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# 4

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

**Volume 59**

Held: March 21, 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

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

Messrs. Frank L. Elman, Q.C., and David G. Barrett: Counsel for  
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Messrs. Jamie W.S. Saunders and Darrel I. Pink: Counsel for the  
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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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59

1 MS. DERRICK

2 My Lord, on Thursday, Mr. Ruby had not quite finished our  
3 cross-examination of Mr. Giffin and I have just a few final  
4 questions.

5  
6 RONALD GIFFIN, still sworn, testified as follows:

7  
8 EXAMINATION BY MS. DERRICK

9  
10 Q Mr. Giffin, I believe you and I are acquainted, but for the  
11 record, my name is Anne Derrick and I represent Donald  
12 Marshall, Jr.

13 A. Yes.

14 Q Mr. Giffin, you decided early on that the Ebsary trials and  
15 appeals were obstacles that prevented you from dealing with  
16 the compensation issue. But the question I want to ask you is  
17 what prevented you from discussing it and having meetings  
18 with Mr. Cacchione for so many months?

19 A. Well, I did have one meeting with Mr. Cacchione, the meeting  
20 which I described in my testimony the other day. The  
21 subsequent dealings which we had with the matter were in  
22 terms of how to develop a process for addressing the  
23 compensation issue.

24 Q What prevented you, though, from having subsequent  
25



1 meetings with Mr. Cacchione?

2 A. Well, given that the first meeting was not productive and  
3 given that, as I've indicated before, he had not kept his word  
4 to me about that first meeting being a private meeting, that I  
5 was very concerned about having any subsequent meetings  
6 with him.

7 Q. And in all those months that went by, in fact no guidelines  
8 were established for dealing with Mr. Marshall's  
9 compensation, isn't that correct? You eventually developed a  
10 process but you never developed any guidelines, isn't that  
11 correct?

12 A. Yes, that's correct. My interest was in the process. I felt that  
13 if we could come up with a method of dealing with the  
14 compensation issue, that then, and in the event we came up  
15 with the method of asking Mr. Justice Campbell to undertake  
16 his inquiry, that I didn't think it would have been appropriate  
17 at that point for us to give him guidelines. In other words,  
18 that the inquiry ought to be independent and that he would  
19 deal with that himself.

20 Q. Don't you think the guidelines might have been helpful in the  
21 process?

22 A. Might have been but it would have raised in my mind the  
23 question of whether or not we would have been  
24 compromising the independence of his inquiry.

25 Q. Did you even inquire with any of your advisers as to how

1 compensation matters had been handled in other  
2 jurisdictions?

3 A. Oh, yes, there was some information in the department about,  
4 I believe there was one case in New Zealand. But my great  
5 concern was not with guidelines for compensation but simply  
6 how to deal with the compensation issue without trespassing  
7 on the Ebsary case. That was the concern that I had.

8 Q. So although there were some limited materials available  
9 within the department, no intensive inquiry was ever made,  
10 for instance, with the home office in the United Kingdom, for  
11 instance, about compensation claims of this nature, is that  
12 correct?

13 A. Yes, I certainly never had any communications like that. It  
14 seemed to me that this case was so totally unique that the  
15 few precedents that were available certainly I didn't know of  
16 anything that was on all fours with this case. And so we were  
17 really treating it as a unique situation.

18 Q. You didn't know, Mr. Giffin, but in all fairness, you also hadn't  
19 made inquiries that might have uncovered other cases to any  
20 degree.

21 A. Well, I think there had certainly been some information in  
22 the department about similar cases. Not similar but cases  
23 where there had been a conviction and a conviction and a  
24 sentence served and set aside. But our real problem was that,  
25 I certainly wasn't aware of anything, my staff did not advise

1 me of anything that came close to the Marshall case. That  
2 there was simply no direct precedent.

3 Q. But that wasn't the thrust of what you were attempting to do,  
4 anyway. Isn't that what you've just told us? That you  
5 weren't saying to your staff, "Go out and find in other  
6 jurisdictions, go and enter into extensive correspondence, for  
7 instance, with the home office in the United Kingdom."

8 A. Yes.

9 Q. Make inquiries. You weren't doing that.

10 A. No, we weren't doing that. In my mind, as we moved in the  
11 direction of doing what we did around the first of March in  
12 '84, that is the setting up of the Commission of Inquiry. It  
13 seemed to me that that was the kind of exercise that would  
14 have been carried out by that commission if its work had  
15 proceeded.

16 Q. With respect to the Ebsary case, you have characterized that  
17 as an obstacle but, in fact, you finally did settle the matter of  
18 compensation with Mr. Marshall in September, 1984 while  
19 the Ebsary matter was still before the courts.

20 A. Yes.

21 Q. Isn't that correct? Now I believe you also said that you had  
22 some worry to some extent that a public inquiry could  
23 operate as a discovery with respect to Mr. Marshall's lawsuit  
24 against the City of Sydney.

25 A. I remember that was a point that was discussed at the

1 meeting which Mr. Coles and I had with Mr. Cacchione and  
2 Mr. Lambert. I forget who raised the point, whether it was  
3 myself or Gordon Coles, but the point did come up during that  
4 discussion.

5 Q. My question is, why were you worried about this? Why  
6 worry at all? Why not just be completely open with Mr.  
7 Marshall and Mr. Cacchione?

8 A. Well, I think I can only answer in a generality by saying that  
9 I was taking an extremely cautious approach. I was dealing  
10 here with something that I had certainly never dealt with  
11 anything like the Marshall case before and I was just being  
12 extremely cautious. I wasn't sure in some of these matters  
13 what implications might flow from a particular course of  
14 action. And it was just a general approach of caution that I  
15 took, certainly in the first few months especially that I was  
16 dealing with it.

17 Q. But, in effect, Mr. Giffin, your actions were really carrying on  
18 the department's past policy of working against Mr. Marshall  
19 by, for instance, having prepared an opinion for the City of  
20 Sydney and by not giving Mr. Cacchione access to Staff Sgt.  
21 Wheaton's May 30th report. Wouldn't you agree with that?

22 A. No, I think you're taking it out of context because certainly in  
23 the first few months that I served as Attorney General, I did  
24 take a very cautious approach with respect to the entire  
25 matter. But we then did move to establish the Campbell

1 Commission to address the issue of compensation and so that  
2 was a step forward, in my view. But, again, one that I took  
3 even then with misgivings. I don't know to this day, looking  
4 back on that, whether or not that was actually the right thing  
5 to have done. Now since the inquiry did not proceed in the  
6 direction originally intended, I suppose one can only  
7 speculate at this point, and I suppose it's a matter that this  
8 Commission will have to give consideration to, but I honestly  
9 don't know to this day whether or not that was really the  
10 right way to go. I still have some misgivings about whether  
11 or not we should have set that up.

12 Q. But wouldn't you agree, Mr. Giffin, that even if it wasn't your  
13 intention to work contrary to Mr. Marshall, that was in effect  
14 the effect of your strategies, that they served the interests of  
15 the City of Sydney more than they served Mr. Marshall's  
16 interests.

17 A. Well, I didn't have any interest in serving the interests of the  
18 City of Sydney. The government of Nova Scotia was not a  
19 party to that civil proceeding and my approach was simply  
20 one of caution until we could figure out what appeared to be  
21 the best way of addressing the compensation issue at that  
22 point in time, given that the Ebsary case was still before the  
23 courts. But there was no grand strategy there to work hand-  
24 in-glove with the City of Sydney with respect to the civil  
25 proceeding. That was not the case.

MR. GIFFIN, EXAM. BY MS. DERRICK

1 Q No, so you're saying that wasn't your intention.

2 A. Right.

3 Q But I'm putting it to you that that was the effect of all this  
4 nondisclosure.

5 A. No, I don't see it that way because while we turned down the  
6 request for information under the Freedom of Information  
7 Act, we did address that issue and we set up the Campbell  
8 Commission at the first of March and that was outlined in the  
9 letter as to how I felt we could move confidential files from  
10 the Department, place them in the hands of the Campbell  
11 Commission and rely on Judge Campbell's good judgement, if  
12 you will, in determining what material would be necessary  
13 for the inquiry into compensation and to deal with that. We  
14 were quite prepared to rely on his judgement in that regard.

15 Q But it was your decision or the decision of your Department  
16 not to just provide this information to Mr. Cacchione and to be  
17 completely frank and open with him.

18 A. That's correct.

19 COMMISSIONER EVANS

20 Ms. Derrick, that's been answered...

21 MS. DERRICK

22 Yes.

23 COMMISSIONER EVANS

24 Last week during a rather lengthy and prolonged cross-  
25 examination. Most of the questions you've asked today are all

1 covered.

2 MS. DERRICK

3 Well, I won't be much longer, My Lord, and I was finished  
4 with that point with that question.

5 BY MS. DERRICK

6 Q. In the course of the time when Mr. Marshall's compensation  
7 claim was in the hands of your Department, both you and the  
8 Premier, Mr. Buchanan, are reported to have said that as long  
9 as the Ebsary matters and as long as Mr. Marshall's civil suit  
10 were before the courts, that the government could neither act  
11 nor comment on the compensation claim. Wouldn't you agree  
12 with me that if you had been acting for Mr. Marshall, this  
13 would have led you to believe that you should drop the civil  
14 lawsuit if you were going to get the government to talk with  
15 you or act with respect to the claim?

16 A. I can't speak for Mr. Cacchione but the, it was never the  
17 position of the Government of Nova Scotia that the civil  
18 proceedings against the City of Sydney and Mr. MacIntyre  
19 and Mr. Urquhart had to be discontinued as a precondition to  
20 our considering the issue of compensation. The fact is that  
21 throughout that time span, particularly January and February  
22 of 1984, we were wrestling with the entire question of how to  
23 address the compensation issue and that was what was going  
24 on within the government at that time. But I can understand  
25 how Mr. Cacchione came to the conclusion that he did, but it

1 was certainly never my intention that he come to that  
2 conclusion.

3 Q. No, but you would agree that that was a reasonable  
4 assumption for him to have made, even if that hadn't been  
5 your intention.

6 A. Oh, yes. Yes, I can certainly understand how he did that.

7 10:00 a.m.\*

8 Q. In the course of dealing with this compensation claim, Mr.  
9 Giffin, did you have any discussions with Justice Pace about  
10 the matter?

11 A. No.

12 Q. There was a provincial election in September or October 1984,  
13 isn't that correct?

14 A. Yes, November 5th or 6th, I think, of 1984.

15 Q. Thank-you. To what extent was the impending election taken  
16 into consideration in dealing with the compensation issue?

17 A. Well, in terms of dealing with the compensation issue, once  
18 we had the agreement of Mr. Justice Campbell to proceed with  
19 his inquiry, then I felt that that really took the issue out of  
20 the political arena, if you will, and that if it had just continued  
21 on that basis, that is if he had carried through with that  
22 inquiry, then I think that would have...it was simply a non-  
23 issue in political terms. Now, when the...when the discussions  
24 developed on the question of settlement then, of course, we  
25 did enter into that process with Mr. Cacchione, but no, I didn't



1 see it as being a political issue or think of it in terms of an  
2 upcoming election.

3 Q. So, that was never discussed, the issue of the election in terms  
4 of the settlement of the compensation matter?

5 A. No, not that I can recall. I think the feeling within  
6 government or if I can presume to speak for my Cabinet and  
7 caucus colleagues on that, was that once Mr. Justice Campbell  
8 had been appointed that then the matter had been taken out  
9 of the political arena, and whether it was ultimately resolved  
10 by his carrying through with that inquiry, or resolved by a  
11 settlement negotiation, that, in political terms, that didn't  
12 really make any difference one way or the other. Once we  
13 had established the commission, then it was my view we had  
14 gotten it out of the political arena.

15 Q. So, just so I understand your evidence, what you're saying is  
16 although your government was going to the polls and  
17 although your government's inaction had received a lot of  
18 public attention with respect to this issue, political  
19 considerations did not factor into the compensation claim at  
20 all?

21 A. Yes, that's correct.

22 Q. Is that correct?

23 A. Yes.

24 Q. Now, you've testified I think this morning and also last week  
25 that you now have concerns about the process that was

1       undertaken and I believe you said last week that you feel  
2       perhaps the compensation claim should have been taken  
3       through Justice Campbell's inquiry. And, in fact, I'll just quote  
4       a short excerpt from your evidence which is in Volume 58 at  
5       page 10,534, you said, "Then I think whatever figure was  
6       finally arrived at would have been hopefully beyond  
7       criticism." Don't you agree, Mr. Giffin, that if a settlement had  
8       been reached that was perceived to have been generous and  
9       speedy that that would have been beyond criticism as well?

10     A. Well, I think the key there would be the process that was  
11     followed. Responding to that question last week, I was  
12     dealing with the question of a negotiated settlement, vis-a-vis  
13     allowing the commission of inquiry to continue, and I said  
14     that having the advantage of thinking about this matter a  
15     good deal in the ensuing years and with the advantage of  
16     hindsight, that given those two choices, the better route, in  
17     my view now, would have been not to negotiate settlement  
18     but to have had the commission of inquiry complete its work,  
19     bring in a report and recommendation and have the  
20     government act on that. Now, what I have said here this  
21     morning takes it a step in a different direction. What I was  
22     talking about last week was the choice between those two  
23     things. But what I've also said here this morning is that I still  
24     have some reservations in my own mind about whether or  
25     not the commission of inquiry should have been established

1       itself. And, the only reason I say that, and we'll never know  
2       the answer to this because the commission of inquiry did not  
3       complete its work, but there was still the question in my  
4       mind as to how far that inquiry would have gone. Now, it  
5       would have been in the hands of Mr. Justice Campbell to  
6       proceed with it. But if it had gotten into areas where there  
7       could have been a trespass or a problem, vis-a-vis the Ebsary  
8       case, that we will never know, and nonetheless it's still a  
9       question I have in my own mind as to...as to whether or not,  
10      you know, there would have been any problems at some  
11      point further down the road. It's purely speculative now, but  
12      nonetheless I still have that reservation in my mind and  
13      perhaps that's...I hope that's one of the issue that this...that  
14      this Commission will address because if a case like this ever  
15      happens again I think whoever is in the position of having to  
16      make decisions about what to do will certainly need all the  
17      help they can get.

18      Q. But I take it that you're saying or you have said that you  
19      acknowledge now that there have been public criticism of the  
20      way that the settlement was arrived at and the amount of the  
21      settlement. And, I think, that's what I understood your  
22      evidence to mean that had there been a commission of  
23      inquiry, regardless of your concerns about how that might  
24      have been conducted, but had there been a commission of  
25      inquiry, your feeling was that whatever figure was arrived at

1 as a result of that Commission of Inquiry would have  
2 hopefully been beyond criticism.

3 A. Yes, that's right.

4 Q. Is that correct?

5 A. Yes.

6 Q. So, I'm asking you isn't it accurate to say that had there been  
7 a settlement which had been perceived to have been  
8 generous and speedy that would have been beyond public  
9 criticism as well.

10 A. Not necessarily. It would seem to me that one would have to  
11 still give consideration to the process involved. I don't know  
12 how we could get around that. The more I think about this it  
13 seems to me that if we ever, God forbid, have a case like this  
14 again in the future that there ought to be some clearly  
15 established process for dealing with that issue, and a process  
16 which would hopefully be above reproach or criticism and a  
17 process which, at the same time, would not impinge upon any  
18 other matters that might still be before the Courts.

19 Q. And, would you agree then that there should be guidelines  
20 and perhaps they should all be embodied in the form of  
21 legislation? Would that be what you're basically saying?

22 A. Yes, nobody's judgement on these matters is infallible but I'm  
23 inclined to think that if...if we had legislation on the books,  
24 and it might have to be both federal and provincial,  
25 for...because we're dealing with the criminal law as well, but

MR. GIFFIN, EXAM. BY MS. DERRICK

1 that if there were legislation on the books that dealt with  
2 guidelines for compensation, procedures for addressing the  
3 compensation issue, including possibly a mandatory  
4 requirement for an inquiry of this type as well, and I'm sure  
5 there would be other issues that legislation of that sort would  
6 have to address. But I'm inclined to think that one of the...one  
7 of the areas that really has to be explored is the need for  
8 legislation of that type and what should be in the legislation.

MS. DERRICK

9  
10 Thank-you, Mr. Giffin, those are my questions.

MR. CHAIRMAN

11  
12 Mr. Pink.

MR. J. PINK

13  
14 Thank-you, Mr. Chairman. I have been instructed by Mr.  
15 Pugsley that there will be no questions asked of Mr. Giffin.

MR. CHAIRMAN

16  
17 Mr. Murray.

MR. MURRAY

18  
19 No questions.

MR. CHAIRMAN

20  
21 Now, Mr...

MR. PRINGLE

22  
23 Just a few.

EXAMINATION BY MR. PRINGLE

24  
25 Q. Mr. Giffin, my name is Al Pringle and I'm counsel for the

1 R.C.M.Police.

2 A. Yes.

3 Q. And I want to ask you just a few questions. Your testimony  
4 last week, it's in Volume 58 at page 10,599, you don't have to  
5 refer to it. You testified that you believe the ultimate  
6 authority existed in the Department of the Attorney General  
7 to stop an R.C.M.Police investigation on rare and particular  
8 circumstances or words to that effect, do you recall that?

9 A. Yes.

10 Q. Could you tell us, sir, where you understand the authority for  
11 that proposition to come from?

12 A. I think I would see that as simply being inherent in the  
13 position of Attorney General as being the final authority with  
14 respect to prosecutions in the province with respect to the  
15 administration of justice. Now, as I acknowledged last week I  
16 couldn't set out any circumstances in which...in which I could  
17 think that that power would need to be exercised. But it still  
18 seems to me that the ultimate authority is there.

19 Q. But you have not researched that, in any event, to find a  
20 specific authority for that proposition.

21 A. Oh, no, I haven't done any legal research on that, no.

22 Q. And you agree it would be rare in your own...in your own  
23 thinking.

24 A. Extremely rare. Yes.

25 Q. Would it not be better if there was a perceived problem with

1 a particular investigation to take up the matter with the  
2 senior officers of the Royal Canadian Mounted Police or any  
3 other police force before taking that route?

4 A. Oh, yes, oh, certainly.

5 Q. That would be the first alternative.

6 A. And that would be the normal procedure.

7 Q. Okay. I want to refer you briefly to Exhibit 125, which is  
8 Volume 32, at page 303, and that is a press release, a draft  
9 press release of January 17th, 1984.

10 A. Yes, I don't believe that was ever...

11 Q. No.

12 A. ...was ever put out publicly.

13 Q. I note there was a first draft and a second draft and a third  
14 draft but it was never released, is that correct?

15 A. Yes.

16 Q. On page 303 of the press release, the first paragraph contains  
17 a reference to, and perhaps I'll just read it, refers to the  
18 retention of the files at the Department of the Attorney  
19 General and the fact that they had been destroyed in  
20 accordance with the normal retention provisions. And then  
21 the draft paragraph goes on,

22  
23 It cannot be determined what steps, if any,  
24 were taken by Mr. MacNeil or senior  
25 officials in the Department of Attorney  
General to communicate the November,  
1971, statement given by James William

MR. GIFFIN, EXAM. BY MR. PRINGLE

MacNeil to the Sydney City Police to  
counsel for Donald Marshall, Jr..

You have seen that paragraph.

A. I'm just reading through it again. It's a little messy here.

Q. Right.

A. Yes.

Q. Yes. My question is if you refer to this third draft press  
release, and particularly at page...pages 306 and 307, from  
my reading of that draft it appears that paragraph was  
deleted.

A. Yes, it would appear.

Q. Do you have any...can you give us any explanation as to why  
that would be deleted in the third draft, what reasons?

MR. CHAIRMAN

Which paragraph are you referring to?

MR. PRINGLE

I'm referring to the paragraph, My Lord, in the second draft  
which is the first paragraph on page 303.

MR. CHAIRMAN

Yeah, and then the para...I'm looking at the paragraph at the  
bottom of 306.

MR. PRINGLE

The bottom of 306, yes, My Lord.

MR. CHAIRMAN

While the words may have been changed somewhat, it seems



1 to me the intent is the same.

2 MR. PRINGLE

3 Well, the words that are changed, My Lord, is that there is no  
4 reference to senior officials in the Attorney General's Department.  
5 In the second...the third draft the reference is only to the former  
6 prosecutor, the late Donnie C. MacNeil.

7 MR. CHAIRMAN

8 Yeah.

9 MR. PRINGLE

10 Q. And I'm wondering why the reference to the senior  
11 prosecutor has...or senior officials in the Attorney General's  
12 Department was deleted in the third draft?

13 A. I really can't say why that was changed. I mean this went  
14 through several...

15 Q. Sure.

16 A. ...drafts and then eventually we decided not to make it public  
17 because we felt that we were, particularly with the Ebsary  
18 case still before the Courts, that we better be cautious in any  
19 public statements.

20 Q. Would you agree, Mr. Giffin, that the information that Jimmy  
21 MacNeil came forward with in November of 1971 to the...to  
22 Mr. Matheson and Mr. MacNeil in Sydney, was information  
23 that should, in the normal course, be passed on to defence  
24 counsel?

25 A. Oh, yes, no question.

MR. GIFFIN, EXAM. BY MR. PRINGLE

1 Q. Okay. Thank-you. You gave some testimony last week with  
2 respect to the memo that Mr. Gale wrote on May 13th of  
3 1983, I believe, and that's found in Volume 20, which is  
4 Exhibit 20, at page 4.

5 A. Yes.

6 Q. That is, is it not, sir, the only direction, if you will, that the  
7 Attorney General's Department passed on to the Royal  
8 Canadian Mounted Police with respect to the question of  
9 reviewing the practises of the Sydney Police in the 1971  
10 investigation?

11 10:15 a.m.

12 A. That's correct.

13 Q. And just so we're perfectly clear about the wording, in the  
14 last paragraph, the reference is to review the files, is it not?

15 A. Yes, that's correct.

16 Q. And further in the last few lines of the last paragraph on page  
17 four, the purpose stated to do that is to use it as background  
18 material to advise the Attorney General as to whether or not  
19 there should be any type of inquiry.

20 A. Yes, that's right.

21 Q. Would you agree with me, sir, that if it was the intention to  
22 ask the R.C.M.Police to conduct any kind of investigation of a  
23 matter that had been directed to be held in abeyance, that the  
24 words, instructing words, should be clear and specific to the  
25 R.C.M.Police?

MR. GIFFIN, EXAM. BY MR. PRINGLE

1 A. Yes, that's correct.

2 Q. And do you understand this particular memo, having  
3 reviewed it and issued a press release with respect to it, to be  
4 nothing more than review the files to see what practices that  
5 might reveal.

6 A. That's correct. And, yes, I'm sorry...

7 Q. No, go ahead.

8 A. I was just going to say that I've indicated in my testimony  
9 before that my use of the word "investigation" at the press  
10 conference that I had in Sydney which arose, I think, as a  
11 result of Mr. Murrant's statements that that was incorrect,  
12 that the correct statement is as outlined in the memo.

13 Q. And, of course, if the 1982 investigation by the R.C.M. Police  
14 focused primarily on the release of Donald Marshall, and also  
15 on whether there was evidence there to charge Mr. Ebsary,  
16 there would not be any focus on the Sydney City Police  
17 activities as such, would there, during 1982?

18 A. That's correct.

19 MR. PRINGLE

20 Thank you very much. Those are our questions.

21 MR. CHAIRMAN

22 Mr. Ross?

23 MR. ROSS

24 Thank you, My Lord.

25

EXAMINATION BY MR. ROSS

1  
2 Q. Mr. Giffin, my name is Anthony Ross and I will asking you a  
3 few questions as they relate to Sandy Seale and I will be  
4 asking a few questions as they relate to the administration of  
5 justice and black people in the Province of Nova Scotia. Now  
6 for the benefit of the Commission and to a large degree to  
7 your own benefit, I will indicate to you that the nature of my  
8 job, as I see it, is to try to really put a handle on a ball, there's  
9 no specific place where you can put it and dealing with  
10 something as pervasive as racism, does not give me anything  
11 very specific that I'm going to be able to hang my hat on and,  
12 as such, I will seek your cooperation and your understanding  
13 and perhaps the indulgence of the Commission. Now as far as  
14 Sandy Seale is concerned, you've now had an opportunity to  
15 review the Marshall file and to reflect on the full  
16 circumstances which led to the death of Sandy Seale, the  
17 imprisonment of Marshall, and the ultimate imprisonment of  
18 Ebsary. Is that a fair statement?

19 A. Yes.

20 Q. And in your reflection, does it not appear to you that there  
21 was no emphasis whatsoever on really the circumstances  
22 surrounding the death of Sandy Seale himself?

23 A. I'm sorry, I honestly don't understand that question.

24 Q. Well, doesn't it appear as though they started by the fact that  
25 Sandy Seale had been stabbed and moved forward rather

1 than looking at the circumstances which could have led to the  
2 stabbing of Sandy Seale?

3 A. I'm still not sure that I fully understand what you're saying.

4 Q. Well, perhaps I'll ask another very direct question.

5 A. Yeah, okay.

6 Q. When you were Attorney General, what was your  
7 understanding of why Sandy Seale was stabbed?

8 A. Well, as far as I was concerned as Attorney General, my view  
9 of the matter was based upon the finding of the Appeal  
10 Division of the Supreme Court after the rehearing and I, as  
11 I've indicated before, there were comments in the court's  
12 decision which I regarded as orbiter dicta. But the essential  
13 finding was that Mr. Marshall had not been responsible for  
14 Mr. Seale's death and that the....So that essentially was the  
15 way I viewed the matter.

16 Q. I see. You just took it on face value and didn't look any  
17 further behind that.

18 A. Well, I didn't...Let me put it this way. I did not read all the  
19 transcripts of the various trials. Time would not have  
20 permitted me to do that. But I was satisfied that that was the  
21 finding that had been made by the Appeal Division after they  
22 had heard all of the evidence on the rehearing and as a result  
23 of the reopening of the case and the R.C.M.P. reinvestigation of  
24 it and I was, I just took that finding as given, that that was  
25 the finding the Appeal Division had made and there was no

MR. GIFFIN, EXAM. BY MR. ROSS

1 reason for me to look behind that.

2 Q. I see. Well, if there was no reason for you to look behind it,  
3 why is it that in Volume 33 at page 340, you're sending out a  
4 memo asking about Sandy Seale's criminal record?

5 A. I asked for information about both Mr. Seale and Mr.  
6 Marshall. I don't specifically recall why I asked for the  
7 information at that point in time but that was simply part of  
8 the process that I went through of informing myself about the  
9 matter, you know, as best I could.

10 Q. When you found out that Sandy Seale had no criminal record,  
11 didn't this ring any bells to you that something just might  
12 have gone sideways, or did it matter?

13 A. Well, the entire case mattered a great deal to me, but I was  
14 taking the case on the basis that we had the decision of the  
15 Appeal Division of the Supreme Court. They had heard all of  
16 the witnesses. They had been able to assess credibility of the  
17 witnesses. They had set aside Mr. Marshall's conviction and  
18 on the basis of the R.C.M.P. reinvestigation of the matter, we  
19 had proceeded, or this was before I was in the Department,  
20 the Crown had proceeded with the prosecution of Mr. Ebsary.

21 Q. Yes, but wasn't it also true that even somebody with very  
22 limited legal experience would recognize that what had been  
23 referred to the Appeal Division was a very narrow question  
24 rather than a retrial?

25 A. Well, the specific question, as I understand under that

MR. GIFFIN, EXAM. BY MR. ROSS

1 provision of the Criminal Code was to reopen the issue of Mr.  
2 Marshall's guilt and to deal with whether or not the  
3 conviction that had been entered against him in 1971 ought  
4 to be set aside.

5 Q. I see. Now tell me, what about your relationship with Oscar  
6 Seale? Did he speak to you from time to time about concerns  
7 he had about the reputation of his son being tarnished at this  
8 time?

9 A. I had a meeting with Mr. Seale in the Sydney Cabinet office.  
10 I can't recall the exact date of that, although I'm sure we  
11 could ascertain it if it's of any importance. But perhaps just to  
12 give you a little background on this, the Provincial  
13 Government operates two Cabinet offices, one in Sydney and  
14 one in Yarmouth, and Cabinet ministers go to those offices on  
15 a rotational basis.

16 Q. I guess a very short answer is that you did have a meeting  
17 with Mr. Seale, right?

18 A. Yes, I wasn't sure if you needed that background or not, but  
19 he asked for an appointment with me on one of the days  
20 when I was in the Sydney Cabinet office and that's where I  
21 met with him.

22 Q. Sure, and you met with him and I take it that he discussed  
23 with you the character of his son.

24 A. Yes.

25 Q. And did you make any notes at that time?

MR. GIFFIN, EXAM. BY MR. ROSS

1 A. No.

2 Q. Did you refer it to anybody in your Department to check to  
3 see whether or not there was any merit to the complaints  
4 made by Mr. Seale or the concerns of Mr. Seale?

5 A. Well, the concerns that he expressed to me were, as you have  
6 indicated, we had a fairly long meeting, perhaps half an hour  
7 or even an hour. We were there for quite awhile and I  
8 pointed out to him that the Ebsary case was still before the  
9 courts and that the Provincial Government was giving  
10 consideration to the holding of a full-scale public inquiry into  
11 all aspects of the matter. But, of course, we had not at that  
12 point in time made a final decision on that. I do recall  
13 discussing that with him.

14 Q. But, sir, isn't it true that even if the Ebsary matter is before  
15 the court, an investigation into the background and the  
16 circumstances, the step-by-step circumstances up to the  
17 death of Sandy Seale, that wouldn't, that couldn't in any way  
18 prejudice the Ebsary trial. As a matter of fact, if anything, it  
19 could help it, wouldn't it?

20 A. Well, I would not have wanted the government to get into a  
21 public inquiry on that at that point in time because it seems  
22 to me that that would, indeed, relate to the Ebsary case  
23 because the tragic fact is that all of these proceedings, the  
24 prosecution of Mr. Marshall and the prosecution of Mr.  
25 Ebsary, flowed from the same fact; namely, the death of



MR. GIFFIN, EXAM. BY MR. ROSS

1 Sandy Seale.

2 Q. Well, sir, I mean just taking what you say, wouldn't it appear  
3 that basically a good thing to do to go and determine the full  
4 and complete facts as opposed to being concerned about  
5 prejudicing the Ebsary case?

6 A. Well, I was satisfied on the basis of the discussions that I had  
7 had with senior staff in the department when I went into that  
8 department and on the basis of the decision that had been  
9 rendered by the Appeal Division that Mr. Marshall's  
10 conviction had been properly set aside, that it should have  
11 been set aside, and that a prosecution of Mr. Ebsary ought to  
12 be carried out. That was certainly my understanding of the  
13 situation and I felt that I had enough information and advice  
14 from my senior staff to make that judgement.

15 Q. Sure. Sir, I agree with you that, about the setting aside of the  
16 Marshall conviction, and I agree with you about the  
17 prosecution of Ebsary, but it seems to be sort of walking  
18 around it, the background and the death of Sandy Seale. Was  
19 it that this was not a matter which for some reason didn't  
20 rank very high in importance as far as the department was  
21 concerned, whatever the reason?

22 A. I don't understand your suggestion that we weren't concerned  
23 about the question. I mean the prosecution of Mr. Ebsary was  
24 based upon the death of Mr. Seale and I...

25 Q. Have you been following the proceedings at this inquiry?

MR. GIFFIN, EXAM. BY MR. ROSS

1 A. Well, not in great detail. I've followed news reports and so  
2 on.

3 Q. Have you been briefed on the evidence on a day-to-day  
4 basis?

5 A. Pardon me?

6 Q. Have you briefed on the evidence on a day-to-day basis?

7 A. Oh, no, no.

8 Q. I see. Now you were Attorney General around the time of the  
9 Jarvis case?

10 A. Yes, the case in Weymouth Falls.

11 Q. Yes, you made reference to it here in your testimony.

12 A. Yes.

13 Q. Now in that case, were you aware of the allegation made by  
14 Judge Nichols to the effect that had he known the facts of the  
15 case at the preliminary he would not have committed the  
16 accused for trial because "You know how the black guys  
17 become when they are drinking."

18 A. Yes, I recall that there was an allegation by Mr. Alan Story, a  
19 journalist, that Judge Nichols had made comments to that  
20 effect that had a racist component.

21 Q. Did you investigate or did your Department investigate that  
22 allegation?

23 A. The procedure that was followed was that the matter was  
24 referred by Chief Judge How to the Judicial Council, and that  
25 seemed to me to be the appropriate way to deal with it, an

MR. GIFFIN, EXAM. BY MR. ROSS

1 allegation respecting a judge's conduct, it seems to me it  
2 should be dealt with by the Judicial Council.

3 Q. But you were the Attorney General.

4 A. Yes.

5 Q. Did you ever get any understanding as to whether or not the  
6 statement was in fact made by Judge Nichols, or did it  
7 matter?

MR. CHAIRMAN

9 You're losing me here as well. I assume that the provision in  
10 the Provincial Courts Act of Nova Scotia provides that any  
11 complaint should only be dealt with by the Provincial Judicial  
12 Council. Are you suggesting that an Attorney General should, who  
13 is a very frequent litigant in the courts by virtue of his office,  
14 should undertake that in the place of the Judicial Council?

MR. ROSS

16 I'm not suggesting that for a minute. I would just like to find  
17 out whether or not it was ascertained whether or not this judge  
18 made that comment. Or did it matter?

MR. CHAIRMAN

20 Well, I think...

MR. ROSS

22 You see, My Lord...

MR. CHAIRMAN

24 I think the answer, the question to be put to this witness,  
25 does he know what the findings of the Provincial Judicial Council

MR. GIFFIN, EXAM. BY MR. ROSS

1 were with respect to this complaint?

2 MR. ROSS

3 I'll frame it in exactly those words.

4 MR. CHAIRMAN

5 All right.

6 BY MR. ROSS

7 Q. Do you know what the findings of the Judicial Council were  
8 with respect to this complaint?

9 A. I can't recall the finding word for word but my recollection of  
10 it was that they found that there was not sufficient evidence  
11 before them to establish that Judge Nichols had made the  
12 comment which Mr. Story alleged he had made.

13 Q. I see. But you would agree with me that such a story would,  
14 in fact, be prejudicial.

15 A. Oh, if the...Well, I guess I'm getting into a hypothetical, but if  
16 the...

17 Q. Yes, if it was made.

18 A. If those comments had been made and it were established, as  
19 a matter of fact, that they, if it was established as fact that  
20 they had been made, then I don't think there's any question  
21 that there was a racial or prejudicial component in those  
22 remarks. But by the same token, in fairness to Judge Nichols,  
23 I think we should recognize that that is not what the Judicial  
24 Council found.

25 Q. Absolutely. Absolutely. And further, when a bail application

MR. GIFFIN, EXAM. BY MR. ROSS

1 was made, there was a reference to the accused as being "a  
2 mean drunk". Were you aware of that?

3 A. I recall hearing that exp...I know that that expression was  
4 used by somebody somewhere in the process about...Well, no.  
5 No, I'm not sure if it was about the accused or if it was a  
6 reference to the...

7 Q. Sorry, the deceased. The deceased.

8 A. The deceased. I just have a recollection that somebody  
9 somewhere in the course of that case was alleged to have  
10 made that comment. I don't have any, I wasn't directly  
11 involved in the case, so I'm only going by that recollection.

12 Q. As a matter of fact, sir, I would suggest to you that you wrote  
13 a letter on the 26th of November, 1985 addressed to Rick  
14 Joseph of the Black United Front and with respect to that  
15 comment about "a mean drunk" and I will just, without  
16 putting the whole document before you, is there any  
17 comment of the judge...

COMMISSIONER POITRAS

18 We have a problem here, Mr. Ross.

MR. ROSS

19 They're your documents.

COMMISSIONER POITRAS

20 I think if there is any reference to be made to that, Mr. Ross,  
21 they ought to be entered in the files.

MR. SAUNDERS

MR. GIFFIN, EXAM. BY MR. ROSS

1 I'd like to see it first, My Lord.

2 MR. ROSS

3 Sure, no problem.

4 COMMISSIONER EVANS

5 Well, was this a matter that was referred to the Judicial  
6 Council?

7 MR. ROSS

8 No, it was not referred to the Judicial Council, My Lord.

9 COMMISSIONER EVANS

10 To whom was it referred?

11 MR. ROSS

12 I think it was referred to the Attorney General.

13 COMMISSIONER EVANS

14 Well, maybe you should find that out first or whether this is  
15 just some dream of some journalist.

16 MR. ROSS

17 Or it might be the dream of the Attorney General over his  
18 signature, but I'll take the dream to him. You see, My Lord, I'll  
19 tell you what I'm trying to do. Without, you see, I don't want to  
20 put this witness through any unnecessary embarrassment, but I  
21 think I have got enough to establish...Here is Judge MacDonald  
22 reported in the papers in Sydney speaking about "white cadets  
23 staying out of the black neighbourhood". Here is Judge Nichols  
24 allegedly making one racist statement. Here is...

25 COMMISSIONER EVANS

MR. GIFFIN, EXAM. BY MR. ROSS

1 Now just a moment. the statement, that's what I'm concerned  
2 about. You're making allegations based upon something that I  
3 believe was Mr. Story wrote. And that was referred to the  
4 Judicial Council and they decided that there wasn't evidence...

5 MR. ROSS

6 Not that one, My Lord.

7 COMMISSIONER EVANS

8 ...to support it.

9 MR. ROSS

10 Not that one. Perhaps I'm confusing you. Not that one.

11 COMMISSIONER EVANS

12 Well, isn't that the one...

13 MR. ROSS

14 The story that was referred...No, the story that was referred  
15 to the Judicial Council was the one speaking about "how the black  
16 guys behave when they're drinking". The one that I'm referring  
17 him to is on a bail application.

18 COMMISSIONER EVANS

19 Yes, I understand that. All I say is the one that you referred  
20 to before wound up no place.

21 MR. ROSS

22 Well, that's fine.

23 COMMISSIONER EVANS

24 And now you want to ask him about some reference that was  
25 made at the...

MR. GIFFIN, EXAM. BY MR. ROSS

1 MR. ROSS

2 At a bail hearing.

3 COMMISSIONER EVANS

4 At a bail hearing.

5 MR. ROSS

6 That might also wind up no place. And I only...

7 COMMISSIONER EVANS

8 Well, the first thing is, was it made?

9 MR. ROSS

10 Well, as a matter of fact, if I'm given an opportunity, I'll get it  
11 to him.

12 COMMISSIONER EVANS

13 Go ahead.

14 MR. CHAIRMAN

15 Just so I know where we're going, the first matter that you  
16 questioned Mr. Giffin on was referred to the Judicial Council and...

17 MR. ROSS

18 And we are bound by their decision.

19 MR. CHAIRMAN

20 Yes, and we're through with that now.

21 MR. ROSS

22 Absolutely.

23 MR. CHAIRMAN

24 Now this is a comment made by some other person during  
25 another proceeding but arising out of the...



MR. GIFFIN, EXAM. BY MR. ROSS

1 MR. ROSS

2 The same stabbing.

3 MR. CHAIRMAN

4 The same...

5 MR. ROSS

6 The same homicide.

7 MR. CHAIRMAN

8 Yes, all right. So your question to Mr. Giffin is whether he is  
9 aware of that.

10 MR. ROSS

11 Whether he was aware of that statement. And I'm going to  
12 provide something to refresh his memory.

13 MR. CHAIRMAN

14 Yes, and he said that he remembered hearing or reading  
15 about someone saying that the deceased was "a mean drunk".

16 MR. ROSS

17 Yes.

18 MR. CHAIRMAN

19 And this was said during a bail hearing. Now that's as far as  
20 we have gotten. Mr. Saunders wanted to see some  
21 correspondence that you were about to introduce into evidence  
22 and...

23 MR. ROSS

24 That I was referring to.

25

DISCUSSIONS

1 MR. CHAIRMAN

2       Yeah, have you seen that, Mr. Saunders?

3 MR. SAUNDERS

4       No, I have not.

5 MR. ROSS

6       I'll give it to you in a minute here, My Lord.     Can we break  
7 at this time so that I can make some photocopies and circulate  
8 them?

9 MR. CHAIRMAN

10       Pardon?

11 MR. ROSS

12       Can we break at this point so that I can make photocopies and  
13 circulate them?

14 MR. CHAIRMAN

15       All right.

16 10:36 a.m. INQUIRY RECESSED UNTIL 11:05 a.m.

17 INQUIRY RESUMES - 11:05 a.m.

18 MR. SAUNDERS

19       My Lords, before my friend, Mr. Ross, pursues the inquiry  
20 that he started on before we broke, I wonder if I might say  
21 something to explain the context of what it is I perceive him to be  
22 doing. I think I should inform the Commission that after the  
23 break on February the 3rd of 4th, whenever we had some weeks  
24 off between February and this month, we communicated with my  
25 friend and others to indicate to him and them that certain of our

DISCUSSIONS

1 officials would be testifying in March and we would like to know  
2 which issues or which, if any, other files they wished to explore  
3 with these witnesses so that they could review those files and be  
4 briefed properly and accordingly. I can say to the Commission  
5 that I did not have any reply from my friend to such  
6 communications until last evening when he informed my partner,  
7 Mr. Pink, that there were two files that he intended to explore  
8 with Mr. Giffin. So I wish to advise the Commission that these are  
9 files that I have not reviewed, have not had an opportunity to  
10 discuss or review with the present witness and I'm perfectly  
11 prepared to have Mr. Giffin speak to those if your Lordships  
12 consider it to be relevant, and if that's so, I would ask my friend  
13 to give Mr. Giffin an opportunity to review whatever paper it is  
14 that's thrust upon him so that he can do his best to familiarize  
15 himself with the context in which the documentation was  
16 prepared.

MR. CHAIRMAN

18 The practise that we have...or the practise that has been  
19 followed by counsel up until now, as I understand it, has been a  
20 very salutary one in that there has been complete disclosure well  
21 in advance of any documents that any counsel seek to admit as  
22 evidence in this hearing. That's desirable for a couple of reasons,  
23 not the least of which is we don't waste a lot of time as we've  
24 done this morning, waiting for copies to be made. Secondly, if  
25 counsel has an opportunity to examine documents in advance they

DISCUSSIONS

1 may very well find that there is nothing in the document that  
2 they find objectionable and they simply go in by consent. If they  
3 deem it necessary they could show it to us in advance and we can  
4 decide very quickly whether or not it is relevant to this hearing.  
5 So, I can only ask counsel if they would avoid departing from that  
6 well-established practise that we have been following since this  
7 Commission started its hearings. Now, there is a letter, I gather,  
8 that Mr. Ross seeks to admit in evidence and to question Mr. Giffin  
9 on. And, I presume that letter now has been circulated amongst  
10 Commission counsel.

11 MS. ASHLEY

12 No.

13 MR. CHAIRMAN

14 It hasn't. Have you seen it, Mr...

15 MR. SAUNDERS

16 Yes, I have, My Lord, I've read it.

17 MR. CHAIRMAN

18 Do you have any objection to it?

19 MR. SAUNDERS

20 No, I do not.

21 MR. CHAIRMAN

22 All right. Well, in that case, bearing in mind Mr. Saunders  
23 comment, will you show a copy to Mr. Giffin before he...as it's  
24 being handed around to the others so he can read it while it's  
25 being delivered to other counsel and we might even get a copy

DISCUSSIONS

1 ourselves if we are patient. Thank-you.

2 MR. SAUNDERS

3 My Lord, Of those being circulated. I've only seen one letter,  
4 a letter of November 26, 1985. That's the one I've indicated I  
5 have no objection to. The rest I have not seen.

6 COMMISSIONER POITRAS

7 Let's take a look at the others too then.

8 MR. SAUNDERS

9 Yes.

10 MR. CHAIRMAN

11 All right. We'll start and we'll look backwards. Now, we'll  
12 look at...[documents being perused] Now, are we ready to...

13 MR. SAUNDERS

14 My Lord, I've quickly glanced only now at the other material  
15 in the package being circulated, those being a letter to Mr. Giffin  
16 dated November 4, 1985, the apparent reply from Mr. Giffin dated  
17 November 13, 1985, and another letter to Mr. Giffin dated April  
18 25, 1986, presuming that Mr. Giffin received this correspondence.  
19 I have no difficulty in my friend putting this material before him  
20 and asking for comments. But I do object to what appears to be a  
21 memorandum dated November 4th, 1985. I can't see how that's  
22 the best evidence before this Commission. There appears to be  
23 some communication between a Mr. Clark to a Mr. Joseph  
24 containing commentary on a review of file materials, beliefs,  
25 views, opinions and that sort of thing. And how that's proper...

DISCUSSIONS

1 MR. CHAIRMAN

2 This document, Mr. Ross, of November the 4th was prepared  
3 by the executive direct...or someone for submission to the  
4 executive director of the Black United Front to be used in the  
5 preparation of a submission which was intended to be made to the  
6 then Attorney General, Mr. Giffin, re Mullen trial.

7 MR. ROSS

8 Very true, My Lord.

9 MR. CHAIRMAN

10 Well, how do you propose to...

11 MR. ROSS

12 This was, in fact, forwarded to the Attorney General.

13 MR. CHAIRMAN

14 This was, as well.

15 MR. ROSS

16 Yes, it was.

17 MR. CHAIRMAN

18 I see, all right.

19 MR. ROSS

20 And as far as that is concerned, I hate to allay your fears. I do  
21 not propose to go through this thing in any degree of detail. I  
22 propose really to touch on one or two items. I do not want to try  
23 to re-try the case here.

24 MR. CHAIRMAN

25 No.

DISCUSSIONS

1 MR. ROSS

2 I just want to ...

3 MR. CHAIRMAN

4 Nor do we. All right. Carry on.

5 MR. ROSS

6 Thank-you, My Lord.

7 EXAMINATION BY MR. ROSS [Continued]

8 Q Mr. Giffin, you were given a package of correspondence and  
9 very quickly I would like to raise...to go through one or two  
10 sections with you. I ask you first to turn to the letter of  
11 November 4, 1985, the two-page letter over the signature of  
12 Rick Joseph.

13 MR. SPICER

14 Perhaps just to maintain the order we ought to have these  
15 documents introduced as exhibits before we lose track of them.

16 MR. CHAIRMAN

17 The whole package as exhibit...

18 MR. SPICER

19 Whatever the next number.

20 MR. CHAIRMAN

21 Exhibit 142.

22 EXHIBIT 142 - PACKAGE OF DOCUMENTS \*

23 Q Well, then for the record then, Exhibit 142 is made up of a  
24 two-page letter of November 4, 1985, on the letterhead of the  
25 Black United Front and over the signature of Rick Joseph. It's

1 further a four-page memorandum, again on the letterhead of  
2 the Black United Front, dated November 4, 1985, addressed to  
3 Rick Joseph from George Elliot Clark and it is...and his name  
4 appears on page 4. The third document is a letter on the  
5 Attorney General of Nova Scotia letterhead, dated November  
6 13, 1985, two pages over the signature of the Honourable Ron  
7 Giffin. The fourth document is a letter dated November 26th,  
8 1985, on the Attorney General's letterhead, a four-page letter  
9 over the signature of Ron Giffin. And finally, there is a letter  
10 of April 25, 1986, on the Black United Front letterhead  
11 addressed to the Honourable Ron C. Giffin over the signature  
12 of Rick Joseph. And, sir, returning to Exhibit 142, the first  
13 letter, November 4, 1985, in paragraph 3 Mr. Joseph is  
14 apparently directing you to a meeting and it reads, "The tone  
15 of the meeting was one of frustration, anger and a sense of  
16 injustice." It goes on to say, "There is a growing feeling  
17 among blacks that they are not treated equally by law  
18 enforcement agencies and they do not receive equal  
19 treatment in the court system of Nova Scotia." I take it, sir,  
20 that you read that letter.

21 A. Yes.

22 Q. Would you agree with me that that's a very, very serious  
23 and...a very, very serious allegation?

24 A. Yes.

25 Q. Could you perhaps tell me what, if anything, was done by the



1 Department of the Attorney General to address the concerns  
2 of these people?

3 A. Well, the concerns arose out of the prosecution which had  
4 taken place there and so I responded with specific reference  
5 to, as you can see from the letters of November 13th to Mr.  
6 Joseph and November 26th, and attempted to respond to the  
7 various points that had been raised with respect to the case.  
8 And, there were suggestions made and I think these are  
9 referred to in Mr. Joseph's letter, that the prosecution had not  
10 been adequately conducted and that there were other  
11 problems with the conduct of the trial, and the response that  
12 I gave him, particularly the one of November 26th, 1985, was  
13 intended to respond to those specific concerns.

14 Q. Well, then perhaps I will refer to that letter, the letter of  
15 November the 13th, sorry, November the 26th. On page 2  
16 there is a reference to the jury selection.

17 A. Yes.

18 Q. Were you aware that the proposed panel of jurors for all of  
19 Digby County listed only one black person?

20 A. No, I was not aware of the racial composition of the jury  
21 panel. I don't...there would be no record of that, simply the  
22 jury panel would never be identified or the members of a  
23 jury panel would certainly never be identified on the basis of  
24 race.

25 Q. I appreciate that. But as a matter of fact, was it a concern

1 that there was this allegation that as far as the composition of  
2 the jury panel was concerned that there was racial imbalance.

3 A. Well, the concern which we felt had to be addressed on that  
4 point was simply whether or not the jury selection was  
5 proper and in accordance with law.

6 Q. Sure, I appreciate that.

7 A. And, the report back that we got from the Crown Prosecutor  
8 and so on was that the jury selection had been done properly.

9 Q. Now, referring back to the letter of November the 4th, 1985,  
10 page 2, allegation number 2 was that at least two of the jurors  
11 were close friends of the defendant. Now, you responded to  
12 that in your letter of November 26, 1985, also on page 2, but  
13 from the response it does not appear as though there was any  
14 investigation as to whether or not, in fact, friends of the  
15 accused had been impaneled as part of the jury.

16 A. Well, no, the report that we had was that the...was that Mr.  
17 Justice Burchell had conducted the jury selection properly.  
18 That he had followed all the necessary requirements.

19 Q. I appreciate that, sir, I've got no doubt it was con...the jury  
20 was impaneled consistent with the Court. But what I'm  
21 getting at is that after the trial there is an allegation that two  
22 of the members of the jury were friends of the accused. Now,  
23 is it not your view that this is something that ought to have  
24 been looked at recognizing it's after the fact?

25 A. No, my view and the view of my senior staff was that

1 all...what we had to be concerned about was the...was whether  
2 or not the jury selection had been carried out properly.

3 Q. I see.

4 A. And, that...I was certainly satisfied based on the reports they  
5 gave me that the jury selection had been carried out properly.

6 Q. Sure. And, on page 2 again of the letter of November 4, 1985,  
7 there is an allegation about the character of the victim, the  
8 character and reputation brought into question at the bail  
9 application. Now, I'll start by indicating that I do not know  
10 that there is anything wrong with bringing the character of  
11 the victim in on a bail application, but as far as the utterance  
12 of the Judge is concerned that the victim was a mean drunk.  
13 Did you look into that allegation?

14 A. No. I did not take that statement that is referring to an  
15 individual as being a "mean drunk" as carrying with it any  
16 racial connotation, if that's the point you're trying to get at.

17 Q. But even without racial connotation, wouldn't you agree with  
18 me that that could very well send the wrong message if it  
19 comes from a judge on a bail hearing?

20 A. Well, I think it's important to understand, and I'd refer you to  
21 paragraph number 3 on page 2.

22 Q. I am looking at that, yes.

23 A. That whatever comments Judge Richards made at that time  
24 were not before the jury at the trial.

25 Q. I appreciate that, but when... if that...if the allegation is true,

1           wouldn't it be incumbent upon your department to see  
2           whether or not it had been published and could have  
3           influenced the jury?

4       A.   Well, I was advised that that was not before the jury.

5       Q.   I see.  When you say "not before the jury," you mean during  
6           the trial itself.

7       A.   Yes.

8       Q.   I see..

9       A.   That was the information I had.

10      Q.   What about publication, whether or not it was published after  
11          the bail hearing and before the trial?

12      A.   I'm not aware of any publication to that effect.  But I'm...you  
13          know, I'd have to go back and look at it, but I'm not aware of  
14          anything like that.

15      Q.   And, as far as making or coming to a conclusion that there  
16          was no basis for an appeal in law, is it fair to say that the  
17          persons who advised you in coming to that conclusion were  
18          the very persons who conducted the trial?

19      A.   Well, the information would be obtained on the question of  
20          whether or not to appeal and whether or not there is a  
21          question of law upon which an appeal could be based.  That  
22          information would come from the Crown Prosecutor, from the  
23          R.C.M.P. and senior staff in the Department of the Attorney  
24          General.  In this particular matter it's my recollection that it  
25          was Mr. Martin Herschorn, the assistant director in criminal

1 matters, would then review all of the information and advise  
2 on whether or not there were any grounds for an appeal, and  
3 the advice that Mr. Herschorn gave me was that there were  
4 no grounds for an appeal.

5 Q. Did you check to see whether or not Mr. Herschorn had  
6 actually listened to the tapes and listened to the Judge's  
7 charge to the jury?

8 A. No, much of the information that Mr....I'm assuming that he  
9 wouldn't, but I don't want to presume to speak for him, but  
10 much of the information that he would have received about  
11 the case, the bulk of it I'm sure, would have come from the  
12 Crown Prosecutor.

13 Q. I take it that you accepted...as far as this letter is concerned  
14 the response of November 26th, 1985, is it fair to say that  
15 this letter would have been prepared by your staff, reviewed  
16 by yourself and then signed?

17 A. Yes.

18 Q. And, is it fair to say further that you didn't question your  
19 staff about what...about the content of the letter?

20 A. Oh, we discussed the matter and the particular point that I  
21 was concerned about was whether or not there were any  
22 grounds for an appeal.

23 Q. I appreciate that.

24 A. That was certainly the question that I was posing to my staff.

25 Q. Uh-hum.

- 1 A. Do we have any grounds for an appeal here?
- 2 Q. And the response was that there wasn't.
- 3 A. And the response was that there were no grounds for an  
4 appeal.
- 5 Q. Did you ask them whether or not they had reviewed the  
6 transcript?
- 7 A. The transcript had not been prepared at that point in time.
- 8 Q. Precisely. As a matter of fact, the trial was concluded on the  
9 8th of October, 1965, and that...1985, sorry, and recognizing  
10 that a transcript had not been prepared, did you find out  
11 from your staff if they had listened to the tapes?
- 12 A. No, the point that I should explain in that regard is this, it  
13 would not be practical to prepare a transcript of every  
14 criminal proceeding in time to have the transcripts to assess  
15 them in determining whether or not an appeal should be  
16 commenced. In other words, transcripts from an  
17 administrative point of view in the Attorney General's  
18 Department, transcripts are prepared where there is an  
19 appeal, but the Department would not have the manpower or  
20 the resources or the time to prepare transcripts and have  
21 those into Halifax for consideration within the thirty day  
22 appeal period.
- 23 Q. I appreciate that, sir. I appreciate that. Then wouldn't it be  
24 the practical thing to do when in doubt to file a notice of  
25 appeal and abandon it after you have reviewed the

1 transcript?

2 A. No, I found in my experience when I was practising was that  
3 counsel for the Crown who certainly I can relate to my own  
4 practise, I always kept copious notes of everything that  
5 happened in the courtroom, particularly on items like jury  
6 selection and instructions to the jury, and I always knew the  
7 day the case was over whether or not I had anything there  
8 that I could go to the Appeal Court with.

9 Q. I see.

10 A. And, I mean that's...that's the practical approach that, sure we  
11 have to rely heavily on the Crown Prosecutor in a case  
12 because the Crown Prosecutor was there, heard all the  
13 witnesses, dealt with all of the arguments of admissibility of  
14 evidence and selection of jurors and instructions to the jury  
15 and is obviously the person in the best position to advise the  
16 department whether or not in his view there were any  
17 grounds for an appeal.

18 Q. I agree with that, sir, but in a situation like the Jarvis matter,  
19 where members of the family expressed grave concern and it  
20 was in direct contact with you, would this not be sufficient of  
21 an exception to listen to the tapes or at least to attempt to  
22 preserve the appeal until final determination had been made?

23 A. No, I didn't see any reason to depart from the established  
24 procedures.

25 Q. I see.

1 A. I assume that Mr. Herschorn will be testifying before this  
2 Inquiry and he may be able to provide more detail on the  
3 information that he obtained and upon which he based his  
4 advice to me. But I was satisfied based on their advice that  
5 there was ample evidence before the jury upon which they  
6 could acquit the accused on the argument of self defence.

7 Q. Sure. Getting to the argument of self defence, looking at page  
8 4 of the memorandum of November 4, 1985, from George  
9 Clark to Rick Joseph, one of the things that the Weymouth  
10 Falls Justice Committee was seeking was an inquiry into the  
11 investigation. Did you consider that that request to be  
12 deserving of any merit?

13 A. I considered the request. I don't recall receiving...I don't  
14 recall seeing this memo before, this looks to be an internal  
15 memo for the Black United Front. But I met with the  
16 committee, in fact, I believe Miss Derrick was present at that  
17 meeting, with the committee from Weymouth Falls at some  
18 length. I think we had a meeting of two or three hours in  
19 which they raised a great many questions about the case and  
20 Mr. Herschorn and I, I believe Mr. Herschorn was at the  
21 meeting as well, we attempted to respond to those questions  
22 as best we could in that meeting.

23 Q. So, that you become a little clear on the question of the  
24 memorandum. I'd ask you to turn to your letter of November  
25 26, 1985, page 3.



1 A. Yes.

2 Q. There's a paragraph number 5, and immediately below that  
3 the words appear "Dealing with some of the remaining points  
4 raised in Mr. Clark's memorandum to you." So, I take it you  
5 must have seen it.

6 A. I must...yes, I'm sorry.

7 Q. Sure.

8 A. I stand corrected, I must have seen that.

9 Q. Yes. So, then getting back to the question of the inquiry,  
10 recognizing now that you did see the memorandum.

11 A. Yes.

12 Q. As far as the inquiry into the investigation is concerned, did  
13 you depart...find that deserving of any merit?

14 A. No, I was satisfied based on the information that I had  
15 received from my staff that the R.C.M.P. had conducted the  
16 investigation properly. There was...I didn't see any  
17 suggestion that they had made any mistake in their  
18 investigation. I was satisfied that the case had been  
19 prosecuted properly and I was satisfied that there was  
20 adequate evidence upon which the jury could reach the  
21 verdict that it, in fact, did.

22 Q. Sure. You've answered my question and again you've given  
23 me a lot more than...than I'm asking. Now, perhaps then  
24 you'd look at what is going to be Exhibit 143, and it's a  
25 newspaper report, a Toronto Star report of December the

1 27th, 1985.

2 EXHIBIT 143 - TORONTO STAR REPORT OF DECEMBER 27, 1985

3 Q. You were Attorney General in 1985.

4 A. Yes.

5 Q. Do you recall seeing this article?

6 A. I believe I did. I'm not certain in that recollection. I was  
7 certainly aware that Mr. Story had written one or more  
8 articles about the case.

9 Q. I'm looking at the second column from the left, and just about  
10 at the end of the photograph it goes and it addresses the  
11 composition of the prospective jury panel, and about two  
12 paragraphs below that there is a report that...the reported  
13 quote of the defence lawyer, and here he says, "I wanted a  
14 real red-neck jury," as a matter of fact I will just read that  
15 paragraph. The paragraph reads,

16  
17 'I wanted a real red-neck jury,' defence  
18 lawyer Garson said in an interview. 'I  
picked a Crown type of jury.'

19 Did you react when you saw that statement?

20 A. No. No, that was Mr. Garson's statement.

21 Q. Were you satisfied then that the accused was being tried by a  
22 jury of his peers?

23 A. Well, yes, I was satisfied that the jury selection was done in  
24 accordance with the law. That there were no procedural  
25 errors in the selection of the jury.

MR. GIFFIN, EXAM. BY MR. ROSS

1 Q. And if, in fact, when the accused was being tried by a jury of  
2 his peers, which his own lawyer classified as real red-neck, is  
3 it your view that had Cromwell been on trial that these same  
4 people could have been a jury of his peers?

COMMISSIONER EVANS

5  
6 What was the question?

MR. ROSS

7  
8 That if the victim Cromwell had been on trial, whether or not  
9 this jury would have been a jury of his peers.

MR. SAUNDERS

10  
11 With respect, I don't know how far we can take speculation  
12 on the part of a witness, and it seems to me...

MR. CHAIRMAN

13  
14 In Nova Scotia as in other parts of Canada that a jury panel is  
15 selected by the Sheriff or someone putting his hand down in a  
16 barrel and pulling out a bunch of names without any reference  
17 to...other than address and occupation. I'm...it seems that...I know  
18 of no other way unless you want to refer...to describe people...

MR. ROSS

19  
20 Well, if there is no other way then perhaps we will just  
21 recognize that what exists exists and is going to exist in the future  
22 and I'll just move along, My Lord.

MR. CHAIRMAN

23  
24 Well, I was looking at, you know, this article here and it says  
25 that there are, oh, twenty...in the area presumably a jury list is

MR. GIFFIN, EXAM. BY MR. ROSS

1 prepared periodically for each county in...or each town in Nova  
2 Scotia. And, from that list then names are drawn out of a barrel  
3 and it says, where I did see this, that, "In the area of Digby," I  
4 presume this is where all this happened," that out of a town of  
5 25,000 there are twenty blacks. So, you know, I don't know what  
6 the...the chance of all twenty coming out of the draw I would  
7 think would be rather difficult. But I, you know, that's pure  
8 speculation.

MR. ROSS

9  
10 Well, I don't propose to continue this speculation, but on the  
11 other section it says that there were 700 blacks included in the  
12 area from which the jury...

MR. CHAIRMAN

13  
14 Where there, I see.

MR. ROSS

15  
16 ...was impanelled and...

MR. CHAIRMAN

17  
18 Only one apparently came out of the...

MR. ROSS

19  
20 Or one was put on the list. I'm speaking about the list. The  
21 list of perspective jurors, not what was selected from the box in  
22 the court.

COMMISSIONER EVANS

23  
24 No, but the panel, the panel was selected and out of fifty  
25 there was one black.

MR. GIFFIN, EXAM. BY MR. ROSS

1 MR. ROSS

2 Yes.

3 COMMISSIONER EVANS

4 That's right. A one in fifty.

5 MR. ROSS

6 Yes.

7 COMMISSIONER EVANS

8 And does that bear any relationship to the population?

9 MR. ROSS

10 No, not really.

11 COMMISSIONER EVANS

12 Well, they had 700 but we don't know whether those were all  
13 eligible jurors or not.

14 MR. ROSS

15 Well...

16 COMMISSIONER EVANS

17 If the population is 9,500 I imagine they count heads, don't  
18 they?

19 MR. ROSS

20 Well, I will abandon that question because unless...

21 COMMISSIONER EVANS

22 His...I'd like to ask you one...isn't the policy followed in Nova  
23 Scotia the same as in every other jurisdiction?

24 MR. ROSS

25 It might be, but if it results in injustices all over I am...

MR. GIFFIN, EXAM. BY MR. ROSS

1 COMMISSIONER EVANS

2 That doesn't say it's unjust.

3 MR. ROSS

4 No, no.

5 COMMISSIONER EVANS

6 I don't think it's unjust if...I don't think the colour of one skin  
7 determines whether or not he is going to be a fair and a impartial  
8 juror. Are you suggesting otherwise?

9 MR. ROSS

10 No, as a matter of fact you might be right, My Lord, but  
11 history has taught us that intolerance as far as differences are  
12 concerned could have very far-reaching effects. Now, that's  
13 another debate that might not be appropriate at this time.

14 COMMISSIONER EVANS

15 Okay, let's proceed.

16 MR. ROSS

17 Q. On the question of the inquiry, which was requested, as I  
18 indicated, sir, in a memorandum from Clark it appears as  
19 though three statements were given by the accused. One, on  
20 the date of the shooting, a second one the day after and a  
21 third in court, that no two of these statements were consistent  
22 and as I understand it from the article the first statement was  
23 not taken down in full by the R.C.M.P. and as such could not  
24 be used to impeach the witness. With the second statement  
25 the R.C.M.P. indicated that their tape recording equipment had