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

Volume 60

Held: March 22, 1988, in the Imperial Room, Lord Nelson Hotel,
Halifax, Nova Scotia

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

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

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Attorney General of Nova Scotia

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

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

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

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

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

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

Court Reporting: Margaret E. Graham, OCR, RPR

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1 MR. CHAIRMAN

2 Mr. Orsborn.

3 MR. ORSBORN

4 Thank-you, My Lord. One exhibit to be filed prior to starting.
5 It has been distributed. It's a collection of references from
6 Hansard, 1982 to 1983, and I believe the next number is 145.

7 EXHIBIT 145 - REFERENCES FROM HANSARD, 1982 TO 1983

8 MR. CHAIRMAN

9 145, all right.

10 MR. ORSBORN

11 The next witness is His Honour Judge Harry How.

12 HIS HONOUR CHIEF JUDGE HARRY HOW, duly called and
13 sworn, testified as follows:

14 EXAMINATION BY MR. ORSBORN

15 Q. Could I have your full name, please, Judge How?

16 A. It's Henry Walter How, but I go by Harry. Harry How.

17 Q. Henry Walter.

18 A. I beg your pardon?

19 Q. Henry Walter How.

20 A. Yes, yes.

21 Q. And I understand that you are presently Chief Provincial
22 Court Judge in Nova Scotia.

23 A. Yes.

24 Q. And that you were appointed to that position in November
25 1983.

1 A. Yes.

2 Q. I understand that you graduated from law school back in
3 1948, I believe.

4 A. Yes.

5 Q. What school was that?

6 A. U.N.B.

7 Q. U.N.B.

8 A. Very small, "Upper Room" Saint John, almost biblical in size.

9 Q. Really.

10 MR. CHAIRMAN

11 Is that the law school that used to be fondly known as the
12 Saint John Law School?

13 HIS HONOUR CHIEF JUDGE HARRY HOW

14 Yes. Much bigger today, My Lord, than those days.

15 MR. ORSBORN

16 I'm sorry.

17 A. It's much bigger today than in those days.

18 Q. I see. And, were you regarded as a disciple at the time?

19 A. I beg your pardon.

20 Q. Were you regarded as a disciple at the time?

21 A. Oh, I didn't achieve that status.

22 Q. I see. Do I understand that following your graduation from
23 that school you practised in Nova Scotia from 1948 to 1952?

24 A. Yes.

25 Q. Following which you practised in Western Canada for a period

1 of years.

2 A. Yes.

3 Q. And that in 1959 you returned to Nova Scotia and practised
4 until 1978.

5 A. That's correct.

6 Q. And, do I understand that you went into politics in 1970?

7 A. Yes.

8 Q. You were first elected in 1970.

9 A. Yes.

10 Q. For what district, Judge How?

11 A. Kings South.

12 Q. Yes. And you remained as a member of the opposition until
13 1978.

14 A. That's correct.

15 Q. And you formed a member of the government in 1978.

16 A. That's right.

17 Q. Until 1983.

18 A. Yes. Yes.

19 Q. And, do I understand also that from 1978 until 1983 you
20 were Attorney General?

21 A. That's correct.

22 Q. In the Cabinet.

23 A. Yes.

24 Q. What was the date of your appointment to the Bench, Judge
25 How?

1 A. I should have looked it up, but it was early in November of
2 1983.

3 Q. So, certainly from 1959 to '78 you had roughly twenty years
4 of practise.

5 A. Yes.

6 Q. Were were you practising, sir?

7 A. In Wolfville.

8 Q. In the Valley.

9 A. Yes.

10 Q. Were you a sole practitioner?

11 A. No, I was with the Honourable George Nowlan for a number of
12 years and then when he went into politics about the same
13 time I went west, but then I came back and picked up where
14 I left off and...but practised alone. I came back in '59 as you
15 mentioned.

16 Q. Yes. And you practised alone for the...

17 A. Well, most of that time. I guess I had a partner for part of
18 that period of time, but...

19 Q. What type of a practise did you have in those years?

20 A. General practise.

21 Q. Did you do any criminal law?

22 A. Yes, indeed, yes.

23 Q. Do much criminal law?

24 A. I nearly went broke doing it too, but I did it, yes, certainly.
25 Pardon.

1 Q. Did you do much criminal law?

2 A. Yes, indeed.

3 Q. Enough to go broke.

4 A. I beg your pardon?

5 Q. Enough to go broke.

6 A. Well, many couldn't pay but I felt that they deserved
7 representation nevertheless.

8 Q. I see.

9 MR. CHAIRMAN

10 This was before the days of Legal Aid.

11 HIS HONOUR CHIEF JUDGE HARRY HOW

12 It was indeed, My Lord. I had my own.

13 MR. ORSBORN

14 Q. I gather from that that you were acting as a defence counsel
15 on a number of occasions.

16 A. Yes.

17 Q. Did you have occasion also to act as a prosecutor?

18 A. Well, very occasionally, for the Town of Wolfville I perhaps
19 would prosecute a speeding charge or something like that.

20 Q. Municipal prosecutions.

21 A. Yes, but very rarely. I didn't consider that my forte.

22 Q. What did you consider you forte?

23 A. Defence.

24 Q. Defence.

25 A. If any, I guess.

- 1 Q. In the course of your practise, Judge How, did you have
2 occasion to defend any natives?
- 3 A. I can't recall precisely but certainly people other than white,
4 I'm sure I had a number...oh, I know indeed I did, come to
5 think of it.
- 6 Q. You don't really know.
- 7 A. A number of people of the black race, but I don't know
8 whether there were any of the Indian race offhand.
- 9 Q. Yes.
- 10 A. I knew a number of them. I was brought up in Annapolis
11 Royal. There was a reservation right in the field next door.
- 12 Q. Yes.
- 13 A. And I knew many of them in those days when we were
14 growing up there.
- 15 Q. Uh-hum.
- 16 A. Were friends with them.
- 17 Q. When you were in practise as a defence counsel can you tell
18 us what your experience was with respect to disclosure by
19 the Crown of its case?
- 20 A. It was unheard of almost in those days. I...the Crown
21 was...felt that any information they had would be revealed in
22 due course, but not in advance.
- 23 Q. So, when you say in "those days" we're covering certainly
24 from 1959 up until '78.
- 25 A. Yes.

1 Q. Does that comment span that entire period?

2 A. Pretty well, yes, although I think the latter part as one
3 approaches 1978 I think at the time we took office and I
4 became Attorney General that there was a practise to give
5 certain information to the Crown. But I don't think it was as
6 extensive as it became after I was there awhile. I'm not
7 taking credit for that, but I...when it was mentioned to me
8 that this would...or when the subject was raised after I was
9 Attorney General I really had no hesitation in supporting it. I
10 remembered the days when I was in private practise and
11 what a help it might have been at that time. And so, I
12 supported that, and indeed, I think we extended the practise.

13 Q. Uh-hum. In your days as a defence counsel if you asked for
14 statements of prospective witnesses, would you get them?

15 A. A little hard to remember that. I...I'll have to say
16 occasionally. Yeah. If you had a prosecutor that, well, was
17 perhaps more generous than others.

18 Q. Did the practise vary then by prosecutor?

19 A. Yes.

20 Q. And could it vary according to the prosecutor's relationship
21 with a particular defence counsel?

22 A. I would think so, yes.

23 Q. How did that change after you became Attorney General?

24 A. Well, as I say, we made it a policy then that there would be
25 full disclosure, save and except where a witness might...by

1 revealing the name of a witness or what the witness had to
2 say, you might be placing that person in jeopardy.

3 Q. Do you know how soon after you came into office that that
4 became a policy?

5 A. I can't put a precise date on it, no.

6 Q. And was this to be full disclosure on request or full disclosure
7 with the Crown taking the initiative?

8 A. I would have to say it was on request.

9 Q. On request of defence counsel?

10 A. Yes, yes. I don't recall that there was ever a practise where
11 they handed, you know, they handed the Crown sheets, so to
12 speak, or statements to the defence counsel automatically.

13 Q. I see. Now, for some five years you were Attorney General,
14 and I understand that the position is called Attorney General.

15 A. Yes.

16 Q. Do I understand also that that would embrace functions that
17 might in other jurisdictions be given to the Minister of
18 Justice?

19 A. Yes.

20 Q. Could you indicate to us your view of what the respective
21 functions are then of the positions which you held as both
22 Attorney General and Minister of Justice?

23 A. Well...

24 Q. Perhaps take the Minister of Justice side first.

25 A. Well, as you just said, we didn't use that term in Nova Scotia.

1 Q. I understand that.

2 A. We maintained the traditional historic name Attorney
3 General.

4 Q. Yes.

5 A. But as you said it did embrace the functions of both Attorney
6 General and Solicitor General. Take the Attorney General
7 first...the Minister of Justice first. Well, that would, of course,
8 include the administration of the courts mainly, and that
9 would include in turn providing a prosecutorial service. Let
10 me hasten to add that as Attorney General I never considered
11 it appropriate for me personally to go into court as a
12 prosecutor although that has happened in Canada in other
13 jurisdictions. I was never, as I said earlier, attuned to
14 prosecuting in any event, but I didn't consider that if you
15 were in the role to do a role, that you've just outlined, that it
16 would be appropriate either, because you would have some
17 obvious conflicts of interest.

18 Q. Apart from the provision of a prosecutorial service, what, in
19 your view, were the functions of the Attorney General?

20 A. Well, as I said the administration of the...

21 Q. Do you draw a distinction between the two functions, Judge
22 How, between the Attorney General and Minister of Justice?

23 A. No, not really. I think they are...they're almost identical.

24 Q. In your role as looking after the administration of the courts,
25 if you will.

1 A. Yes.

2 Q. Did you consider yourself to be subject to Cabinet direction
3 and Cabinet solidarity?

4 A. No.

5 Q. In your role as providing a prosecutorial service, did you
6 consider yourself subject to Cabinet direction and Cabinet
7 solidarity?

8 A. No.

9 Q. Just imagine for a moment that I'm a ten-year old child, and
10 I'd ask you to explain to me how one could be an Attorney
11 General and a politician as well?

12 A. Well, I suppose one might say it wasn't easy. But I...I viewed
13 the Attorney General as a rather special government or
14 Cabinet role. It was more in what I understood of the
15 tradition...the English tradition. And in England the Attorney
16 General is not, as I have always understood it, even a member
17 of Cabinet let alone sit in Cabinet, let alone attend Cabinet. It
18 is a...it's a, I suppose you might describe it as a quasi-judicial
19 role. That's the way I perceived it. And so, any matters that
20 concerned a decision that Attorney General should make and
21 make alone were never discussed in Cabinet. I would not
22 indulge in it.

23 MR. CHAIRMAN

24 Judge How, in England, I believe, the Attorney General is a
25 Member of Parliament.

1 HIS HONOUR CHIEF JUDGE HARRY HOW

2 Oh, yes.

3 MR. CHAIRMAN

4 But not a member of Cabinet.

5 HIS HONOUR CHIEF JUDGE HARRY HOW

6 Yes.

7 A. So, I tried to in little Nova Scotia maintain somewhat the same
8 attitude or position.

9 Q. Do you have any views on whether or not the Attorney
10 General should be a member of Cabinet?

11 A. Well, I think it was a former Premier that said one time if you
12 excluded people in a small province from everything, you
13 might run out of people to, you know, that would have what
14 you might want in the capability. That Premier was the
15 Honourable Gerald Regan, and I've never forgotten that
16 phrase. I thought it was rather appropriate. I think that in
17 Nova Scotia...I think you can combine the two if you keep in
18 mind the role that you're playing, that you're responsible for.

19 Q. You mentioned, sir, that there were decisions that you would
20 have to take as Attorney General that you would not bring to
21 Cabinet. What sorts of decisions are you thinking of?

22 A. Well, say a prosecution.

23 Q. Uh-hum.

24 A. In particular that might be one of the more outstanding ones.
25 An appeal.

1 Q. When you say "an appeal" you...

2 A. Whether or not an appeal would proceed.

3 Q. Whether or not an appeal would go ahead.

4 A. Yes.

5 Q. Yes.

6 A. Those are examples. We had some occasional difficult
7 decisions there but I've...but they were not ones that I could
8 share with or take any counsel with my fellow members of
9 Cabinet.

10 Q. Are there types of decisions on which you might want to
11 consult, not take direction from, but consult your Cabinet or
12 your colleagues to determine whether or not any public
13 interest should affect the decision, and an example that I can
14 think of if, for example, there were some labour unrests and
15 you were considering a prosecution but you wonder whether
16 or not those prosecutions are in the overall public interest. In
17 a decision of that nature would you ...would you consult with
18 your colleagues?

19 A. No, I don't think so. I would say that if it involved a question
20 of public expenditure then I would feel it was appropriate,
21 once I had determined to make a...determined on a
22 recommendation to Cabinet then I would feel it was
23 appropriate, of course, to take it to them because I asking for
24 their support in making that expenditure.

25 Q. Yes. Would you brief...

1 MR. CHAIRMAN

2 Before you leave that, do you mean, Judge How, expenditures
3 that are...that had not been budgeted for?

4 HIS HONOUR CHIEF JUDGE HARRY HOW

5 Yes.

6 MR. CHAIRMAN

7 The ordinary witness fee, jurors' fees that automatically flow
8 from a prosecution would not be...

9 HIS HONOUR CHIEF JUDGE HARRY HOW

10 No, if we had budgeted...we had a budget for them, no, I
11 wouldn't...I wouldn't have to.

12 MR. CHAIRMAN

13 No.

14 MR. ORSBORN

15 Q. Thank-you. Would you brief your colleagues and I'm
16 thinking right now of Cabinet, as to on-going investigations?

17 A. No.

18 Q. Would you brief the caucus?

19 A. No.

20 Q. Brief the Premier?

21 A. No.

22 Q. Would you brief the Cabinet as to your intentions once you've
23 determined them and to lay charges in any particular case?

24 A. No.

25 Q. Your colleagues?

1 A. Likewise, no.

2 Q. Caucus?

3 A. No.

4 Q. Premier?

5 A. No.

6 Q. Are you able to describe for us your own management style
7 in running the Department of Attorney General and what I'm
8 thinking of is whether you took an active sort of hands-on
9 approach or whether it was a more delegated laid-back
10 approach?

11 A. Well, I...hard to judge yourself, but I delegated a good deal,
12 perhaps because I didn't consider myself the greatest of
13 managers. So, in a way, I had...it was a blend, hands on in
14 terms of perhaps people's complaints, say, to the Department.
15 I would want to know those...of those, and...but when it came
16 to...when it came to the daily administration of the courts, and
17 indeed the prosecution service, I left that to the...to those
18 officials, the deputy and...or directors to manage. May I add
19 that I understood from others that had held that role that
20 that was generally their practise too.

21 Q. As the minister, Judge How, were you responsible for the
22 positions and actions and decisions of your own officials?

23 A. Well, I suppose, yes, I think you...in legally speaking as you
24 are, even though you may not know what has been done, but
25 I suppose you have the ultimate responsibility.

1 Q. And would that include responsibility for the positions taken
2 by your prosecutors?

3 A. Well, I suppose in the delegated sense, yes.

4 Q. Who would you be responsible to?

5 A. I beg you pardon?

6 Q. Who would you be responsible to?

7 A. Well, I never quite decided that. I...I don't know as I was, in
8 theory at least, that I was responsible to anyone, unless it's a
9 higher power of some kind.

10 Q. Back from the law school days?

11 A. Pardon.

12 Q. From the law school days?

13 A. But really I suppose the Premier may be in a sense, but again,
14 as I explained, in my view it's a very independent role.

15 Q. In what sense would you be responsible to the Premier?

16 A. Hum?

17 Q. In what sense would you be responsible to the Premier?

18 A. Well, only as a member of his Cabinet. I mean he could...if he
19 didn't like what I did, he would have the right to suggest that
20 I might step aside, I suppose that's the only thing I can see
21 that he would say. I mean I didn't, as I outlined before, he
22 was not my confidante in terms of the operation of the
23 Attorney General's Department. I don't know whether I
24 covered that...answered that, but...

25 Q. Perhaps.

HIS HONOUR CHIEF JUDGE HARRY HOW, EXAM. BY MR. ORSBORN

1 A. I suppose perhaps the Minister of Justice in Ottawa might
2 be...might be one of...one of my...

3 Q. The person that you'd be responsible to.

4 9:56 a.m.

5 A. I don't know in what way. I never had occasion to test it.
6 But I suppose it being a central government and he being the
7 Minister of Justice for Canada might have some kind of a
8 responsibility for.

9 CHAIRMAN

10 I take it that last comment is without prejudice.

11 HIS HONOUR CHIEF JUDGE HARRY HOW

12 Yes, indeed. I'm not so sure that all provinces would agree
13 with that theory but I never had occasion to test, to determine
14 who was my ultimate boss.

15 MR. ORSBORN

16 Q. Were you under the impression that if you made a
17 prosecutorial decision that the Premier did not like that he
18 could remove you from Cabinet because of that?

19 A. I suppose in theory, he could. He never did, but I suppose it
20 would be his right to remove me for any reason that he felt
21 was appropriate. But he's very understanding. He gave me
22 considerable latitude.

23 Q. I'm sorry?

24 A. He always gave me, he seemed to give me plenty of latitude.

25 Q. In what respect, sir?

1 A. Well, I meant in political terms.

2 Q. You're speaking in terms of prosecutorial decisions?

3 A. Well, I was kind of frank sometimes and some statements
4 that I made publicly, that's what I mean. And he was always
5 tolerant of those. But it had nothing to do with the
6 management of the Department of the Attorney General, as I
7 said.

8 Q. In respect of your communications with your officials in your
9 Department, would you have communication, direct
10 communication with officials other than the Deputy?

11 A. Yes.

12 Q. So it would not be necessary for all communications to be
13 routed through your Deputy from you.

14 A. That's right.

15 Q. It's said by some when they look at civil services and
16 bureaucracies and whatnot that, well, "Ministers come and go
17 but really the Deputy runs, or the bureaucracy and the
18 Deputy run the Department."

19 A. Well..

20 Q. What was the situation in your Department?

21 A. The, I had a Deputy with whom I consulted very frequently.
22 His office was right nextdoor. As I said, we are a small
23 province, a small department accordingly, and so I did have a
24 good deal of communication with him and took his advice on
25 many, many occasions on matters and, but, the other hand, he

1 was not of the attitude that no one was to talk to me other
2 than through him. And so I had it on a first name basis with
3 most of the senior people in the Department and many of the
4 staff besides. And they would come. If they had a matter
5 they thought I should know about and call up and come in.
6 Or just come in. I had sort of an "open door" policy, you might
7 say.

8 Q. We've had some evidence before the Inquiry, Judge How, that
9 there was an existence at least at some time in the
10 Department of a filing system which included green striped
11 files for sensitive matters that there was limited access. Do
12 you have any knowledge of such a system?

13 A. No, I can't remember any such files. No. I must, I might add
14 here, it's perhaps appropriate, a point that I had, and I think
15 my predecessors in the Attorney General's role had a policy
16 that no files were to be given out that contained, no files, no
17 police reports were to be made public and the reason for that
18 was that if you did, you allowed it, then you would destroy
19 the confidentiality in which those files were, that information
20 was obtained and, indeed, destroy the future effectiveness of
21 the police. We followed a traditional position on that.

22 Q. Do you remember what your first knowledge was of the
23 Marshall case, sir?

24 A. Well I think in the early part of 1982, perhaps February of
25 '82, that's as close, I think, as, it may have been March, but it

1 was one of those two months, I think, when I first became
2 aware of the Marshall case we'll call it for moment.

3 Q. Yes. There is a...

4 A. Marshall conviction.

5 Q. There is a reference in Exhibit 145 which is the Hansard
6 dated March 24, 1982. And you do say in the House that you
7 became aware of the matter yesterday, which would be the
8 23rd of March. And from the...

9 A. My memory's a tad better than I thought, but that's good.

10 Q. From the documents we have that suggests that March 23rd
11 was the first day that a report had come to your Department
12 from the RCMP. So that should, that sounds accurate.

13 A. Yes.

14 Q. Do I understand, then, that you would not have been involved
15 in the decision to involve the RCMP in the re-investigation in
16 1982 because they had already started when you found out
17 about it.

18 A. Yes, I would agree. That's my recollection.

19 Q. Did you consider this a unique case when it arose?

20 A. Oh, very definitely.

21 Q. Anything like that ever happen to you in the Department
22 before?

23 A. No. No.

24 Q. Did you request and receive regular briefings from your
25 officials as to the progress of the investigation?

1 A. I got them. I can't remember when I particularly requested
2 them but I got them because, for the reason you just
3 mentioned. This was a fairly, really unusual one. It had
4 never occurred in the Province of Nova Scotia to our, to my
5 knowledge, nor any knowledge I gained.

6 Q. Did you have any direct contact yourself with the RCMP?

7 A. No. The practice was that Mr. Gale, Gordon Gale, the Director
8 of Criminal Prosecutions, was the contact person for the
9 Department with the RCMP normally. And as a matter of fact,
10 his schedule included a weekly meeting with them, with a
11 representative of the RCMP. Generally their chief, I was going
12 to say, chief investigating officer of the RCMP.

13 Q. Would you attend those meetings, sir?

14 A. No.

15 Q. We've had other evidence, Judge How, of a routine in the
16 Attorney General's Department, certainly in earlier years,
17 where the deputies and the senior solicitors would sort of
18 have a morning coffee and discuss the events of the day
19 pretty well routinely. Do you know if that practice existed in
20 your time?

21 A. I didn't know if I did. I wouldn't have had any objection if
22 they had wanted to, you know, the senior people to have a
23 coffee like that, but I didn't participate or did I know.

24 Q. Okay. You would have had access to the RCMP reports as they
25 were coming into the Department, I take it, the Marshall

1 reports.

2 A. Well, I would have had access but I seldom saw them.
3 Generally they would, you know, there'd be a memo
4 summarizing what they had said for my attention. And I
5 didn't, you know, go through the file, as a rule. I don't recall
6 any particular instances where I did. But there may have
7 been some. But it would be rather rare.

8 Q. Given it was such a unique case would you not have wanted
9 to see the first-hand information as it came in?

10 A. Well, you, for one thing, that you said much earlier, you have
11 many, you wear many hats as a politician and as Attorney
12 General, or member of Cabinet. And so I didn't really budget
13 the time for that sort of thing. And moreover, I didn't feel it
14 necessary because I had a very, what I considered,
15 competent staff. And I'm not saying that in a flattering sense,
16 it just is a reality. And so I found them to be very
17 informative and, to my knowledge, they kept me fully
18 informed.

19 Q. Did you provide any direction or advice to your officials as
20 the investigation was proceeding?

21 A. I don't recall doing that, no. See, I want to say Mr. Orsborn,
22 that I took the view, a traditional view, that, in fact, the
23 British or English practice, that the police have the unfettered
24 right to investigate any matter that they may deem
25 appropriate for their attention. And that the Attorney

1 General is in, was, in any view, not, it was not appropriate for
2 him, or he was not at liberty to intervene in that regard.

3 Q. What was your understanding of what the police were doing?
4 What were they investigating?

5 A. Are you speaking of the Marshall case?

6 Q. Yes.

7 A. Marshall. Well, they were investigating an allegation from
8 the solicitor for Mr. Marshall. And the allegation was that the
9 Mr. Marshall was improperly convicted of the charge of
10 murder, of the murder of Sandy Seale. And as I got it at the
11 time, if my memory is correct, some of these details, of
12 course, are hard to recall. But that a, that there were
13 witnesses who had changed their testimony. I've forgotten
14 how many that I would have, that have been mentioned to
15 me at the first, and that, indeed, there was evidence that
16 someone other than Marshall had done, had committed the
17 crime.

18 Q. Is it fair to say that you understood that they were
19 investigating, number one, whether or not in their view Mr.
20 Marshall was innocent of the crime of murder?

21 A. Yes.

22 Q. Is it also fair to say that in your view they were investigating
23 whether or not another individual should have been, or
24 should be charged with that offence?

25 A. As I recall there seemed to be the sort of twin approach by

1 the police.

2 Q. In your view were they investigating, in any manner, the
3 reasons why Mr. Marshall had been charged and convicted in
4 the first place?

5 A. I didn't focus on that at the time perhaps for the reason that
6 that wasn't one, that wasn't emphasized to me.

7 Q. Yes.

8 A. That particular feature.

9 Q. If the police had wished to investigate that aspect of it, could
10 they have done so?

11 A. Oh, yes. In fact, you may know that I eventually issued an
12 order directed to Chief MacIntyre and, indeed, the Mayor of
13 Sydney...

14 Q. Yes.

15 A. As Chairman of the Police Commission to that end.

16 Q. If in investigating the causes of why Mr. Marshall had been
17 charged and convicted in the first place it became necessary
18 for the RCMP to investigate the activities of one or more
19 members of the Sydney Police Force, could they have done
20 so?

21 A. Yes.

22 10:10 - BREAK

23

24

25

1 10:35 a.m.

2 Q. Thank you, My Lord. Judge How when the lights went out we
3 were just talking about the, we were discussing whether or
4 not, in your view, the RCMP could proceed with an
5 investigation if that touched upon the activities of the Sydney
6 Police Department. And I believe you indicated that they
7 could?

8 A. Yes.

9 Q. Do I take from that that they would not require direction
10 from your Department to do that?

11 A. Not to my knowledge, no. As I said earlier, I think, at one
12 stage I was asked to sign an order which we treated as an
13 assistance to the RCMP.

14 Q. Yes. As the investigation itself proceeded in the months of, I
15 believe, March, April and May of 1982, were you briefing
16 your Cabinet colleagues on the process, the progress of the
17 investigation?

18 A. I don't recall ever doing that, no.

19 Q. What about Government caucus?

20 A. No.

21 Q. The Premier?

22 A. No.

23 Q. Were you aware that, in the course of their investigation, the
24 RCMP conducted interviews with a number of members of the
25 Sydney Police Department?

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1 A. Oh, I eventually became aware of that, yes. I don't think that
2 I knew it, you know, on a contemporaneous sense.

3 Q. Were you aware that the RCMP did not interview, at least in
4 detail, the principal investigators of the 1971 incident,
5 namely Chief MacIntyre and Detective Urquhart?

6 A. You ask me if I knew that?

7 Q. Did you know that they were not interviewed?

8 A. No, I didn't. No.

9 Q. Would you have expected that they would have been
10 interviewed in the course of the investigation?

11 A. Well, I suppose one might.

12 Q. Did you ever direct that they not be interviewed or, at least,
13 that their interviews be delayed?

14 A. No.

15 Q. Were you aware of any direction from your Department that
16 the interviews not be held or that they be delayed

17 A. I became aware subsequently, yes, that there had been a,
18 well maybe it was a directive for want of a better word,
19 suggestion perhaps is more appropriate, that the, that any
20 investigation into the conduct of the original investigation by
21 the Sydney Police be deferred to follow the gathering of
22 evidence which would be, which would support an appeal to
23 the court or an application to the court by Mr. Marshall.

24 Q. When did you become aware of that Judge How?

25 A. I can't put a date on it.

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1 Q. Was it during your term as Attorney General?

2 A. Oh, yes. Oh, yes. Yes.

3 Q. And your understanding was that those interviews were to
4 be...

5 A. Wait now, I'm not sure. I better qualify that. I'm not sure
6 whether I knew it at the time I was still Attorney General.
7 Allow me to just qualify to that extent. I can't be that precise
8 at the moment.

9 Q. And did you receive information, though, about the matter, at
10 a later date? And if so, from whom?

11 A. Well I tell you I do recall reading of suggestions that the
12 Department had, not terminated, but forestalled an inquiry
13 into the activities of the Sydney Police. And I do recall that I
14 spoke with Mr. Gale on one occasion, since I've been in this
15 role, but subsequent to this Inquiry commencing, and asked
16 him what that was about. I do recall that. So it may be that
17 it never came up until, in that fashion.

18 Q. Yes. I believe that the matter surfaced publicly sometime in
19 the fall of 1984.

20 A. Yes.

21 Q. In the course of an election. Would it have been around that
22 time that you discussed it with Mr. Gale?

23 A. It may have been, yes.

24 Q. And do I understand that you were advised that the matter
25 had simply been deferred until the relevant evidence as to

1 Marshall's guilt or innocence had been...

2 A. That's what Mr. Gale told me, yes, in so many words. That
3 was the sense of what he told me, yes.

4 Q. Did you have any...

5 A. Because I was a bit concerned that the reflection may have
6 been left that we had forestalled an inquiry of any kind into
7 the original investigation. And because I, frankly, thought
8 that would be inappropriate.

9 Q. That what would be inappropriate?

10 A. For us to intervene to the extent of cutting off or determining,
11 if you will, any investigation relating to the Marshall
12 conviction.

13 Q. Do you have any idea how long it would take to interview
14 Chief MacIntyre and Detective Urquhart?

15 A. Oh, I wouldn't know. It wouldn't be fair for me to speculate
16 either.

17 Q. But I would think it wouldn't take a period of weeks would it.

18 A. Hmm?

19 Q. It wouldn't take a period of week to conduct a couple of
20 interviews.

21 A. No, but let me just say that my information at the time was
22 that there were a number of sort of phases to this, to the re-
23 inquiry into the Marshall matter and that first, and most
24 important, in terms of the order of things was to get the
25 information which would be, which would either support a

1 re-assessment by the court or confirm the original conviction.
2 It was felt that that had priority and I think logically so.

3 Q. Yes. The RCMP wrote to your Department on the 10th of May,
4 I don't need to ask you to look at it. For the record I'm
5 referring to Volume 19 at page 115. This is on May 10th of
6 '82. And they are saying at that point there are only minor
7 avenues of investigation to be completed and the
8 documentation attached to that report indicates that they
9 believe that Marshall was not responsible and that there was
10 sufficient evidence to charge Mr. Ebsary.

11 A. Yes.

12 Q. Are you able to suggest any reason why following that date
13 the interviews of Mr. MacIntyre and Mr. Urquhart would not
14 be proceeded with?

15 A. No, I can't suggest.

16 Q. Now, sir, based on the reports and the briefings that you were
17 receiving over these months in early 1982...

18 A. But perhaps I might just add this. The next stage was to
19 assist in the re-examination of this by the court.

20 Q. Yes.

21 A. And, of course, that was a totally new procedure so far as our
22 Department was concerned. And, because it had never
23 happened before in Nova Scotia.

24 Q. Sure.

25 A. And so there was, the, for example, Mr. Gale, who was the one

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1 in constant contact with the RCMP on this matter turned his
2 attention to determining what was the best or most
3 appropriate approach to the courts and that took some weeks
4 and involved Mr. Rutherford of the Federal Department of
5 Justice.

6 Q. Yes. And would those efforts on Mr. Gale's part have
7 prevented the RCMP from interviewing Chief MacIntyre and
8 Mr. Urquhart?

9 A. Oh, I wouldn't have thought so. No.

10 Q. Now, sir, based on the reports and the briefings that you were
11 receiving over March, April, May 1982, did you, yourself,
12 form any opinion as to the guilt or innocence of Mr. Marshall
13 with respect to the 1971 murder?

14 A. It began to appear there was a very great or serious question
15 about the conviction of Mr. Marshall and that it was a matter
16 that ought to be thoroughly investigated and if it, if the
17 indications held, or continued as the investigation progressed
18 that it should be, that consideration should be given to the
19 best way in which to redress it.

20 Q. Prior to the ultimate determination by the Court of Appeal,
21 had you, yourself, formed any opinion on Mr. Marshall's guilt
22 or innocence of the 1971 murder?

23 A. I began to think he was not guilty, yes.

24 Q. And what information were you using to found that opinion
25 on?

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1 A. Well, these reports, particularly those from Mr. Frank
2 Edwards...

3 Q. Yes.

4 A. Who was the prosecutor in Sydney and who was the one who,
5 of course, first dealt with the RCMP. Staff Sergeant
6 Wheatley[sic] and Scott.

7 Q. Yes.

8 A. For example.

9 Q. Based also, sir, on the reports and briefings that you were
10 receiving, did you form any opinion on the role that the
11 Sydney Police had played in the 1971 investigation and
12 charging of Mr. Marshall?

13 A. Well, I didn't form a precise opinion. There were suggestions
14 in those reports that the, as I mentioned earlier, three key
15 witnesses had reversed their original testimony in interviews
16 with the RCMP to the effect that they had lied on the stand in
17 1971, when they testified that they saw Mr. Marshall stab Mr.
18 Seale. And that they were saying in these statements,
19 according to the summary I saw, that they did this under
20 some pressure from the Sydney Police.

21 Q. Was that of concern to you?

22 A. Well, of course. Yes.

23 Q. Did any of your officials express to you any concern over the
24 role allegedly played by the Sydney Police?

25 A. I don't, I think they did. I can't remember what precise

1 terms.

2 Q. Did Mr. Edwards express any concern to you over the role of
3 the Sydney Police?

4 A. Well, Mr. Edwards and I never talked about the matter face to
5 face. But he did express concern in his memorandums to the
6 Department, yes.

7 Q. About the role of the police?

8 A. Yes.

9 Q. Yes, I see. Now again, sir, in these early months in 1982,
10 were you aware that Mr. Marshall had retained Mr. Aronson
11 as his counsel?

12 A. I think I became aware, yes, in that period.

13 Q. Yes. Were you aware that Mr. Aronson was requesting
14 reports and information from your Department?

15 A. I'm not sure that I was aware of that. I say that because that
16 was, you know, a part of the process which normally might
17 not come to my attention.

18 Q. I see. Mr. Aronson has indicated and testified to the effect
19 that he did not receive any assistance or cooperation from
20 your Department in the provision of information to him.

21 A. Yes, I saw that later.

22 Q. Yes. We break it down into two parts. What I understand,
23 that the not providing to Mr. Aronson of the RCMP reports
24 would be consistent with your practice.

25 A. Yes, it would be, as a matter of fact.

1 Q. What about the provision of statements of witnesses.

2 A. Well, that might be another matter.

3 Q. Can you suggest any reason why Mr. Aronson should not have
4 had access to such statements from your Department?

5 A. Well, no, I don't know of any. You see, the one thing with
6 respect to the police report itself was that the police might
7 have expressed in it suspicions. They might express opinions
8 in it. Many things were there were not necessarily factual
9 and so that was one of the reasons why those kind of reports,
10 apart from the serious damage it would do to their
11 investigating role in the future, those were the kind of
12 considerations which led us to the policy of not giving out
13 those reports. Now, when it came to witnesses I don't know
14 that, I think one can make a distinction there as to witnesses'
15 statements, if you will.

16 Q. Yes. Are you saying, sir, that...

17 A. Because those are what, those were what would be in the
18 Crown file in any given case in court.

19 Q. Are you telling us then, sir, that it would have been
20 appropriate to provide Mr. Aronson with those statements?

21 A. I don't know of a reason not to unless they're, but that isn't to
22 say that I know...

23 Q. I understand that.

24 A. You know, have a full enough knowledge, detailed enough
25 knowledge of this case.

1 Q. What was your understanding of the Department's disclosure
2 policy at the time with respect to witness statements if a
3 request were made?

4 A. I'm sorry, perhaps you'd give...

5 Q. What was your understanding of the Department's policy at
6 the time with respect to a request for statements of
7 witnesses?

8 A. Well I don't know what position that officials took on that.

9 Q. You indicated earlier, though, sir, that after you became
10 Attorney General the policy was that upon request statements
11 would be provided.

12 A. Yes.

13 Q. To your knowledge, was this your policy in April and May of
14 1982?

15 A. I would have thought it was. Yes, I haven't an explanation if
16 it wasn't done. Well there may be one but I haven't one.

17 Q. Were you, yourself, sir, familiar with the Criminal Code
18 provisions that were utilized in this case, 617 and 613?

19 A. I became familiar with them, yes.

20 Q. Now in April of 1982 Mr. Edwards, and I think you indicated
21 that you were relying on Mr. Edwards' reports to you?

22 A. Yes.

23 Q. He recommended...

24 A. Let me just add, he didn't make them, as a rule, directly to me
25 but I was, I kept acquainted with them from time to time.

1 Q. Yes. Right. He recommended in a memo to your Department
2 that the, a reference be made to the court to consider the
3 matter as if it were an appeal...

4 A. Yes.

5 Q. And he indicated that, in his view, the best result would be
6 that Mr. Marshall were acquitted on the basis that there was
7 a miscarriage of justice.

8 A. Yes.

9 Q. Were you aware of that recommendation of Mr. Edwards'?

10 A. Yes.

11 Q. Were you aware of his view that the best result would be an
12 acquittal for Mr. Marshall on the basis that there had been a
13 miscarriage of justice?

14 A. Yes.

15 Q. Did you agree with it?

16 A. Yes. As I, I just elaborate. As Mr. Edwards explained it it
17 made eminent good sense to me.

18 Q. Why, in your view, was it desirable for the court to conclude
19 that there had been a miscarriage of justice?

20 A. Well, it was felt that since it was apparent that there may
21 have been one, that it would best be exposed by this process
22 as against what was termed a free pardon.

23 Q. I understand. We'll come to that. Miscarriage of justice is a
24 term that we all throw around.

25 A. I know.

- 1 Q. Go back to my being a 10-year old child and I'd say to you,
2 "What's a miscarriage of justice?"
- 3 A. Well to me it means that justice wasn't done.
- 4 Q. What's justice?
- 5 A. Now you're getting almost Biblical again. Pilate said, "What's
6 truth?" I suppose, it's, justice is that people are fairly treated
7 under the law, I suppose.
- 8 Q. Fairly treated under the law?
- 9 A. Yes.
- 10 Q. If you were asked to list out the attributes of fair treatment
11 under the law, what would they consist of?
- 12 A. That you are, that the evidence presented, is factual, truthful,
13 and that the decision of the court, be it judge or jury, is based
14 on those facts and those alone, and that the person is given
15 the benefit of the doubt, if there be a doubt.
- 16 Q. Was it your view, then, sir, in April of 1982, having looked at
17 or received the benefit of Mr. Edwards' advice that Mr.
18 Marshall should not have been charged with murder?
- 19 A. I wouldn't say as early as that, but it began to appear over
20 that period and certainly by the time it went to court I was
21 convinced that this, the course chosen was correct in terms of
22 revealing it.
- 23 Q. Were you aware, sir, of any visits to your Department by
24 Chief MacIntyre?
- 25 A. No, not at the time. I might have later but, considerably later,

1 but I didn't know of any visits.

2 Q. Up until the time...

3 A. At the time they apparently occurred.

4 Q. Yes, up until the time the matter was referred to the court in
5 June 16, 1982, had you had any communication with Chief
6 MacIntyre?

7 A. No. No. Let me just explain that as Attorney General I
8 attended functions which might be put on by the Police
9 Association and so on. They always very kindly invited the
10 Attorney General of the day and I made the order I
11 mentioned in that period directing Chief MacIntyre to deliver
12 to the RCMP his files on the Marshall matter and I can
13 remember that on one occasion when he was President of the
14 Police Association of Nova, Chiefs of Police Association of Nova
15 Scotia, that we met at a social function and he remarked that
16 why did, he thought it was perhaps necessary or something to
17 that effect that I make that order, but I simply said, "Well,
18 Chief, or John," I knew him on a first name basis for quite a
19 number of contacts over those years, I simply said, "Well,
20 they, it was requested and I felt that it was appropriate to do
21 it." And nothing more was said.

22 10:58 a.m. *

23 Q. Uh-hum. Who requested you to make the order?

24 A. You know, I can't be precise. I suspect it was, I believe it was
25 Mr. Gale who came to me with it. Yes.

1 Q. How many such orders did you give in your time as Attorney
2 General?

3 A. That was the one and only.

4 Q. That was the only one.

5 A. Yes. As I said this was a very unique case.

6 Q. Yes. Why did you give it?

7 A. Well, Mr. Gale explained that it was the request of the R.C.M.P.
8 who felt that they could best examine the processes followed
9 by the Sydney Police in their original investigation if they had
10 the files at their disposal and in their possession. And,
11 the...my recollection, the only one I have is that they
12 suggested that the Chief was prepared to let them examine
13 the files but in his keeping and in his headquarters and was
14 not prepared to release them to them. Now, that's the only
15 recollection I had as the reason given me for making the
16 order.

17 Q. Other than that reason, was there any concern of any nature
18 expressed by Mr. Gale about the information being provided
19 by the Sydney Police?

20 A. I don't recall that, no.

21 Q. Uh-hum. And, did you get any subsequent reports from
22 either your officials or from the R.C.M.P. about the reaction of
23 the Sydney Police to that order?

24 A. No, I don't recall any reactions expressed to me.

25 Q. Did you ask whether or not the order had been complied

1 with?

2 A. I don't recall asking that.

3 Q. Was there any...

4 A. I felt that if it hadn't been they'd be back for something else
5 and...

6 Q. That was my next question. Was there any...ever any
7 indication that it had not been complied with?

8 A. No, there wasn't. No, no.

9 Q. During the course of the investigation and up until the time
10 that the matter was referred to the Court of Appeal, were you
11 contacted by any municipal politicians in Sydney as to
12 whether or not the Sydney Police Department should or
13 should not be investigated?

14 A. No, none.

15 Q. Contacted by any other individuals in the Sydney area as to
16 whether or not the Sydney Police should or should not be
17 investigated?

18 A. I don't recall any, no. No recollection.

19 Q. Up until the time the matter was referred to the Court, in
20 June of '82, did you yourself have any opinion on whether or
21 not there should be an investigation of the role played by the
22 Sydney Police Department in '71?

23 A. Well, I certainly would say that I felt that it was certainly a
24 topic to be discussed and determined within the Department,
25 yes. In other words it was a matter well worthy of

1 discussions and perhaps even direction.

2 Q. And this is prior to the matter going to the Court in 19...in
3 June of '82.

4 A. Probably in that period.

5 Q. Yes. Do I take it from that then that one or more of the
6 officials...or your officials had expressed some interest in
7 pursuing that type of investigation?

8 A. Well, no, I don't know as that would be the case. As I said
9 earlier, they were concentrating on this in sort of phases and
10 the phase at that time was to complete the investigation, to
11 assemble the material necessary for a hearing before the
12 Court, or a pardon as the case might be, and then following
13 that to turn their attention to the matter, several matters,
14 including the investigation of the procedures followed by the
15 Sydney Police.

16 Q. Yes. I'd like to turn, Judge How to some correspondence and
17 reports involving the actual reference process and the
18 communications with Mr. Chrétien, and if I could ask you to
19 turn first to Volume 31 at page 54.

20 A. Yes. 54. All right.

21 Q. Yes.

22 A. I've got it.

23 Q. Number...

24 A. Oh, yes, I see it now.

25 Q. ...at the top of the page, sir, Your Honour.

1 A. I see the system now. Yes. Thank-you.

2 Q. And do I understand that on...letter on pages 54 and 55 to be
3 a letter sent by yourself to Mr. Chrétien on May 17, 1982?

4 A. Yes.

5 Q. And would it be fair to say that in writing a letter such as this
6 you would be relying on the reports and information
7 provided to you by your officials?

8 A. Well, I'll be very frank with you, as I hope I am throughout
9 this proceeding. I didn't draft the letter. I believe Mr. Coles
10 or Mr. Gale or both drafted that letter. But they brought it to
11 me as...for approval and, of course, I thought it faithfully
12 represented the circumstances that we wanted to relay...

13 Q. Yes.

14 A. ...relay to Mr. Chrétien .

15 Q. You would then adopt it as your letter.

16 A. Yes, yes.

17 Q. And, a look at the letter as a whole, I take it that you're
18 providing to Mr. Chrétien your suggestions and
19 recommendations so that he can take them into account if he
20 wishes.

21 A. Yes.

22 Q. And in the second paragraph of that...of that letter you say
23 that you've received the final reports from the R.C.M.P. and
24 the prosecuting officer and you go on to say that on the basis
25 of the information now known, Mr. Marshall should not have

1 been charged and that the jury would not have convicted him.

2 A. Yes.

3 Q. Did that reflect your opinion at the time?

4 A. I think that, yes, it did.

5 Q. Yeah. Now, I'd like if I could, sir, to go to the two reports of
6 Mr. Edwards which I would understand, as you've indicated,
7 would provide some support.

8 A. Yes.

9 Q. For this...for this letter, because I'm simply trying to get
10 before the Commission the information and the circumstances
11 which surrounded the writing of this letter. And I'd ask you
12 to turn first to page 22 in this volume, which is a report of Mr.
13 Edwards dated April the 5th.

14 A. Yes.

15 Q. This was a report from Mr. Edwards to Mr. Gale. Would you
16 read these reports, Your Honour?

17 A. Did I at the time?

18 Q. Would that be your practise?

19 A. I think I did, yes.

20 Q. I see.

21 A. Yes.

22 Q. Mr. Edwards writing on April the 5th.

23 A. Yes.

24 Q. And, on page 2 he...and subparagraph 4, he indicates
25 that...and paragraph, subparagraph A that Mr. Marshall is

1 now admitting that he was in the park intending to roll
2 somebody.

3 A. Yes.

4 Q. Now, this report is being written in the context of at least an
5 alleged robbery.

6 A. Yes.

7 Q. And one matter that I...well, on that same page, at the sub
8 paragraph 2 at the top of the page there, it's indicated that
9 "The earlier statements of Chant and Pratico were not known
10 to defence counsel."

11 A. Yes.

12 Q. And then Mr. Edwards goes to his recommendation, this is on
13 page 24, right in the middle of the page he writes, "I submit
14 the most desirable result at the reference would be a
15 direction by the Appeal Division that a verdict of acquittal be
16 entered on the basis that there had been a miscarriage of
17 justice." And that's the one we talked about a few minutes
18 ago.

19 A. Yes.

20 Q. And I think you've indicated you concurred with that view.

21 A. Yes.

22 Q. And he then goes on to set out his reasons for suggesting that.
23 He says in the following sentence, "Mr. Marshall would thus
24 have the opportunity to call fresh evidence and would have
25 been vindicated of the murder." Did you share the view that

1 an objective of that process was to vindicate Mr. Marshall?

2 A. I...it certainly was to provide him with an opportunity to
3 vindicate himself, I don't know whether that's quite the word,
4 proper word, but anyway that will do. The...and I do know
5 that Mr. Edwards had that view that this would provide him
6 with an opportunity to vindicate himself. So, I suppose it's
7 fair to say that I associated myself with that viewpoint.

8 Q. Thank-you. In the following paragraph, sir, and much in the
9 same vein, reading at the end of line three, "Neither choice,"
10 and this is between another trial or no evidence, "Neither
11 choice would be fair to Marshall as the former puts him in
12 jeopardy and the latter prevents his name from being
13 cleared."

14 A. Would you indicate where that is again?

15 Q. I'm sorry, Your Honour. It's in the third paragraph from the
16 bottom of that page 24, the paragraph starting "The latter
17 option..."

18 A. Oh, yes, the third...I'm sorry, the third paragraph.

19 Q. The third paragraph from the bottom.

20 A. Yes.

21 Q. The paragraph which commences "The latter option..."

22 A. Oh, yes, all right.

23 Q. And within that paragraph Mr. Edwards is speaking in the
24 sense of Mr. Marshall's name being cleared.

25 A. Yes.

1 Q. And again, were you of the view that the process should
2 desirably result in Mr. Marshall's name being cleared?

3 A. Oh, yes, indeed, as the evidence or the facts assembled by Mr.
4 Edwards through the R.C.M.P. would indicate, yes.

5 Q. If I could turn to a follow-up memo of Mr. Edwards, Your
6 Honour, starting at page...

7 A. In other words, I...we wanted to be sure that he, you know,
8 that Mr. Marshall was justly dealt with.

9 Q. Yes. Page 29, Mr. Edwards again writes to Mr. Gale.

10 A. Page 29.

11 Q. Page 29, Your Honour, yes, a further...an update of his earlier
12 memo.

13 A. Oh, yes.

14 Q. Do you know if you read that, sir?

15 A. I probably did. I think I can go that far, I probably did.

16 Q. And, this memo, as I read it, is an indication of why Mr.
17 Edwards believes the matter should be heard in court and
18 should not simply be subject to a free pardon.

19 A. Yes.

20 Q. All right. And, he says at paragraph 7 on page 30.

21 A. Yes.

22 Q. Talks about a number of unanswered questions and he says,
23 "I submit the department would be cut off from the best
24 avenue of answering them." Was it your view that the
25 department required an avenue to answer certain questions?

1 A. Let me just think for a moment. I'm not quite sure of what
2 he meant. I think it relates to the paragraph just before that.
3 [Witness peruses document.]

4 Q. He goes on to...

5 A. Well, yes, he...the six and seven, six explains seven, that they
6 thought at that time and his mind was that Ebsary would
7 very possibly not be able to stand trial.

8 Q. Uh-hum.

9 A. And that a pardon would not reveal and would not reveal
10 the...all the circumstances surrounding Mr. Marshall's original
11 conviction unless he did stand trial.

12 Q. Yes.

13 A. And, therefore, and in turn a pardon would cut off this
14 process, this possible process, so that it was felt that it was
15 preferable to bring out the circumstances relating to Mr.
16 Marshall's conviction through a trial process involving himself
17 than a trial process involving Mr. Ebsary.

18 Q. Yes.

19 A. Which might be doubt...which could be doubtful if...that it
20 would even occur.

21 Q. And, would it be fair to take from Mr. Edwards' memo that
22 one of the questions that was being discussed was whether or
23 not perjury charges should be laid against the 1971
24 witnesses? He appears to say that in paragraph 8, "That
25 several members of the community have already volunteered

1 their opinions that perjury charges are expected."

2 A. Yes.

3 Q. "Marshall and his counsel will pursue the matter until they
4 learn the reasons why witnesses lied."

5 A. Well, that was one...that was one of the ingredients, yes.

6 Q. Okay.

7 A. To be addressed in such a court process.

8 Q. Yes. He says at paragraph 13, sir, on page 31, and I'll read
9 paragraph 13,

10
11 From the foregoing it is clear that any
12 consideration of perjury charges
13 necessarily involves an examination of
14 police conduct in the investigation. That
15 examination will likely make it equally
16 clear that perjury charges are not
17 appropriate.

18 Did you share the view, sir, that an examination of police
19 conduct would make it clear that perjury charges were not
20 appropriate?

21 A. Well, the only thing I can say on that was that it was clear
22 that the perjury charges would relate to three teenage
23 witnesses in 1971 I'm referring to, and the fourth would
24 relate to Mr. Marshall himself who had been imprisoned for a
25 lengthy period. Given the suggestion of their youth in all
cases and the...in terms of the three witnesses other than Mr.
Marshall, the alleged pressures on them, it was felt at that

1 time that perjury charges might not be appropriate.

2 Q. If we could...

3 A. In fact, I think Mr. Edwards expresses that in one or so of
4 those...

5 Q. Yes.

6 A. Of his memorandums. With respect to, well, I think I've
7 covered Mr. Marshall's case because of the long term
8 he'd...imprisonment that he had endured.

9 Q. In the letter that you write, sir, to Mr. Chrétien going back to
10 pages 54 and 55.

11 A. Yes.

12 Q. And I'm looking at the paragraph at the bottom of page 54,
13 and then continuing over to page 55. You say in the middle
14 of the bottom paragraph on 54, "If the matter is proceeded
15 with by the granting of a pardon, there will not be any airing
16 of the facts of the case and there may be some lingering
17 doubt as to whether or not Mr. Marshall was innocent of the
18 offence of murder."

19 A. Uh-hum.

20 Q. And then you continue, sir, at page 55, the last sentence of
21 the paragraph at the top of the page, "If there is no court
22 hearing on the matter of Marshall, then there is unlikely to be
23 any public material on which I can rely...which I can rely on
24 to indicate why charges of perjury may not be proceeded
25 with."

1 A. Yes.

2 Q. Can I take from that that your concerns, as expressed in this
3 letter, were that the public be convinced of Mr. Marshall's...of
4 his innocence and that there be some...

5 A. Absolution.

6 Q. No. Some evidence to indicate why perjury charges would not
7 be laid.

8 A. Yes. Absolve the witnesses, yes.

9 Q. And did you understand that in order to absolve the
10 witnesses it would require an examination of the conduct of
11 the police?

12 A. Well, obviously not necessarily. But it was felt that it would
13 be more publicly...the public would be aware by this process
14 of the background of his conviction and therefore more
15 understanding of why the perjury charges would not
16 necessarily or were not appropriate.

17 Q. You use the term "absolution". What evidence did you wish to
18 put before the public that would absolve those witnesses,
19 speaking specifically of...

20 A. Well, the...

21 Q. ...Chant, Pratico and Harriss?

22 A. Well, very obviously, if there were pressures placed upon
23 them at the time they made their statements then that would
24 be revealed by the Court process as against the pardon option.

25 Q. Yes. So, do I take it from that that you felt that this evidence

1 might at least explain why they lied?

2 A. Yes.

3 Q. You then go on to suggest, sir, in the second-last paragraph of
4 the letter that a proceeding under 617(b) would be the most
5 appropriate.

6 A. Yes.

7 Q. And did you understand that a proceeding under 617(b) was
8 a hearing by the Court of Appeal as if it were an appeal?

9 A. Yes.

10 Q. Yes.

11 A. Save and except that an appeal normally before them does
12 not admit the new evidence. This was...

13 Q. But they could have...

14 A. ...unusual. That section allowed this sort of...this expansion of
15 the trial evidence by the admission of new evidence.

16 Q. Yes.

17 A. I always remember that because I tried to get some new
18 evidence in one time as...when I was a practising lawyer and
19 without success.

20 Q. I see.

21 A. I always felt I was unfairly denied.

22 Q. Of course.

23 A. I didn't know this section. Had I known, I might have
24 employed it.

25 Q. And at the time you wrote this letter, sir, were you still of the

1 view that the most desirable result of a 617(b) appeal would
2 be the acquittal of Mr. Marshall on the basis that there had
3 been a miscarriage of justice?

4 A. Yes, oh, yes, yes, definitely.

5 Q. At the time you wrote Mr. Chrétien in May of 1982 did you
6 have any view or opinion yourself as to why Mr. Marshall
7 was convicted in the first place, why he was charged and
8 convicted in the first place?

9 A. Well, yes, from the memorandums, particularly those of Mr.
10 Edwards, it appeared that the police did not accept the
11 explanation of Mr. Marshall given at the time of the charge
12 laid against him, that the murder was committed by one of
13 two men whom he described as appearing to be priests the
14 night in Wentworth Park, the night in question. And,
15 therefore, the police...and in considering that they had
16 evidence that Seale, Sandy Seale and Marshall were in the
17 park together on that occasion, pretty clear, then I suppose or
18 we suppose that they took the position that the only possible
19 conclusion they could make was that one stabbed the other.
20 Now, the...the...and also there appeared to be, if I may put it, a
21 problem in Mr. Marshall's explanation, apart from the two
22 strange individuals when he...when he related to the that...if I
23 can just recall a minute. Oh, yes, that one of them had
24 attacked Mr. Seale and then him in turn, he, Marshall,
25 simply...with a knife, simply because the...simply because

1 they didn't like Negroes or Indians. It was considered
2 apparently from the scenario in the memorandums that the
3 police didn't think this provided sufficient motive. And that
4 therefore a better theory was that one stabbed the other,
5 without a compelling motive...

6 Q. Uh-hum.

7 A. They felt it was unlikely that a person would just come up
8 and stab somebody because they might not like their race or
9 colour. Now, that's what I gathered from this. I don't know
10 whether that answers it very well, but if not, please ask me.

11 Q. Okay. You say that what they felt was a better theory was
12 developed.

13 A. They...that's what I gathered from the...these memorandums
14 as to why the police may have...may have decided that this
15 was...this was a more accurate explanation for what
16 happened. I did notice in some material that they had
17 originally tended to accept the explanation of Mr. Marshall
18 that there were two people, two strangers there, one of whom
19 committed the murder, but that they were...they were
20 dissuaded from that after being unable to find any trace of
21 these two people in their investigation and therefore
22 abandoned it after some days, some few days.

23 Q. Not wanting to get into detail.

24 A. No.

25 Q. But are you aware that the police had very early statements

1 from other individuals stating that there were these two
2 strange characters around.

3 A. Oh, I agree, I quite understand that.

4 Q. Uh-hum.

5 A. But they seemed to balance it, nearly as I could gather from
6 the memorandum, they seemed to balance that against the
7 theory of the case, the lack of a really plausible motive for the
8 crime.

9 Q. Once this theory was developed, do you have any
10 understanding of how evidence to support that theory was
11 gathered?

12 A. Oh, no, I don't...again my limited knowledge came from these
13 memorandum.

14 Q. Yes.

15 A. Yes.

16 Q. Are you aware that what convicted Mr. Marshall at trial was
17 the testimony of two eyewitnesses?

18 A. Oh, yes. Jack and Pratico.

19 Q. Yes.

20 A. Chant, I'm sorry.

21 Q. At the time you wrote this letter to Mr. Chrétien in 1982, did
22 you have any views on how that eye-witness testimony had
23 been collected?

24 A. No, I don't think I did. That I really don't recall having any.

25 Q. If I can summarize your views, Judge How, the question of

1 some time ago was at the time you wrote this letter, why did
2 you think Mr. Marshall was convicted, and correct me if I
3 haven't summarized you accurately, you're saying that he was
4 not convict...he was convicted because he, Marshall, did not
5 tell the truth. Have I compressed that too much?

6 A. Perhaps a bit too much. The...it was a part. The information
7 that Mr. Edwards had collected by the R.C.M.P. to base his
8 recommendations on to us, the department, was...reflected the
9 fact that Mr. Marshall in an interview in 1982 admitted to the
10 reason why he and Mr. Seale were in the park that night.

11 Q. Uh-hum.

12 A. To the, as I understood it, to the effect that he, Marshall, had
13 suggested to Sandy Seale that they go to the park to roll
14 somebody, which meant rob somebody, as I got it, and he
15 says in his memo there, some of the information given to us
16 by Mr. Edwards, that Mr. Seale had never done this but
17 nevertheless they were both there when along came two men,
18 one old, one young, one tall and the old one very short, very
19 small, and that they had called them...that he, Marshall, had
20 called them back and proceeded to say, we...something to the
21 effect they wanted what they had.

22 Q. In your view, Judge How, were there any other factors
23 contributing to Mr. Marshall's charging and conviction other
24 than his failure at the time to tell the whole story?

25

11:28 a.m.

A. Oh, I suppose if the alleged pressures put upon the witnesses to, Pratico, Chant and Harriss, to sort of abandon their original statements, or part, that there were two men there with Seale and with Marshall.

Q. Did you accept the fact, sir, that those three witnesses lied at trial?

A. Well, I think one has to today in the light of the whole of the evidence. Yes.

Q. Well I guess I'm thinking particularly when you wrote Mr. Chrétien in 1982. Did you accept on the basis of the advice and opinions that you had that those witnesses had lied at trial?

A. Yes.

Q. Were you of the view that their testimony at trial was, in any way, attributable to Mr. Marshall?

A. In thinking about it you got the feeling that if Mr. Marshall had given as the, given the fact, had stated the fact that they were, he was there with Mr. Seale, at his suggestion, to roll someone well, given that, as an explanation for, and that they had proceeded to try and roll these two, one of which was Ebsary, or that he had, if he'd a told that it does seem to follow logically that the police might have accepted the story that there were two individuals there more readily and that, therefore, uncovered who was the real murderer more

1 readily, and also, accepted the statements of the teenagers,
2 the three teenagers more readily.

3 Q. Are you of the view, or were you of...

4 A. I don't suggest that one flowed from the other but you can't, I
5 can say that there seemed to be at least a possible connection.

6 Q. When you wrote this letter in 1982, were you of the view
7 that had Mr. Marshall told the truth he likely would have been
8 acquitted?

9 A. I think so. The, I'm a layman, I was then obviously. I was
10 not a policeman but it seemed logical that if your explanation,
11 meaning Mr. Marshall's explanation, had a logic to it, a greater
12 logic to it, ie. we were there to, and we attacked somebody
13 and they retaliated, then it becomes more reasonable.

14 Q. How can you say you're a layman, Your Honor, when you're a
15 lawyer, a QC and Attorney General?

16 A. Well, I'm a layman in terms of, should we say the
17 investigation of crimes and the theory of criminal activity,
18 perhaps.

19 Q. I see.

20 A. You might have you own views but I don't count myself as
21 being any expert.

22 CHAIRMAN

23 I don't know how much of this detail we need from this
24 witness. It's my understanding, you weren't Attorney General at
25 the time of the original conviction.

1 HIS HONOUR CHIEF JUDGE HARRY HOW

2 Yes.

3 MR. ORSBORN

4 No.

5 CHAIRMAN

6 And that based on reports that were submitted to you by
7 your officials as Attorney General you concluded that Donald
8 Marshall, Jr. was not guilty or alternatively may not have been
9 guilty of the offence that he had been committed, convicted of.

10 HIS HONOUR CHIEF JUDGE HARRY HOW

11 Yes. The evidence pointed in that direction.

12 CHAIRMAN

13 Well whether whatever this witness' theories may have been
14 as to the cause it seems to me his obligation was simply to decide
15 based on the information he was given whether he should assist
16 the Attorney General of Canada who has the ultimate
17 responsibility in reaching a conclusion to refer this to the Court of
18 Appeal. Is that the position?

19 HIS HONOUR CHIEF JUDGE HARRY HOW

20 Yes.

21 CHAIRMAN

22 I guess that's our responsibility to decide, in time, what were
23 the contributing factors to the original conviction. And I'm just,
24 you know, every witness seems to have a different theory, but it's
25 all theory, because they weren't there. I mean they weren't

1 involved directly at the time. I don't want to shorten this but it
2 seems we're going over and over that same...

3 MR. ORSBORN

4 Some of these points may be a little more relevant later in the
5 examination, My Lord.

6 CHAIRMAN

7 All right. Okay.

8 MR. ORSBORN

9 Q. Nonetheless, Judge How, even though you were of the view
10 that Mr. Marshall may have been acquitted had he told the
11 truth, do I understand from your earlier testimony that you
12 were still of the view that a desirable result would be that he
13 be acquitted on a basis that there was a miscarriage of
14 justice?

15 A. Oh yes, because the fact, or it appeared to be a fact that he
16 did not stab...

17 Q. Sure.

18 A. Yes. Mr. Seale.

19 Q. Did you have any direct discussions with Mr. Chrétien on the
20 matter of the reference?

21 A. I don't remember any verbal discussions with him.

22 Q. I see. You recommend in this letter...

23 A. I knew him very well but I don't remember...

24 Q. You recommend that there be a proceeding under 617(b)
25 which is as if it were an appeal. Were you aware that there

1 was active consideration of the 617(c) option which is an
2 advisory opinion of the court?

3 A. Yes.

4 Q. And did you have any views on whether or not the matter
5 should proceed under 617(c) or 617(b)?

6 A. I don't know as I had any strong views, no. I did agree that
7 on the basis of the presentation or arguments of Mr. Edwards
8 that it would appear to be the better of the two options.

9 Q. The appeal option.

10 A. Yes.

11 Q. And...

12 A. That is, if you're going to the court.

13 Q. Yes. Mr. Chrétien wrote you on May 31st. That letter is at
14 page 60 of this volume.

15 A. Yes.

16 Q. And I'll just refer you to it briefly. It appears given that Mr.
17 Chrétien is speaking of possible Executive action following the
18 decision of the court, it appears that he is thinking at the time
19 of the 617(c) option which would be the advisory opinion of
20 the court.

21 A. In this letter?

22 Q. It appears to be the case. It's not totally clear but in that he
23 does refer to Executive action, it may be he's considering the
24 possibility of a pardon once the court gives its advisory
25 opinion.

1 A. Oh, yes.

2 Q. Did you provide any assistance or direction to your officials in
3 the course of discussions of possible questions that could be
4 put to the court?

5 A. No.

6 Q. Were you aware of the later change of heart in the Federal
7 people from 617(c) back to the (b) or appeal option?

8 A. No, I wasn't aware of that.

9 Q. Were you aware of any discussions that the Federal people
10 had with Chief Justice MacKeigan concerning the form of the
11 reference?

12 A. I don't believe I was, no.

13 Q. The options that were available to the Minister of Justice and
14 your recommendations on the those options, were they the
15 subject of discussions in Cabinet?

16 A. No.

17 Q. Subject of discussions in Government caucus?

18 A. No.

19 Q. Subject of discussions with the Premier?

20 A. No.

21 Q. Before my friend gets up I was only going to ask if they were
22 the subject of discussions, not the nature of them. Now sir, on
23 page 63, Mr. Chrétien forwarded you the actual reference on
24 June 16, 1982. And he refers in the second paragraph
25 about, "refraining from raising the issue of compensation at

1 the request of your Department."

2 A. Yes.

3 Q. Up 'til this time, sir, what discussions were you aware of in
4 your Department about the matter of compensation?

5 A. I think it was a topic of limited discussion. I say that because
6 the gain, the main concern was to get the, complete the
7 evidentiary process for a reference to the court before the
8 matter of compensation or inquiry into the police, Sydney
9 Police, was considered, that is, focussed upon, better put.
10 After all, the, it was felt that these were the orders of
11 priorities.

12 Q. Yes. Had you had occasion to consider any principles on
13 which compensation might be payable? At this time. Up
14 until June of '82.

15 A. I don't know whether I had. I certainly would have had it in
16 mind and may have expressed myself on it, perhaps in the
17 Legislature and probably did. The, again, it was something
18 where there was no precedent in this province and we
19 ultimately found that it was the same in any other province
20 that we could find, at that time or in this, these periods, this
21 particular period of time.

22 Q. Prior to the matter actually getting into the court, was it still
23 your view that there should be a full public airing of the
24 facts?

25 A. If the trial, if this evidence was accepted by the court, that is,

1 the evidence which was proposed to be put to the court was
2 acceptable, accepted by the court as being truthful, then, yes,
3 there would...

4 Q. Yes.

5 A. I think, clearly, be that requirement.

6 Q. And was it still your view that a desirable end would be that
7 Mr. Marshall be vindicated?

8 A. Oh, yes.

9 Q. Was it still your view a desirable end would be that the
10 public would know why perjury charges may not be
11 appropriate?

12 A. I think that's clearly indicated from the correspondence, yes.

13 Q. And it was still your view that the desirable result would be
14 an acquittal based on a miscarriage of justice?

15 A. Yes.

16 Q. The first court proceeding was, I believe, in October when
17 there was an application to hear certain new evidence, the
18 same sort of application that you lost.

19 A. Yes.

20 Q. Do you recall receiving any briefings following the hearing in
21 court?

22 A. No, I don't think so. No. I left that to Mr. Gale, Mr.
23 Rutherford. Those that were dealing directly with it. Mr.
24 Coles. Mr. Edwards, too.

25 Q. The evidence itself was heard in early December of 1982. Do

1 you remember receiving any briefings following that hearing?

2 A. I may have but it doesn't stand out in my memory. They
3 were looking after this process.

4 Q. Now did you expect Crown counsel to maintain and put forth
5 the views that you have expressed to us this morning? That
6 the acquittal be entered on the basis that there was a
7 miscarriage of justice?

8 A. Well, we couldn't suggest what the court was going to do
9 precisely but it was felt...

10 Q. You can argue...

11 A. That the evidence was that compelling that that would be the
12 likely result.

13 Q. Did you...

14 A. In other words, they were confident that that would
15 transpire. That he would be acquitted.

16 Q. Did you read the factum submitted by Crown counsel?

17 A. I don't know which one you're, are you referring to a specific
18 one or just in general?

19 Q. It is a factum filed prior to the argument on the reference
20 after the evidence had been heard and the...

21 A. No, I don't think I saw that.

22 Q. Factum was filed. Just reading from that factum. It's
23 contained at Volume 4, page 39, and I'll simply read out the
24 submission of Mr. Edwards. Paragraph 83.

25 A. I'm sorry, I don't, Volume 4?

1 Q. I can read that to you, Your Honor.

2 A. Okay. Yes.

3 Q. This is Mr. Edwards saying,

4
5 The respondent (meaning the Crown)
6 disagrees with counsel for the appellant
7 who argues that the aforementioned order
8 could issue on the basis that there has
9 been a miscarriage of justice. It is
10 submitted that the letter phrase connotes
11 some fault in the criminal justice system or
12 some wrongdoing on the part of some
13 person or institution involved in that
14 system. The respondent contends that
15 such was not the case and that care should
16 be taken to dispel any such notion.

17
18 Were you aware that that view was to be advanced by Crown
19 counsel?

20 A. Now would you just repeat the first part of that. I...

21 Q. Yes, I'm sorry.

22
23 The respondent disagrees with counsel for
24 the appellant who argues that the
25 aforementioned order could issue on the
basis that there has been...

26 A. He disagreed with counsel for the appellant which was Mr.
27 Aronson, yes.

28 Q. Yes. What he's saying basically is that, "I, Crown Counsel,
29 disagree with Mr. Aronson that there has been a miscarriage
30 of justice."

31

HIS HONOUR CHIEF JUDGE HARRY HOW, EXAM. BY MR. ORSBORN

1 The Crown says that there was no
2 miscarriage of justice and that care should
3 be taken to dispel any such notion.

4 Were you aware that that...

5 A. I wasn't aware of that, no.

6 Q. Was that contrary to your expectations of the view to be
7 advanced by the Crown?

8 A. Well my expectation was that the man would be acquitted. I
9 don't know what phrase would, perhaps, be applied to the
10 acquittal.

11 Q. Yes.

12 A. Or associated with the acquittal. I say that because I was not
13 in intimate contact with, you know, Mr., I was not in contact
14 with Mr. Edwards, only through memos which he sent to the
15 Department.

16 Q. Are you able to say, sir, as Attorney General, that you agree
17 or disagree with the position put forward by Crown counsel,
18 that there had not been a miscarriage of justice?

19 A. I don't think it's really fair for me to answer that. I'm not
20 trying to fence sit or waffle on it but I can't remember having
21 an opinion precisely in those, in that context.

22 Q. Well you've told us consistently this morning, Your Honor,
23 that a desirable result be an acquittal based on the
24 miscarriage of justice.

25 A. Oh, I suppose that would be the most desirable.

Q. Yes. And can you suggest now, though, why Crown counsel

1 would argue that there was no miscarriage of justice?

2 A. Well, I don't want to trespass by getting into theory again but
3 I gathered from the memoranda from Mr. Edwards that he
4 was strongly of the view that had Mr. Marshall told the real
5 reason why he was there that night, in that park, that the
6 truth would have been uncovered, probably uncovered by the
7 Sydney Police in the process.

8 Q. As Attorney General did you want the view put to the court
9 that there was not a miscarriage of justice?

10 A. No, I didn't have a position on that. Again, you must
11 remember that this was in the hands of senior people in the
12 Department and Mr. Edwards.

13 Q. Mr. Edwards also states in his factum that, I'm looking at
14 pages 40 and 41 of the same volume that, "the Court should
15 make it clear," and I can paraphrase it for you, Your Honor.

16 A. All right.

17 Q. If my paraphrasing is not accurate I'm sure there are people
18 behind me that will correct me. He takes the position on
19 behalf of the Crown that what happened was not the fault of
20 anything, anybody or anything in the criminal justice system,
21 that what happened was largely the fault of Mr. Marshall.
22 Now, was that a view which you wished him to take on behalf
23 of the Crown?

24 A. No. I didn't express any preference for their, a position by
25 the Crown.

1 Q. Do you...

2 A. I didn't express any preference at all.

3 Q. Do you agree with that view having been taken?

4 A. Well, it's, I think I ventured the view before without
5 trespassing again on the tribunal's responsibilities, that you
6 could postulate that from the basic failure by Mr. Marshall to
7 tell the truth as to why he was in the park on that occasion
8 with Mr. Seale that the others could conceivably, the other
9 results could conceivably flow from that. In other words, the
10 wrong person get convicted. I don't know how else to...

11 Q. After the decision, not after the decision but after the hearing
12 of the evidence on the reference, were you of the view that
13 the matter had been fully aired to your satisfaction?

14 A. Yes.

15 Q. Were you aware that the police witnesses had not been
16 called?

17 A. No, I wasn't.

18 Q. Knowing that they were not called do you, are you still of the
19 view that it was aired to your satisfaction?

20 A. Well it...the, as I understood it, the officials like Mr. Gale,
21 officials like Mr. Rutherford and Mr. Edwards, consulted with
22 the court as to what would, what evidence was proposed to be
23 put to the court as I got it on this motion, I think, which was
24 taken in the fall of 1982.

25

1 CHAIRMAN

2 When you say consult, you're referring to the application
3 made in open court.

4 HIS HONOUR CHIEF JUDGE HARRY HOW

5 Yes.

6 CHAIRMAN

7 With respect to the evidence, the new evidence they wished
8 to call.

9 HIS HONOUR CHIEF JUDGE HARRY HOW

10 Exactly.

11 A. And that the only assumption I had was that what was
12 presented was acceptable so far as the court was concerned in
13 terms of its nature, not its weight. And that to, not only the
14 court but to Mr. Aronson, Mr., on behalf of Mr. Marshall, and
15 Mr. Edwards on behalf of the Crown.

16 Q. Mr. Edwards.

17 A. Mr. Edwards and Mr. Gale.

18 Q. Mr. Edwards wrote in a note following the hearing of the
19 evidence in December, and for the record it's Volume 17, page
20 16. And again, you don't need to refer to it, Your Honor, it's
21 only two lines. He wrote his note in, I think a briefing,
22 perhaps with Mr. Herschorn, that the police witnesses had
23 come through, or that the police had come through in the best
24 possible light after the evidence had been heard. The police
25 had come through in the best possible light. Was it your

1 intention, as Attorney General, that the police should come
2 through in the best possible light?

3 A. No. I don't, I didn't see that as our major concern.

4 Q. I see. Mr. Edwards also wrote at Volume 17, page 17 that the
5 Deputy, your Deputy, is reported to have said on occasion, I
6 think to Chief MacIntyre, that "Mr. Marshall was the author of
7 his misfortune." Did the Deputy, at any time, express that
8 view to you?

9 A. I think he may have, yes.

10 Q. Yes. Were you aware that that view was pressed by Mr.
11 Edwards in court?

12 A. No. I wasn't aware of that. But it certainly was emphasized
13 in his, the two lengthy memoranda that you referred me to
14 earlier.

15 Q. Was it your intention to have that view pressed in court?

16 A. No, I didn't take it...

17 Q. If you had been aware that that position ...

18 A. I didn't have a role, or didn't take a role in that regard.

19 Q. If you had been aware that that position was to be taken,
20 would you have attempted to change it in any way?

21 A. Well, I wouldn't, it wouldn't have been, put it this way,
22 appropriate for me to intervene unless I had more indepth
23 knowledge of it at that time than I did have. Mine was, I was
24 really, my information stemmed from the sources I
25 mentioned. Mr. Edwards to Department senior officials and

1 then to me.

2 Q. I get the impression, Your Honor, that you were standing
3 some distance back from all this and the skirmishing and the
4 positions and the arguments was being carried on without,
5 perhaps, detailed reference back to you, is that a fair...

6 A. I think that's fair to say. Yes.

7 Q. Even though it was a unique case in Nova Scotia history?

8 A. Well, you have to remember, too, that I had a, I had what I
9 considered a very competent staff. And I was, and also as I
10 explained earlier, it was not my custom to involve myself in
11 court matters. I did that by design. And also we had here
12 not only our senior officials but the Federal ones. And I left it
13 to them to make these determinations. And I think, but I
14 don't want that to be taken as a lack of interest in it but as a
15 confidence in the people who are carrying out the position we
16 had taken vis-à-vis a reference to the court.

17 Q. Were you aware of any dispute between Mr. Coles and Mr.
18 Edwards concerning the position to be taken by the Crown
19 with respect to the acquittal?

20 A. Either before or after the hearing, yes, I was aware.

21 Q. And what's your knowledge of that?

22 A. My knowledge was that Mr. Coles felt it was traditional and
23 appropriate that Mr. Edwards taken a neutral position and
24 simply bring forth the evidence which would, the new
25 evidence if you will, which had come to light through the very

1 thorough investigation of the RCMP and bring that out fully.
2 Assist the court by cross-examination of those who might be
3 called in person, that is the new evidence, and let the court,
4 and not put forward a position as a Crown Prosecutor himself.
5 Now, Mr. Edwards, having involved himself very, very deeply
6 in the investigation process, to the extent of talking with Chief
7 MacIntyre, individual witnesses, the RCMP, senior officers
8 who were conducting the inquiry, having done that, I think
9 Mr. Edwards felt that he could not, in good conscience, do
10 other than to express his personal feelings and position to the
11 Appeal Division. And he said, I think at one point, that he
12 was prepared to withdraw from the case if any restriction
13 was placed upon him.

14 Q. His view, I believe, was that he felt at least that he should
15 argue that the court should grant an acquittal.

16 A. Yes. Give the court whatever benefit it might be to them, his
17 personal view of the, of Mr. Marshall's conviction.

18 Q. As Attorney General, what was your view of the role of Crown
19 counsel?

20 A. Well I suppose, I can understand Mr. Edwards' feeling on the
21 thing. And, you know, I would say further that had I been in
22 Mr. Edwards' position and involved myself as intensely and
23 deeply as he did in it, I might very well have taken the same
24 position. But I can also understand the traditional role.
25 Because I think it's fair to say that my concept of a Crown

1 Q. Our understanding is that it was a jury composed of twelve...

2 A. To make it clear again, as you already have, but let me
3 emphasize, that was in 1971.

4 Q. Yes.

5 A. I didn't even know of the Marshall case in those years.

6 Q. I understand. No, I'm...I'm just wondering if you had
7 enquired subsequently.

8 A. No.

9 Q. Our understanding is it was certainly...

10 A. Because I had no complaint about the jury.

11 Q. Okay.

12 A. As such.

13 Q. It was composed of twelve whites. Based on your experience,
14 I guess both as a counsel for a number of years and also as
15 Attorney General, do you have any concerns about possible
16 racial bias in juries in a general sense?

17 A. No. I'll tell you why. I have been constantly impressed over
18 the years, and needless to say that means a few, with the
19 integrity of juries. I think it comes from the...from the mental
20 attitude which is invoked by their becoming jurors. I have
21 noted the seriousness with which they enter upon their
22 duties, and I have always put that down to a real desire on
23 the part of juries, broadly speaking, to perform as they
24 honestly ought to perform, that is listen to the evidence and
25 render a verdict based on that evidence. Now, I therefore

1 A. I'm sorry, if...

2 Q. Do you recall ever seeing an Indian on a jury when you were
3 involved in a jury trial?

4 A. Not precisely, no.

5 Q. What about a black?

6 A. Yes. Yes, oh, yes.

7 Q. The Crown position on the reference and, again, this was an
8 appeal by Marshall, the issue, I believe, was whether he
9 was...whether or not he was guilty of murder back in 1971.
10 The Crown position asks the Court to exonerate the justice
11 system and put the blame on Marshall. Can you suggest any
12 reason for the Crown putting forward that position?

13 A. Not really.

14 Q. To your knowledge, was there any relationship between the
15 position put by the Crown and the matter of compensation to
16 be considered?

17 A. No. Not with my direction, indeed not with my knowledge.
18 No, that was a matter which I felt we would deal with
19 at...depending on the outcome of this...

20 Q. Yes.

21 A. ...this hearing.

22 Q. Do you have any view on whether or not in the course of this
23 appeal it was appropriate to ask the Court to exonerate the
24 justice system?

25 MR. SAUNDERS

1 My Lords, before the witness answers the question I have
2 some difficulty with my friend pursuing concepts like
3 appropriateness and fairness. He wasn't there. Mr. Edwards will
4 be called in May to speak to what happened and you've already
5 heard from Mr. Aronson, and the facts are before the Court by
6 way of evidence before this Commission, and I question how
7 useful it is in the...to the issue of what you Commissioners have to
8 decide, that is, the process and what occurred, to hear from this or
9 any other witness who was not present during the argument and
10 the presentation of evidence what he thought or theorized about
11 what someone else in a department did or did not do. I'm not
12 sure it advances anything.

13 MR. ORSBORN

14 With respect to my friend, My Lord, I think the positions
15 taken or not taken by the Crown it may be of interest to the
16 Commission and surely this gentleman, as Attorney General, who
17 has indicated that he was responsible for the actions and decisions
18 of the Crown Prosecutors should be able to indicate whether or
19 not he agreed with the positions taken. Whether or not he knows
20 of them at the time is perhaps less relevant than the fact that he
21 is answerable for those positions.

22 MR. CHAIRMAN

23 Well, firstly it's my understanding from the testimony so far
24 that Judge How says the factum that was submitted on behalf of
25 the Crown was not subject to any direction of his nor did he see it.

HIS HONOUR CHIEF JUDGE HARRY HOW, EXAM. BY MR. ORSBORN

1 I don't quarrel... It would be most unusual if an Attorney General
2 or any other client of counsel saw a factum before it was
3 submitted. But be that as it may, he says he didn't. And as a
4 result thereof he didn't know what was in there, contained in the
5 factum. It is a fact that by convention ministerial responsibility
6 extends to everyone in a department. I understand there has
7 been a judgement of a single judge of the Federal Court of Canada
8 that has taken that a step further. But that's under appeal and
9 you never comment on appeals when they're ongoing. But I
10 would...based on Judge How's experience in the law, both as
11 defence counsel and then as Attorney General, I don't think it's
12 inappropriate to ask him for his opinion on this, albeit it's only
13 one of many opinions, all of which we may be totally disagree
14 with. So, I would allow that question, but I note your reservation
15 and it's a reservation that we have, I guess, with all opinion
16 evidence.

17 MR. SAUNDERS

18 Thank-you, My Lord.

19 MR. ORSBORN

20 Q. I'll just repeat or rephrase the question, Judge How. The
21 position taken by the Crown on the reference, or one position
22 at least, was that the Court should be asked during the course
23 of this appeal to exonerate the criminal justice system. My
24 question to you is as Attorney General do you feel that that
25 was an appropriate request or position for the Crown to make

1 during this appeal?

2 A. I wouldn't have known the reason for it and, therefore, I
3 wouldn't think it was necessary, perhaps therefore not
4 appropriate.

5 Q. I see.

6 A. Yes. And certainly I did not suggest that that be part of the
7 case in the Appeal Division.

8 Q. When the decision came out in May of 1983, what was your
9 reaction to it?

10 A. Well, I suppose one was relief. I felt that...I felt glad for Mr.
11 Marshall. I...because of what I considered the strength of the
12 case, and I was gratified, if you will, that the Appeal Division
13 had decided on an acquittal as against an option, I guess, of a
14 new trial, and that the matter was, therefore, in that...in terms
15 of his...a liability, concluded and satisfactorily.

16 Q. Had the process and the decision provided the public airing
17 which you hoped for to explain why perjury charges may not
18 be appropriate?

19 A. Well, I thought so, yes, from reading the decision of the
20 Supreme Court.

21 Q. Were you aware immediately following the handing down of
22 the decision by the Court of Appeal that Mr. Aronson called a
23 press conference in which he asked for a public inquiry?

24 A. No, I wasn't.

25 Q. Were you aware immediately following the decision that a

1 decision had been taken to charge Mr. Ebsary with...

2 A. At some point there, and probably at that time, yes, I was
3 aware, yes.

4 Q. I wanted to turn to another matter, My Lord, concerning the
5 review of the R.C.M.P. file and what have you, I don't...I'm
6 quite happy to go on for another fifteen minutes, but this is a
7 new area. I don't know if you want to break now or...

8 MR. CHAIRMAN

9 Keep going for another fifteen minutes.

10 MR. ORSBORN

11 Q. In Volume 20, Judge How, I'd ask you to turn to page 14.

12 A. Yes.

13 Q. This is a letter written by, I believe, Mr. Gale to the
14 Commanding Officer of "H" Division of the R.C.M.P..

15 A. Yes.

16 Q. And he indicates here on May 13th that they're proceeding
17 with a charge against Mr. Ebsary and considering possible
18 charges against others. Then he says in the beginning of the
19 third paragraph, "There remains the question as to whether
20 there should be any inquiry into the handling of the original
21 investigation and the prosecution of it." He then asks that the
22 R.C.M.P. review their files. Were you aware, sir, that this
23 request was being made of the R.C.M.P. immediately following
24 the handing down of the decision?

25 A. No, I wasn't aware that he had written this.

1 Q. Had there been any discussions prior to the handing down of
2 the reference decision that, "Look, when the decision comes
3 down we better take a look at what happened"?

4 A. No, I don't think I...at least I can't precisely say that we had
5 discussions before the decision was handed down on a further
6 inquiry.

7 Q. Yes. This type of request to the R.C.M.P. would you look upon
8 that as an unusual request, their being asked to look at their
9 files to see if there was improper practises or procedures by
10 another police department?

11 A. Well, all I think I can say is that it's appropriate if you're
12 going to question the practises of a given police department
13 that you do not get that same department to give you their
14 views on whether they should be investigated obviously.

15 Q. Yes.

16 A. It would have to be another police department. I think it
17 seems reasonable.

18 Q. I take it if you are not aware of the request you can't help us
19 as to why Mr. Gale asked that they simply review their files?

20 A. No, at some stage about this time I had asked in a memo to
21 Mr. Coles...or had mentioned in a memo to Mr. Coles that there
22 were about four items still left.

23 Q. Yes, that comes out...

24 A. Does it?

25 Q. ...about ten days later, I think.

1 A. All right.

2 Q. Yeah. Can you suggest, sir, any reason why in the reference
3 itself the Crown would urge that there is no fault in the
4 criminal justice system, but the day after the decision comes
5 down your director of criminal asks the R.C.M.P. to look at
6 possible improper practises on the Sydney Police
7 Department?

8 A. I think you'll have to ask Mr. Gale that. I really don't have an
9 intelligent answer to give you. It does seem to be in conflict,
10 yes.

11 Q. Yes. There is mention made in Mr. Gale's letter about the
12 handling of the prosecution of it. Would you have expected
13 the R.C.M.P. to look at how they case was originally
14 prosecuted, forget how it was investigated, but how it was
15 prosecuted?

16 A. I don't quite know how to answer it. I suppose they might
17 have views that would be helpful.

18 Q. Yes.

19 A. That's the only answer I can give you, I think.

20 Q. All right. Turning to the memo that you refer to, sir, which is
21 in Volume 32 at page 159.

22 A. Yes.

23 Q. I think this is a memo from yourself to your deputy.

24 A. Yes.

25 Q. And copied to Mr. Gale. It's on May 25th of 1983.

1 A. Yes.

2 Q. The third sentence there you say, "In addition to this we
3 should be looking into the question of the performance of the
4 police and Crown in the prosecution of Donald Marshall
5 originally."

6 A. Uh-hum.

7 Q. And if you were not aware of Mr. Gale's letter that may
8 explain why you asked for this some...

9 A. Yes.

10 Q. ...ten or twelve days later.

11 A. It does seem to parallel one of his concerns, one of his
12 requests.

13 Q. What did you want done with respect to the looking into the
14 question of the police? How did you think that it should be
15 handled?

16 A. I wasn't sure, to be very frank, but there did seem to be
17 questions raised throughout up to this point throughout the
18 process, and...process of investigation perhaps more precisely.

19 Q. Yes.

20 A. And, the question was whether or not there had been
21 improper pressures applied to witnesses in the original...with
22 respect to their testimony in the original trial. The question...
23 why I mentioned the Crown was that there were suggestions
24 along the way that the late Donald MacNeil, the prosecutor in
25 that case, had possibly applied pressures. These were

1 suggestions or allegations only.

2 Q. Yes.

3 A. But certainly called for consideration in terms of an inquiry.

4 Q. Do you think they...you believe that they warranted looking
5 at?

6 A. Yes.

7 Q. And the fact that these questions or allegations had been
8 raised, again, these would be inconsistent with the position
9 taken by the Crown on the reference with respect to
10 exonerating the justice system.

11 A. I suppose, yes.

12 Q. You also asked in this memo that, ah, "To start to formulate
13 considerations if we received a request from Donald Marshall
14 for some sort of compensation."

15 A. Yes.

16 Q. Can you expand on that at all?

17 A. Yes. The...I took the position, and again I emphasize that I
18 had no precedents to go by. But I took the position that
19 logically a person claiming compensation from the Crown on
20 any basis ought to make that clear to the Crown as a request
21 or claim. After all a government is only the custodian of the
22 funds placed in its hands by the taxpayers and, therefore, it's
23 not unreasonable to ex...to suggest that...or take the position
24 that anyone who feels they have an appropriate...they have a
25 claim against the Crown to put it forward in a formal way.

1 It's not a very onerous obligation to place on them and I think
2 it's a proper one. Then if it is found that the claim is justified
3 and monies are appropriate, then I think you can...you can
4 fairly answer the taxpayer that you proceeded properly.

5 Q. Leaving aside the question of making a formal application,
6 which makes some sense, what kind of considerations were
7 you thinking about in terms of the, I guess, the payment or
8 non-payment of compensation?

9 A. Well, I think as you probably have seen throughout the
10 material in these books, that you would consider the length of
11 time, that is a factor, that a person had served a prison term
12 for an offence they didn't commit. You would take into
13 account, I think logically, whether or not that person was in
14 part responsible for that result. And, then you might well
15 consider a gratuity or a gift. Apart from arithmetic, if you
16 will, calculation based on loss of earnings, the latter would be
17 perhaps loss of freedom. Now, what I personally had in mind,
18 if this is appropriate to mention at this time in response, was
19 that you would...you would multiply the number of years by
20 a factor. The factor I had in my mind was something in the
21 range of \$25,000 a year. That was purely an arbitrary figure.
22 You would then deduct a factor for...deduct an amount in view
23 of the...what would be fairly considered the...reflect the
24 person's responsibility. In this case there was the, I think,
25 accepted purpose for which the person was there in the park

HIS HONOUR CHIEF JUDGE HARRY HOW, EXAM. BY MR. ORSBORN

1 that night, i.e. robbery or attempted. That would have to be a
2 deduction. One might say, one year, two years, something for
3 that, at the same rate. Totaling that, my thought was that you
4 would add to it a factor...what did I refer to it as?

5 Q. Loss of freedom, I think.

6 A. Loss of freedom.

7 COMMISSIONER EVANS

8 You kind of loss me there, Judge How. Do I understand that
9 the compensation factor that you talked about was approximately
10 \$25,000 multiplied by the number of years that the applicant had
11 been in custody and I'm a little at a loss as to what you were
12 going to deduct.

13 HIS HONOUR CHIEF JUDGE HARRY HOW

14 Had, My Lord, had...the deduction would apply to the factor
15 which I have referred to before of the illegal purpose for which
16 the person was there.

17 COMMISSIONER EVANS

18 So in this case...

19 HIS HONOUR CHIEF JUDGE HARRY HOW

20 Which might happen...pardon.

21 COMMISSIONER EVANS

22 Sorry. You're...in dealing with the Donald Marshall case, you
23 were deducting then the factor of his attempted robbery, is that
24 it?

25 HIS HONOUR CHIEF JUDGE HARRY HOW

1 Yes.

2 COMMISSIONER EVANS

3 And then you would say the number of years that he would
4 be penalized for that.

5 HIS HONOUR CHIEF JUDGE HARRY HOW

6 Yes, it's possible.

7 COMMISSIONER EVANS

8 Three.

9 HIS HONOUR CHIEF JUDGE HARRY HOW

10 Possibly be penalized.

11 COMMISSIONER EVANS

12 Three years. You would deduct the three years, that's
13 seventy-five thousand from that.

14 HIS HONOUR CHIEF JUDGE HARRY HOW

15 Yes.

16 COMMISSIONER EVANS

17 And then give some allowance for...

18 HIS HONOUR CHIEF JUDGE HARRY HOW

19 Loss of freedom.

20 COMMISSIONER EVANS

21 Loss of freedom.

22 HIS HONOUR CHIEF JUDGE HARRY HOW

23 Yes. I'm expressing this because this...these were the
24 thoughts that I had personally had in mind. We didn't formulate
25 this while I was there, but had we, these would have been my

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1 submissions to the officials of the department as to what kind of
2 recommendation we should make to the government. Now,
3 what...and in addition, may I just conclude my general amateur
4 theory here as to ...or formula. On top of that I would compensate
5 him for his legal expenses.

MR. ORSBORN

7 Q. So, if I can summarize that then you take a number of years
8 incarcerated times a figure of \$25,000 that you mentioned
9 less a deduction for...

10 A. I wouldn't have said three years, as the His Lordship said.

11 Q. Well, whatever.

12 A. But he's taking an arbitrary figure, so am I, yes.

13 Q. Less that, plus loss of freedom, plus legal expenses.

14 A. Yes. Those would have been the ingredients if you will.

15 Q. Was it your view that the government...

MR. CHAIRMAN

17 Just so we don't get off on a frolic of our own. This is...things I
18 understand you said that were going through your mind.

HIS HONOUR CHIEF JUDGE HARRY HOW

20 Yes.

MR. CHAIRMAN

22 But the memo of May 25th, 1983...

HIS HONOUR CHIEF JUDGE HARRY HOW

24 Yes.

MR. CHAIRMAN

HIS HONOUR CHIEF JUDGE HARRY HOW, EXAM. BY MR. ORSBORN

1 From you to your deputy minister, was that ever responded
2 to before you left? Had there been any meaningful discussions
3 before...

HIS HONOUR CHIEF JUDGE HARRY HOW

5 No, I'll tell you why, My Lord. It was that in the meantime an
6 action had been started against the City of Sydney by Mr.
7 Marshall based on the treatment or based on his...what he alleged
8 was his improper conviction, and in turn related to...he related his
9 claim to what he alleged were the improper actions by the Sydney
10 City Police in their handling of witnesses against him.

MR. CHAIRMAN

12 Right, but am I...but are we...

HIS HONOUR CHIEF JUDGE HARRY HOW

14 That action was ongoing at the time this memo was written.

MR. CHAIRMAN

16 I see. But are we entitled to assume from your testimony
17 that there were no discussions between you and your officials or
18 between you and anyone prior to your leaving the portfolio of
19 Attorney General as to the formulation of any response to a
20 request for compensation on behalf of Donald Marshall?

HIS HONOUR CHIEF JUDGE HARRY HOW

22 I think it is fair to say, Chief Justice, that we talked of it in
23 general terms but did not arrive at any formula or approach,
24 precise approach, because of...and we felt that the...that any
25 determination of that could await the outcome of the success of

1 this action against the City of Sydney.

2 MR. CHAIRMAN

3 All right. I appreciate that. But during these discussions,
4 albeit informal and with the caveat that you should wait for the...

5 HIS HONOUR CHIEF JUDGE HARRY HOW

6 Yes.

7 MR. CHAIRMAN

8 ...outcome of the Sydney action, civil action, did you as Attorney
9 General advance to your officials the view that you've expressed
10 here today as to at least one method of calculating compensation
11 to be paid to Donald Marshall, Jr.?

12 HIS HONOUR CHIEF JUDGE HARRY HOW

13 I may have in general terms but without figures. I may have
14 and probably did, My Lord, suggest that in my humble opinion
15 that these would be the factors we might consider but you will
16 note in my memo of May 25th that I suggested that they try and
17 find precedents out...within or without the province. That's...to
18 answer your question, that's as close as we came to it, yes.

19 MR. CHAIRMAN

20 Well, I guess this is a good time to rise.

21 INQUIRY ADJOURNED - 12:29 p.m.

22
23
24
25