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**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. 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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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

MR. GIFFIN, EXAM. BY MR. ROSS

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

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

MR. GIFFIN, EXAM. BY MR. ROSS

1 malfunctioned so that at trial it was just the one statement of
2 the accused. Now, did you look into those allegations?

3 11:39 a.m.

4 A. Well, I think the short answer would be that from my point of
5 view that type of question is the type of question that would
6 be dealt with at the trial. In other words, if there's any
7 question about statements given or not given by a witness or
8 the question of impeaching a witness's testimony, that those
9 are matters to be explored by counsel at the trial.

10 Q. Absolutely, but the article goes on to indicate that the trial
11 Judge Mr. Denne Burchell ruled that the statements were
12 incomplete and could not be used in evidence. And I'm
13 asking you whether or not recognizing that there were
14 incomplete statements taken from the accused, whether or
15 not as far as the general administration of justice was
16 concerned, the Attorney General's Department did not contact
17 the police and say, "Now, wait a minute. You took a statement
18 one day. You took a second statement. And neither of these
19 statements were complete and could be used in a court."
20 That's the inquiry that I'm suggesting.

21 A. Yes, and my response to that would be that I would not see
22 that as a matter that would necessitate a public inquiry
23 because my experience has been that the taking of
24 statements, particularly from accused persons and whether or
25

MR. GIFFIN, EXAM. BY MR. ROSS

1 not statements will be admitted or not admitted at trial, that's
2 an issue which is always fraught with difficulties for
3 investigating officers and which usually, and it's very
4 common, for the courts to rule statements as being
5 inadmissible.

6 Q. I appreciate all of that, sir. I'm going to suggest to you that
7 there was no reference to a public inquiry. All they asked
8 was for an inquiry into the investigation. And what I'd like to
9 know is whether or not there was any such inquiry, whether
10 or not you found it even deserving of merit.

11 A. Well, I don't want to leave the impression that we did nothing
12 because the letter which I sent to Mr. Joseph on November
13 26th attempted to address all of the issues that had been
14 raised. But on the particular point, the fact that a police
15 officer had obtained a statement or a partial statement and
16 the statement had been ruled inadmissible at the trial, that is
17 something which happens all the time because of all the
18 difficulties that are associated with...

19 Q. You've told me that...

20 A. Statements.

21 Q. You've told me over and over and, believe it, I have absorbed
22 that and I've got no difficulty with that. I am asking that in
23 the position, Attorney General's Department is an allegation
24 that the first thing is there's a very serious matter has
25 occurred. Somebody is dead. There is a police investigation.

MR. GIFFIN, EXAM. BY MR. ROSS

1 The results of the investigation cannot be brought to court
2 because of technical flaws and what could be human error in
3 that the statements were not complete and I'm asking you
4 whether or not that was okay as far as you were concerned or
5 was it something to be looked at, recognizing the seriousness
6 of the offence, of the allegation.

7 A. Well, I think I've answered the question as best I can. That is
8 something which happens constantly and the fact is that the
9 taking of statements, particularly from an accused person, is
10 always fraught with difficulties and that very frequently, the
11 courts will rule particular statements to be inadmissible for a
12 wide variety of reasons. So I mean there was nothing out of
13 the ordinary about that. That's something which happens
14 very frequently.

15 Q. If that's your best answer, then I just must take it as given.
16 When you were Minister of Municipal Affairs and responsible
17 for the Human Rights Act, is it fair to say that you had quite a
18 few situations or complaints brought to your attention to the
19 effect that black people were of the view that when they
20 were involved with the legal system that it tended to break
21 down?

22 A. I had many meetings, I'm sure, during the approximately
23 nine months that I was responsible for the administration of
24 the Human Rights Act with not only the people in the Human
25 Rights Commission but also with representatives of various

MR. GIFFIN, EXAM. BY MR. ROSS

1 organizations such as the Black United Front and various
2 members of the black community in the province. I don't
3 recall complaints about the legal system but I do recall a
4 specific matter that we had in Digby County, an allegation of
5 racism in one of the schools there, which we spent quite a bit
6 of time on and eventually did resolve, I think.

7 Q. But as far as the legal system is concerned, are you saying to
8 me that there were not these expressions of concern and, to a
9 large degree, dissatisfaction by blacks with respect to the
10 operation, or their experiences with the legal system? Just
11 limiting it to that narrow question.

12 A. Well, the way I would have to answer you is this, to say that
13 the discussions that we had were not limited to that narrow
14 question.

15 Q. I appreciate...

16 A. There was the much broader...

17 Q. I appreciate that, sir.

18 A. Questions of employment and discrimination and so on. I
19 don't recall, for example, anybody in the black community of
20 Nova Scotia approaching me about any particular matter that
21 was before the courts when I was responsible for the
22 administration of the Human Rights Act. I don't recall
23 anything.

24 Q. And as Attorney General, and drawing on your experiences as
25 Minister responsible for the Human Rights Commission, can it

MR. GIFFIN, EXAM. BY MR. ROSS

1 be said that you were not aware of concerns of black people
2 with respect to their experiences with the justice system?

3 A. Well, certainly at the meeting which we had with the
4 Weymouth Falls Committee, those concerns were expressed to
5 us.

6 Q. And must I take it then that prior to the meeting with the
7 Weymouth Falls Committee, you were absolutely unaware
8 that such complaints existed?

9 A. It's difficult to answer a question put in those terms. I can't
10 say that I was absolutely unaware. Let me respond to it in
11 this way by saying that certainly there are many areas of
12 concern that I think we all as a society have to address in
13 terms of relationships between visible minority groups and
14 society at large. And those are very broad concerns and
15 would relate not just to the administration of justice but to a
16 whole host of other things from employment opportunities to
17 affirmative action and so forth. We're getting into a very
18 wide area here but that, I never saw those issues as being
19 just in the context of a single court case. Many of those are
20 obviously issues that could not be addressed in a courtroom.

21 Q. Would you agree then that they are very broad social issues
22 which from time to time are regulated by the court?

23 A. Yes, in the context of a particular matter, yes.

24 Q. In preparing to give evidence before this Inquiry, and I do
25 not propose to go through the details, short answers if

MR. GIFFIN, EXAM. BY MR. ROSS

1 possible. I take it that you would have reviewed the
2 circumstances which led to the impaneling of the Judicial
3 Committee to address the remarks allegedly made by Judge
4 Nichols?

5 A. In preparing for my evidence here?

6 Q. Yes.

7 A. No, because I was not advised until...

8 Q. Last night.

9 A. Last evening, Mr. Saunders telephoned me at my home and
10 advised me that you would be raising these matters here
11 today. But, no, I did not have an opportunity to go back and
12 review the files. I can give you my best recollection...

13 Q. No, I don't want to get into it. I don't want to get into the
14 recollection. And as far as the remark about the accused
15 being "a mean drunk" is concerned, you recall that having
16 looked at the documents.

17 A. Yes.

18 Q. As far...

19 A. Not the accused, I'm sorry...

20 Q. Sorry, to the deceased.

21 A. That was a reference to the deceased.

22 Q. Sorry.

23 A. Yes.

24 Q. And I take it that you would also have been aware of the
25 allegations of the alleged statements made by Judge Matheson

MR. GIFFIN, EXAM. BY MR. ROSS

1 to the extent that "a fence should be built around the
2 reserve."

3 A. Well, I've heard news reports about that. I'm not sure if I
4 should start commenting on testimony of other witnesses.

5 Q. I just want to know if you heard it.

6 A. I'm aware of the news reports about that.

7 Q. And were you also aware of statements allegedly made by
8 Judge John F. MacDonald to the effect that the white cadets at
9 the Coast Guard College should not...should be...Sorry, the
10 black areas of Sydney should be out of bounds to the white
11 cadets from the Coast Guard College. Were you aware of
12 those?

13 A. No. No, I haven't heard about that.

MR. SAUNDERS

14 (inaudible) that evidence whatsoever.

MR. ROSS

15 Q. And also you were aware of the statements to Judge
16 Cacchione with reference to Mr. Marshall?

17 A. I'm sorry? I'm aware that there were, there was evidence
18 given about conversations between, as he then was, Mr.
19 Cacchione and Judge Anderson, just on the basis of news
20 reports, that's all.

21 Q. Sure, very much so. And as far as Sandy Seale is concerned,
22 you're aware that it was part of the written decision of five
23 judges on the Appeal Court that Seale was involved in a
24
25

robbery.

1
2 A. I've read the decision of the Appeal Division, yes.

3 Q. And there was evidence from Mr. Aronson, Steve Aronson,
4 that the decision went much further than he himself could
5 have even expected and that the conclusions about Sandy
6 Seale being involved in a robbery, to his view, was not based
7 on any evidence.

8 A. I don't recall seeing any news reports about Mr. Aronson
9 saying that, but that doesn't signify anything because I...

10 Q. Precisely. But when you read the decision of the Appeal
11 Court, you were Attorney General at that time.

12 A. Yes.

13 Q. And didn't it occur to you that the conclusions were not based
14 on any evidence?

15 A. I'm having some difficulty in responding to that question. I
16 read the decision of the Appeal Division as one of the things
17 that I did in the course of informing myself about the
18 Marshall case and I think, as I've indicated several times
19 before, there were some portions of the decisions, or
20 particularly the portion relating to Mr. Marshall's own
21 conduct which, in my view, were orbiter dicta. They were
22 not essential to the making of the court's decision and,
23 fundamentally, I was just concerned with what the court's
24 decision was, what the finding was. The finding was that the
25 conviction was set aside.

MR. GIFFIN, EXAM. BY MR. ROSS

1 Q. As far as your department is concerned, was any fault
2 attributed to Sandy Seale?

MR. CHAIRMAN

4 Any what?

MR. ROSS

6 Fault, any fault?

MR. ROSS

8 Yes, was he responsible for what happened to him?

COMMISSIONER POITRAS

10 I've got a problem with that. What is that question again, Mr.
11 Ross?

MR. ROSS

13 I'm asking whether or not as far as his department was
14 concerned was any fault attributable to Sandy Seale as a result of
15 what happened in May of 1971.

COMMISSIONER EVANS

17 Take the report as it stands.

COMMISSIONER POITRAS

19 You mean in the reference, in the decision?

MR. ROSS

21 In general. I'll tell you why, My Lord. I looked at my notes
22 and it was put to Mr. Giffin by Mr. Spicer, he asked him whether
23 or not he ever took the position that Marshall was not the author
24 of his own misfortune and whether or not he took the position
25 that there was no miscarriage of justice and whether or not he

MR. GIFFIN, EXAM. BY MR. ROSS

1 | took the position that, ever took the position that Marshall was
2 | not partially to blame... Sorry, that Marshall was partially to
3 | blame was not a factor in considering the compensation. Now I
4 | don't propose to address the compensation aspect or the
5 | miscarriage of justice, but I would suggest that if Marshall was
6 | partly responsible for what happened, then somebody has had to
7 | be the other part responsible and I wanted to find out whether or
8 | not this was being attributed to Sandy Seale.

COMMISSIONER POITRAS

9 |
10 | Your question, therefore, to the witness would be?

MR. ROSS

11 |
12 | My question to the witness was whether or not the
13 | department did at any time conclude that Sandy Seale was
14 | responsible for what happened to him on the 20th of May, 1971.

MR. GIFFIN

15 |
16 | A. I certainly never reached any conclusion like that.

17 | Q. Do you know wether or not there was a general conclusion
18 | reached in your department?

19 | A. Well, it's difficult to presume to speak for all the individuals
20 | in the department who were involved, but certainly some
21 | people in the department who I assume will be testifying put
22 | forward the view that one of the expressions that was used
23 | about Mr. Marshall was that "he was the author of his own
24 | misfortune," or words to that effect. That was a point that a
25 | number of people made. But as I've indicated, my own view,

MR. GIFFIN, EXAM. BY MR. ROSS

1 my own view was that the comments of the Appeal Division
2 about Mr. Marshall's conduct were orbiter dicta.

3 Q. I hear you. I think I've heard you say that before but it
4 doesn't...If that's your best answer you can give me, I guess
5 I'll just go along. In Volume 33 at page 383, there is a
6 request for a memorandum...Sorry, an inventory. I think it's
7 in the second last paragraph, the one above the one-liner.

8 A. Yes.

MR. CHAIRMAN

9
10 Volume 33, page 383?

MR. ROSS

11
12 Yes.

COMMISSIONER EVANS

13
14 You referred to the question about an inventory?

MR. ROSS

15
16 An inventory, yes.

COMMISSIONER EVANS

17
18 What's the question?

MR. ROSS

19
20 Well, I wanted to draw his attention first. I just want to find
21 out from him now.

BY MR. ROSS

22
23 Q. You were asking for material with respect to Marshall and
24 you wanted an inventory and so forth. I take it by the
25 inventory, you were expecting some form of a list of the

MR. GIFFIN, EXAM. BY MR. ROSS

1 documents that would be available.

2 A. Yes, the materials that were in the department that would be
3 made available to Mr. Justice Campbell.

4 Q. Yes, and as far as that inventory is concerned, is it fair to say
5 that it would be set up with perhaps a date, the document
6 date, who created it, and who it was sent to and what it was
7 about?

8 A. Yes, I assume that there would have been, it would have been
9 for organizational purposes of making sure that we got
10 everything that was in the department and that it was
11 properly organized and made available to Mr. Justice
12 Campbell.

13 Q. Was that inventory ever made available to Mr. Justice
14 Campbell?

15 A. No, I don't believe it was because the negotiations for the
16 settlement began before the Commission got that far along.

17 Q. Was the inventory put together?

18 A. I don't think so. I don't recall ever seeing an inventory. Now
19 I don't, I hasten to add that I don't know what was done
20 within the department in terms of making material available
21 for this inquiry, because that took place after I had left the
22 portfolio. But vis-à-vis the inquiry conducted by, or that
23 would have been conducted by Mr. Justice Campbell if it had
24 proceeded, I don't recall ever seeing an inventory actually
25 prepared for that purpose. But the memo here was just

MR. GIFFIN, EXAM. BY MR. ROSS

1 indicating my intentions in that regard if the inquiry had
2 proceeded.

3 A. Sure, I see. Finally, sir, I ask you to look at the letter of April
4 25, 1986 to yourself from Rick Joseph, part of Exhibit 142, the
5 last document. They're referring here to the Judicial Council
6 and I do not propose to get into that. I'm concerned just with
7 the second last paragraph where Mr. Joseph, as Executive
8 Director of the Black United Front writes:

9 Failure of the Council to answer these
10 questions further adds to the growing
11 frustration that the black community feels
12 when encountering the legal and judicial
 system.

13 You agree with me that that would be a fairly serious concern.

14 A. Yes.

15 Q. And would you agree with me further that the perception of
16 black people, as given in these documents, that they do not
17 get a fair shake by the legal system, is something that ought
18 to be seriously looked at.

19 A. Well, I think whenever there is an allegation that somebody
20 has been treated unfairly in the administration of justice, that
21 that obviously necessitates further inquiry. This particular
22 letter, the one of April 25th, 1986, dealt with the decision of
23 the Judicial Council with respect to the remarks that had been
24 attributed to Judge Nichols by Mr. Alan Story.

25 Q. I appreciate that and I don't...

MR. GIFFIN, EXAM. BY MR. ROSS

1 A. Well, I'd like to complete my answer.

2 Q. Go ahead, go ahead.

3 A. As Attorney General, I had no authority to deal with the
4 Judicial Council on that matter and it just would have been
5 totally inappropriate for me to attempt in any way to
6 intervene with the Judicial Council in those dealings. That
7 was entirely completely in the hands of the Judicial Council.

8 Q. I appreciate that and I wasn't suggesting from you that you
9 should step over that line. As far as the administration of
10 justice in Nova Scotia is concerned, the concerns expressed by
11 black people, wouldn't it have been an appropriate token
12 perhaps to impanel at least some of the black lawyers in the
13 province to see whether or not these concerns of the black
14 community could be put to rest?

15 A. Well, essentially with respect to the Weymouth Falls case,
16 which was the specific one we were dealing with, as I've said
17 before, I was satisfied that there was no need for a public
18 inquiry into that case. On the broader issue, it's something
19 that I think one would always have to take very seriously
20 and I know that this Commission is examining some of these
21 questions and, indeed, as far as I was concerned, it was one of
22 the reasons why the Government of Nova Scotia wanted to
23 proceed with this Commission of Inquiry.

24 Q. I see. So I take it that you were really waiting for a
25 commission to come along, is that your answer?

MR. GIFFIN, EXAM. BY MR. ROSS

1 A. No, that was not my answer. I take very seriously any
2 suggestion that there is racism in the administration of justice
3 in the Province of Nova Scotia and I think that we have to be
4 prepared, however painful it may be for some people, to
5 examine those issues and I have no problems whatsoever
6 with this Commission examining those issues and, indeed, as
7 I've said, as far as I was concerned, it was one of the reasons
8 why the Cabinet decided to go ahead with this Commission.
9 And your suggestion that I was just waiting for a commission
10 to come along is not entirely fair. We had certainly that same
11 year, 1986, that Cabinet approved the establishment of this
12 Commission of Inquiry and it is my recollection the final
13 approval was given after the Ebsary case was concluded at
14 the end of September of 1986 and Cabinet approved the
15 establishment of this Commission in October of 1986.

16 Q. Are we to understand then that from your point of view as
17 Attorney General, you first became aware of the concerns of
18 black people and racial discrimination, racism and the justice
19 system, just in the 1980's? You weren't aware of the
20 allegations before that?

21 A. Well, I'm sure you could go back to the 1960's. I can recall
22 when the Government of Nova Scotia of that day established
23 the, passed the Human Rights Act and established the Human
24 Rights Commission, that that obviously was a direct
25 governmental response to concerns that were being expressed

MR. GIFFIN, EXAM. BY MR. ROSS

1 by members of the black community of Nova Scotia in the
2 1960's about discrimination in a wide variety of areas. I can't
3 recall specifically if that related to the administration of
4 justice, but certainly there were concerns expressed about the
5 relationships, generally, between the black community in the
6 Province of Nova Scotia and the majority. And that was why
7 that was enacted. So certainly the concerns have been there,
8 and I've certainly been aware of concerns about race relations
9 generally in the Province of Nova Scotia since the 1960's.

10 Q. The Province of Nova Scotia funds the, in full, the Legal Aid
11 Services, am I correct?

12 A. I'm sorry, I didn't hear that clearly.

13 Q. You fund Legal Aid in this province, the Province of Nova
14 Scotia?

15 A. Well, there is...

16 Q. The government?

17 A. Assistance from the Government of Canada as well and there's
18 an agreement there.

19 Q. Has anything ever been done actively to recruit black lawyers
20 to work in Legal Aid?

21 A. I can't recall that the Legal Aid Commission has ever
22 specifically done that. Now perhaps you'd have to question
23 the people involved with the Legal Aid Commission. I don't
24 have any recollection of it.

25 Q. What about blacks being involved in the administration of

MR. GIFFIN, EXAM. BY MR. ROSS

1 justice? For instance, the prosecutor's department? Do you
2 know whether or not the Attorney General's Department ever
3 actively tried to recruit black people?

4 A. Well, I think I would have to respond to that in this way. The
5 provincial government has a broadly based affirmative action
6 program which deals with hirings in the civil service right
7 across the provincial government system and one of the
8 components of that program is an effort to insure where
9 possible, where people are qualified, that affirmative action
10 approaches be taken with respect to members of visible
11 minorities, disabled individuals, which is I think a more
12 recent concern but equally important, and that that is
13 something that we try to do on a government-wide basis.
14 Now it's not going to happen overnight but it is something
15 that we have tried to do.

16 Q. Well, I wouldn't ask you whether or not you had ever
17 recommended a black for the bench. I'll just leave it like that.

MR. ROSS

18
19 Thank you very much, sir.

MR. SAUNDERS

20
21 My Lords, before my friend, Mr. Wildsmith begins his cross-
22 examination, I think there is one point I would like to clarify for
23 the record. I'm ever mindful of communications with a witness
24 during the course of the witness's testimony. There was a matter
25 outstanding Thursday last in answer to a question posed by Mr.

MR. GIFFIN, EXAM. BY MR. ROSS

1 Ruby and, with the consent of Commission counsel and my friend
2 ahead of me, I had a single communication with Mr. Giffin on that
3 matter and the communication last evening raised by Mr. Ross
4 was as a courtesy to the witness to advise him of Mr. Ross' two
5 cases that he intended to put to the witness today.

MR. ROSS

7 For the record, My Lord, I would just like to confirm that I
8 take no umbrage whatsoever with Saunders and his conduct in
9 this matter.

MR. CHAIRMAN

11 Mr. Wildsmith?

MR. WILDSMITH

13 Thank you, My Lord.

EXAMINATION BY MR. WILDSMITH

16 Q. Mr. Giffin, my name is Bruce Wildsmith and I'm here for the
17 Union of Nova Scotia Indians. Most of the questions I have to
18 ask you concern Indians, but before I do that, I'd like to just
19 ask you one question about the R.C.M.P. policing agreement
20 relative to an inquiry that the R.C.M.P. made of you a few
21 moments ago. If you have in front of you Volume 40, I'm not
22 sure it has an exhibit number, but it's Volume 40 in the red
23 books. Exhibit 140, for the record. It appears to me, there's
24 a number of agreements in here, that at page 29, you'll find
25 the current R.C.M.P. policing agreement for the Province of

1 Nova Scotia?

2 A. Yes.

3 EXHIBIT 140 - R.C.M.P. CONTRACTS.

4 Q. And if I read this agreement correctly, Clause 21 indicates the
5 term of this agreement runs until 1991. Do you recognize this
6 as the current R.C.M.P. policing agreement for the province?

7 A. Yes.

8 Q. Now counsel for the R.C.M.P. asked you about your authority
9 to stop or become involved in directing a police investigation
10 and I'm wondering if Clause 4, Subsection 1 is, in part, an
11 answer to his question?

12 A. You can appreciate it's been some time since I looked at this
13 agreement. Yes, that would be my understanding of the
14 relationship.

15 Q. So when it talks about the "Commanding Officer of the
16 Provincial Police Service", we go back to the definition section
17 and that is, in fact, a reference to the R.C.M. Police Force.

18 A. Yes.

19 Q. And the commanding officer would be for the Province of
20 Nova Scotia?

21 A. Yes.

22 Q. And it says that "This commanding officer will act under the
23 direction of the Attorney General."

24 A. Yes.

25 Q. And "act under the direction" then would include, in your

1 estimation, instructing to investigate or not to investigate?

2 A. Yes.

3 Q. I also note Clause 7 in this agreement, which appears to deal
4 with the municipal policing and, if I read correctly, 7 Sub. 1
5 says that "the R.C.M. Police are not to provide services in
6 municipalities having a population of more than 1500."

7 12:10 p.m.

8 A. Yes.

9 Q. And that would include the City of Sydney obviously?

10 A. Yes

11 Q. But clause 3 says that the Attorney General, this is as 7 sub 3,
12 "may require the provincial police service to provide
13 temporary assistance or special expertise to other police
14 agencies in the province." Is it fair to say that that would
15 include providing policing services in the City of Sydney, if
16 requested?

17 A. Yes. We frequently had situations in which there were
18 municipal police force strikes and that the RCMP were
19 requested, by the Attorney General's Department...

20 Q. Yes.

21 A. To provide limited municipal policing services during those
22 strikes.

23 Q. So just to summarize the thrust of these comments, it's fair to
24 say that you, when you were Attorney General, could have
25

1 directed an investigation into the Sydney Police Department...

2 A. Yes.

3 Q. And, in particular, officers of it.

4 A. Yes.

5 Q. Is there any costing consequence to the Province under this
6 agreement if you were to look into the Sydney Police
7 Department?

8 A. I can't think of any direct cost, perhaps indirect in the sense
9 that it would be an allocation of resources that might
10 otherwise be used elsewhere. I don't know of any direct
11 increase in the Department's budget, if you will, that would
12 result from that.

13 Q. All right. And just one other question before I leave this
14 agreement. As I read on page 31, "the responsibilities of the
15 RCMP include enforcing the provisions of the Criminal Code in
16 the Province of Nova Scotia."

17 A. Yes.

18 Q. And that is so even though the Criminal Code is a federal
19 statute.

20 A. Yes.

21 Q. And the balance of this relates to provincial statutes and
22 municipal by-laws.

23 A. Yes.

24 Q. I'll come back to this agreement for one other purpose in a
25 moment. Is it fair for me to think that in your role as

1 Attorney General, between the years of 1983 and 1987, that
2 you had some experience with Indians and Indian issues?

3 A. Yes.

4 Q. Without going into those at the moment, what experience,
5 outside your role as Attorney General, have you had dealing
6 with Indians and Indian issues?

7 A. Well I've served for a number of years on a Cabinet
8 committee on aboriginal affairs which consists of a number of
9 Ministers of the Crown and which attempts to deal with
10 various issues that arise as between the native Indians in the
11 Province of Nova Scotia and the Provincial Government.

12 Q. Can I just pause at this time to emphasize this point. There is
13 a Cabinet committee on aboriginal affairs...

14 A. Yes.

15 Q. Made up of Ministers of the Crown?

16 A. Yes.

17 Q. Can you give some indication as to how often they met?

18 A. The meetings seemed to be becoming more frequent. I'd say
19 in the past year that it seems to me that at least once a
20 month.

21 Q. When you were Attorney General would you sit on that
22 committee?

23 A. Yes, I did.

24 Q. And how often during those years did it meet?

25 A. Difficult to think back. Perhaps not quite as often but we

MR. GIFFIN, EXAM. BY MR. WILDSMITH

1 found as we'd become more involved, particularly in the
2 Constitutional issues, that this entire field has been absorbing
3 more and more of our time and attention as we go along.

4 Q. Would minutes have been kept of those meetings?

5 A. I believe so, yes.

6 Q. I believe, My Lords, that was included in documents that I
7 requested and we have Volume 41 now which has a variety
8 of documents in it but, as I read it, there is very little, if any,
9 minutes of Aboriginal Affairs Committee meetings. That's the
10 material that I was interested in seeing and, perhaps, would
11 have found questions to put to this witness as a result.

CHAIRMAN

12
13 It's my understanding from Mr. Giffin's last answer is that he
14 believes there were minutes kept of these meetings.

MR. WILDSMITH

15
16 Yes.

MR. GIFFIN

17
18 I'm under oath. I'd better be careful in what I say. The best
19 way to check that out would be through Mr. Alan Clarke of the
20 Department of Community Services who functions as, in effect,
21 Secretary to the Committee.

MR. WILDSMITH

22
23 Q. Yes. So continuing with your response you had some
24 exposure to Indians and Indian issues through the Cabinet
25 committee on aboriginal affairs?

1 A. Yes.

2 Q. What about through your work as Minister responsible for
3 the Human Rights Commission?

4 A. No, I was, well I shouldn't say no as a blanket no, but I was, I
5 only held that responsibility for about nine months, from
6 October of '78 to June '79. And I...

7 Q. So you don't recall Indian issues coming up during that time.

8 A. No, I don't.

9 Q. What about as a practicing lawyer?

10 A. Oh, yes. Yes, certainly. If I may explain there is an Indian
11 reservation named Millbrook Reservation which is located in
12 Truro...

13 Q. Yes.

14 A. It's in my constituency, so both as a practicing lawyer and as
15 an MLA, too, I deal at that level, certainly over the years
16 have, in different ways, with matters relating to the people at
17 Millbrook.

18 Q. Okay. Thank you. Now you realize that one of the issues that
19 this Commission is exploring is the relationship between
20 Indians and the criminal justice system.

21 A. Yes.

22 Q. And with the background that you've just indicated as a
23 practicing lawyer, citizen of Truro, MLA dealing with the
24 constituents in Millbrook and Attorney General in the
25 Province, are there any observations that you would care to

1 make now to assist the Commission in their deliberations on
2 Indians and criminal justice?

3 A. Well, I think the most important experience that I had in this
4 whole area was when I was representing, along with others,
5 representing the Government of Nova Scotia in the extensive
6 Constitutional discussions that took place vis-à-vis the
7 entrenchment of the right of self-government for native
8 peoples in Canada and I found as I progressed further in
9 dealing with that and in learning about those issues which
10 are, as I'm sure you know as well as anybody in the room,
11 extremely complex and challenging that it seems to me that in
12 the long run the approach that carries with it the most hope
13 for improving the condition of native peoples in our country
14 is the pursuit of the development of self-government. Now,
15 there are many complex issues that play here in terms of how
16 that ought to be entrenched or recognized in the Constitution.
17 But it does seem to me that in the long run that is the
18 approach that holds the greatest promise.

19 Q. And it's fair to say that the Province of Nova Scotia supported
20 a Constitutional amendment on self-government?

21 A. Yes, our position changed as we dealt with the issue. And...

22 Q. Changed for the better or for the worse, if I can put it that
23 way?

24 A. No, I think I would say that it changed for the better. The
25 initial concern that we had, and I know that my predecessor,

1 Mr. How had, was, and many other provincial governments
2 had, was that in recognizing self-government for native
3 peoples in the Constitution that we might be setting up a
4 "third order of government". And so there was ongoing
5 concern about that issue. And the point that kept causing
6 great difficulty at the Constitutional conferences that took
7 place was whether the right of native self-government in
8 Canada is a sovereign right or if it is a right that ought to be
9 recognized within the context of the Canadian Confederation.
10 Several provinces, particularly...

11 Q. Well, perhaps, I didn't want to get too far into...

12 A. Sorry, I could get off, I could spend about three days talking
13 about this.

14 Q. I think we could easily. I think the bottom line that I'm
15 interested in is the proposition that the Province of Nova
16 Scotia supported entrenching aboriginal self-government in
17 some form in the Constitution.

18 A. That's right.

19 Q. That's correct. And that's your personal view as well?

20 A. Yes.

21 Q. And I take it since my question was about Indians and
22 criminal justice you see self-government as a concept that
23 should apply as well to the criminal justice system.

24 A. Yes.

25 Q. Perhaps you could help the Commissioners in explaining that

1 a little bit.

2 A. Well, in the sense that it seems to me that when we're
3 talking about self-government that that has to include control
4 over the administration of justice. That that is one of the
5 essential components of any concept of self-government that
6 I think one would want to talk about. The enormous problem
7 here is with the implementation of that.

8 Q. Yes.

9 A. And particularly I think with the smaller Indian bands, and
10 that would be our situation here in Nova Scotia. We have a
11 comparatively small native population broken up into several
12 small communities and so the development of models of self-
13 government under those circumstances is going to be very
14 difficult. There are fewer difficulties when you're dealing
15 with the very large groupings that we have, for example, in
16 western Canada. But in a province like Nova Scotia, it
17 becomes more difficult.

18 Q. Without getting into too much detail about this I take it that
19 your notion of this concept is that the administration of
20 justice would be in Indian hands on Indian reserves.

21 A. Yes, I think that would be the ultimate result. I don't pretend
22 to have any suggestions as to how we get from here to there
23 because obviously very complex and difficult negotiations are
24 going to be involved in all of this but I see that as the
25 ultimate result.

1 Q Thank you. Now putting aside the question of the
2 administration of justice on Indian reserves in dealing with
3 Indians coming into contact with the system outside of the
4 reserve, would you subscribe to the view that Indians have
5 been treated poorly in the system in the past?

6 A. It's difficult to make blanket generalizations here. It seems to
7 me that when we see an Indian person before the courts and
8 in conflict with the law then what we're really looking at is
9 the end result of centuries of discrimination and exploitation
10 and a long, sad history that ought to be, that is just tragic in
11 its nature. But, so in that sense I suppose if we just look at
12 the administration of justice per se, to some extent we're at
13 the wrong end of the telescope because I think in many cases
14 that when we have native persons coming before the courts
15 that's the end result of what has gone on for generations.
16 Now that's, again, we're into an area that we could discuss at
17 great length.

18 Q Well that's a fair response. Is it also fair, then, for me to
19 think leading from that that you think we could do a better
20 job of dealing with Indian problems when Indians come into
21 contact with the criminal justice system?

22 A. Yes.

23 Q All right. I'd like to direct your attention to a letter that's in
24 Volume 41, at page 43. It's Exhibit 141 as well.

25 EXHIBIT 141 - VOLUME 41 - CORRESPONDENCE FROM ATTORNEY

GENERAL'S DEPARTMENT re INDIAN AFFAIRS

1
2 A. I'm sorry, what was the page number again?

3 Q. Page 43.

4 A. 43?

5 Q. It's a letter written by your Deputy, Gordon Coles, back in
6 1975. It appears that Mr. Coles attended the national
7 conference on Native Peoples in the Criminal Justice System.
8 And I'd like to direct your attention to the third paragraph.

CHAIRMAN

9
10 What page, Mr. Wildsmith?

MR. WILDSMITH

11
12 Page 43.

13 Q. Page 43 of this letter, sorry, paragraph 3 of this letter, Mr.
14 Coles seems to be saying,

15
16 Perhaps more than anything else the
17 Conference did point out the need for
18 attitudinal changes on the part of those
19 involved in the criminal justice system and
20 the need for the system itself to be more
21 sensitive to native peoples who come in
22 conflict with the law.

23 Is that similar to the view that you've just been expressing?

24 A. Yes.

25 Q. And I take it that's a view that you would then subscribe to?

A. Yes.

Q. Would you say from your knowledge of dealing with Mr. Coles

1 that he exhibited the sensitivity and sympathetic attitude
2 that he refers to in this letter when dealing with Indians and
3 Indians' issues?

4 A. Yes. I might say, just to expand on that briefly, that Mr. Coles,
5 perhaps more than anybody else in the Government, was the
6 individual most extensively involved in the Constitutional
7 discussions about the entrenchment of self-government.

8 Q. Yes.

9 A. I think he was more involved on a personal basis than any
10 other senior official in the Government.

11 Q. And I take it from that comment that he was personally
12 supportive of entrenching Indian self-government in the
13 Constitution?

14 A. Well, he had the concern which I had mentioned earlier which
15 I know other governments had expressed about the, whether
16 this would lead to the establishment of a third order of
17 government outside the context of the Canadian
18 Confederation. But he put in untold hours working on these
19 issues to try to find an appropriate formula for amending the
20 Constitution and then, again, this is an area that we could
21 discuss at great lengths but he was very much involved in
22 that but I think it would be fair to say, too, that his views,
23 like my own, and those of our colleagues in Cabinet,
24 tended to progress as those discussions progressed on the
25 Constitution.

1 Q This is the second time you referred to this.

2 A. Yes.

3 Q What do you mean by "progress" or "advance"?

4 A. Well, in the sense that when I first dealt with the issue I had
5 great difficulty with that, with the concept of setting up or
6 recognizing a sovereignty that went completely outside the
7 concept of the Canadian Confederation. But, by the same
8 token, I've recognized for some time now that this is the route
9 that in the long run we have to travel in this country. And so
10 we spent a great deal of our time, in effect, acting or trying to
11 act as brokers between the several provincial governments
12 who took a much more conservative point of view towards
13 the aspirations of native peoples and between the other
14 governments, including the Federal Government, which took a
15 much more open attitude. And we found a lot of time at
16 those Constitutional conferences was spent kept trying to
17 reconcile different points of view and see if we could come up
18 with some amendment to the Constitution that would be
19 acceptable to everybody.

20 Q I take it from your comments so far that you would subscribe
21 to the view that Indians and other aboriginal peoples occupy
22 a unique position in Canadian law?

23 A. Yes.

24 Q And, indeed, in Canadian society?

25 A. Yes.

1 Q. That Indians are unique people with unique problems?

2 A. Yes.

3 Q. Requiring unique solutions?

4 A. Yes.

5 Q. Another issue of interest to me, Mr. Giffin, is the question of
6 whether the Province of Nova Scotia sees Indians as a totally
7 federal responsibility.

8 A. I think that was the traditional attitude that provincial
9 governments took but I found in my own experiences that
10 that attitude is changing. Now obviously from a purely
11 financial point of view a province with limited resources like
12 the Province of Nova Scotia doesn't want to end up in the
13 position of taking on a responsibility which properly belongs
14 with the Government of Canada, simply because we wouldn't
15 have the resources to do that. But having said that I've
16 certainly come to the recognition and I know my colleagues
17 have, that there is a wide range of issues that the Provincial
18 Government has to deal with. Hunting rights is one that
19 comes immediately to mind. And I think that's an excellent
20 example of the kind of situation where the courts have made
21 a ruling that it was really historic and it's now, falls to us as a
22 provincial government to try to deal with that issue.

23 Q. It's fair to say, I guess, then in light of that answer that
24 recognition of the provincial responsibility to Indians has
25 taken some time to evolve in this province.

MR. GIFFIN, EXAM. BY MR. WILDSMITH

1 A. Yes. I think the traditional view always was it's a federal
2 responsibility and if we start becoming involved we may end
3 up taking on responsibilities that we simply cannot handle.
4 But, by the same token I think there's been a practical
5 recognition that many of these issues such as hunting rights,
6 are issues that provincial governments are going to have to be
7 involved with. Now I add another comment to place it all in
8 its appropriate context. There are some representatives of
9 native peoples who are of the view that they don't want to
10 deal with provincial governments...

11 Q. Yes.

12 A. And so that is another complicating factor that sometimes
13 comes into play.

14 Q. Our particular concern is the administration of justice.

15 A. Yes.

16 Q. And I take it that with respect to the administration of justice
17 issues you would see the Province as having a role to play in
18 relation to Indians.

19 A. Yes, very much so.

20 Q. Just for the record, I'd like your comments on, I've got a letter
21 in front of me written by Edmund Morris to the President of
22 the Union of Nova Scotia Indians in 1983 referring to the
23 Government's Speech from the Throne. We could put this...

MR. SPICER

24 I think if you're not going to distribute this I think we ought
25

1 to put it in as an exhibit. It will be easier probably.

2 EXHIBIT 144 - LETTER - 1983 - FROM EDMUND MORRIS TO THE
3 PRESIDENT OF THE UNION OF NOVA SCOTIA INDIANS

4 Q. Again, in light of your answer, I don't want to make a big deal
5 about it, but you have in front of you Exhibit 144. This letter
6 from Edmund Morris refers to the Speech from the Throne, I
7 take it given around February or Mar-, probably February of
8 1983. In paragraph 16, which says,

9
10 My Government fully supports the view of
11 native people that they and their lands are
12 a total federal responsibility.

12 And then he finishes off the letter by saying, "We wanted it to
13 be a clear statement and reference point." I take it from your
14 answer today that that isn't the present position.

15 A. Well, we certainly come to the recognition and I might add,
16 too, that I believe at that time Mr. Morris was chairman of the
17 Cabinet committee of aboriginal affairs. We have never
18 abdicated the legal position of saying that the fundamental
19 legal responsibility vis-à-vis native peoples is that of the
20 Government of Canada under the Constitution. But what we
21 have come to is the practical recognition that there are many
22 issues at play here in which we, as a provincial government,
23 have to play a part. That's one of the reasons why we set up
24 that Cabinet committee was to establish a mechanism within
25 the government for dealing with those areas where the

1 Provincial Government ought to be involved.

2 Q. You do recall the Speech from the Throne having this
3 paragraph in it, do you?

4 A. Well, I can't honestly say that I recall the wording of the
5 1983 Speech from the Throne. I'd have to go back and look at
6 it.

7 Q. But Mr. Morris' position, as Minister of Social Services, made
8 him the main contact person between the Provincial
9 Government and the Indian population?

10 A. Yes, historically the Department of Social Services was the
11 lead department within the provincial government in terms
12 of dealings with native peoples.

13 Q. Okay. Some of the administration of justice issues that have
14 come up and which Mr. Ross touched on include things like
15 legal aid. Is it fair to say, then, in light of your response that
16 you would recognize a provincial responsibility to assist
17 Indians with respect to legal services.

18 A. Oh, yes. The provision of legal aid is under the
19 federal/provincial agreement.

20 Q. Yes. You mentioned the federal/provincial agreement before.
21 We have some documentation in Volume 41, I could refer you
22 to if you wanted to see it, but it seems to suggest that the
23 federal contribution to provincial legal aid across the country
24 is in the magnitude of 45 percent of the total cost. Can you
25 tell us about Nova Scotia?

MR. GIFFIN, EXAM. BY MR. WILDSMITH

1 A. The percentage would be much higher for Nova Scotia. I can't
2 tell you what exactly the percentage is today in the Province
3 of Nova Scotia, but it would be much higher than that.

4 Q. Higher than 50 percent you mean?

5 A. Oh, yes. Yes.

6 Q. Higher than 60 percent?

7 A. Yeah, and I'm darned if I can remember the number. If you
8 know you can tell me but it, we have a pretty good...

9 Q. Well I don't have it here.

10 A. You know, when I was there we certainly had a, what I
11 thought was a good deal with the Federal Government on
12 legal aid.

13 12:34 p.m. *

14 Q. Is that calculated on a per capita basis?

15 A. I believe it is, yes.

16 Q. And the per capita would include Indians?

17 A. I think so, yes, I'd have to go back and check, but I believe it
18 does.

19 Q. Are you aware of any programs whereby Legal Aid lawyers
20 receive training in relation to Indians?

21 A. I'm not aware of any programs, no.

22 Q. We touched a few minutes ago on unique legal problems that
23 Indian have.

24 A. Yes.

25 Q. Yet as far as you're aware there are no courses of instructions

1 or training to familiarize Legal Aid lawyers with those
2 problems.

3 A. I'm not aware of any that the Commission has carried out.

4 Q. Okay. What about the probation service that is part of the
5 Attorney General's Department? Is there a...yeah, I would
6 take it that Indians are included in the general services that
7 are provided by that service.

8 A. Yes.

9 Q. Is there any federal contribution to funding that particular
10 program or service?

11 A. I'd have to check back. I don't recall any federal funding.
12 The probation service is conducted by the Attorney General's
13 Department and paid for by the Attorney General's
14 Department. I'm not aware of any federal participation in
15 that but I stand to be corrected because there may be
16 specific...there may be something specific in there, vis-a-vis
17 providing services on reserves. I'm just not sure.

18 Q. Do you know if there are any particular programs or services
19 within the probation services that are directed towards
20 Indians?

21 A. I don't know of any programs that I would describe as
22 programs per se, but I do know that they do have dealings
23 with native peoples.

24 Q. Yes. As part of the general services.

25 A. Part of the total service.

1 Q. Okay. And do you know if there's any special training
2 provided to probation officers about dealing with Indians?

3 A. Not that I'm aware of, no.

4 Q. Okay. A third area dealing with the administration of justice
5 is the provision of court worker service.

6 A. Yes.

7 Q. I take it that you're generally in favour of the value of such a
8 service.

9 A. Well, as I recall it, that was attempted at one point here in
10 Nova Scotia, I believe in the 1970's.

11 Q. Yes.

12 A. And, was subsequently discontinued. I think it was a victim
13 of budget cuts if my memory is correct. But I don't know if
14 that service is really beneficial or not. It, as I understood the
15 program, it was intended to provide court workers who would
16 assist native persons who were appearing before the courts
17 and that set up some question marks as to what the
18 relationships were, in other words, what the relationship of
19 the court worker is, vis-a-vis for example the Crown
20 Prosecutor or defence counsel, and I think there were some
21 questions about that. It would seem to me that in terms of
22 native persons appearing before the courts that if we can find
23 the ways and means and obviously this would not happen
24 overnight, to encourage native persons to become members of
25 the legal profession and thereby have persons who were

1 trained in the law, as well as knowledgeable of the needs and
2 the concerns of native persons, that in the long run that I
3 think would be a more effective thing than a court worker
4 program. I was never clear in my own mind as to what
5 precisely the role of the court worker would be, vis-a-vis the
6 other participants in the court system.

7 Q. Do I take it from your response that during the time you were
8 Attorney General you looked at the court worker program or
9 gave consideration to it?

10 A. We discussed it, yes, and as I say I have mixed feelings about
11 it. I'm not really sure how effective it really would be. It's
12 something I have an open mind on, but there were some
13 questions, for example, I remember one question arose about
14 what information a Crown Prosecutor, for example, ought to
15 disclose to a court worker who is not a counsel. So, there was
16 some practical problems there. But it's something that
17 certainly we still had under consideration.

18 Q. Well, if I understand your response correctly, what you're
19 saying is the best case scenario is to have Indians represented
20 by Indian lawyers.

21 A. Yes. I think that would certainly be a major improvement if
22 we had a number of native Indians in Nova Scotia who were
23 members of the Bar. I don't believe there are any at the
24 present time. None that I know of.

25 Q. I think that's been the evidence in front of the Commission,

1 but would you not think that court workers who are Indians
2 could provide a useful service in the interim at least, or in the
3 absence of an Indian who is a lawyer?

4 A. I think it's something that we could look at, but I'm not sure
5 that it's...I don't know how beneficial it would be in a practical
6 sense. I'm just not sure about that.

7 Q. You're aware that there's a wealth of experience across the
8 country on court worker programs.

9 A. Other provinces have them, I know that.

10 Q. Yes. And that the province's contribution is only fifty percent
11 under the existing federal program.

12 A. Yes, I'll take your word for that. I haven't looked at that.

13 Q. We have some documentation, which I won't take you
14 through, to the effect that in 1974-75 physical year, 1975-76
15 physical year, the province did contribute towards a native
16 court worker program.

17 A. Yes, that was my understanding. I recall...in fact, I recall
18 seeing court workers in court when I was doing trials at that
19 time.

20 Q. And, at least in the documentation that has been provided in
21 Volume 41 I don't see anything to say that the province's
22 decision not to continue funding or not to fund in the future
23 had anything to do with the ineffectiveness of the program.

24 A. Well, that would have been before I was in the government,
25 so I can't really say.

1 Q. Is there any assessment that was done while you were
2 Attorney General or that came into your possession when you
3 were Attorney General on the effectiveness of the court
4 worker program?

5 A. I don't recall seeing anything.

6 Q. So, did you, in making the comments you made a few minutes
7 ago, are you relying on your impressions or was there advice
8 funnelled to you by your senior staff?

9 A. No, these were just general discussions that took place. There
10 was no research done or that sort of thing, but just general
11 discussions from time to time.

12 Q. Okay.

13 A. Within the department.

14 Q. And, a fourth area dealing with criminal justice is the
15 question of policing. I would take it from comments you've
16 already made about self-government that you would support
17 the idea of Indians policing Indians on Indian reserves.

18 A. Yes.

19 Q. At the moment the policing of Indian reserves, outside of
20 some special situations, is covered by the policing agreement
21 that we looked at in Volume 40.

22 A. Yes. I think that's correct, and there are, as you've
23 mentioned, there are some special arrangements that have
24 been worked out over the years in particular situations.

25 Q. And under the concept of this policing agreement the

1 province now pays for policing service on a number of Indian
2 reserves.

3 A. Yes, I believe that's correct.

4 Q. Okay. We have some correspondence in Volume 41 dealing
5 with the question of Indians policing Indians on Indian
6 reserves. Do you recall that being an issue you dealt with as
7 Attorney General?

8 A. I recall specific situations coming up every now and then, for
9 example, the adequacy of policing on a particular reserve in
10 the province, and I have some recollection of responding to
11 particular situations where, for example, there was a request
12 for additional constables or that sort of thing. Now mind you
13 I'd have to...my memory is not perfect, I'd have to go back
14 and look at those files.

15 Q. Well, maybe I could direct your attention to pages 274 and
16 275.

17 A. Is this Volume 41?

18 Q. Yes. There are minutes of something called a "Tripartite
19 Meeting", a meeting that involved the Department of Indian
20 Affairs, federal, various provincial representatives under the
21 chairmanship of Edmund Morris as Minister of Social Service
22 and representatives of the Indian community. And, on page
23 275 the question of policing on reserves comes up. The
24 second paragraph, "Mr. Gale," who appears to be Mr. Gordon
25 Gale representing your department, indicates, "That the

1 service is not a Provincial responsibility but a Federal
2 responsibility."

3 A. Yes. But it's one that the province has participated in.

4 Q. Indeed through the policing agreement that we just looked at.

5 A. Yes.

6 Q. And there is some reference at the end of it to despite it not
7 being a provincial responsibility a problem is that the police
8 force would not be accountable to the provincial Attorney
9 General's Department. I'm wondering if you subscribe to both
10 of those views or either of them or none of them?

11 A. The second, ah, I'm sorry, I missed your statement about
12 being responsible to the Attorney General.

13 Q. Well, the last sentence says.

14 A. Is that on the same page?

15 Q. Yes. The last sentence of the same paragraph, I'm just
16 referring to that one paragraph. We don't know...never know
17 whether minutes are completely reflective of what's
18 transpired, but the way the minutes are recorded Mr. Gale
19 seemed to raise two things, one is that Indian policing on
20 reserves is not a provincial responsibility. And if I
21 understand what you're saying a few moments ago you don't
22 see it that way now.

23 A. No, I would see it now that if ...if we proceed, ultimately
24 whether it's by constitutional amendment or tripartite
25 negotiations. I think in practical terms it would more often,

1 probably preferably be the latter, that if we're serious about
2 implementing that concept of self-government, then issues
3 like this would have to be addressed, because if we recognize
4 self-government, at least on reserves or however that is
5 worked out, as the process continues and include in that the
6 recognition that the administration of justice would be part of
7 that concept of self-government, then I think once we'd
8 finally get to that stage, you would then be in a situation in
9 which in a genuine self-government situation that the
10 administration of justice, including policing on reserves,
11 would no longer be accountable to the Attorney General.

12 Q. Yes. But in the absence of a constitutional amendment, what
13 you're saying is that the administration of justice on Indian
14 reserves is a provincial responsibility.

15 A. Yes. Yes, as matters stand at the present time.

16 Q. Yes. And so in that respect you're disagreeing with Mr. Gale.

17 A. Well, I think one should be fair to Mr. Gale. He is a civil
18 servant who is stating the situation as he understood it to be
19 at that time.

20 Q. Yes. And indeed, the Speech from the Throne, a matter of
21 months before this said that Indians and Indian lands were a
22 total federal responsibility.

23 A. Yes. And as I've said, it's my view that as we have
24 progressed in our dealings with these matters that we do
25 recognize that the provincial government has a role to play in

1 a number of significant areas.

2 Q. Okay.

3 A. And a role that I think will probably increase in the years
4 ahead.

5 Q. We saw some documentation in Volume 41, I won't make you
6 look it up now, but at page 242 we see Mr. How when he was
7 Attorney General talking about the court worker's program
8 and saying that it was or should be a hundred percent federal
9 responsibility.

10 A. Well, that's a position that any provincial Minister always
11 starts out with.

12 Q. Because of the financial repercussions.

13 A. Yes, sure.

14 Q. Okay. But I take it what you're telling me today is that court
15 workers, if they served a useful purpose, would be part of the
16 administration of justice and would be a provincial
17 responsibility.

18 A. I don't know that I'd want to go all the way on that, but
19 perhaps go far enough to say that the province would be
20 prepared to participate financially in that.

21 Q. Yes. Because it's a component of the administration of justice.

22 A. Yes. Yes.

23 Q. Now during your time as Attorney General, did that include
24 the constitutional conference that you've been referring to?

25 A. Yes, I attended I think all of the constitutional conferences

1 from '84 to '87.

2 Q. And that included the one on the constitutional amendment
3 on self-government for aboriginal peoples.

4 A. Yes, plus a large number of ministerial meetings, as well, that
5 led up to the First Ministers' Conferences.

6 Q. So, with respect to the court worker program now, am I
7 understanding your evidence correctly to be that the reason
8 there was no court worker program implemented while you
9 were Attorney General is because you doubted the
10 effectiveness of the program?

11 A. I wasn't convinced of the effectiveness and the results of the
12 financial side. Certainly from 1982 onward after the
13 recession hit we suffered under budget cuts in every
14 department of the provincial government, and it just became
15 very difficult over the past five or six years to get funding for
16 new programs, or in this case, the reinstatement of a program
17 which had lapsed.

18 Q. Was the court workers program an issue that went out of
19 your hands into Cabinet?

20 A. My recollection is that what discussions we had about that
21 took place in budget meetings with management board. That
22 is that each department under the budgeting system that we
23 have in place makes its budgetary submissions to
24 management board prior to the provincial budget being put
25 into its final form.

MR. GIFFIN, EXAM. BY MR. WILDSMITH

1 Q. So, is it your recollection that you took the court workers'
2 program in to management board?

3 A. I don't recall taking in any documentation on it. Now, we'd
4 have to go back...it's...

5 Q. Were you seeking a budget allocation through management
6 board?

7 A. I don't recall ever specifically asking for one but I can recall
8 that we had some discussions about the program, but the
9 way...I'd have to take a moment to explain the budgeting
10 system to you. It's...it's...

11 Q. Well.

12 A. ...there's an enormous amount of paperwork involved, and I
13 don't think you'd want to get into that here.

14 12:50 p.m.

15 Q. Well, no, I don't think we do either.

16 CHAIRMAN

17 We don't. We don't. Every Minister asks for a lot more than
18 he knows he's going to get.

19 MR. WILDSMITH

20 Q. What I'm wondering is whether this Minister asked for more.
21 Whether, in fact, you went to the Management Board over it.

22 A. I can't specifically recall if we had that. I'd have to show you
23 the type of documentation that we use in those presentations.
24 But, there are hundreds of items in there. I'd have to go back
25 and check and see whether or not we ever included it on

MR. GIFFIN, EXAM. BY MR. WILD SMITH

1 what His Lordship would probably refer to as our wish list.

2 But I'd have to go back and check.

3 Q. I think you can appreciate there's a little ambiguity, at least
4 in my mind, about whether you asked for the money because
5 you think it was a good program or whether you don't ask for
6 the money because you don't think it's a good program.

COMMISSIONER EVANS

8 (Or because you're satisfied that the money's there.)

CHAIRMAN

9 Or alternatively you know that you're not going to get it.

COMMISSIONER EVANS

10 You're not going to get any more.

11 A. Well, yes, that was one of the problems.

12 Q. Okay. What about the Indian policing on reserves. Can you
13 give us some insight into why, ultimately, during your tenure
14 as Attorney General, there was not an agreement to allow that
15 Indian police force to take place?

16 A. It was a matter that we discussed from time to time and it
17 just, we hadn't come to any new approach to it. It was
18 something that had been under discussion. But generally my
19 involvement with that was in terms of specific concerns being
20 expressed. For example, an MLA might approach me about
21 the adequacy of the number of constables on a particular
22 reservation in his constituency or something like that. But,
23 no, I don't recall that while I was there that we had reached a
24
25

1 new agreement on it. It was still something that was under
2 consideration.

3 Q. Well, you know, my sense of it is that it was on the agenda. If
4 we look at these minutes, in 1983, when you became
5 Attorney General. If we look through it had been on the
6 agenda, on the Provincial agenda, for long before you became
7 Attorney General, and all through the four or more years that
8 you were Attorney General, no development took place.

9 A. Yes. And the essential reason for that, again, would be that
10 we were faced, certainly throughout the time I was in that
11 portfolio with very serious financial constraints and it was
12 very difficult to break any new ground. We had to fight for
13 every clerk that we could hire in the Department and so, you
14 know, it was very difficult to get into any new programs.

15 Q. My understanding is that the program would have been paid
16 for, 100 percent, by the Federal Government. There was no
17 financial repercussions and, indeed, it would allow you to
18 reduce the cost of your policing agreement, Exhibit 40, with
19 the RCMP.

20 A. Well that's not my recollection but I'd have to go back and
21 look at the material.

22 Q. Well assuming that it was going to be paid for 100 percent by
23 the Federal Government then do you have any other
24 explanation to offer as to why it didn't happen while you
25 were Attorney General?

1 A. No, I'd have to go back and examine the material.

2 Q. Okay. But what you're saying today is you think it's a good
3 idea.

4 A. Well, yeah, I think that what's happening here is you and I
5 are starting to get into a negotiation which we really shouldn't
6 be trying to do here.

7 Q. I'm trying to get your position on it and I'm trying to find out
8 why it didn't happen in the past.

9 A. Right.

10 Q. Because I'm understanding you to say you're supportive of all
11 these things and yet you were Attorney General for four
12 years and it didn't happen.

13 A. Right. Well, it's a question of being supportive of things but
14 also having to operate within the constraints that we had.
15 And...

16 Q. And I'm trying to get at those constraints...

17 A. Yeah.

18 Q. One of them was financial.

19 A. Right.

20 Q. I'm wondering if there are any others.

21 A. Well, there was also, you know, always the concern about
22 what areas were federal responsibility what areas were our
23 responsibility. And we saw that sort of thing as something
24 that would be negotiated between ourselves and the Federal
25 Government.

1 Q A couple of other points then. The question of getting a
2 release on the compensation issue from Junior's parents.

3 A. Yes.

4 Q Can you tell us whose idea that was?

5 A. No, I can't say who originated it. It came up in the
6 discussions that Mr. Endres and Mr. Coles and myself had
7 during the course of the negotiations. But I can't recall who
8 originally suggested that.

9 Q There's a note in Volume 33, you don't need to look it up, at
10 page 483, that Mr. Endres made of a conversation with Mr.
11 Coles. And at the bottom it refers to getting a release from
12 Junior's parents. Is that fair to think that that probably
13 means the idea came from Mr. Coles?

14 A. Well, I just can't say. That would be consistent with my
15 recollection of the matter.

16 Q It didn't come from you.

17 A. No, I don't recall that I suggested that. My view, as I've
18 indicated before, was that if they were prepared to sign a
19 release then, fine, but if they weren't I didn't want that to
20 stand in the way of the settlement.

21 Q Okay. And I wanted to just get a little clarification about one
22 other comment you made this morning. Mr. Ross asked you
23 about when judges make racist remarks.

24 A. Yes.

25 Q And if I understood your response correctly, your response

1 was that the responsibility to refer those remarks to the
2 judicial council rests with the judiciary itself, presumably
3 with the Chief Judge of the Court that the member serves on.

4 A. Yes. There's perhaps one point I should clarify with respect
5 to that. As I understand it the legislation that established the
6 judicial council provided that the Chief Judge of the Court
7 would refer any matter that he deemed, he or she deemed
8 appropriate to the judicial council. There's also a provision in
9 there for the Attorney General to refer a matter to the judicial
10 council. But it's my understanding that that was only
11 intended to be operative in the situation in which the
12 complaint related to the Chief Judge.

13 Q. Ah, okay. So where you're not dealing with the Chief Judge
14 your understanding, as former Attorney General, is that it
15 was for the Chief Judge of the Court that the member sat on to
16 refer the matter to the judicial council.

17 A. That's correct.

18 Q. Or to put this...

19 COMMISSIONER EVANS

20 Surely it's on the basis of a complaint being made.

21 MR. WILDSMITH

22 Well this is my next question.

23 COMMISSIONER EVANS

24 Have you got the Act? I think the Act says that.

25

1 MR. WILDSMITH

2 No.

3 COMMISSIONER EVANS

4 You'd have to get a complaint from somebody to originate it I
5 would think. From the complaint it would go to the Chief Judge or
6 to the AG.

7 MR. WILDSMITH

8 Q. Well perhaps we can get into an element of argumentation
9 here but is it your understanding, Mr. Giffin, that a Chief
10 Judge should not act on his or her own initiative?

11 A. I don't know of anything in the legislation that would prevent
12 a Chief Judge from acting on his or her own initiative. In
13 other words, one would ordinarily expect that that would be
14 complaint driven. But I don't, I'd have to go back and check
15 the statute. We're perhaps getting into a question of law here
16 but it, I don't understand that as being that restrictive. It's
17 my understanding that a Chief Judge could refer a matter,
18 even if a specific complaint had not been received.

19 Q. And amongst, if I can put it this way, all of the official actors
20 in the justice system, which would include the judges,
21 attorney generals, prosecutors, whatever, the primary
22 responsibility for referring it, would that be of the Chief
23 Judge?

24 A. Yes, that's the way I under the legislation.

25 Q. Thank you. You've already given some evidence about not

1 having a recollection of the regimental dinner and certain
2 comments that were made...

3 A. Right.

4 Q. That Staff Sergeant Wheaton testified about. I think one
5 question that wasn't asked of you is whether there was a
6 senior official in your Department who did refer to the
7 Marshall matter as the "longest running thing since Bonanza."

8 A. I don't, I honestly don't recall ever hearing anybody in the
9 Department say that.

10 Q. During your time in Cabinet, were any Indian issues discussed
11 in Cabinet?

12 A. Oh, yes.

13 Q. Thank you. I won't pursue that further. I just wanted to
14 know whether there was anything there to decide at a later
15 date. My learned friend, Mr. Ross, asked you about the make-
16 up of juries. And without getting into the legalities of how
17 juries are selected today, I wanted to ask you for your views
18 as to whether you have any concern about bias as the result
19 of the make-up of a jury when an accused person is an Indian
20 or Black.

21 A. That's a very difficult question. I would have to assume that
22 if there was a case in which it could be demonstrated that
23 bias had occurred or had influenced a jury's decision that that
24 would presumably provide a basis for another trial...

25 Q. Indeed. But my question really goes to whether before one

MR. GIFFIN, EXAM. BY MR. WILDSMITH

1 goes through a trial with a jury and finds out that information
2 afterwards, whether you have a concern about the way in
3 which jurors are selected now and whether there is a
4 possibility that should be acted upon of bias because of the
5 make-up of juries under the existing system.

COMMISSIONER EVANS

6
7 You're questioning him as to whether he is satisfied with the
8 present Jurors' Act in Nova Scotia?

MR. WILDSMITH

9
10 It ultimately, I guess, would be that. I'm really asking
11 whether he would have a concern because of the way jurors
12 are selected now that bias might creep into the jury when
13 you're dealing with an Indian or a Black accused.

14 A. It's a very speculative question.

15 Q. Well, juries are impaneled every day so I don't think that it's
16 completely speculative.

17 A. No, no, I'm sorry, no. But I mean you're asking me do I have
18 a concern about whether or not there might be bias and that,
19 to me, is highly speculative.

20 Q. Well your concern's either there or not, I guess.

21 A. I'm not sure...Yeah. It's a very difficult question to answer.
22 The, obviously anybody would be concerned if there was a
23 prospect of bias but, by the same token, I'm, I don't know
24 what changes we could introduce into the system that would
25 be workable.

1 Q. Well, I'm not asking about the reform now, Mr. Giffin, I'm
2 only asking about whether there is, in your judgement, a
3 reason to be concerned.

4 A. Well, I suppose it depends on how one relates to one's own
5 experience. I did not encounter in jury trials that I did over
6 the years any suggestion of racial bias on the part of any
7 jurors. Now, it may have been there, I, you can't assert that
8 kind of a negative. But if you're asking me about my personal
9 experience I never encountered it.

10 Q. Well I'm not restricting my question to your experience as a
11 lawyer but your experience as a citizen.

12 A. Well, I think that it's the kind of issue that we always have to
13 try to address because if there's any defect in our system of
14 selecting jurors, particularly in cases involving members of
15 minority groups, then that defect would have to be remedied.
16 But I'm not sure, first of all, if there is a defect in the
17 procedure. We're maybe getting into other areas here of
18 attitudes and education and a lot of other things but whether
19 or not there's any change that one could make in the Jurors'
20 Act that would workable...

21 Q. Yeah, that's one, what you do about it is a different question.

22 A. Would be a serious question. Yes.

23 Q. And I'm not asking you to direct your mind to the solutions at
24 the moment, in fact, I'm not going to ask you about that at all.
25 But I just wanted to know whether you, as a citizen of Nova

1 Scotia, and former Attorney General, do have a concern that
2 accused Blacks or Indians may not receive a fair trial because
3 of the make-up of the jury.

4 A. Yes, and I'm having great difficulty answering that. I guess,
5 first of all, because I'm not sure what we mean by the word
6 "concern".

7 Q. That they won't get a fair trial. That bias will creep in. Racial
8 bias.

9 A. Right. I think that's always a danger in any case involving a
10 representative of a member of a minority group. But it's very
11 difficult to be precise in responding to that kind of question.
12 As having said that it's always a possibility, that that's going
13 to happen. By the same token, the responsibility for ensuring
14 that it doesn't happen, I think, rests, I suppose, upon all of us
15 involved in the administration of justice. And that would
16 include the legal profession, the judges and so on. I don't
17 know if that's much of an answer to your question...

18 Q. Well, I think it is...

19 A. I would always have an ongoing concern about the danger of
20 that happening and I think that's a concern that we all should
21 have and should try to make sure it doesn't happen.

22 Q. So just to summarize that, what you're saying is that it's a
23 realistic possibility.

24 A. Well it's very difficult to respond, again, to that kind of
25 question. I think it's a possibility that we always have to

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1 guard against. I think that would be a more accurate answer.

2 Q. A possibility that something should be done to protect
3 against.

4 A. Yes.

5 MR. WILDSMITH

6 Thank you.

7 CHAIRMAN

8 Mr. Saunders?

9 EXAMINATION BY MR. SAUNDERS

10 Q. Yes, thank you, My Lord. I'll be brief. Mr. Giffin, you spoke
11 this morning about the Cabinet committee on aboriginal
12 affairs. I'm wondering if you can assist me, and the members
13 of the Commission, as to other representation on that
14 committee, sir?

15 A. The chairman of the committee has been the Minister of
16 Social Services, who's now the Minister of Community
17 Services. The Attorney General serves on it. The Minister of
18 Lands and Forests. Myself, as Minister of Education. The, I'm
19 just going around the room trying to remember what other
20 ministers come to those meetings. It would be about eight or
21 ten ministers all together.

22 Q. Is there representation from Federal departments?

23 A. No, no, this is a Provincial Government, it's a Cabinet
24 committee. It's intended to coordinate the dealings that
25 various Provincial Government departments and agencies

1 have with matters relating to native peoples.

2 Q. From time to time there is representation by Chiefs of Indian
3 bands?

4 A. Well, there are meetings that are set up from time to time
5 with, yes, with Chiefs of bands and so forth.

6 Q. Thank you. Could I get you to turn to Exhibit book 125, it's
7 red Volume 32, please? At page 325. And these, I believe,
8 are handwritten notes of Mr. Cacchione, dated November 15,
9 1983.

10 A. Yes.

11 Q. And you'll see that he records, "Will meet privately. No
12 reporters."

13 A. Yes.

14 Q. Was that your understanding of the meeting as well, sir?

15 A. Yes.

16 Q. And tell me, Mr. Giffin, what had you hoped to accomplish by
17 having a one-on-one private meeting with Mr. Cacchione?

18 A. Essentially I was interested in trying to open up a line of
19 communication. Certainly the first thing that struck me when
20 I became Attorney General, and became aware of his request
21 for a meeting that to that point in time no meeting had taken
22 place and I had hoped that by meeting privately and
23 discussing the issues that were outstanding with respect to
24 Mr. Marshall, that we might have been able to develop some
25 mutually acceptable approach to dealing with those.

1 Q. And how was your expectation affected by the disclosure to
2 the media, sir?

3 A. Well, it was affected in the sense that I felt that Mr. Cacchione
4 had broken his word to me and got us off on the wrong foot
5 right from the start.

6 Q. Did you express your annoyance to him?

7 A. Yes, very much so.

8 Q. What, if any, response did he have to that expression?

9 A. I can't recall his precise response. We did proceed from there
10 to a discussion of the issues that he was concerned about on
11 behalf of his client. But I think it would be fair comment to
12 say that the whole meeting just got off on the wrong foot and
13 then never, didn't really, we didn't get anywheres in terms of
14 making any progress.

15 Q. Yes. Did he appear to understand your annoyance?

16 A. Yes.

17 Q. You said last day, sir, that it was a freewheeling discussion
18 with several matters raised for discussion among those
19 present. And I'm wondering if you raised at the meeting
20 your fears about not doing anything which might compromise
21 the Ebsary trials?

22 A. I really can't recall if I mentioned that at that time or not. I
23 just can't recall.

24 Q. In dealing with the Roy Ebsary matter and the trials before
25 the courts why was it that you contacted Mr. Ebsary's counsel,

1 Luke Wintermans, in Florida?

2 A. Well, I did that on my own initiative. My intent was simply
3 to get a sense from him as one lawyer talking to another
4 about how he felt about the case and to try to get some sense
5 of whether this was a matter that might continue to be before
6 the courts for a very long period of time.

7 Q. And having so communicated you came away with what
8 understanding or impression?

9 A. My impression was very clear on that. That he believed very
10 firmly that his client was innocent and indicated that he
11 would pursue any and all avenues that were open to him to
12 continue to contest the prosecution.

13 Q. And as the Attorney General for Nova Scotia, what did you
14 consider your duties to be in protecting the rights of an
15 accused like Ebsary and the sanctity of the trial process?

16 A. Well, just in a very general sense that we certainly didn't
17 want to do anything that was going to, for example, create
18 problems in terms of impaneling a jury. He was, as an
19 accused person, entitled the presumption of innocence. And I
20 was very concerned, there'd already been a great deal of
21 publicity, of course, about the entire case and, in fact, I
22 believe that Mr. Ebsary's solicitor even made some reference
23 to that in one of his notices of appeal. And so I was very
24 concerned that in the entire context of that situation that we
25 might trespass upon his rights, that we might make it

1 difficult, if not impossible, to impanel a jury and to see that
2 he had a fair trial.

3 Q. Thank you. One final subject area, Mr. Giffin. What do you
4 say to any suggestion by some that your Department was not
5 serious about its dealings with the Marshall case or, in
6 particular, obtaining an acquittal and providing
7 compensation?

8 A. Well, certainly my experience in dealing with that matter was
9 that all of the people in the Department who were involved
10 were very serious about it. I know that they, like myself, had
11 great difficulty with the matter as it was so totally
12 unprecedented and it's always, I think, easy to second-guess
13 yourself or for other people to second-guess the things that
14 you do, but, sure, the attitude in the Department was one that
15 this was an extremely difficult matter and an extremely
16 important one and that we'd just have to try and deal with it
17 as best we could.

18 Q. And in that context are there any answers that you've given
19 over the last several days of testimony that you would care to
20 expand?

21 A. Well I can't think of any. I think we've covered everything
22 fairly extensively.

23 Q. I think we have. In light of your evidence, sir, that the
24 Ebsary proceedings not be compromised and the uniqueness
25 of the Marshall case, what efforts did you make to ensure that

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1 Mr. Marshall's claim was dealt with reasonably and
2 honorably?

3 A. Well, on the compensation issue, as I've indicated before we
4 decided to ask Mr. Justice Campbell to undertake that and we
5 did so because we felt that that kind of an inquiry had to be
6 conducted by a judge. We discussed other possibilities. For
7 example, asking a member of the Bar to undertake an
8 appointment and various other possibilities like that but,
9 ultimately, we came to the conclusion that it was the type of
10 issue that was so important to the integrity of the
11 administration of justice, that any attempt to deal with it
12 ought to be carried out by a judge and we also felt, given the
13 involvement of so many judges and members of the legal
14 profession in the Province of Nova Scotia with various aspects
15 of the Marshall case, that it would be preferable to have a
16 judge from outside the Province of Nova Scotia and so that,
17 that was our thinking in asking Mr. Justice Campbell to do
18 that. There was also the practical question that we wanted
19 somebody that wasn't too far away. Getting somebody from
20 Vancouver might have presented some problems for us.

21 MR. SAUNDERS

22 Thank you very much.

23 CHAIRMAN

24 Mr. Spicer?

25 WITNESS WITHDREW

ADJOURNED TO 22 March 1988 - 9:30 a.m.

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 21 day of March 1988 at Dartmouth, Nova Scotia