requests
11 coming forward for interim payments. But if any had been
12 made, I certainly would have given it very serious
13 consideration.
14 Q. Aside from the fact that his lawyer was as good as your
15 lawyers which I will concede to you quite freely, what's equal
16 about it? Where are you and Marshall on equal positions?
17 Explain it to me.
18 A. No, just in the sense that this was a negotiation in which he
19 was...he could either accept an offer or reject it.
20 Q. Yes, that's true.
21 A. We were not attempting to put any pressure on Mr. Cacchione
22 or Mr. Marshall to negotiate a settlement at all. We did not
23 initiate the process and we did make the interim payment.
24 Q. So the two respects and I take it the only two respects in
25 which you can suggest to me now that you and Mr. Marshall

1 were equal was that (a) you had good lawyers both and (b)
2 you were equal in that both had a perfectly equal right to
3 accept or reject the agreement. Any other respects in which
4 you're equal?
5 A. Well, equal in the sense that both sides were free to continue
6 on with the Inquiry, that we had set up that Inquiry for the
7 express purpose of addressing the issue of compensation for
8 Mr. Marshall and I would have been perfectly content to see
9 that proceed.
10 Q. Any other respects in which they're equal?
11 A. I'm not sure if I understand your question. Certainly, the
12 government obviously has enormous resources which no
13 individual would possess. I'm not too sure where you're...
14 Q. I'm suggesting that this is a big guy fighting a little guy and
15 it's an unequal contest. That's what I'm saying.
16 A. What I'm suggesting to you is first of all there was not a fight,
17 that we had set up an Inquiry which was in the process of
18 getting under way and which would have been, if it had
19 proceeded, an independent Inquiry conducted by Judge
20 Campbell and that he is the one who would have been making
21 recommendations in terms of compensation for Mr. Marshall.
22 And we were fully prepared to go that route.
23 Q. In your view, despite the significant important factors that
24 you've acknowledged which were unequal, this was still an
25 equal contest.

1 A. Yes, in the sense that both sides were represented by
2 competent solicitors and both sides were free either to agree
3 on a settlement or not agree on a settlement.
4 Q. I think we understand each other. Let's go back then in the
5 negotiating process which I've digressed from because of your
6 interesting suggestion, and I understand it now, that the two
7 parties were bargaining equally, and come back to Page 484.
8 The top of the page again, the paragraph you already looked
9 at. Mr. Endres, according to the notes says, "Spoke to Felix.
10 Told him that we cannot go that far." And "that far" obviously
11 refers to Page 483, $300,000 to $325,000 plus Aronson's
12 account, which was $400,000. Was that true?
13 A. I'm sorry, I misunderstood the question. Was what true?
14 Q. Was it true in relation to that offer which you'll find at 483
15 middle, $300,000 to $325,000 plus Aronson's account which
16 was $78,000. "We cannot go that far." Is that true?
17 A. I don't mean to seem obtuse. I'm not sure if I understand
18 your question yet.
19 Q. Was the Attorney General actually in a position where they
20 could say in all honesty "We cannot go that far." Was that a
21 true statement or not?
22 A. You mean we cannot go to the...
23 Q. To the total of $375,000 or $380,000, to $405,000.
24 MR. SAUNDERS
25 My Lord, I hesitate to interject again. It's my friend's cross-

1 examination, but surely Mr. Endres is the best witness to say what
2 he intended by the phrase "that far." I mean it's his note of what
3 he perceived his instructions to be.
4 MR. RUBY
5 My Lord, it's inconvenient to the witness to bring him back
6 afterwards, after Mr. Endres has testified, so I want to ask him
7 what the ordinary meaning of that is and get his view.
8 MR. CHAIRMAN
9 I suppose the ultimate decision is for us to, after we hear the
10 other witnesses, as to what that means. My understanding is that
11 this is a note from Mr. Endres and I think I heard Mr. Giffin say
12 that he had not seen these notes until he started to prepare for his
13 testimony.
14 MR. RUBY
15 That's right.
16 MR. CHAIRMAN
17 And I don't know how his interpretation is going to help us.
18 MR. RUBY
19 I'm not asking him to interpret the note. I'm saying assuming it
20 means exactly what it says "We cannot go that far." Words of
21 plain English import. Whether that's true as far as he knew, what
22 was in his mind during the negotiations or whether that's another
23 misrepresentation.
24 MR. CHAIRMAN
25 There was evidence yesterday, as I recall it, from Mr. Giffin, that

1 the lawyers negotiating or the lawyer negotiating for the
2 government of Nova Scotia could go to $325,000 without coming
3 back.
4 MR. RUBY
5 That's right.
6 MR. CHAIRMAN
7 That's his maximum without coming back. Now whether when a
8 client gives that instruction to a lawyer on how to negotiate, "Now
9 you can go to three twenty-five." And the lawyer during his
10 negotiating starts from the bottom. One starts from the top and
11 goes down and the other from the bottom and comes up. Well, I
12 would leave that to the lawyers to decide and I'm sure the
13 practice varies from one lawyer to the next. I take it the same
14 questions could be put to Mr. Cacchione. "What was the lowest
15 amount that you were instructed to accept?"
16 MR. RUBY
17 I'm certain it will be.
18 MR. CHAIRMAN
19 That's why I say I don't know how helpful all this is.
20 MR. RUBY
21 What I want to get is what this witness can tell me, that whether
22 or not that statement was true or whether it required a
23 qualification in order to be true. And he's the only one who can
24 tell us that because he's the man in charge of the negotiation. Let
25 me try the question again so you'll understand what I want to ask.

1 Don't answer for a moment until their Lordships rule. I want to
2 know from you whether or not it is true when he said "We cannot
3 go that far" or that the truth would have been "Look, I can't go
4 that far unless I go back to my Minister and get specific approval."
5 A. My understanding is...
6 Q. Don't answer for a moment.
7 A. I'm sorry, I apologize.
8 MR. CHAIRMAN
9 Let him answer. It's the fourth time he's been asked so once more
10 won't hurt him.
11 MR. RUBY
12 O.K. You may answer the question.
13 A. All right, my understanding was that we had given Mr.
14 Endres negotiating room up to $325,000. That, if he was
15 going to go beyond that, then, yes, he would have to come
16 back.
17 Q. So an accurate statement would not be "We cannot go that
18 far," but rather "We cannot go that far without going back to
19 our Minister for approval." Is that true?
20 A. Yes, I have some difficulty in reading so much into that kind
21 of shorthand note.
22 Q. I'm not asking you to read into it. I'm just asking assuming it
23 means what it says, assuming that, that would not be
24 accurate?
25 A. That's correct. If he was going to go beyond three hundred

1 and twenty-five, then he would have had to come back to us.
2 Q. If this note is correct then, there are...tell me if you'll agree
3 with me, Page 484, three items that were not, strictly
4 speaking, true. (1) the statement "We cannot go that far,"
5 should have gone farther and you've just touched on that.
6 Secondly, "We have a limit" was not true. There was no limit.
7 A. Well, only in the sense that if he went past three twenty five,
8 he would have to come back to us.
9 Q. And that was not, you said, a real limit?
10 A. That's correct.
11 Q. And third when he says "I was authorized an additional ten
12 thousand dollars, he was authorized an additional fifteen." So
13 in three respects, if that note is correct as to what was said,
14 the representations were false, correct?
15 A. Yes.
16 Q. Now look, if that's so, I take it you would not have approved
17 that process because you told me that your primary concern
18 was to see that the process of negotiation was fair and honest
19 and open.
20 A. Yes.
21 Q. And if that's so, it's just not fair and honest and open, is it?
22 A. Well, you're asking me to...
23 Q. If that's so, assuming that that's so.
24 A. If that's so, then your statement is correct, yes.
25 Q. And you would not have approved that process if that's so?

1 A. That's right.
2 Q. Were you Minister when Billy Joe MacLean who I think was
3 then Culture Minister...
4 MR. SAUNDERS
5 Does this have anything to do with this Inquiry?
6 MR. RUBY
7 He's very leery about certain names.
8 MR. SAUNDERS
9 Well, we recognize that...
10 COMMISSIONER EVANS
11 If we're going to be much longer I shall be leaving.
12 MR. CHAIRMAN
13 Ask the question at least so that we can decide whether or not it
14 has anything to do with Donald Marshall, Jr.
15 MR. RUBY
16 Q. Were you Minister when the government of Nova Scotia
17 forgave Billy Joe MacLean who I think was then Culture
18 Minister, you correct me if I'm wrong, a debt owed to the
19 family Shieling Motel in Port Hawkesbury. And would you
20 tell me the amount involved in that one?
21 MR. SAUNDERS
22 Well, My Lords, what does that have to do with this Inquiry?
23 MR. RUBY
24 I want to ask this man if he was in the government at that point
25 in time.

1 MR. CHAIRMAN

2 Supposing he was. What does that suggest?

3 MR. RUBY

4 Whether the government bargained as hard on that issue as they

5 have done this one.

6 COMMISSIONER EVANS

7 Surely we're not going to try that issue.

8 MR. CHAIRMAN

9 No, we're not.

10 COMMISSIONER EVANS

11 We have problems enough, Mr. Ruby.

12 MR. RUBY

13 Thank you, My Lord.

14 COMMISSIONER EVANS

15 Next you'll be asking if they bargained about a breakwater in

16 some place rather than...if they bargained as hard as they should

17 have with the contractors.

18 MR. RUBY

19 I won't press it but the point of my question is that this seems to

20 me it's very hard bargaining indeed.

21 COMMISSIONER EVANS

22 It always is, Mr. Ruby. If you'd done civil work, you would

23 appreciate that. This was an ex gratia deal. They had a...as I

24 understand it, had a legal opinion. There was no legal

25 responsibility. They put two lawyers together at the request of

1 Mr. Cacchione and they were bargaining. And you come in with
2 your top figure and you come in with your low figure and some
3 place in between you arrive at a settlement.
4 MR. RUBY
5 It may be tough negotiations but it's negotiations.
6 MR. RUBY
7 It's quite tough and maybe in criminal law we all act in sweetness
8 and light, but we'll bargain as hard.
9 COMMISSIONER EVANS
10 Oh, Mr. Ruby, in criminal law the bargaining is equally good when
11 you get into plea bargaining. Somebody wants to go to jail and the
12 other wants a suspended sentence. Some place you arrive at a
13 compromise. And you are very expert at that, I may say.
14 MR. RUBY
15 I cannot deny this.
16 COMMISSIONER EVANS
17 I speak with some experience in that, Mr. Ruby, and I appreciate
18 your ability in that line.
19 MR. CHAIRMAN
20 Well, the concern is that I hope that all these resources that we've
21 been hearing about today will still be available...are still available
22 to [eke?] out counsel fees now. And on that delightful note, we
23 will now adjourn until Monday at 9:30.
24 HEARING ADJOURNED TO MONDAY, MARCH 21, 1988, AT 9:30 A.M.
25

REPORTER'S CERTIFICATE

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

Margaret E. Graham

DATED THIS 17 day of March 1988 at Dartmouth, Nova Scotia