ROYAL COMMISSION ON THE DONALD MARSHALL, JR., PROSECUTION

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

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INDEX - VOLUME 60

His Honour Chief Judge Henry How

Examination by Mr. Orsborn		10771
	9:56	10786
	10:35	10794
	10:58	10806
	11:28	10824
	2:06	10859
	2:18	10864
	2:29	10871
	3:07	10885
	3:15	10889
	3:30	10897

EXHIBIT LIST

Exhibit	Description	Page	Volume
92	Four pages of Mr. Smith's handwritten	6833	37
93	Mr. Smith's record of polygraph examinations	6833	37
94	Copy of Donald L. Burgess' job description dated 1983	7134	38
95	A-5 with related notes and RCMP correspondence	7150	38
96	Copies of pages of Sgt. Cole's notebook	7225	39
97	Copy of Melinda MacLean's file	7243	39
98	Volume 29	7484	41
99	Volume 34	7484	41
90A	Photocopy of handwritten notes by Staff Sgt. Wheaton (typed version in Exhibit 90)	7490	41
90B	Original of Staff Sgt. Wheaton's notes (original in Exhibit 90)	7491	41
100	Statement of G.A. Ebsary dated April 19, 1982	7492	41
101	Statement of Donald Marshall, Jr. to Cpl. Carroll dated Feb. 18, 1982, taken at Dorchester Penitentiary	7493	41
102	Affidavit dated September 1982 of Staff Sgt. Wheaton	7495	41

Exhibit	Description	Page	Volume
103	Statement of Roy Newman Ebsary February 23	7574	41
104	Cpl. Carroll's handwritten notes	7581	41
105	six excerpts from Cape Breton Post dated May 29, 31, and June 1, 2, 3, and 5, 1971	7656	42
106	Volume 37. Transcript of June, 1984 examination for discovery of Heather Matheson, John F. MacIntyre v. Canadian Broadcasting Corporation.	7656	42
100A	Original of Greg and Mary Ebsary's statement	8014	44
88A	Copy of Staff Sgt. Wheaton's written notes	8163	44
107	Calender for years 1800 to 2500	8229	45
108	Photocopy of Staff Sgt. Wheaton's notes	8230	45
109	Diagram drawn by Staff Sgt. Wheaton of John MacIntyre's office with seating plan of meeting of April 26, 1982	8231	45
110	Three pages from discovery evidence of Heather Matheson	8277	45
111	RCMP guide for contact with media	8280	45
112	Correctional Services records of Donald Marshall, Jr. (Volume 35)	8516	46
113	Stephen Aronson's correspondence re fees (Volume 27)	8530	46

			C
105A	Article from Cape Breton Post concerning Donald Marshall's remand	8587	47
114	Original of Donald Marshall, Jr.'s statement taken at Dorchester Penitentiary, March 9, 1982		50
115	Supt. Scott's notes, 1982	9251	50
116	Cape Breton Post issue, June 19, 1986 one page		50
117	R.C.M.P. Operational Manual, one page	9303	51
118	Letter January 8, 1980 from Inspector Scott to Chief A. Christmas	9453	51
119	Mr. Urquhart's resumé	9476	52
120	Criminal record and fingerprint records of Robert Patterson	9551	52
121	Mr. Roy Ebsary's fingerprint record from Sydney Police Department,April 9, 1970	9614	52
122	Copies of portions of Criminal Code of Canada	9651	53
123	Volume 30 of Marshall Inquiry docs.	9651	53
124	Volume 31 of Marshall Inquiry docs.	9651	53
125	Volume 32 of Marhsall Inquiry docs.	9651	53
126	Copy of letter dated May 10, 1983 from the Chief Justice of Nova Scotia to Minister of Justice	9651	53
127	Notes of Mr. Ron Fainstein	9693	53

128	Report of Federal-Provincial Task Force	9762	53
129	Brian Williston's telephone notes	9864	54
130	Collection of newspaper articles	9893	54
131	Volume 38 of Marshall Inquiry docs.	9899	54
132	Vol. 28 - Correspondence, October December, 1984, 1986	10081	55
133	Single sheet of paper in S. Aronson's Handwriting - "meeting with Junior" September 3, 1981	10081	55
134	Volume 39, compilation of material court of appeal files	10082	55
136	Copy of sec. 4. of the Public Service Act	10337	57
137	Cabinet documents	10456	57
135	Volume 33	10462	57
139	Letter June 1984 from F. Cacchione to Attorney General's Department	10486	57
138	Telex from R. Giffin to Crosbie April/85	10528	58
142	Package of documents	10692	59
143	Toronto Star report of December 27, 1985	10703	59
140	RCMP contracts	10726	59
141	Volume 41 - correspondence from the Attorney General's Department re Indian Affairs	10735	59

E

144	Letter - 1983 - from Edmund Morris to the Union of Nova Scotia Indians	10741	59
145	References from Hansard, 1982-1983	10771	60

MR. CHAIRMAN

Mr. Orsborn.

MR. ORSBORN

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

EXHIBIT 145 - REFERENCES FROM HANSARD, 1982 TO 1983

MR. CHAIRMAN

145, all right.

MR. ORSBORN

The next witness is His Honour Judge Harry How.

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

EXAMINATION BY MR. ORSBORN

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

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

Q. Henry Walter.

A. I beg your pardon?

Q. Henry Walter How.

A. Yes, yes.

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

A. Yes.

Q. And that you were appointed to that position in November 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.

A. Yes.

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

A. No.

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

A. No.

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

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

MR. CHAIRMAN

Judge How, in England, I believe, the Attorney General is a 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.

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?

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

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

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

Q. Would you attend those meetings, sir?

A. No.

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

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

Q. Okay. You would have had access to the RCMP reports as they 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

10:35 a.m.

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

A. Yes.

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

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

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

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

Q. What about Government caucus?

A. No.

Q. The Premier?

A. No.

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

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

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

A. You ask me if I knew that?

Q. Did you know that they were not interviewed?

A. No, I didn't. No.

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

A. Well, I suppose one might.

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

A. No.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

terms.

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

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

Q. About the role of the police?

A. Yes.

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

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

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

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

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

A. Yes, I saw that later.

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

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

with?

A. I don't recall asking that.

Q. Was there any...

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

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

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

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

A. No, none.

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

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

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

A. Well, I certainly would say that I felt that it was certainly a topic to be discussed and determined within the Department, 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

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

A. Yes.

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

A. Yes.

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

A. Yes.

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

A. Yes.

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

A. Yes.

Q. And he then goes on to set out his reasons for suggesting that. He says in the following sentence, "Mr. Marshall would thus have the opportunity to call fresh evidence and would have 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 consideration of perjury charges
12 > necessarily involves an examination of police conduct in the investigation. That
13 > examination will likely make it equally clear that perjury charges are not
14 > appropriate.
15 Did you share the view, sir, that an examination of police
16 conduct would make it clear that perjury charges were not
17 appropriate?
18 A. Well, the only thing I can say on that was that it was clear
19 that the perjury charges would relate to three teenage
20 witnesses in 1971 I'm referring to, and the fourth would
21 relate to Mr. Marshall himself who had been imprisoned for a
22 lengthy period. Given the suggestion of their youth in all
23 cases and the...in terms of the three witnesses other than Mr.
24 Marshall, the alleged pressures on them, it was felt at that
25

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.

HIS HONOUR CHIEF JUDGE HARRY HOW

Yes.

MR. ORSBORN

No.

CHAIRMAN

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

HIS HONOUR CHIEF JUDGE HARRY HOW

Yes. The evidence pointed in that direction.

CHAIRMAN

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

HIS HONOUR CHIEF JUDGE HARRY HOW

Yes.

CHAIRMAN

I guess that's our responsibility to decide, in time, what were the contributing factors to the original conviction. And I'm just, you know, every witness seems to have a different theory, but it's 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
who argues that the aforementioned order
7 could issue on the basis that there has
been a miscarriage of justice. It is
8 submitted that the letter phrase connotes
some fault in the criminal justice system or
9 some wrongdoing on the part of some
person or institution involved in that
10 system. The respondent contends that
such was not the case and that care should
11 be taken to dispel any such notion.

12 Were you aware that that view was to be advanced by Crown
13 counsel?

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

15 Q. Yes, I'm sorry.

16

17 The respondent disagrees with counsel for
the appellant who argues that the
18 aforementioned order could issue on the
19 basis that there has been...

20 A. He disagreed with counsel for the appellant which was Mr.
21 Aronson, yes.

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

25

1 The Crown says that there was no
2 miscarriage of justice and that care should
be taken to dispel any such notion.
3 Were you aware that that...
4 A. I wasn't aware of that, no.
5 Q. Was that contrary to your expectations of the view to be
6 advanced by the Crown?
7 A. Well my expectation was that the man would be acquitted. I
8 don't know what phrase would, perhaps, be applied to the
9 acquittal.
10 Q. Yes.
11 A. Or associated with the acquittal. I say that because I was not
12 in intimate contact with, you know, Mr., I was not in contact
13 with Mr. Edwards, only through memos which he sent to the
14 Department.
15 Q. Are you able to say, sir, as Attorney General, that you agree
16 or disagree with the position put forward by Crown counsel,
17 that there had not been a miscarriage of justice?
18 A. I don't think it's really fair for me to answer that. I'm not
19 trying to fence sit or waffle on it but I can't remember having
20 an opinion precisely in those, in that context.
21 Q. Well you've told us consistently this morning, Your Honor,
22 that a desirable result be an acquittal based on the
23 miscarriage of justice.
24 A. Oh, I suppose that would be the most desirable.
25 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

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

MR. ORSBORN

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

MR. CHAIRMAN

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

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

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

Q. Loss of freedom, I think.

A. Loss of freedom.

COMMISSIONER EVANS

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

HIS HONOUR CHIEF JUDGE HARRY HOW

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

COMMISSIONER EVANS

So in this case...

HIS HONOUR CHIEF JUDGE HARRY HOW

Which might happen...pardon.

COMMISSIONER EVANS

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

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

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.
6 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...
16 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.
19 HIS HONOUR CHIEF JUDGE HARRY HOW
20 Yes.
21 MR. CHAIRMAN
22 But the memo of May 25th, 1983...
23 HIS HONOUR CHIEF JUDGE HARRY HOW
24 Yes.
25 MR. CHAIRMAN

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

4 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.

11 MR. CHAIRMAN

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

13 HIS HONOUR CHIEF JUDGE HARRY HOW

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

15 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?

21 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

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

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

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

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

A. Oh, yes, the typewritten part.

Q. Yes, I'm sorry.

A. Oh, yeah.

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

A. Yeah.

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

A. I didn't ask.

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

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

Q. General?

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

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

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.

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

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

A. And if so, go ahead.

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

A. Yes.

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

> It is not our intention to launch contempt proceedings unless you and the members of the panel in Marshall have different views.

A. Yeah.

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

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.

MR. ORSBORN

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

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

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

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

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

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

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

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

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

Q. Sorry?

A. You can have both.

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

A. Well, let me let you in on a little secret. When I get an open letter like that, I immediately, and perhaps wrongly, jump to the conclusion there's something political about it. See, when 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

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

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

A. Yes.

Q. That there was no reference to...

A. Well, this is long after the decision.

Q. Yes.

A. Well, I mention that here.

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

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

respond, of course.

Q. I'm sorry?

A. I wanted to respond and I did.

Q. Page 221 of Volume 32.

A. Yes.

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

A. Yes.

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

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

A. Yes.

Q. Did you share that concern?

A. Yes.

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

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

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

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

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

Q. You wanted him to...

A. Yes.

Q. Do the groundwork.

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

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

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

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

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

A. Yes.

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

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

A. Yes.

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

A. Well, my only impression at that time was that an American District Attorney is part investigator, in other words, part detective as well as...He involves himself in the detection and development of the case as well as being prosecutor. Whereas in Canada, the Crown is supposed to take the information supplied by the police force in question and assess it as to whether it supports criminal charges and to act 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 thoroughly and fairly investigate the
18 > activities of the principals involved in the investigation and prosecution at this point
19 > in time.
20 Did you agree with that conclusion?
21 A. I don't know as I fully agreed with it. I could see the
22 deficiencies that faced us in terms of a complete investigation
23 because of, he was no longer alive, MacNeil. And, as Mr. Coles
24 said, he was a very, what, involved participant in the
25 prosecution and acted like an American prosecutor more than

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

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

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

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

> This is not a situation where there may be an ongoing or present police practice which needs to be scrutinized publicly and corrected.

Did you know that for a fact?

A. I didn't, no.

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

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:

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

A. Yes.

Q. Do you recall saying that, sir?

A. Oh, yes, I think I do.

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

3:30 p.m.

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

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

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

Q. I appreciate that...

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

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

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

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

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

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

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

MR. ORSBORN

Thank you. That's all, My Lord.

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

REPORTER'S CERTIFICATE

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

Margaret E. Graham

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