

1 2:06 p.m. INQUIRY RESUMES

2 Q Judge How, in response to the request from your Department,
3 the R.C.M.P. provided to your Department certain reports in
4 May, 1983. If I could direct your attention to Volume 20 at
5 page 26.

6 A. Yes.

7 Q Do you recall, sir, reviewing any of the R.C.M.P. reports that
8 were provided to your department?

9 A. Not specifically, no.

10 Q I see. I believe that your department received this letter on
11 pages 26 and 27.

12 A. I could take judicial notice of that.

13 Q Perhaps. And attached to that letter were reports from
14 Inspector Scott and Sergeant Wheaton, and I think...

15 A. Oh, yes.

16 Q And I think on a reading of those reports, one can say that
17 they did not make complimentary comments about the
18 conduct of the 1971 investigation. Did you receive any
19 briefing from your officials as to what the R.C.M.P. had said in
20 their reports?

21 A. Well, I again probably did, yes.

22 Q This was a matter that you yourself had said should be done.
23 You said back in May.

24 A. Oh, yes.

25 Q We should look at the question of the performance of police.

1 A. Oh, indeed.

2 Q. Yes.

3 A. Yes.

4 Q. Other than the file review by the R.C.M.P., to your knowledge,
5 was anything else done to look at the performance of the
6 police?

7 A. I don't know of any.

8 Q. Based on the reports that were submitted and briefings from
9 your officials, did you form any views or opinions on the
10 handling of the 1971 investigation?

11 A. Well, I think I may have said in another way previously that
12 there certainly were, but findings by the police in these
13 reports which would alert one to that distinct possibility, yes.

14 Q. Did you form any view as to whether or not the conduct of
15 the Sydney Police in 1971 was acceptable or not?

16 A. Well, I can't say that I came to a positive conclusion that it
17 was not, that it was unacceptable. I think it called for, it
18 seemed to me at least, it called for examination by, in
19 some...by some tribunal or individual.

20 Q. Was it your view that this examination should then be in
21 addition to whatever had been done by the R.C.M.P?

22 A. Well, I don't know as I would have concluded at the time that
23 it required additional examination. But it would be another...
24 what? It would be an independent body of some kind.

25 Q. I guess what it comes down to, Judge How is that you

1 suggested that the performance of the police should be looked
2 at. The R.C.M.P. looked at that. They provided you with
3 reports in 1983. What, if anything, did you do with the
4 reports that came into you with the information contained in
5 them?

6 A. Well, again, in 1983, there was in process an action against
7 the City of Sydney alleging certain misdemeanours on the
8 part of the Sydney City Police. And it was felt at that time
9 that that process ought to take its course before an inquiry of
10 the type you're referring to was launched.

11 Q. I wasn't referring to any inquiry, sir. I was simply asking
12 what you did on the basis of the information you received.

13 A. Well, all right, I mentioned inquiry then, a form of that. In
14 any event, that was why it was... the structuring of an inquiry
15 was not followed up at that time.

16 Q. Can you explain the relationship between the civil suit and
17 the launching of an inquiry?

18 A. Well, the civil suit contended, claimed, alleged the very things
19 that would have been the subject of an inquiry, as I saw it,
20 and as officials in the Department saw it. And they felt also
21 that there should not be an inquiry contemporaneously with
22 that process, that that would be...

23 Q. Why not?

24 A. Well, it would be perhaps an intervention or trespass upon
25 the court, matter *sub judice* at that stage. Now if that didn't

1 produce the, what, satisfactory explanations or, I'll put it
2 another way, or perhaps in addition, if it didn't, if it didn't
3 produce answers to the allegations of pressures by the police,
4 the Sydney police, in that process, then consideration would
5 have to be given to a form of inquiry to supplement or
6 supplant it.

7 Q. Were there any other avenues open to you to look at the
8 performance of the police other than the use of a public
9 inquiry?

10 A. Yes, you could take information gathered by the police, I
11 suppose, and lay charges, you know, charges under the Code.

12 Q. Was it your view that there had been sufficient work done by
13 the police to warrant the laying of charges?

14 A. I don't think that we reached the point of decision on that at
15 that point, no.

16 Q. Is the Nova Scotia Police Commission the body that could have
17 provided any assistance in this matter?

18 A. That would be one structure, that would be one medium, yes.

19 Q. What could that Commission have done for you under the
20 Police Act?

21 A. Well, of course, their regular function was in part examination
22 of the performances of police departments by statute.

23 Q. Was any consideration given to utilizing the police
24 commission to look at the performance of the Sydney Police?

25 A. Not to my knowledge, no. We had not formulated a course of

1 action at that time.

2 Q. The memo that you wrote, sir, in May of 1983 also talks about
3 looking at the performance of the Crown.

4 A. Yes.

5 Q. There is very little reference in the reports of the R.C.M.P. to
6 the Crown. They say, Number One, Mr. MacNeil is deceased,
7 and also, as you said, they're policemen, they're not...

8 A. Yes.

9 Q. Not lawyers. What, if anything, did you do or cause to have
10 done with respect to looking at the performance of the Crown
11 in 1971?

12 A. I didn't have anything done at that time. But, again, there
13 were suggestions throughout the police investigation, the
14 investigation conducted by the R.C.M.P. to be more specific,
15 that there may have been pressures applied to witnesses by
16 the Crown Prosecutor in the 1971 trial.

17 Q. Did you ask anybody to review the trial transcript to give you
18 a view on how it was prosecuted?

19 A. No, we left this in abeyance, as I say, or said.

20 Q. Did you ask anybody to speak to Mr. Rosenblum and Mr.
21 Khattar to find out what they could tell you?

22 A. I didn't personally ask.

23 Q. Did you ask anyone to speak to Mr. Matheson, who was Mr.
24 MacNeil's assistant?

25 A. No, I didn't know him at that time.

1 Q. Did you, while you were Attorney General, ever read the
2 affidavits that were provided to the court by Mr. Khattar or
3 Mr. Rosenblum or Mr. MacIntyre?

4 A. No.

5 Q. I'd like to turn for a moment, Judge How, to the response of
6 your officials to these considerations that you set out in your
7 memo of May 25th.

8 A. Yes.

9 Q. In Volume 32, page 169, Mr. Herschorn replies to you, in a
10 memo to you from Mr. Herschorn. Do you have that, Your
11 Honour?

12 A. I do.

13 Q. And at page 170, he addresses one of your concerns about the
14 role of the Sydney Police and he, if I read it correctly, says at
15 the end, "The court didn't comment on what the police did,"
16 and it seems to be left at that.

17 A. Yes.

18 Q. And in the same vein, at page 203 of this volume, Mr.
19 Herschorn writes you another memo a little bit later, writes
20 you in July, I believe this was written, and at page 207.

21 2:18 p.m. *

22 A. Yes.

23 Q. He says close to the bottom of the page, "The Court made no
24 direct criticism of the role of the Sydney Police Department."

25 A. Yes.

1 Q Was it your understanding that the Court had, in fact, looked
2 or had evidence on which it could assess the conduct of the
3 police?

4 A. Oh, frankly I didn't know.

5 Q Yeah. Okay. Did any of your officials at any time suggest to
6 you any criticism of the manner in which the investigation
7 had been handled?

8 A. I can't remember a precise occasion.

9 Q You also asked your officials to address the issue of
10 compensation, and if I can take you to page 177.

11 A. Oh, yes.

12 Q Well, perhaps before we do that, page 175.

13 A. Yes.

14 Q Page 175 of Volume 2 there is some handwriting at the
15 bottom of the page there. Is that your handwriting, Judge
16 How?

17 A. Yes.

18 Q And it says "Sympathize, but not apologize," can you tell us
19 what you mean by that?

20 A. Well, how...I think I can explain that, that ...I don't remember
21 writing it, but I did write it and I would interpret that as
22 being...being a, let me see, yes, a reflection in part of the
23 decision of the Appeal Division, and I don't need to go over
24 that in any extent except to say that they suggested that the
25 defendant, Mr. Marshall, was in their view, very much or

1 substantially the author of his own misfortune, and I
2 forgot...there were other comments made along that line. So, I
3 think that...but at the same time one could not help but
4 sympathize with the defendant.

5 Q. Yes.

6 A. In the end result that placed him behind...that incarcerated
7 him for eleven years.

8 Q. Was it then...

9 A. So, I can only now interpret that in that way.

10 Q. But would you interpret that as saying that you believe that
11 no apology was due to Mr. Marshall for his...

12 A. Well, I wouldn't say that that was a precise position. It was a
13 sort of thought.

14 Q. I understand.

15 A. Yes.

16 Q. With respect to your question on compensation, Mr.
17 Herschorn wrote to you, and that's at page 177, the next page.

18 A. Yes.

19 Q. And simply says, "No request has been received," and then he
20 recites the comments of the...of the Court of Appeal.

21 A. Yes.

22 Q. And that is repeated in the later memo. Was this the tenor of
23 the advice that you were receiving from your staff, "Wait
24 until we get an application, if we get an application, we'll have
25 to consider the comments of the Court." Is that the advice

1 you were receiving?

2 A. I think that's fair to say, yes. I think we had in a general
3 way, although we didn't develop a specific approach, we had
4 the view that we could not or should not ignore the possible
5 effects of Marshall's own conduct.

6 Q. Was the advice that you were receiving to the effect that
7 these comments of the Court of Appeal should go only to
8 quantum or should go to whether or not there was any
9 compensation payable?

10 A. My own view was quantum only.

11 Q. What about the position of your officials as expressed to you?

12 A. I can't precisely say that they disagreed with that. I don't
13 remember any significant disagreement on their part.

14 Q. Just turning briefly then to the third matter that you
15 mentioned in your earlier memo, the question of charges,
16 and...

17 A. What page are we now?

18 Q. Page 205 and 206, Your Honour.

19 A. Thank-you.

20 Q. This is Mr. Herschorn writing to you again. And the
21 comments on the evidence of Maynard Chant, Patricia Harriss,
22 recites a comment of Frank Edwards, and at the top of page
23 206 he says, "In such circumstances it may not be in the
24 overall interest of the administration of justice to charge
25 either Patricia Harriss or Maynard Chant." Did you agree with

1 that advice that it would not be in the overall interest of the
2 administration of justice to lay such charges?

3 A. Well, in view of the surrounding facts, yes.

4 Q Surrounding facts being what?

5 A. Well, that developed and that were brought to our attention.

6 Q The...your earlier comment to Mr. Edwards simply is couched
7 in terms of intent, because I don't think we can prove the
8 necessary intent to sustain a charge of perjury, and Mr.
9 Herschorn seems to expand on that to the overall interest of
10 the administration of justice. Was it a...

11 A. Sometimes people got a bit global in their phraseology, I
12 suppose.

13 Q I see. Was there any concern expressed to you that the
14 pursuing of perjury charges would involve an examination of
15 police conduct?

16 A. Oh, I think inevitably.

17 Q Yes, but was it a concern that this matter would be raised?
18 Was there any concern that...

19 A. Police conduct.

20 Q Yes.

21 A. No, no, no. I don't think that was...the sense I had and they
22 seemed to express was that given the suggestion ...given the
23 fact of their youth, given the alleged pressures...

24 Q Yes.

25 A. ...hey were under, and that it would not be fair to contend

1 that they had deliberately perjured themselves.

2 Q Now, on page 209.

3 A. Yes.

4 Q There is a handwritten note there, Judge How.

5 A. Yes.

6 Q Is that your handwriting too?

7 A. That is, yes.

8 Q I'll read it...

9 A. It's not the world's greatest, but it's mine.

10 Q It's considerably better than some that I've seen.

11 A. All right.

12 Q It reads as follows, I believe, sir, "Gordon Gale, Martin
13 Herschorn, and I met today," being July 8th, '83, "Regarding
14 Marshall, decided not to press any charges against Marshall or
15 the other witnesses."

16 A. Yes.

17 Q "And will hold action re the Sydney Police force until we
18 know the outcome of the civil action Marshall has brought
19 against them."

20 A. Yes.

21 Q "On the question of compensation, will leave to see if he or
22 someone on his behalf applies to us."

23 A. Yes.

24 Q And is that accurate reflection of the decisions that you took
25 at that time?

1 A. Yes.

2 Q. The matter of the perjury charges, was that matter raised in
3 Cabinet?

4 A. No.

5 Q. Discussed with your government caucus?

6 A. No. Nor with the Premier, to complete your trilogy.

7 Q. So, the next time if I say question number 4 you'll...

8 A. Right, yes, give it a number.

9 Q. On page 178.

10 A. Yes.

11 Q. Your Honour, there's a notation at the top of the page in
12 handwriting. Is that your handwriting, Judge How, page 178,
13 I'm sorry, Volume 32?

14 A. Oh, 178. Yes, mine.

15 Q. If I read it correctly, "Marshall an Indian, therefore, federal
16 responsibility," and I'm not sure given the way the page is
17 constructed if we can put a date on that. But there is
18 reference, I think, in some of the press clippings to your
19 making similar statements around June of '83.

20 A. Yes.

21 Q. Could you indicate to us in which context you're speaking
22 here?

23 A. No, I think, well, I can, yes, but the only recollection I have on
24 that it wasn't...there was a thought that the federal
25 government might bear some responsibility if the question of

1 compensation arose. And, that was just perhaps a reminder
2 of that thought, if you will, but I don't take from it, the
3 wording of it or from its context, that that was a position that
4 I took on that, because I think I said in one...I'm quoted as
5 saying anyway, one newspaper article that given that that is
6 a fact that on the other hand the administration of justice is a
7 provincial responsibility, and of course might be...might
8 indicate the paramount responsibility, that is, the provincial
9 one.

10 2:29 p.m.*

11 Q. Were you of the view that the Federal Government had any
12 responsibility with respect to compensating Mr. Marshall?

13 A. Well, I don't know as I had a precise view of that. It was only
14 just a thought, but not a position. I might say that I was
15 interested reading some of the material that was supplied to
16 me prior to my coming here that there was, unknown to me,
17 there was an undertaking, alleged undertaking, by the
18 Minister of Indian Affairs, Mr. John Munro, to pay the costs
19 of... the legal costs of Mr. Marshall at one stage and the
20 allegation was he reneged on it. But I don't know anything
21 beyond that of any commitment by the Federal Government
22 in relation to this matter.

23 Q. On page 179, sir, there's a memo from Mr. Gale to Mr. Coles in
24 June of '83 and it deals with possible contempt proceedings
25 arising out of an article by Mr. Parker Donham , which was

1 published on May 25th.

2 A. Yeah.

3 Q. As I read the article, the Chief Justice MacKeigan evidently
4 asked that the matter be reviewed to see if proceedings were
5 warranted. Were you aware of that request being made or
6 having been made by the Chief Justice?

7 A. I really don't have a clear recollection of that. I heard of it at
8 some stage but... I do remember this much that I remarked
9 to Mr. Coles, I referred him to the article and I felt that
10 perhaps they had gone, the writer had gone a long ways into,
11 and possibly into the area of contempt of court. I felt he was
12 very unfair to me, but I was by that time rather used to that
13 and I guess that's one of the hazards of political life.

14 Q. To your knowledge, sir, had you or your department on other
15 occasions been asked by the court to review documents or
16 broadcasts to see if there was any basis for contempt
17 proceedings?

18 A. Any other occasions?

19 Q. To your knowledge?

20 A. I don't really have a recollection, no. I do remember this,
21 perhaps not at the precise time, but of being aware of it
22 shortly after.

23 Q. Mr. Gale writes in the last three lines of that memo on page
24 179:

25

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1 The Chief Justice suggested that the
2 Attorney General might write to the C.B.C.
3 to request a transcript of that broadcast
4 (This is, I gather, another broadcast
referred to) in the hope that so doing
might have some salutary effect.

5 A. I don't follow that but...I don't see it but...

6 Q. I'm sorry, page 179, Your Honour, the last three lines of that
7 memo.

8 A. Oh, yes, the typewritten part.

9 Q. Yes, I'm sorry.

10 A. Oh, yeah.

11 Q. Chief Justice suggested that the Attorney General might write
12 to the C.B.C.

13 A. Yeah.

14 Q. Do you have any memory of being asked by your staff to
15 write to the C.B.C.?

16 A. I didn't ask.

17 Q. Can you help us at all in the salutary effect that was being
18 looked for?

19 A. Do you mean in general or Mr. Donham?

20 Q. General?

21 A. In general? Oh, I would have no way of measuring that in
22 general.

23 Q. Do you have any opinion on whether or not that is an
24 appropriate request to be made to an Attorney General?

25 A. Yes, I have a view on that. My limited research on another

1 occasion entirely and in another context, with respect to the
2 law relating to contempt of court...

3 Q. I'm sorry. I wasn't asking you generally about whether or
4 not you would institute contempt proceedings. I was simply
5 asking about the...

6 A. I wasn't going to tell you I was, but you, I thought you...You
7 were asking me to comment on whether it was normal or,
8 indeed, appropriate for a chief, or a judge to ask the Attorney
9 General to look into a matter of alleged contempt, or
10 perceived contempt.

11 Q. That wasn't the question.

12 A. All right.

13 Q. But give us your answer on that anyway.

14 A. Do you want it anyway?

15 Q. Sure.

16 A. All right. My conclusion was that it is, I think, practically the
17 only way that a court can deal with that. They do deal with
18 it, I think, traditionally through a Minister of Justice, or as in
19 England, the Attorney General. And that person if, if that
20 person deems it is appropriate to take action, does so on
21 behalf of the court.

22 Q. The question was directed more to the requests contained in
23 the last three lines of that memo, where apparently you are
24 being asked to write to the C.B.C. in the hope that your so
25 writing might have some salutary effect.

1 A. I see. Well, any reasonable request by the court, we always
2 like to respond. But I don't see, to answer it more specifically,
3 I don't see any, I don't see that that is sufficiently at variance
4 of what I just explained, that is the duty of the Attorney
5 General to take any action on behalf of the court to protect it
6 from unwarranted attack, all right? And simply writing and
7 asking for a transcript, I think, I don't see an inherent conflict
8 there.

9 Q. And presumably the process would be that you would or your
10 staff would look at the material, formulate an opinion on
11 whether or not there was grounds on which to institute a
12 proceedings and, if so, go ahead.

13 A. And if so, go ahead.

14 Q. On page 190, Your Honour, Mr. Gale replied to the court.

15 A. Yes.

16 Q. And he says basically... looked at it and says "It's at most
17 borderline." And then he says, last three, two and half lines
18 of that letter:

19
20 It is not our intention to launch contempt
21 proceedings unless you and the members
22 of the panel in Marshall have different
23 views.

24 A. Yeah.

25 Q. As I read that, it's saying we've looked at it. We don't think
it's contemptuous. We're not going to do it unless you tell us

1 differently. Is that a fair reading of that?

2 A. Yes.

3 Q. Do I understand from that that if the court had then come
4 back and said that "We think it's contemptuous, proceed," that
5 you would have done so?

6 A. Oh, I gather so, yes. I think that's perhaps just an extension
7 of what I said earlier. Probably the court could suggest to the
8 Attorney General that it take action.

9 Q. Even though this is not a contempt in the face of the court as
10 such.

11 A. Well, again, if you want my limited opinion on it. There are
12 two kinds of contempt--contempt in the face of the court, *in*
13 *facie*, it's called.

14 Q. Yes.

15 A. And contempt outside, *ex facie*. The Supreme Court has
16 jurisdiction in both. The lesser courts like the one I sit on, do
17 not have jurisdiction only *in facie*, in the court. So that the
18 Supreme Court, i.e. Mr. Justice MacKeigan, could, in my view,
19 make that request, yes.

20 Q. But he could not have initiated the proceedings.

21 A. Well, he can't be an advocate and a judge, too. So he does it
22 through the medium of the Attorney General.

23 Q. But is it your...

24 A. That's my understanding.

25 Q. Is it your evidence then, sir, that if the court had come back

1 to you and said, "Yes, we think this is contemptuous, we want
2 you to proceed," that you would have done so?

3 A. I think so.

4 Q. Notwithstanding your opinion that it was a borderline case.

5 A. Yes, I think that's fair to say.

6 Q. And would it be fair to say that if the matter proceeded to
7 litigation and ended up in the Court of Appeal that the
8 decision would be a foregone conclusion?

9 A. Don't ask me. I don't know the answer to that one. We may
10 find out, to some extent, by an action which perhaps is going
11 to proceed which might be somewhat akin to this.

12 Q. On page 180, Judge How, on the first of June, you were
13 interviewed, I believe, by Barbara Frum, as she then was of
14 Morningside on C.B.C.

15 A. Yes.

16 Q. And I can only assume that this is an accurate transcript. Just
17 a couple of questions on this. On page 183.

18 A. Yes.

19 Q. About eight or ten lines from the bottom of the page, you say:
20 "And in the latter case," referring to the reference.

21 A. Yes.

22 Q. "There were five of our imminent jurists who reviewed every
23 scrap of evidence that was presented to them." Do I take it
24 that you are simply saying there that they reviewed the
25 evidence before them?

- 1 A. Yeah.
- 2 Q. You're not necessarily saying that they reviewed all the
3 evidence that you wanted them to see.
- 4 A. No, it was a phrase.
- 5 Q. On page 184, there's a bit of back and forth between you and
6 Ms. Frum on whether someone is acquitted or whether
7 they're innocent or whether they're not guilty as opposed to
8 innocent. And you appear to be saying that there's a
9 distinction between being innocent and being found not
10 guilty.
- 11 A. Yes.
- 12 Q. Was that a distinction you were intending to make?
- 13 A. Yes.
- 14 Q. Was it your view then that Mr. Marshall had been found not
15 guilty?
- 16 A. Yes.
- 17 Q. As opposed to being found innocent?
- 18 A. Yes, in technical and legal terms, yes.
- 19 Q. Was it your view that Mr. Marshall was innocent of the crime
20 of murder?
- 21 A. Yes, I would say that I had the view that he did not commit
22 that offence, yes. A bit of sparring, I grant you, with Barbara
23 Frum because she's not the one that seems to, at least in my
24 case, inspire cordiality, for some reason.
- 25 Q. Do I take from that that if cordiality had been inspired, you

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1 might have agreed that Mr. Marshall was innocent?

2 A. I suppose I might not have been so technical, yes.

3 Q. I see. In the same vein, Judge How, page 194...

4 A. May I say, too, when I use the term "dear" in there...

5 Q. I noticed that.

6 A. It's not a term of endearment, shall we say.

7 Q. It was not a term of endearment?

8 A. No, just an expression of mine again.

9 MR. CHAIRMAN

10 Where are we now?

11 MR. ORSBORN

12 194, My Lord.

13 HIS HONOUR CHIEF JUDGE HOW

14 A. What page?

15 Q. Page 194, and I simply refer you to it as an open letter that
16 you received from the, I believe there are some references in
17 the interview of Barbara Frum where the witness refers to
18 "My dear, my dear," but he simply wishes to be placed on the
19 record that that was not being used as a term of endearment.

20 MR. CHAIRMAN

21 Page 188.

22 COMMISSIONER EVANS

23 Was he complaining about it?

24 MR. ORSBORN

25 Was he complaining about it? I'm not sure, My Lord.

1 MR. ORSBORN

2 Q. Just page 194, there's a letter from Alexa McDonough and I'm
3 more interested, sir, in your reply at page 196 and you draw
4 her attention to the opinions of the judges of the Court of
5 Appeal and you attach certain extracts and then you say:

6
7 I'm sure they'd have to be given great
8 weight in connection with any
9 consideration of compensation.

10 The question, sir, is why would you refer only to the views of
11 the Court of Appeal and not to other information that you had
12 in your Department such as, for example, the reports of the
13 R.C.M.P., such as information suggesting that the statements of
14 witnesses were not provided by the Crown to defence
15 counsel?

16 A. Well, first of all, I think it is reasonable to suggest that if an
17 Appeal Court, a full court such as in our highest court, having
18 gone through apparently a thorough review process, and
19 includes five of our leading judges, makes certain findings,
20 one would be, I think, one could be criticized for ignoring it.
21 After all, they were making the judgement. That was their
22 responsibility. They made it and in the course of that, made
23 comments. In respect to what they perceived to be the part,
24 the behaviour of Mr. Marshall as it affected the original trial.

25 Q. The question, sir, was not so much that you, to suggest that
you should ignore it. The question was, why would you focus

1 on that to the exclusion of other information that you had
2 within your Department?

3 A. Well, I was coming to that. The other information we had was
4 very lengthy, very thorough memoranda from, and you
5 referred me to two of them this morning, Mr. Frank Edwards,
6 a man who admittedly, and you also said that, was
7 sympathetic to the acquittal of Mr. Marshall and, in fact,
8 advocated it to the court. But in his memos was also critical
9 of Mr. Marshall and the part he may have played in his own
10 conviction in 1971. Those were the two main sources. And,
11 indeed, I think it is fair to say that there were comments of a
12 similar nature, perhaps not precisely the same, by one or
13 more of the senior R.C.M.P. investigators.

14 Q. I believe that to be so. It was also criticism or comments
15 from the R.C.M.P. that were somewhat critical of the manner
16 in which the investigation was handled.

17 A. Oh, indeed so, but you can have both.

18 Q. Sorry?

19 A. You can have both.

20 Q. Precisely, and the question was why in correspondence such
21 as this would you focus just on the one and not the other?

22 A. Well, let me let you in on a little secret. When I get an open
23 letter like that, I immediately, and perhaps wrongly, jump to
24 the conclusion there's something political about it. See, when
25 I reply, I want to be awfully careful what I put in my letter.

1 Q. Okay.

2 A. Because I have had my letters circulated in the past in my
3 political life, written to a person, not in an open fashion, to an
4 individual, end up in the hands of the opposition to question
5 me about it in the House. So I got terribly conservative about
6 the way I responded.

7 Q. Let's turn to a closed letter, then. If we look at Exhibit 138,
8 which should be that pile of paper in front of you just to your
9 right there.

10 A. Oh, yes. Yes, thank you.

11 Q. This is a letter, I believe, written by you to a Miss Ruth Cordy
12 in Halifax on August 29th, 1983 and that letter is essentially
13 the same effect.

14 A. Sure.

15 Q. And whether there's any political implications to this letter, I
16 have no idea.

17 A. Oh, no, no, these were just what one got in political life,
18 criticizing you.

19 Q. You do take the same approach.

20 A. Yes.

21 Q. That it's Mr. Marshall's fault, the court has said so.

22 A. Well, you see, those people attempted to ignore what the
23 Supreme Court of Nova Scotia said was, in their view, a fact.
24 That whether or not Mr. Marshall would admit it on the stand,
25 he had admitted it to the police and they decided that they

1 accepted that, that he was there on that occasion to rob
2 someone. These people writing me, of course, want to give,
3 shall we say, a rosier view to Mr. Marshall in general. That's
4 their right, but it doesn't compel me not to point out to them
5 that maybe he had, there was some flaws in his performance,
6 too.

7 Q. You had, at the time of writing, you had some information to
8 indicate that there were flaws in people other than Mr.
9 Marshall.

10 A. Yes.

11 Q. That there was no reference to...

12 A. Well, this is long after the decision.

13 Q. Yes.

14 A. Well, I mention that here.

15 Q. A small point, Your Honour, in the end of the middle
16 paragraph in that letter. I may be nitpicking on wording, but
17 you say, in effect, "He may well have established his
18 innocence of the murder charge at that time." Does that
19 reflect your view on what the onus on Mr. Marshall was in
20 1971?

21 A. No, no. No, but you're dealing with laymen and I didn't have
22 time, lots of time. I used to write these late at night, you
23 know, when other people had gone home, I did my letter
24 writing on the machine. So I might well have, I didn't have
25 time to argue about technicalities, whatever. I wanted to

1 respond, of course.

2 Q I'm sorry?

3 A. I wanted to respond and I did.

4 Q Page 221 of Volume 32.

5 A. Yes.

6 Q Mr. Herschorn is again writing to you in August, and the
7 memo concerns the civil action down in Sydney against the
8 police.

9 A. Yes.

10 Q And he indicates at the end of the second paragraph:

11 You will recall our concern that a public
12 inquiry ought not to serve as a forum for
13 the assembling of evidence for any civil
14 suit initiated by Mr. Marshall.

14 A. Yes.

15 Q Did you share that concern?

16 A. Yes.

17 Q In laymen's terms, so what? If you have an inquiry, and as a
18 result of that, evidence comes out that might be useful in a
19 civil suit?

20 A. Well, now in lawyer terms, that you are one, I'm sure you
21 would agree, or I would trust you would, that when a subject
22 is under consideration by a court, it is considered improper to,
23 what? Conduct any kind of process which impinges on that.

24

25

1 MR. ORSBORN

2 It may be wise to take a short break, My Lord.

3 INQUIRY RECESSED UNTIL 3:07 p.m.

4 INQUIRY RESUMES -3:07 a.m. *

5 MR. CHAIRMAN

6 Mr. Justice Evans is not feeling too well this afternoon, so we
7 will carry on without him so that he can rest.

8 MR. ORSBORN

9 Q. Judge How, there is one letter I meant to ask you to comment
10 on and I'm sorry I didn't. It's contained in Exhibit 138, and
11 the second page of that Exhibit, pages 2 and 3, and judging by
12 the last paragraph of the letter this seems to be a lady that
13 inspires some degree of cordiality in you.

14 A. Yes.

15 Q. Looking at the...page 2 of the exhibit and the first page of that
16 letter.

17 A. Yes.

18 Q. Your Honour, the last paragraph of that page you say, "With
19 respect to the Marshall case you will understand that most of
20 the media in their simplistic approach portray Mr. Marshall as
21 a victim of injustice."

22 A. Yes.

23 Q. Do I understand you to be saying that you did not agree with
24 that approach?

25 A. Well, not wholly obviously. What I...there I explain I think

1 the following sentences, in fact, I say our Supreme Court
2 Appeal Division reviewing this case and hearing evidence
3 from witnesses who reversed their evidence, came to the
4 conclusion that there was now such a doubt of the whole of
5 the evidence that no jury could convict, they are obliged to
6 find him not guilty. Then I said it's not the same as finding
7 him innocent.

8 Q. Yes. You said, "This should not be construed as..." or sorry,
9 "This should not be interpreted as finding him innocent."

10 A. What I meant by that was that a court had said he was there
11 for a nefarious purpose, therefore, not a hundred percent
12 innocent, if you will, in that sense.

13 Q. You did not mean to suggest that he had not been found
14 innocent of murder, I apologize for the double negative.

15 A. He had been found not guilty of stabbing Seale, Sandy Seale,
16 yes.

17 Q. But were you suggesting that there was still some doubt as to
18 whether or not he had killed Mr. Seale?

19 A. No, no.

20 Q. Well, of killing Mr. Seale he was innocent.

21 A. No, but you see I think I mentioned earlier, so many of these
22 people writing this want to (a) portray the Crown, perhaps
23 even the Court, as being less than fair to people, you see. And
24 what I wanted to point out to her is that in this case there
25 was blame attached, as we understood it and as the Court

1 understood, some blame attached to Marshall, in fact, the
2 Supreme Court attached a great deal of blame to him. That
3 was their view. I simply wanted to point that out to her.

4 Q. You say that people wanted to portray the Crown and perhaps
5 the Court as not being fair to Mr. Marshall.

6 A. Well...

7 Q. In your view was there anything to suggest that the
8 investigation by the police had or had not been fair?

9 A. That was...that was...I would put it this way, that was another
10 issue. The view...you saw the view the Court took, you read it.
11 They put the proposition in their decision that had he told the
12 truth then, and this was supported, I think as I said earlier,
13 by comments in the senior R.C.M.P. memorandums to the
14 department, that had he told the truth, the Sydney Police in
15 their view, indeed in the Court's view, and indeed in the...and
16 indeed one senior R.C.M.P. officer's view would have
17 uncovered, to use their phrase, the truth.

18 Q. Uh-hum. Is it simplistic to conclude that had Mr. Pratico or
19 Mr. Chant told the truth Mr. Marshall would not have been
20 convicted?

21 A. Well, I suppose one could postulate that too, had they told the
22 truth.

23 Q. There's some suggestion at page 221 we touched on just
24 before we broke, Mr. Herschorn's memo to you, and there was
25 a concern raised about the public inquiry acting as a forum

1 for discovery.

2 A. Yes.

3 Q. And we did break. But did I understand your evidence to be
4 that your concern was a matter of principle that there should
5 not be an inquiry while there was a civil dispute before the
6 courts.

7 A. Yes.

8 Q. Okay.

9 A. Yes.

10 Q. Page 236, Your Honour, just a small point at the bottom right-
11 hand corner of page 236.

12 A. Yes.

13 Q. Is that in your handwriting there, sir?

14 A. Yes.

15 Q. And I believe that simply relates to the fact that you agree
16 with the proceeding of a manslaughter charge against Mr.
17 Ebsary after it had been changed at the preliminary.

18 A. Yes. Yes, I guess that was...that would be the chronology of
19 events there.

20 Q. Right. Now, sir, on page 262 there is a letter to you from Mr.
21 Cacchione and...

22 A. Yes.

23 Q. ...this is, I believe, the first letter that I've seen to your
24 department from Mr. Cacchione.

25 A. Yes.

1 Q. And on page 263 you reply to him saying that you're not
2 aware of any request for an inquiry.

3 A. That's right, yes.

4 Q. And you turn the matter over to Mr. Coles. Had you not
5 already determined at that point that there would be no
6 inquiry until the civil matter was determined?

7 A. No.

8 Q. I'm sorry, then I had understood that to be your position and
9 your evidence that you did not believe there should be an
10 inquiry because...

11 A. While, while....

12 Q. Yes.

13 A. And then depending on the result of that trial would...we
14 would determine whether a further inquiry of any nature
15 was warranted, yes.

16 Q. Was there any reason that could have not been passed on to
17 Mr. Cacchione in your reply?

18 3:15 p.m.

19 A. I suppose there's no reason why it couldn't have been. We
20 weren't hiding anything. It just hadn't been done.

21 Q. There's an exchange of correspondence, then, back and forth
22 between yourself and Mr. Cacchione...

23 A. Oh, yes.

24 Q. And he wanted to meet with you and you sent him back a
25 letter saying, "I've sent it to Mr. Coles." I take it from what

1 you say that you did not want to meet with Mr. Cacchione?

2 A. Let me explain, if I may. I didn't want to meet...I didn't mind
3 meeting with Mr. Cacchione, but I wanted to have Mr. Coles
4 talk with him first to determine what he was proposing. I
5 just mentioned moments ago that I found so often that if I
6 talked or wrote that it often ended up in a public exposure, if
7 you will, and so it was, I began to develop the view that it
8 was better to find out what was on their mind through an
9 intermediary. That's why.

10 Q. You wanted him to...

11 A. Yes.

12 Q. Do the groundwork.

13 A. Yes. Yes, I did. I want to know when I am talking with
14 someone that if we're discussing a matter, that it's not, that it
15 is a face-to-face and not a public discussion, especially
16 matters of that nature. He said, "I want to see you
17 personally," Yes, that's fine. But I want to know if I do see
18 him personally, if it's going to remain between us until we
19 jointly are able or are prepared to make it public.

20 Q. Did you have any reason to believe that your discussions with
21 Mr. Cacchione would not be private?

22 A. Well, there were, I can't give you specific, but, you know,
23 there was a great deal of resort to the media throughout this
24 whole thing. I'm not saying it's a bad thing but I'm simply
25 saying it doesn't, to my mind, make for frank discussions

1 many times. And I prefer to have them friendly and frank,
2 if we can, and to reach some conclusions before it's,
3 everybody runs to the media.

4 Q. I'd like to turn to Mr. Coles' memo to you, which is found on
5 page 272 and 273.

6 A. Yes.

7 Q. On page 272, he comments on whether or not an inquiry
8 should be initiated and in the paragraph numbered one,
9 towards the bottom of the page, he says:

10
11 The police officers that were involved are
12 retiring or about to retire. (He says) The
13 Crown Prosecutor, Mr. MacNeil,
14 undoubtedly was much involved as he had
a reputation of acting more like a D.A. and
he's deceased.

15 A. Yes.

16 Q. Do you have any idea what is meant when they speak of Mr.
17 MacNeil "acting more like a D.A."?

18 A. Well, my only impression at that time was that an American
19 District Attorney is part investigator, in other words, part
20 detective as well as...He involves himself in the detection and
21 development of the case as well as being prosecutor.
22 Whereas in Canada, the Crown is supposed to take the
23 information supplied by the police force in question and
24 assess it as to whether it supports criminal charges and to act
25 accordingly. Because we come back to the position of the

1 Crown Prosecutor, as we touched on much earlier today, that
2 he is a person who is not an adversary. He is a person whose
3 role is to present both good, both information or facts, better
4 put, which support the charge but also may, in turn, benefit
5 the defendant. He is in a somewhat neutral position, to use
6 Mr. Coles' phrase again. And I take it that Donald MacNeil
7 wasn't quite of that mold.

8 Q. Do you have any personal knowledge of Mr. MacNeil's abilities
9 as a prosecutor?

10 A. I don't. I knew him by reputation but that is all.

11 Q. No personal knowledge of him.

12 A. I never met him, but he was reputed to be a very able, very
13 capable, somewhat aggressive person in political and legal
14 life.

15 Q. Mr. Coles goes on to write to you:

16
17 Accordingly, it will be almost impossible to
18 thoroughly and fairly investigate the
19 activities of the principals involved in the
20 investigation and prosecution at this point
21 in time.

22 Did you agree with that conclusion?

23 A. I don't know as I fully agreed with it. I could see the
24 deficiencies that faced us in terms of a complete investigation
25 because of, he was no longer alive, MacNeil. And, as Mr. Coles
said, he was a very, what, involved participant in the
prosecution and acted like an American prosecutor more than

1 perhaps a Canadian. And without his evidence, that could you
2 insure a totally factual and fair result? That's what he meant,
3 in my view. But I'm not suggesting or saying that I totally
4 agree with him. I understood from what he was saying but
5 we didn't take action on it. What's the date of that memo, by
6 the way?

7 Q. There's a handwritten date on the second page which says
8 "October 25th, 1983".

9 A. Well, it's about two weeks later that I was no longer in the
10 role of Attorney General, but in my present one. But that's
11 the reason we didn't follow up on it, or I didn't, sorry. But I
12 don't say that I necessarily, my views coincide entirely with
13 his. In part, perhaps, but not entirely.

14 Q. On page 273, Paragraph number 3, he writes to you:

15
16 This is not a situation where there may be
17 an ongoing or present police practice which
18 needs to be scrutinized publicly and
19 corrected.

20 Did you know that for a fact?

21 A. I didn't, no.

22 Q. Did Mr. Coles have any other information other than what you
23 had access to on which he could base that, to your
24 knowledge?

25 A. We might well have. I think he was basing it, or it would
appear to me he was basing it on the fact that Chief

1 MacIntyre, did you say, had retired? "Due to retire shortly.
2 Mr. Urquhart who is now retired." Were no longer, well,
3 would not be much longer in active police work in Sydney.

4 Q. I think you said it was about two weeks after that that you
5 went to the Bench.

6 A. Yes, roughly that.

7 Q. And left it all behind you.

8 A. Pardon?

9 Q. Left it behind you?

10 A. Well, I didn't do it purposely, but it was left behind me, yes.

11 Q. You mentioned this morning that you believe that you might
12 have spoken to Mr. Gale some time after you...

13 A. I mean I wasn't trying to get rid of this by taking this...

14 Q. Sorry?

15 A. I wasn't trying to rid of this by taking my present position.

16 Q. I see.

17 A. No.

18 Q. You mentioned that you may have spoken to Mr. Gale about
19 this holding interviews and stopping in abeyance and that
20 that may have been after you went to the Bench. Are you
21 able to tell us whether you initiated that contact or Mr. Gale
22 initiated that contact?

23 A. Well, there was something, it seemed to me, in the press or
24 one of the media that would suggest that the Attorney
25 General; i.e. me, of the day had suppressed or had discouraged

1 this or had placed it in abeyance or had suspended or stopped
2 it. I don't know whether they went quite as far as the latter.
3 So I was curious about it, because it reflected, I thought, on
4 me and I knew I had no knowledge of my ever saying don't
5 proceed with any further inquiry into the Sydney City Police
6 performance in connection with the Marshall case. I had no
7 recollection of doing it and am confident I wouldn't have.

8 Q. We have in our volumes, I think Volume 27, and you don't
9 need to look at, Your Honour. There is a fair bit of
10 correspondence about Mr. Aronson's legal fees.

11 A. Yes.

12 Q. And there's correspondence between him and Mr. Munro,
13 between you and Mr. Munro, and others. I think the bottom
14 line is that he was not paid by the Federal Government and
15 he was not paid by the Provincial Government. And as I read
16 the correspondence, your grounds were that you did not want
17 to go outside the existing legal aid arrangement.

18 A. We didn't prefer to.

19 Q. Because of its precedential value.

20 A. Yes.

21 Q. Was it any more than that that you didn't want to create a
22 precedent?

23 A. Yes. I would say this. Only if we had, only when we reached
24 a point where compensation was paid to Mr. Marshall. Then,
25 as I said much earlier today, I would have been very

1 supportive of paying his legal fees, all reasonable ones, of
2 course, assume that. And I'm not saying they were
3 unreasonable in the final bill. All reasonable legal fees as
4 part of the settlement.

5 Q. So you were not prepared...

6 A. But we didn't have a structure at that time.

7 Q. I understand.

8 A. In the ordinary administration of our budget, we didn't have
9 a budget item for this kind of thing.

10 Q. But you were not prepared to consider the payment of legal
11 fees outside a compensation structure.

12 A. That's right, at that time.

13 Q. But within that structure, is your evidence that you were
14 prepared to consider that as a...

15 A. Yes, but if it accompanied a general compensation package,
16 yes. Then I think it would be only proper.

17 Q. Just a couple of final questions, Your Honour. If I could direct
18 your attention to Volume 38, which is a compilation of
19 newspaper clippings.

20 A. Yes.

21 Q. And I'm reading at page 36. And I believe this to be an
22 excerpt from the Cape Breton Post of May 17th, 1983 which
23 would be immediately following the handing down of the
24 decision of the Court of Appeal. And you're reported to have
25 said:

1 'There is little question the Nova Scotia
2 Government bears some responsibility,
3 perhaps all, for the system that sent
4 Donald Marshall to prison for eleven years
5 for a murder he did not commit,' Attorney
6 General Harry How said.

6 A. Yes.

7 Q. Do you recall saying that, sir?

8 A. Oh, yes, I think I do.

9 Q. Can I ask you to explain it, given the fact that counsel on
10 behalf of the Attorney General has just prior to this urged the
11 court to exonerate the system from any blame. They don't
12 seem consistent at first reading.

13 3:30 p.m.

14 A. Well, of course, that, they could suggest that to the court. It's
15 part of their presuming, presumably facts, but I might, at the
16 same time, take the position that although he bore in my view
17 some responsibility I might take it that he should not be
18 barred from compensation.

19 Q. But were you, in fact, sir, of the view on May 17th, '83, or
20 thereabouts that the Government bore some responsibility for
21 the system that sent him to jail?

22 A. Well, I don't know as those are my words, you understand.
23 That is not a quotation...

24 Q. I appreciate that...

25 A. It's a paraphrase of...

1 Q. Of the sentiments expressed there.

2 A. Well, I was saying, I think it's pretty obvious, that our system
3 did send him to prison. That was a fact. And that under our
4 Constitution the Government, the Provincial Government was
5 responsible for the administration of justice. Putting the two
6 together I said something to this effect.

7 Q. So are you suggesting that you were simply saying this in a
8 Constitutional setting? That the Provincial Government,
9 rather than the Federal Government, is responsible for that
10 system?

11 A. That's why I said perhaps, I was perhaps being a tad cautious
12 there, you might say. I guess you got so in political life and
13 particularly in that. As Attorney General, you got sometimes
14 you felt that you ought to err on the side of caution your
15 remarks, I don't know as I always observed that, but, and I
16 hear some laughter. Obviously they didn't think I did. But, in
17 any event, I was a bit reserved on that, yes. But to be
18 perfectly frank I had the view myself that we were, that we
19 were going to be totally responsible for payment of
20 compensation. That we could not ask the Federal Government
21 to participate.

22 Q. Does that then suggest that you were of the view that the
23 system did not function properly?

24 A. Well I don't, well, from what the court, the jury heard, from
25 what the judge heard on that occasion, I can understand why

1 they came to the conclusion they did. I think I said much
2 earlier that a jury, or judge, is obliged to decide on what he or
3 they hear. That's an axiom. They heard certain evidence. It
4 turned out that that evidence did not reflect the facts, but
5 long after they made their decision that's what, so that on the
6 basis of what they heard the system functioned. But it's only
7 as good as the information fed or submitted to it. We know
8 that.

9 Q. Based on the information that was available to you during
10 your tenure as Attorney General, were you of the opinion that
11 the system functioned properly?

12 A. Well, if you say properly. Now, if they came to a wrong result
13 I don't know if you can say it functioned properly. Can you.
14 But that's not to fault those people involved at the time, that
15 is, those people meaning the jury and the judge, because of,
16 for what I just explained.

17 Q. Based on the information available to you during your tenure
18 as Attorney General, did you consider that there was any
19 fault to be attached to any person other than Mr. Marshall in
20 his being charged and convicted?

21 A. I considered, yes, (a) there was fault on Marshall's part. I
22 think there was apparent fault on the Sydney Police for the
23 manner in which these witnesses said they were handled, all
24 right, by them. And perhaps there was fault, and
25 undoubtedly, on the Crown Prosecutor, MacNeil, for the same

1 reason. Allegedly. Now that's as far as I could go at that time
2 and perhaps that applies even 'til today. The, as has been
3 said, the Supreme Court did not comment on what they might
4 have, their views, or did not give any of their views on what
5 they thought of the conduct of the case by the Sydney City
6 Police, or, indeed, the Crown Prosecutor. I had nothing more
7 to go on than what I'm...

8 MR. ORSBORN

9 Thank you. That's all, My Lord.

10 ADJOURNED TO 23 March 1988 - 9:30 a.m.

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REPORTER'S CERTIFICATE

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



Margaret E. Graham

DATED THIS 22 day of March 1988 at Dartmouth, Nova Scotia