

ROYAL COMMISSION ON THE  
DONALD MARSHALL, JR., PROSECUTION

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- Held: March 23, 1988, in the Imperial Room, Lord Nelson Hotel,  
Halifax, Nova Scotia
- Before: Chief Justice T.A. Hickman, Chairman  
Assoc. Chief Justice L.A. Poitras and  
Hon. Justice G. T. Evans, Commissioners
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- Mr. Donald C. Murray: Counsel for Mr. William Urquhart
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- Mr. William L. Ryan, Q.C.: Counsel for Officers Evers, Green and  
MacAlpine
- Mr. Charles Broderick: Counsel for Sgt. J. Carroll
- Messrs. S. Bruce Outhouse, Q.C. and Thomas M. Macdonald: Counsel  
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- Messrs. Bruce H. Wildsmith and Graydon Nicholas: Counsel for  
the Union of Nova Scotia Indians
- Mr. E. Anthony Ross: Counsel for Oscar N. Seale
- Mr. E. Anthony Ross and Jeremy Gay: Counsel for the Black  
United Front
- Court Reporting: Margaret E. Graham, OCR, RPR

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HIS HONOUR CHIEF JUDGE HARRY HOW, EXAM. BY MS. EDWARDH

1 MARCH 23, 1988 - 9:30 a.m.

2 MR. CHAIRMAN

3 Good Morning. Ms. Edwardh?

4 MS. EDWARDH

5 Thank you very much, sir.

6  
7 HIS HONOUR CHIEF JUDGE HARRY HOW, still sworn, testified  
8 as follows:

9 EXAMINATION BY MS. EDWARDH

10 Q. Judge How, I would like to start, if I might, with some of your  
11 observations about the Office of the Attorney General.

12 A. Yes.

13 Q. If I understood your evidence correctly yesterday, I take it it  
14 was your position that the Attorney General was, of course,  
15 not subject to direction from members of the Cabinet or  
16 Cabinet solidarity on issues relating to prosecutions.

17 A. That's right.

18 Q. And so that with respect to laying of charges, the conduct of a  
19 particular prosecution, the staying of charges, or plea  
20 bargaining, the Attorney General would not discuss that with  
21 other members of the Cabinet.

22 A. Yes.

23 Q. Now you also stated that in the ordinary course, you would  
24 have to resort to Cabinet for an unbudgeted financial  
25 expenditure. Do you recall making that statement?



1 A. Yes.

2 Q. I take it that none of the expenses associated with the  
3 ordinary prosecution of a criminal offence would require  
4 that?

5 A. That's right.

6 Q. Now you do have authority, sir, in extraordinary cases, for  
7 example, to appoint a special prosecutor, correct?

8 A. Well, I don't recall but perhaps I did.

9 Q. You had authority.

10 A. It would seem reasonable, yes.

11 Q. I'm just trying to understand the office. As Attorney General,  
12 there is authority in the office to appoint a special prosecutor  
13 in appropriate cases.

14 A. All right.

15 Q. Is that correct?

16 A. Well, I...

17 Q. You don't know that?

18 A. I can't point you to chapter and verse where it says that, but  
19 I would conclude, yes, from the general nature of the office.

20 Q. And assuming for a moment that that would involve some  
21 extraordinary expenditure, would that have to be approved  
22 by Cabinet? Or do you know?

23 A. I can't answer you. I can't answer you.

24 Q. So with regard to the general duties of the Attorney General, I  
25 take it that, in addition to not discussing matters with

1 members of Cabinet or Cabinet, that it's the obligation of the  
2 Attorney General, it's your view anyway, that it is  
3 appropriate to resist any attempt by members of Cabinet to  
4 discuss cases with him.

5 A. Yes.

6 Q. And, indeed, if someone sought to discuss a case with you, I  
7 take it you would feel obliged to remind them that you would  
8 not be in a position to have any such discussions.

9 A. I would say, yes.

10 Q. And I don't want to deal with what actually happens in  
11 Cabinet for the moment, since that is subject to an assertion of  
12 privilege.

13 A. There's some controversy about that, yes.

14 Q. Yes, but I take it if the matter just hypothetically were raised  
15 in a Cabinet meeting, it would be the obligation of the  
16 Attorney General to caution his colleagues and even to leave,  
17 if he had to, so as not to discuss it.

18 A. Yes, right. That's right.

19 Q. Now given those considerations, you commented yesterday  
20 that you can combine the Office of the Attorney General with  
21 the political figure of a Cabinet Minister.

22 A. Yes.

23 Q. But I take it, sir, it's your view that that is sometimes not  
24 necessarily easy to do.

25 A. Yes, I think I said that.

1 Q. Is that a fair statement?

2 A. I certainly haven't changed my mind overnight, no.

3 Q. That's a fair statement of your view, though?

4 A. Yes.

5 Q. Would you go so far as to say, although it can be done with an  
6 Attorney General who is very conscious of his role, that it  
7 would be better should there be a real structural separation  
8 so that the Attorney General did not sit in Cabinet?

9 A. I think I touched on that yesterday in this way that this is a  
10 tradition in this Province. More than that, we're a small  
11 province and it's oftentimes, what, somewhat difficult to  
12 separate the politician who becomes a member of Cabinet and  
13 Attorney General, in turn, from those three roles. I have  
14 always put it down to this that, yes, it can be done. It is done.  
15 Traditionally has been done. And what it involves and  
16 requires is the integrity of the individual to assert itself.

17 Q. I appreciate that, sir. But we all understand that it would be  
18 easier in some senses if there were a structural separation. Is  
19 that a fair statement?

20 A. Oh, that's a pretty global question. You see, you say it's easier  
21 if it were. I don't know what your parameters are for the  
22 new office that you seem to have in mind or might have in  
23 mind.

24 Q. No, I'm just trying to follow up...

25 A. I can't answer that. I can't answer that.

1 Q. So I take it, although you say it's difficult to do, you're not  
2 prepared to go so far as to say it would be preferable that a  
3 structural separation exists.

4 A. Oh, I don't personally see the need of it and, more than that,  
5 I've never given enough thought to it to really answer you  
6 intelligently.

7 Q. Okay, that's fair. Now do you recall, sir, whether in and  
8 around the months of October and November, 1984, there  
9 were discussions in caucus about the Marshall case in which  
10 you participated.

11 A. Not with me. I wasn't there.

12 Q. I'm sorry, '82, wrong year. I appreciate you left in '83, yes,  
13 '82.

14 A. Discussions in caucus about what then?

15 Q. The Marshall case.

16 A. No, I don't recall any.

17 Q. You don't recall any?

18 A. No.

19 Q. And one other general question, I take it that recently the  
20 Government of Nova Scotia has created a Department of the  
21 Solicitor General, is that correct?

22 A. Yes.

23 Q. And I take it that it is contemplated that that office shall have  
24 some direct authority over policing in the Province, is that  
25 correct?

1 A. I think that's one of the divisions, yes.

2 Q. And when you sat as Attorney General, is it your view that  
3 you exercised, in effect, the functions of the Solicitor General?

4 A. Yes.

5 Q. So that you had a, held an office in which you were both then  
6 Attorney General and Solicitor General, in effect, for the  
7 Province?

8 A. Yes.

9 Q. Okay. Now you characterized your style in terms of your  
10 management of the Department of the Attorney General as  
11 one involving a delegation of the day-to-day responsibilities  
12 to senior members in your Department.

13 A. Yes.

14 Q. But you also said, sir, yesterday that you would be considered  
15 a hands-on Minister when it came to matters of complaints.  
16 Do you recall saying that?

17 A. Yes.

18 Q. So would it be fair to say that from your perspective, you  
19 viewed a complaint as a matter which may, in fact, involve  
20 questions of the administration of justice and, therefore, your  
21 obligation to get involved?

22 A. Yes.

23 Q. And I take it you viewed your obligation as insuring the  
24 integrity of the administration of justice.

25 A. Indeed.

1 Q. Now you've also talked about the political hat you wore as a  
2 Cabinet Minister.

3 A. Yes.

4 Q. And I suppose a complaint would have with it a second  
5 dimension as well, that being that it may bring some political  
6 difficulty to the government or the party in which you're a  
7 member.

8 A. Yes, I suppose it could.

9 Q. And that's, indeed, another reason why you would be hands  
10 on in relation to it.

11 A. A reason why I'd be?

12 Q. Hands on, directly involved.

13 A. No, my real reason would be hands on is because I was  
14 Attorney General. That came first.

15 Q. Yes, but a secondary consideration.

16 A. Well, all right.

17 Q. Was the political cost.

18 A. You said "first", you say now "secondary".

19 Q. Yes.

20 A. Yes.

21 Q. But both factors are there. That's all I'm trying to establish.  
22 I'm not trying to weight them.

23 A. Let me put it very briefly that the, taking what I said, that  
24 my integrity as Attorney General came first. If there were a  
25 political embarrassment by it, it still came first.

1 Q. I understand that.

2 A. All right.

3 Q. But one of the reasons you... Let me go back a step. You said  
4 in your testimony yesterday that you were hands on with  
5 respect to complaints.

6 A. Yes.

7 Q. And I'm just exploring with you, sir, why you would be hands  
8 on, and I'm suggesting there is both the question of the  
9 integrity of the administration of justice and also the political  
10 side, just as a reality of the system.

11 A. Yeah.

12 Q. Is that a fair statement?

13 A. Yeah, all right.

14 Q. Okay. Now given your style as you've described it, I take, sir,  
15 that it was also true that you had an open door with respect  
16 to all of the senior members in your Department.

17 A. Indeed.

18 Q. If they wanted to discuss a case with, even in the sense of  
19 hands on or even in the sense of day-to-day things, you were  
20 available to talk.

21 A. Yes.

22 Q. Should there be any question in their minds.

23 A. Uh-huh.

24 Q. And that open door would certainly extend to men like Mr.  
25 Gale, Mr. Coles, and Mr. Herschorn.

1 A. Very definitely.

2 Q. And, indeed, if Mr. Edwards had wanted to meet with you to  
3 get your view on a matter, I take it, in an important case, you  
4 would have found the time.

5 A. Yes.

6 Q. Is that correct?

7 A. Yes.

8 Q. In fact, during this period dealing with Marshall, do you ever  
9 recall a request by any of these gentlemen for access to you  
10 where you denied them access or were unavailable?

11 A. No.

12 Q. And I take it throughout this process in dealing with the  
13 Marshall case, you were briefed regularly by your  
14 Department? That's what you stated yesterday?

15 A. Oh, I think that's fair to say. We didn't have a precise  
16 meeting each Friday, for example, no, but periodically, yes.

17 Q. You were briefed after events of any significance arose?

18 A. Yes, they would report to me, yes.

19 Q. And do you recall who specifically briefed you? Who had the,  
20 first of all, the responsibility of giving you information from  
21 the police investigation? Was that Mr. Gale?

22 A. Probably Mr. Gale, yes.

23 Q. Do you have any recollection of that today?

24 A. Well, I saw Gordon Gale, I suppose, on the average of two,  
25 three times every week on matters. It might well have



1 included the Marshall case during that period.

2 Q. In the ordinary course, because he was the liaison with the  
3 R.C.M.P., I take it you would have expected it would be, it was  
4 Mr. Gale informing you of what was going on.

5 A. Yes, I didn't have a formal schedule to meet Gordon Gale or  
6 anybody else. They chose the time and made the request, or  
7 just came in.

8 Q. Now would Mr. Coles have anything to do with briefing you as  
9 well?

10 A. Oh, yes.

11 Q. On what was transpiring with the Marshall case?

12 A. Oh, yes, he did, but probably not to the same extent as Mr.  
13 Gale.

14 Q. But they both discussed it with you.

15 A. Oh, yes.

16 Q. Would it be fair to say that they discussed it at length?  
17 Certainly enough to know your general views?

18 A. Now wait a minute. They would, they informed me what was  
19 going on. At one stage, which was brought out yesterday,  
20 they came in and asked for an order for the Sydney, to the  
21 Sydney Police to turn over their files. There were numerous  
22 occasions when they came for some reason or other, yes.

23 Q. Well, I take it, though, in answer to my friend's questions  
24 yesterday, that you were informed...

25 A. I was kept reasonably informed, yes.

1 Q. Early in the spring of '82 and really kept abreast of the major  
2 developments by these two individuals in your Department.

3 A. Yes, I guess that's fair to say.

4 Q. Now before going into some of the details of that, I'd like to  
5 just deal with some of your other general comments. You  
6 testified yesterday that as Attorney General, you had no  
7 concerns about the impartiality of juries in the Province of  
8 Nova Scotia.

9 A. No, I don't have concern.

10 Q. And that, indeed, you were...

11 A. It's not perfect, but it's human beings.

12 Q. Well, indeed, you said...

13 A. But I have no concern as a system, no.

14 Q. As a system, okay. But you had made also the comment that  
15 there, and you may have just referred to it now, that it would  
16 perhaps be better if there was a different way of choosing a  
17 base. And do I understand you correctly, sir...

18 A. No, no, I don't think that I said...

19 Q. Okay.

20 A. That I advocated a better way. I said there might be a better  
21 way.

22 Q. And what do you mean?

23 A. But the base we use is traditional and seems to have served  
24 the justice system well, yes.

25 Q. What is the base that's being used today?

1 A. Well, I think it's taken the last four to five years, it's taken  
2 from voters' lists, if I remember correctly. Previous to that, it  
3 was taken from property owner's lists.

4 Q. And was there, in dealing with the question of property  
5 owners' lists, was there a complaint with respect to whether  
6 that kind of base was inadequate to reflect the social  
7 composition in the community?

8 A. Well, I think it was felt, and this is only my theory of it, the  
9 reason for the change was that it was felt that more and more  
10 people owned less and less property, shall we say. That more  
11 and more people rent than people that used to own property.  
12 We've changed from a rural to an urban society, perhaps in  
13 brief.

14 Q. Now that change has, I take it, dealt with the question, a very  
15 serious question of whether some groups in the community  
16 virtually would be not included in who would come forward.

17 A. Yes, indeed.

18 Q. I'm going to suggest to you, sir, that there is another issue  
19 today which is the question of ethnic and racial compositions  
20 on juries, and that that was, indeed, a question that was alive  
21 at the time that you were Attorney General. People were...

22 A. Alive?

23 Q. Yeah, it was a real issue when you were Attorney General as  
24 well as it is today.

25 A. I don't recall it as being, you know, a particularly prominent

1 issue but it may have been.

2 Q. I wouldn't say "prominent issue", but it was one that in the  
3 academic literature and in legal circles, was of concern.

4 A. Well, if you say so, I don't know.

5 Q. Was it of any...

6 A. I'm willing to accept your version.

7 Q. Was it of any concern to you or members of your  
8 Department?

9 A. Not really, because I didn't see that there need be a concern.  
10 I explained yesterday my theory of juries and the chemistry  
11 that goes with it.

12 Q. Well, with the greatest of respect, sir, what you said was that  
13 the juror, the jury system tended to bring together twelve  
14 people who approached their task honestly. Correct?

15 A. Yes.

16 Q. Would you agree with me that twelve honest people can also  
17 have racist values, can work on stereotypes without ever  
18 knowing it?

19 A. I suppose.

20 Q. So it's not a question of simply honesty.

21 A. It might be a larger question.

22 Q. I'd like to show you an article, and indeed I'm giving you a  
23 portion of an article.

24 MS. EDWARDH

25 This is, My Lords, a portion of an article which occupied a

HIS HONOUR CHIEF JUDGE HARRY HOW, EXAM. BY MS. EDWARDH

1 full page in The Toronto Star. We could not xerox, just because of  
2 a lack of facility, but we will get the full article xeroxed and filed.  
3 Perhaps I could ask then that this be marked as an exhibit,  
4 because I'm going to refer to it.

5 EXHIBIT 146 - ARTICLE BY ALAN STORY, THE TORONTO  
6 STAR, JUNE 9, 1986.

7 BY MS. EDWARDH

8 Q. It's an article written by Mr. Alan Story, published June 9,  
9 1986 and it is an overview, in effect, of the Marshall case.  
10 But let me take you to the second column, and the second full  
11 paragraph of the second column. I'm sorry, the third  
12 paragraph, which refers to an interview conducted by  
13 someone at The Star with a juror in the 1971 trial of Marshall,  
14 and let me read it to you:

15  
16 Interviewed by The Star after Marshall's  
17 innocence was proved, the juror denied any  
18 discrimination was at work in the case. But then  
19 he added, "With one redskin and one Negro  
20 involved, it was like two dogs in a field. You  
21 knew one of them was going to kill the other. I  
22 would expect more from a white person," he  
23 said, "We are more civilized."

24 Would you...

25 COMMISSIONER EVANS

Does that constitutes a breach of the Juror's Act in a criminal  
offence?

HIS HONOUR CHIEF JUDGE HARRY HOW

1 I was going to suggest that.

2 MS. EDWARDH

3 It may, My Lord.

4 HIS HONOUR CHIEF JUDGE HARRY HOW

5 It certainly does.

6 MS. EDWARDH

7 I'm not making any comment. There may be other issues  
8 involved. I just want to bring this specific comment to the  
9 attention of this witness in light of his testimony.

10 MR. RUBY

11 ....six-month time limitation.

12 BY MS. EDWARDH

13 Q. Now would you agree, sir, in reading a remark like that in  
14 1986, that such a remark discloses attitudes and values that  
15 would be of great concern to you as Attorney General?

16 A. Yes.

17 Q. And, indeed, it discloses the use of stereotypes which  
18 fundamentally undercut the presumption of innocence?

19 A. I would suppose, yes.

20 Q. In fact, the notation that white people are more civilized is  
21 more than just supposing that it creates a stereotype that  
22 undercuts the presumption of innocence. It's pretty clear, is  
23 it not?

24 A. Clear that it what?

25 Q. Clear that it undercuts the presumption of innocence, that

1 native people...

2 A. I don't know as...

3 Q. And black people fight?

4 A. Well, of course, if one person has that view, yes, they  
5 wouldn't be perhaps an unbiased juror, I grant you.

6 Q. Yeah, okay. Now in terms of the discharge of your duties as  
7 Attorney General, do you recall giving any direction of any  
8 kind or are you aware of anything since you left the office of  
9 the Attorney General that has been, that has come forward in  
10 the Nova Scotia system of justice to deal with some of these  
11 attitudes?

12 A. No.

13 Q. Has there been any efforts to kind of increase the racial and  
14 ethnic representation of juries or anything like that?

15 A. I'm sure there hasn't been.

16 9:55 a.m. \*

17 Q. Okay.

18 A. Are you suggesting that if you have a particular...you have a  
19 defendant who has a particular ethnic background that you  
20 would have your jury tailored so that there would be  
21 representatives of that race on the jury?

22 Q. I'm not suggesting anything, sir, I just asked you a question.

23 A. Well, you got my answer.

24 Q. I'd like to ask you to put on your defence hat for a moment if  
25 I could to take you back to those years in practise when you

1 were a member of the defence bar.

2 A. Um.

3 Q. And I understood you to say in answer to a question posed by  
4 my friend that when you practised, Crown counsel made  
5 disclosure available in a unsystematic way. It varied from  
6 counsel to counsel and, indeed, some of them took the position  
7 that you would obtain it in, "due course".

8 A. Yes.

9 Q. I take it that means at the trial.

10 A. Um.

11 Q. Yes. Now, when you became Attorney General I take it from  
12 your experience, sir, you would be aware the basic fairness to  
13 an accused person in a criminal trial requires that disclosure  
14 be made.

15 A. Yes.

16 Q. And indeed, today that right of full answer in defence, which  
17 is given a constitutional dimension, really requires full  
18 disclosure for its exercise.

19 A. Oh, you're getting into another area there. I don't know  
20 whether it requires it. I felt it was an appropriate policy and,  
21 indeed, I think I said yesterday that it's one that in part at  
22 least, if not fully, was in effect at the time I took office. We  
23 certainly underscored it and reaffirmed it.

24 Q. What I really want to establish is that your position is  
25 fairness to an accused person...



1 A. Oh, yes.

2 Q. ...requires disclosure.

3 A. Oh, yes, yes, but that's another thing than saying it's required  
4 under the Charter.

5 Q. I won't ask you for a legal opinion.

6 A. All right, that's right. I'll give you one if you want but I...

7 Q. No, it's all right.

8 A. ...don't want to volunteer.

9 MR. CHAIRMAN

10 Please don't.

11 MS. EDWARDH

12 Q. I take it what you're saying then is you didn't institute a  
13 policy of disclosure but when you came into office there was  
14 one that you underlined.

15 A. Or expanded.

16 Q. Or expanded.

17 A. I think I said, yeah.

18 Q. Okay. And I take it that the position in 1983 when you left  
19 office.

20 A. Yes.

21 Q. And that you brought with you to reinforce in 1978 was that  
22 all evidence that the Crown intended to rely on should be  
23 made available by way of disclosure.

24 A. With this qualification, that if it presented any danger to any  
25 witness to disclose it prior to trial, then that would not be

1 part of the disclosure.

2 Q. But that's the one caveat you attach.

3 A. Yes, I think basically, yes.

4 COMMISSIONER EVANS

5 So, that they had to request then.

6 MS. EDWARDH

7 I'm sorry, you're quite right, My Lord, that's true.

8 Q. Do you recall specifically any discussion about whether or not  
9 the obligation should be extended to the point where the  
10 Crown counsel simply supplied it to the defence? Whether  
11 the defence...

12 A. Oh, I suppose it would be a short step to do it. I would have  
13 if I were there and having a part in policy making, I might  
14 well say, "Yes".

15 Q. There's really no impediment to that.

16 A. I don't see.

17 Q. Okay. It was not though the position in 1978 through to '83.

18 A. No, I...we didn't hand out a pre-trial package if you will.

19 Q. Now, as a part of the duty to disclose everything the Crown  
20 was going to rely on, would you agree with me, sir, it was  
21 very much part of the duty of Crown counsel to make all  
22 evidence that could assist the defence available?

23 A. Oh, under that policy, yes.

24 Q. And indeed, that was really also a statement of the law as it  
25 was then and is today, that the Crown counsel has that

1 obligation to give to the defence...

2 A. No, no, please, it was not a law. It was a policy.

3 Q. Okay.

4 MR. CHAIRMAN

5 What was the last question?

6 MS. EDWARDH

7 I asked Judge How whether he agreed that as a matter of  
8 law Crown counsel was bound to give over evidence pointing to  
9 the innocence of the accused, and...

10 MR. CHAIRMAN

11 Would there be a corollary to that that we could abolish the  
12 preliminary inquiry?

13 MS. EDWARDH

14 That's another issue, My Lord. We'll deal with that at 12:30.

15 Q. So, you take the view that it was not a matter of law but  
16 rather a question of policy but that was the policy.

17 A. Um.

18 Q. Crown counsel were obliged to do that.

19 A. Yes.

20 Q. And not, would you agree with me, whether they were asked.

21 A. No, our policy was, I said it I think, Mr. Justice [Gage?] just  
22 reminded us that I said the...it was on request.

23 Q. But my point, sir, is different. I appreciate the Crown  
24 disclosing its case is on request. But if, for example, Crown  
25 counsel had the statement of a witness which would assist the

1 defence in establishing, for example, self defence.

2 A. Uh-hum.

3 Q. But it was the duty of Crown counsel to bring that forward on  
4 his own motion whether or not there was any request by the  
5 defence, would you agree with that?

6 A. Well, I suppose if it...you're speaking of a situation where it  
7 came to their attention afterwards, after they had disclosed  
8 what they assume was their full case.

9 Q. Let's take that as a hypothetical, yes. Let's assume they  
10 disclose their full...

11 A. I think there's a moral obligation to add that additional  
12 statement or evidence, yes.

13 Q. So, if the...

14 A. To the disclosure process.

15 Q. So, the disclosure obligation in a sense in an ongoing one, but  
16 I'm trying to get to a little different idea, if you'll bear with  
17 me for a moment, that there is a difference between the  
18 Crown disclosing its case and the Crown being in possession of  
19 evidence they know will assist the defence. Do you follow the  
20 distinction I'm making?

21 A. Yes.

22 Q. Now, in the circumstances where the Crown is in possession of  
23 evidence that assists the defence.

24 A. Uh-hum.

25 Q. Would you agree with me that regardless of whether a

1 request is made, the Crown's duty as an officer of the Court is  
2 to bring that to the attention of the defence?

3 A. I would agree, and I think it's exactly what I said yesterday  
4 as my concept of the role of Crown Prosecutor.

5 Q. Indeed you did.

6 A. That they bring out evidence for and against the defendant.

7 COMMISSIONER EVANS

8 It's not only evidence in Court.

9 MS. EDWARDH

10 Yes, that's my next...

11 COMMISSIONER EVANS

12 It's evidence as come into the possession of the Crown  
13 subsequent to the original request for disclosure, if you wish. In  
14 other words, everything that they have. The Crown...the defence  
15 cannot ask for particular disclosure if they have no idea of it.  
16 And, what you're suggesting, as I understand, is that after the  
17 initial request, assuming there is a request for disclosure, that if  
18 the defence, the Crown obtains information which is helpful to the  
19 defence, then the Crown, on its own initiative, should supply that  
20 to the defence, and that is not a moral problem. That is a legal  
21 requirement.

22 MS. EDWARDH

23 I take that view too, my Lord. I just wanted to understand  
24 what the policy was in the Attorney General's office and also their  
25 understanding of that policy.

1 Q. Now, let me backtrack one step further. Let us assume as a  
2 hypothetical that defence counsel makes no request for  
3 general disclosure, but in the Crown's possession is evidence  
4 that the Crown knows would assist the defence. What was  
5 the position of the Attorney General's office with respect to  
6 the duty on the Crown to bring that material to the defence's  
7 attention regardless of their failure to make a request?

8 A. I don't know precisely what it was. Our was a general  
9 directive that they would disclose to the defence in advance  
10 the case for the Crown, witness statements, whatever went  
11 with it, with that one caveat or exception.

12 Q. I understand sir, but...

13 A. And then...and then, I repeat, the duty of a Crown Prosecutor  
14 takes over once the case is started as I saw it, and that if  
15 there were material or information that came to the attention  
16 of that...of the Crown counsel before or after the trial started,  
17 it was his duty to bring it out. If it favoured the defence, so  
18 be it.

19 Q. So, in other words, should the defence be remiss in making  
20 such a request that, of course, did not relieve or does not  
21 relieve Crown counsel of bringing that either to the attention  
22 of the Court or the defence in terms of their over...

23 A. Just run the first part by me again, your premises there.

24 Q. If the defence is remiss by making...by failing to make a  
25 general request for disclosure that the Crown's general

1 obligations to the Court to bring forward all the evidence, for  
2 and against, would result in the Crown bringing forward that  
3 evidence to either the Court's attention or to the attention of  
4 the defence.

5 A. One or the other, yes, yes, I agree.

6 COMMISSIONER EVANS

7 Miss Edwardh, is it your position that experienced defence  
8 counsel who makes no request of Crown is entitled to have the  
9 Crown run over with this evidence that may be helpful to the  
10 defence?

11 MS. EDWARDH

12 No, my position goes much further, My Lord. Once the  
13 Crown is in possession of information that will assist an accused  
14 person standing at trial, it matters not two wits what defence  
15 counsel has done or not done, the Crown's obligation is to bring it  
16 to the defence's attention.

17 COMMISSIONER EVANS

18 Even without being asked?

19 MS. EDWARDH

20 Absolutely.

21 COMMISSIONER EVANS

22 And if the defence...

23 MS. EDWARDH

24 Or the Court's attention.

25 COMMISSIONER EVANS

1 Uh-hum. That's assuming the defence counsel is quite  
2 satisfied that he is competent to run the defence without any aid  
3 from Crown counsel.

4 MS. EDWARDH

5 Well, if one is to look at what the obligation of Crown  
6 counsel is. For example, let's take evidence of psychiatric  
7 disability. It would be my submission to you that it would be the  
8 obligation on Crown counsel to at least raise for the defence that  
9 they know that there is a history that perhaps the defence is  
10 unaware of, if that should be the case. It may be that that  
11 relieves Crown counsel from bringing it forward to the Court, and  
12 indeed I would take that position. That once the defence is aware  
13 Crown counsel does not have to take over steerage of the case.  
14 Their obligation is exhausted once they say to counsel in the  
15 courtroom "I don't know whether you're aware of this but here's  
16 this, or you should know that this witness said this." And  
17 that's...that exhausts their obligation. They have given it to the  
18 party responsible for bringing it forward in a proper manner if  
19 that party sees fit. And it's a part of the overriding duty of Crown  
20 counsel to the Court. I mean the Court assumes the adversarial  
21 system will work and it's Crown counsel who have the resources.

22 COMMISSIONER EVANS

23 But does that obligation of Crown counsel only arise at trial  
24 to produce all the evidence favourable and unfavourable? I'm  
25 thinking of the position of defence counsel who sit on their hands



1 and do absolutely nothing of obtaining any information. They  
2 don't ask the Crown for anything. And you say that the Crown  
3 should run over to them and divulge what information they have.  
4 There is some defence counsel who feel they don't want any help  
5 from the Crown. They know far more about it than the Crown  
6 themselves.

7 MS. EDWARDH

8 My Lord, I think the rule requires, that regardless of the  
9 character of defence counsel, that the duty to the Court...

10 COMMISSIONER EVANS

11 Right.

12 MS. EDWARDH

13 ...requires that if Crown counsel knows it it be brought to the  
14 defence's attention. And that rule as a sound rule of policy is the  
15 only rule that guarantees that the parties who have carriage of  
16 the case both have access to the information. Anything short of  
17 that taking a position, well, this defence counsel isn't really trying  
18 or isn't trying hard enough inevitably leaves the question of, you  
19 know, what should or should not be disclosed to the wrong  
20 parties. You simply I think take the position it must be disclosed  
21 as a question of fairness to the accused and to the tribunal and  
22 anything short of that is unsatisfactory as a question of policy.

23 COMMISSIONER EVANS

24 Even if the defence makes no move, makes no request, does  
25 nothing.

1 MS. EDWARDH

2 If it relates to a matter that will assist the accused person,  
3 yes.

4 MR. CHAIRMAN

5 Well.

6 MS. EDWARDH

7 Mr. Ruby just said to me, and perhaps it's well worth the  
8 point, maybe especially if the defence does nothing.

9 COMMISSIONER EVANS

10 I'm sorry.

11 MS. EDWARDH

12 Maybe especially if the defence does nothing. That's when  
13 it's Crown counsel looking at the situation with his broad  
14 obligations to the tribunal and to the accused person wants to  
15 make sure that they...that the defence who hasn't done anything  
16 should know this one fact.

17 COMMISSIONER EVANS

18 Well, you're...then that would result in the Crown counsel  
19 running over to the defence and saying, "Here is everything that  
20 you should use in the defence of your client."

21 MS. EDWARDH

22 No, I'm not suggesting that, My Lord. We're talking about  
23 information in Crown counsel's possession that he knows will  
24 assist the defence.

25 COMMISSIONER EVANS

1 The question is when does he divulge it.

2 MS. EDWARDH

3 Well, it would be, I think, our view that it should be  
4 divulged as soon as the Crown counsel is in possession of that  
5 information and at the earliest possible opportunity so that it can  
6 be appropriately checked out and the evidence gathered or  
7 further developed. But the only thing that is consistent with  
8 enhancing the truth-finding functions of the criminal trial process  
9 is that both parties try and get that information in its most fully  
10 developed form before the tribunal. And so it should be...the  
11 obligation should be consistent with disclosure at the first  
12 reasonable opportunity. There shouldn't be hiding it for  
13 strategic...

14 COMMISSIONER EVANS

15 But in a case...I'm not saying hiding it, but I think there  
16 must be an obligation on defence counsel to defend his client  
17 properly and to make some investigation, and part of that is going  
18 to the Crown and asking "What have you got?"

19 MR. CHAIRMAN

20 Well.

21 MS. EDWARDH

22 I don't dispute that there should be such an obligation, I'm  
23 sorry, My Lord. But I also think that the only way to ensure the  
24 integrity of the process is to put the obligation on Crown counsel  
25 as well.

1 MR. CHAIRMAN

2 Now...

3 MS. EDWARDH

4 I'm sorry.

5 MR. CHAIRMAN

6 Well, it's been a very interesting lecture. We, you know, are  
7 doing some work ourselves...a great deal of work ourselves.

8 MS. EDWARDH

9 A very difficult question and important one.

10 MR. CHAIRMAN

11 And we understand that Professor [?] the leading Canadian  
12 authority on the role of the Crown, and we, I'm sure, would have  
13 the benefit of his...reading his opinions. If we can get back to this  
14 witness. My...I understand what he is...has said as to what the  
15 policy was during his term as Attorney General of Nova Scotia. I  
16 don't know if we can expect him to go further than that in  
17 discussing...

18 MS. EDWARDH

19 I just had a couple specific points in relation to this case and  
20 disclosure in this case.

21 Q. You've stated, sir, that police reports in general are viewed by  
22 and were viewed under your policy as being "Confidential."

23 A. Yes.

24 Q. I take it you do not include in that category police reports  
25 arising from, for example, an expert examination of forensic

1 material? For example, if you use the R.C.M.P. labs in  
2 Sackville and they have given you an expert opinion, that  
3 kind of opinion from a policeman would not be subject to the  
4 rule of confidentiality or would it?

5 A. Well, I didn't make a distinction, to be frank. I didn't  
6 consider the point you're making that there were...in other  
7 words you might have a partial ban as against a total one. It  
8 was felt that, and indeed was the practise and tradition, that  
9 police reports were for the information of the Attorney  
10 General's Department only, and the police, of course.

11 Q. But...

12 A. And I explained the reason yesterday.

13 Q. So, I take it from your answer then that the ban that you  
14 contemplate would have precluded disclosure of that kind of  
15 information because it was a total ban?

16 A. Yes.

17 MR. CHAIRMAN

18 Are we talking about before or after a charge is laid?

19 MS. EDWARDH

20 I take it at any time.

21 MR. CHAIRMAN

22 Well, before a charge is laid, obviously it couldn't be  
23 disclosed.

24 MS. EDWARDH

25 No, I appreciate that. I took it that the ban involved was a

HIS HONOUR CHIEF JUDGE HARRY HOW, EXAM. BY MS. EDWARDH

1 complete ban on the production of police reports and the witness  
2 has just said that a police report of a forensic opinion from a  
3 officer employed at the labs would not have been produced.

HIS HONOUR CHIEF JUDGE HARRY HOW

5 Now, then, if I might add, the Crown would select from that  
6 information, that and other, what they were going to utilize for a  
7 given case, and then at that time if it involved disclosure of  
8 witnesses or opinions obtained by the police then so be it, that  
9 would be included in the disclosure.

MS. EDWARDH

11 Q. Okay. I'm sorry. Then I may have misunderstood you. Are  
12 you then saying that a police report could indeed be  
13 disclosed...

14 A. No, I didn't say that. I said they would...the Crown would  
15 take from whatever information was supplied them to  
16 support their case, and that much would be disclosed to the  
17 defence upon request.

18 10:15 a.m.

19 Q. But even with an expert then forensic report...

20 A. They might say, "I'm going to call in an expert."

21 Q. But the remainder of the report or the totality of the report is  
22 not available, or wasn't under your regime.

23 A. That's right. To my knowledge, anyway.

24 Q. Now the question was posed to you yesterday that Mr.  
25 Aronson had difficulty getting copies of witness statements

1 and you stated that you had no explanation because it  
2 certainly wasn't in violation of the policy subject to the  
3 concerns about safety of a witness.

4 A. Now wait a minute now. You're going a little fast for me.  
5 What did you say I said? What was the...

6 Q. That there was no reason that you could think of that Mr.  
7 Aronson was not given copies of statements of witnesses,  
8 leaving aside the little exception.

9 MR. SAUNDERS

10 I think in fairness to the witness, My Lord, he also said that  
11 there may have been a good reason known to those who had a  
12 much more intimate knowledge of the file. I think that was also  
13 part of his answer.

14 BY MS. EDWARDH

15 Q. I'm sorry, I don't want to mislead you. I don't recall that part  
16 of it, but why don't we start then and find out what the true  
17 situation is? Did you...

18 A. I don't recall the first part, but anyway you say that I said  
19 that in answer to a question about statements that weren't  
20 supplied to Mr. Aronson.

21 Q. Initially, yes.

22 A. That I knew of no reason.

23 Q. Yes.

24 A. Why he shouldn't have gotten them.

25 Q. Yes, in the ordinary course, those kind of witness statements

1 would have been given out.

2 A. Yes, I think under our policy of disclosure.

3 Q. Okay. Now when did you first...

4 A. But allow me to add. My understanding of that whole trial  
5 before the Supreme Court, I presume you're talking, that was  
6 when Mr. Aronson was involved.

7 Q. Yes.

8 A. Was, Mr. Aronson, I do believe, got not only the Crown's file  
9 but I think he got the R.C.M.P. file as well, despite the fact  
10 that the latter was technically against policy.

11 Q. Well, and he was severely criticized for it.

12 A. Who was?

13 Q. Mr. Edwards, for giving it to Mr. Aronson.

14 A. That may have been, yes.

15 Q. Okay, but my concern, sir, is this. I would like to find out  
16 when you learned that Mr. Aronson was having difficulty in  
17 obtaining information from the Department to assist him...

18 A. Oh, I never learned any time before the trial and I can't  
19 remember precisely when, if ever, I learned of it, that he was  
20 having that kind of difficulty.

21 Q. So I take it...

22 A. Because, as I just said, my information was he got everything  
23 that the Crown had.

24 Q. And who would have given you that information? Mr. Gale?

25 A. It came either through Mr. Gale or Mr. Coles, as I recall it.



1 Q. And, indeed, it...

2 A. Or a memorandum in the file, I can't precisely recall the  
3 source.

4 Q. Indeed, as I understood your evidence yesterday, by the time  
5 you were asking or suggesting to Mr. Chrétien that the  
6 reference be held, it would have been your personal view  
7 that the Department ought to have been cooperating fully  
8 with Mr. Aronson to bring this reference properly before the  
9 court.

10 A. Yeah, I think that's fair to say, and I think I said they did, to  
11 my recollection.

12 Q. Well, that's your view that they...

13 A. In fact, the court criticized obliquely Mr. Edwards for not  
14 participating in a cross-examination process of the witnesses.

15 Q. We'll come to that.

16 A. Well, you can have it now.

17 Q. But it's your view that once there was any discussion, once  
18 you were writing to Mr. Chrétien asking for the reference,  
19 that you took the position that the Department should be  
20 helping Mr. Aronson getting information.

21 A. I don't know as I took a position. I had the general policy  
22 that I just explained moments ago of disclosure. I did not  
23 have a day-to-day knowledge of how the Department people  
24 were proceeding on that hearing.

25 Q. Okay, let me... Would your position have been then that the

- 1 Department should make disclosure to assist Mr. Aronson?
- 2 A. Yes, because that would be the general policy.
- 3 Q. Yes. And, indeed, if it wasn't the general policy...
- 4 A. But why say even if it wasn't, if it was?
- 5 Q. Let me just...May I ask my question, please?
- 6 A. Yes, go ahead.
- 7 Q. You personally had recommended to Mr. Chrétien that this
- 8 matter proceed pursuant to Sec. 617 Subsection (b) of the
- 9 Code.
- 10 A. Right on.
- 11 Q. Which placed the onus on Mr. Aronson to come forward with
- 12 the evidence, correct?
- 13 A. Yes.
- 14 Q. He had to adduce it in the Court of Appeal, not Mr. Edwards.
- 15 A. Uh-huh.
- 16 Q. Is that correct?
- 17 A. Yes. Wait now, no, no. I wasn't there but my understanding
- 18 or recollection is that they proceeded in the normal way you
- 19 would before the Appeal Court, save and except that they had
- 20 the right to adduce new evidence.
- 21 Q. Yes. Mr. Aronson brought an application to adduce fresh
- 22 evidence and he called the witnesses.
- 23 A. I see.
- 24 Q. Correct?
- 25 A. All right.

1 Q Is that not your understanding?

2 A. I wasn't there. I wasn't there.

3 Q Was that not your understanding of the process or as  
4 Attorney General?

5 A. Now wait a minute. You see, my understanding of the  
6 process. This was the only time in the history of Nova Scotia  
7 it ever happened.

8 Q No, I'm talking about...

9 A. How would I have a knowledge of how it would work?

10 Q Well, let's talk about how fresh evidence is usually adduced in  
11 the Court of Appeal.

12 A. Well, you go ahead.

13 Q Can you assist us in terms of what your understanding was of  
14 what Mr. Aronson's role would be in this kind of reference  
15 where there was fresh evidence being adduced? Was he  
16 adducing it or was Mr. Edwards? What was your  
17 understanding?

18 A. My understanding was that it would, that new evidence, it  
19 would be conducted in a sort of trial manner except that it  
20 was an appeal, a blend with the appeal process. Therefore, I  
21 would assume that Mr. Edwards would have called the new  
22 witnesses, the new evidence.

23 Q I see. So then I take it, sir...

24 A. I don't know whether he did or not, but I say that's...

25 Q If I told you that Mr. Edwards didn't call those witnesses, I

1 take it you would be learning that information for the first  
2 time then.

3 A. Yes. But let me simply add that my knowledge of it was that  
4 there was the very highest level of cooperation between the  
5 Crown and defence counsel because the Crown in the person  
6 of Mr. Edwards was not only sympathetic but was advocating  
7 that Mr. Marshall be found not guilty.

8 Q. And you supported that position.

9 A. Yes, as I said yesterday.

10 Q. And you communicated that to Mr. Gale...

11 A. As the information became...

12 Q. And Mr. Coles.

13 A. As the case was, as the memorandums disclosed the case, the  
14 situation, yes, I was.

15 Q. You were sympathetic, you adopted Mr. Edwards' position  
16 with respect to the acquittal, and you communicated that  
17 position with respect to your views to Mr. Gale, Mr.  
18 Herschorn, and Mr. Coles.

19 A. Probably at some stage, I did, yes.

20 Q. Indeed, you couldn't have been briefed continually on it, sir,  
21 without communicating your general support for the position  
22 put forward by Mr. Edwards, could you?

23 A. I don't know. I may have said to them, "Look, I agree with  
24 you." In any event, I may have just said to them that it  
25 appears that this man is not guilty. You go ahead and proceed

1 under 617(b). I, you know, I can't recall precisely saying to  
2 them, "I have decided that, in my view, he is not guilty. I  
3 don't know as I said it in those terms. But all the reports  
4 indicated the Crown counsel had taken that position and so,  
5 and I shared it.

6 Q. Yes, and you shared it.

7 A. I can say that.

8 Q. All I'm really saying, sir, is that you didn't keep your personal  
9 views of sharing Mr. Edwards' position a secret or quiet. They  
10 would have been obviously known to your senior deputies in  
11 the Department.

12 A. Oh, I feel confident they would have, yes.

13 Q. Now let me just deal with your views for a moment, if I could.  
14 You testified yesterday that in the spring of 1982, in the  
15 April/May period, that you, responding to the information  
16 obtained from the R.C.M.P. and from the views expressed by  
17 Mr. Edwards, took the view that it was, it seemed fairly clear  
18 that Mr. Marshall wasn't guilty of the murder in question.  
19 Fair?

20 A. Yes.

21 Q. And that...Let me just put it this way. Would it be also fair to  
22 say that you personally, sir, and I'm just trying to interpret  
23 your testimony in the documents, appeared to be sympathetic  
24 to Mr. Marshall? I mean you made the note...

25 A. Well, I'd have to qualify that.

1 Q Not too far later that...

2 A. I felt and I expressed it yesterday that he was in part the  
3 author of his own conviction, because of what I said, the  
4 reports indicated his not telling the truth to the Sydney City  
5 Police.

6 Q. I appreciate that you've said that, and you've said it on a  
7 number of occasions, but you also said in one of your notes,  
8 "Sympathize but don't apologize." And I'm wondering  
9 whether in 1982 you had some humanitarian concerns for a  
10 17-year-old kid who went to prison for eleven years. That's  
11 my question. Did you feel those then?

12 A. Well, don't put in those kind of terms. I have sympathy for  
13 anybody who is wrongly or unjustly accused or convicted,  
14 yes.

15 Q. Yes, and that's a humanitarian response, I take it.

16 A. Well, fine, I'm kind of human, yes.

17 Q. Okay, and you had it for Mr. Marshall at that time in April  
18 and May, 1982?

19 A. Yes, I think so. Once it became clear. But I held the view as  
20 well that he was not totally blameless in the process.

21 Q. No, but you testified yesterday, sir, that regardless of how  
22 you viewed him, it was your view, shared with Mr. Edwards  
23 in April or May, that Mr. Marshall should be acquitted and  
24 that the acquittal should be based upon the fact there was a  
25 miscarriage of justice.

1 A. Yes.

2 Q. Yes, okay. Now let me ask you, when Mr. Wheaton's reports  
3 came in, including Mr. Marshall's description to Mr. Wheaton  
4 of, Staff Sgt. Wheaton of what had happened, was there a  
5 discussion in the Department about charging Mr. Marshall at  
6 that time? This would be the early spring of '82.

7 A. Of '82, no.

8 Q. Charging him for robbery.

9 A. No.

10 Q. For attempted robbery.

11 A. No, I don't think there was.

12 Q. Did Mr. Edwards raise with you during the course, or through  
13 Mr. Gale or through anybody else, whether he should inform  
14 Mr. Aronson one way or the other during the course of the  
15 reference whether the matter of the robbery should be dealt  
16 with in the sense of there should be some assurance one way  
17 or the other the charges would not be laid?

18 A. No, I don't think that was discussed.

19 Q. Never discussed.

20 A. Not with me.

21 Q. Not with you.

22 A. No.

23 Q. Can you think, sir, and there's a letter in the file, I won't take  
24 you there unless you would like to see it, in September of  
25 1982 where Mr. Aronson is writing to Mr. Edwards and he's

1 saying here is the affidavit of Mr. Marshall for the reference  
2 and I'm not including certain things and he'll probably claim  
3 the privilege of the Charter and the Canada Evidence Act, et  
4 cetera, when he testifies. It's pretty clear that Mr. Aronson is  
5 preparing the reference on the assumption that there may be  
6 charges arising.

7 A. Well, I don't know. If I looked at it, I might have a better  
8 view.

9 Q. Were you aware that that was his view, or were you made  
10 aware at any time?

11 A. No.

12 Q. Prior to the reference.

13 A. No.

14 Q. Can you think of any reason to assist us as to why members,  
15 senior members of your Department would not have dealt  
16 with that issue so the reference could have taken place  
17 without the question of a further charge on the attempt  
18 robbery, leaving aside the perjury for a moment?

19 A. I see. I don't know there was any question...

20 Q. Can you think of some reason?

21 A. About it in, any question about that involved in the reference  
22 to the court.

23 Q. Well, let me assure you, sir, and let me take you through  
24 some documents. The day after the Court of Appeal decision,  
25 one of the primary concerns of your deputies was whether or



1 not to charge Junior Marshall. Let me take you to Volume 32.

2 Do you have that before you?

3 A. Yes.

4 Q. And it is clear from, let's start at page 154, from the opening  
5 words of this memorandum, which is to Mr. Herschorn from  
6 Mr. Edwards, that on May 11th, within 24 hours, Mr.

7 Herschorn had telephoned Mr. Edwards, and you see that in  
8 the first paragraph, in relation to perjury charges...

9 A. Well, that's perjury.

10 Q. And it will gone on, and the memo also deals with the  
11 robbery charges, in light of the Appeal Court's decision, okay.  
12 And Mr. Edwards come to a conclusion, and let me draw it to  
13 your attention, it's at page, really, 156, where he deals with  
14 the question of both the robbery and the perjury and says...  
15 Let me take you to the kind of second last paragraph on page  
16 156 above the number "eleven" where the last sentence is:

17  
18 For this reason, as well as the fact that Marshall  
19 has already spent eleven years in prison, my  
20 recommendation is that he not be charged with  
21 either perjury or attempted robbery.

22 So that was the recommendation. Now do you recall  
23 discussing that memorandum or seeing it at all early or in  
24 mid-May, 1983?

25 A. No, I don't think it was copied to me and I don't recall  
discussing it at that time, no.

1 Q. Now there is a memo much later in July, July 7th of '83 to  
2 you from Mr. Herschorn where many of these same issues are  
3 canvassed. But my query was whether anything had  
4 happened in July...I mean in May or June on this issue. So I  
5 take it you have no recollection in May or June discussing  
6 this.

7 A. No, well...No, no, I didn't say that. You asked me at the time  
8 this was written if I had a discussion on it.

9 Q. Yes, okay.

10 A. I said, "No, I have no recollection."

11 Q. Then prior to...

12 A. Now the two months following, there may have been.

13 Q. Yeah.

14 A. Yes.

15 Q. Okay, leaving side...

16 MR. CHAIRMAN

17 Keeping in mind that we looked at that yesterday, a  
18 memorandum purportedly from Mr. How to the Deputy, May 25th,  
19 1983.

20 MS. EDWARDH

21 I'm sorry, I've missed that then, My Lord.

22 MR. CHAIRMAN

23 159 of Volume 32. There was some discussion on that  
24 yesterday which seemed to indicate that he was unaware of this  
25 memorandum, of this opinion of Mr. Edwards of May 16th.

1 MS. EDWARDH

2 Yes, it does, indeed.

3 BY MS. EDWARDH

4 Q. Well, then let me take you to the other memorandum which is  
5 to you, sir, of July 7th. That is at page 203, sir. And at page  
6 207 of this document, there is the second full...it would be the  
7 first full paragraph on page 207, there is a reiteration, really,  
8 of Mr. Edwards' views:

9  
10 But then again the statement of this factor is also  
11 relevant to the question of whether charge of  
12 attempt robbery should be made against Donald  
13 Marshall. The ultimate question to be resolved  
14 is whether the administration of justice would be  
15 brought into disrepute by the Crown failing to  
16 initiate criminal charges against Donald Marshall.

17 Do you see that?

18 A. Yes.

19 Q. Now I take it you do recall a meeting where this was  
20 discussed and it gave rise to, I think, your handwritten memo  
21 on July 8th, 1983 which is at page 209. Do you see that?

22 A. Yes.

23 Q. And you were in a meeting with Mr. Gale and Mr. Herschorn?

24 A. That's what I said.

25 Q. When you discussed?

A. Yeah.

Q. Yes. Now can you tell me what position Mr. Gale took with

- 1        respect to whether or not there should be a charge of  
2        attempted robbery laid?
- 3    A.    No, I can't remember that.
- 4    Q.    Did anyone during this discussion take that position?
- 5    A.    Not to my...I don't recall.
- 6    Q.    So I take it, sir, today you have no recollection of the views  
7        expressed to you beyond what's written in the memorandum?
- 8    A.    Individual views? No, I don't.
- 9    Q.    Yes, individual views.
- 10   A.    No.
- 11   Q.    Do you have any recollection, forgetting what views to attach  
12        to what people, of anyone expressing that view or giving that  
13        advice to you that there should be charges laid?
- 14   A.    But I can't precisely say who, what views were held by  
15        individuals, to repeat...
- 16   Q.    Fair enough, sir.
- 17   A.    All right, but just a minute. I have the sense or recollection  
18        that, and obvious from my note, that there was no serious  
19        suggestion that he be prosecuted.
- 20   Q.    Now I take it that there's no reason that that view wouldn't  
21        be conveyed to Mr. Marshall's counsel?
- 22   A.    Oh, I don't know. Again, the liaison was with Mr., generally  
23        with, between Mr. Gale and Mr. Aronson.
- 24   Q.    No, my question to you, though, as the Attorney General who  
25        made the decision recorded at page 209 in your notes, in your

1 own handwriting.

2 A. Yes.

3 Q. There would be no bar to that matter being communicated to  
4 counsel for Donald Marshall, correct?

5 A. That's a different question and you'll get the answer, that's  
6 right, there would be no bar to it.

7 Q. No bar. Did you, do you recall, sir, there being any discussion  
8 as to if that view should be communicated or did you just  
9 assume that in the ordinary course it would be?

10 A. I didn't assume anything. We made a decision. There was a  
11 pattern of liaison between the Department and Mr. Aronson,  
12 to my knowledge, at least and I left it at that time, for that  
13 process to take over.

14 Q. No, but in the ordinary course, and now Mr. Cacchione is, in  
15 July of '83, is Mr. Marshall's counsel, this is obviously a  
16 matter of concern to Mr. Marshall's counsel.

17 A. Well, how...

18 Q. I take it...

19 A. Do I know? Maybe they had said to him, "Well, we're going to  
20 recommend to the Attorney General that nothing be done. I  
21 don't know.

22 Q. You took no steps nor did you issue any directions for such  
23 communication to go to Mr. Cacchione, I take it that's your  
24 evidence.

25 A. Yes.

1 Q. Now my next question is, would you...We know there's no bar  
2 to it being transmitted. Would you have assumed as a  
3 question of courtesy in conveying your decision, that would  
4 have been communicated to Mr. Marshall's counsel?

5 A. I don't know if the point was raised about communication. I  
6 took it that the matter was brought to me for a decision. We  
7 made it. If there was, if Mr. Aronson was waiting for our  
8 answer, fine. If he was unconcerned, fine.

9 Q. My question to you, sir, was...

10 A. I don't know of any... All right, you want an answer.

11 Q. Yes.

12 A. I don't know. Nothing was discussed about Mr. Aronson and  
13 nothing was discussed, to my knowledge, my recollection,  
14 about communicating to anybody including him.

15 Q. No, my question to you, sir, again, is, would you have assumed  
16 that that would have been in due course communicated to Mr.  
17 Cacchione or Mr. Aronson, whoever was acting at that time?

18 A. I didn't know anybody was asking. All I knew they asked me  
19 to join with them and make a decision, which I did.

20 Q. I take it, sir, you assumed nothing in relation to that.

21 A. Well, right, okay.

22 Q. Now if I understand you correctly, that there was no real  
23 serious issue addressed or no one pressing or suggesting in  
24 any way that Mr. Marshall should be charged with the  
25 attempted robbery.

1 A. I don't recall any, that's right.

2 Q Now your position that we heard about yesterday of adopting  
3 Mr. Edwards' views, that Mr. Marshall was innocent of the  
4 murder and there should be an acquittal on the basis of a  
5 miscarriage of justice, was dealt with quite extensively by Mr.  
6 Orsborn as being fundamentally inconsistent, sir, with a  
7 number of positions you took, both public and private. Let  
8 me just review them with you. In your letters, for example,  
9 Exhibit 138, to a Mrs. Provost, you took the position that  
10 really Mr. Marshall's conviction was his own fault. Is that a  
11 fair statement of the effect of your letter?

12 A. I'd have to look at it again to see.

13 Q Well, why don't we look at it?

14 A. Yes.

15 Q Could I refer you to page two. I take it, Mrs. Provost is active  
16 in Victim's Rights Association.

17 A. That was pretty evident, yes.

18 Q Yes, and is writing to you and then you go on in really the  
19 third paragraph of your letter to deal with Marshall. Now I'd  
20 like you to read that letter and would you agree with me the  
21 effect of it was to say that, really, Mr. Marshall's problem was  
22 of his own making?

23 A. Yes, I said that.

24 Q Yes. And, again, in your letter to Alexis McDonald, which is at  
25 Volume 32... I'm sorry, McDonough, Volume 32, page 196,

1 when she has made some complaint. Again you make the  
2 assertion... Do you want to look at that letter?

3 A. Yes.

4 Q. The effect of that letter by referring to the Court of Appeal  
5 decision was that Mr. Marshall really was in the situation as a  
6 result of his own making. That was the view that's implicit in  
7 that letter.

8 A. That was the view of the Supreme Court of Nova Scotia, I  
9 might add.

10 Q. I'm not dealing, sir, with the Supreme Court of Nova Scotia.

11 A. Well, just a moment.

12 Q. I want to deal with your views.

13 A. Yes. Yes, I correctly stated, I think, what they said.

14 Q. Yes. And to Barbara Frum in an interview with the C.B.C.,  
15 Volume 32, page 184.

16 A. Yes.

17 Q. First of all, you make it clear that an acquittal is by no means  
18 a finding of innocence. And then further that, page 185, 86  
19 and 87, that, indeed, if there's been a miscarriage of justice,  
20 it's been precipitated by Mr. Marshall.

21 A. Where did I say that?

22 Q. Well, it's throughout those pages. Take an opportunity to look  
23 at it, if you wish. It starts at 185.

24 A. You point out one or two for me.

25 Q. Page 185 at the top, sir.



1 A. What?

2 Q. Page 185 at the top of the page.

3 A. Yes.

4 Q. You say:

5

6

7

8

Well, it depends. I mean I can cause my own. I  
can cause a miscarriage of justice against myself,  
can't I, by the way, my demeanour, my words,  
my...

9

And she poses the question.

10 A. Yes.

11 Q. And that's the effect of what you're saying to her.

12 A. I suppose.

13 Q. And, again, your view as recorded, and I say "your view".

14

15

16

17

18

Perhaps I should use your own words, sir. Yesterday in  
testimony, you described it as your thoughts, Volume 32,  
page 175, where in reading the analysis put forward in the  
memo from Mr. Herschorn to you, you make the note,  
"Sympathize but not apologize." Do you see that note?

19

A. Yes.

20

21

22

23

24

Q. Now I'm going to suggest to you, sir, that these letters,  
comments made to the press, comments made to members of  
the House in their, I suppose to their open letter, go a great  
long way to assert the position that there was nothing at fault  
in your Department. Do you agree with that?

25

A. In the Department itself?

1 Q. Or in the administration of justice...

2 A. Or are you including Mr. MacNeil?

3 Q. There was nothing at fault in the administration of justice,  
4 that's what I'm including. So I do, indeed, sir, include Mr.  
5 MacNeil. That's the effect of these letters, the comments to  
6 Barbara Frum, the note "Don't apologize..." Or "Sympathize but  
7 not apologize." The effect of that is to say that there was  
8 nothing wrong with the administration of justice in Nova  
9 Scotia.

10 A. Well, the only area where fault might lie, and I had no  
11 knowledge, was because Mr. MacNeil was dead when this  
12 came up, was possibly, and I say possibly, because I don't  
13 have that knowledge, in the area of the prosecution by Mr.  
14 MacNeil.

15 Q. Over which you had responsibility.

16 A. I wasn't there. How could I have responsibility?

17 Q. As Minister of the Crown, you are responsible for  
18 prosecuting...

19 A. For what happened in '71 when I went there in '78?

20 Q. Let's talk about your present position or your...

21 A. You've got to be kidding.

22 Q. Position as Attorney General. You are responsible for  
23 prosecutions in the Province, correct? You're also responsible  
24 for correcting defects that may arise...

25 A. I repeat. How could I be responsible...

1 Q. In the administration of justice?

2 A. For Mr. MacNeil when I wasn't there in 1971 as Attorney  
3 General?

4 Q. I don't want to agree with you, sir.

5 A. Well, I don't want to argue with you...

6 Q. But your position...

7 A. But you'd better get that clear.

8 MR. CHAIRMAN

9 Let's say we leave that. That would be an interesting...

10 MS. EDWARDH

11 Question.

12 MR. CHAIRMAN

13 ...discussion some time as to whether an Attorney General  
14 inherits the sins of his predecessors in office.

15 BY MS. EDWARDH

16 Q. Your position, if I can just take you back to your position, you  
17 took a position, though, that there was nothing wrong with  
18 the administration of justice over which you were then  
19 presiding, that Marshall was the author of his own  
20 misfortune, correct?

21 A. I don't think I said that.

22 Q. Well, sir, if you look at the letters and you look at your  
23 comments about...

24 A. I said that it was pretty clear or clear that Donald Marshall,  
25 that I accepted the opinions and statements of senior R.C.M.P.,

1 indeed, Mr. Edwards, and indeed following that, the Court of  
2 Nova Scotia, the Supreme Court, that Marshall, had he told the  
3 truth, I repeat again, had he told the truth, might have led the  
4 Sydney Police to uncover the real perpetrator of the crime.

5 That's what I said.

6 10:45 a.m. \*

7 Q. And you also said in testimony yesterday, sir, that you  
8 accepted that there had been a miscarriage of justice and  
9 those...

10 A. In the sense that the jury of the day, the Court of the day, had  
11 statements from people, later changed by those people, to  
12 deal with and they, on the basis of those statements, yes,  
13 they found the person guilty.

14 Q. You also had information, sir, that those same police officers  
15 that you relied on took the position that witnesses had been  
16 pressured to giving ...into giving false evidence...

17 A. That was the allegation...

18 Q. ...and that they were...

19 A. ...yes.

20 Q. Yes.

21 A. Yes.

22 Q. Yes. And that that was the basis that the reference was  
23 moving forward.

24 A. Um.

25 Q. That they had given false evidence.

1 A. Yes.

2 Q. And indeed, would you agree with me that when witnesses  
3 purport to be eye witnesses and give false evidence and  
4 police use pressure tactics to get that kind of evidence, the  
5 whole administration of justice is in jeopardy?

6 A. Well, who would argue the contrary?

7 Q. Who would argue? No one, I suggest, seriously could argue  
8 the contrary.

9 A. That's right.

10 Q. Okay. So, indeed given that jeopardy, wouldn't you agree  
11 with me that that is also a major problem and fault in  
12 addition to whatever you attribute to Mr. Marshall and must  
13 be viewed as a major problem and fault?

14 A. Of course. I think I made that clear yesterday. If not, I'll say  
15 it again now.

16 Q. I'm not sure you did, sir. I just want it clear for the record.

17 A. I thought I did.

18 Q. The position that you took when you made you statements to  
19 Barbara Frum and in your letters and in your comments, I  
20 suggest to you, sir, was a political position that you took  
21 regardless of your obligations as Attorney General.

22 A. No, it wasn't.

23 Q. When you took that position publicly you took it, sir, and you  
24 knew that Mr. Edwards had not fully raised the issues of the  
25 police conduct in the Court of Appeal.

1 A. Let me explain this now. The position I took in those letters  
2 reflected what the Supreme Court of Nova Scotia had found,  
3 what I had...what I had previously been informed by opinions  
4 in the case about Donald Marshall's untruthfulness. These  
5 people, these writers from organizations or the media would  
6 have it that Mr. Marshall was totally, in their view, innocent  
7 of anything. That's what they would have. I was simply  
8 pointing out what the Court said that he bore a substantial  
9 responsibility for what happened.

10 Q. But you, sir, had in possession information that the Court  
11 never had. You, sir, had information that was critical of the  
12 police. You, sir, had also the information that the evidence of  
13 the police wrongdoing was not explored by the Court and you,  
14 sir, also knew that Mr. Edwards urged on the Court a finding  
15 when there was not a record. You knew that.

16 A. I didn't know what Mr. Edwards urged on the Court then or  
17 now.

18 Q. You didn't know.

19 A. No.

20 Q. You didn't direct.

21 A. I wasn't there.

22 Q. You didn't direct it.

23 A. No.

24 Q. You didn't authorize it.

25 A. Mr. Edwards worked out an approach or strategy to the Court

1 with, as I understood it, Mr. Aronson and with senior officials  
2 in the department of the Attorney General, and they  
3 proceeded on that plan. I was not privy to it then and I don't  
4 know anything about it now.

5 Q. I ...

6 A. What they did in that Court.

7 Q. I just want to appreciate the effect of your evidence. In the  
8 most important case involving the administration of justice in  
9 Nova Scotia you did not consider what position as Attorney  
10 General you would take, you did not convey it to your Crown  
11 who was appearing in the Court of Appeal, and you let him  
12 take what you define as a...working out a strategy to put  
13 before the Court. That's what happened, in effect.

14 A. Just a moment. Just a moment. Let me remind you that all of  
15 this proceeding, all of these proceedings before the Court  
16 were on the basis of a common position, common position, by  
17 the Crown Prosecutor, by senior officials of the Department,  
18 by myself if you will, and my Mr. Chrétien that these...all  
19 these people were convinced that Donald Marshall had not  
20 stabbed Sandy Seale...

21 Q. And therefore...

22 A. And that he...just a moment, that he ought to be acquitted of  
23 it. Now, in view of that why was it necessary in your view for  
24 me to determine, in a hands-on fashion, what every step of  
25 the procedure they would follow in the Supreme Court of

1 Nova Scotia when competent people had all agreed on it.

2 Q. Were those...I'm sorry.

3 A. And were perfectly capable of carrying it forward in the  
4 Court.

5 Q. Well, let me just stop you for a moment. Those same  
6 competent people you refer to so clearly carrying out your  
7 view of the matter to ensure an acquittal were the same  
8 people leaning on Mr. Edwards so that he wouldn't take that  
9 position in the Court of Appeal. Let me ask you to turn to  
10 Volume 17, pages 16...

11 A. Well, just a moment. I don't think you should get away with  
12 that. The position taken there, I explained fully yesterday,  
13 but you apparently want to make an issue of it. Let me  
14 add...let me just underline that again. They took the position  
15 that Mr. Edwards should not indicate to the Court of Appeal  
16 his view of the case, but that he should bring forth evidence  
17 which would support an acquittal.

18 Q. With the greatest of respect, sir, it wasn't his view--it was  
19 your view. You were Attorney General of the Province. Why  
20 on earth would Mr. Edwards take a different view? You've  
21 said over and over in the last two days.

22 A. I have told you, I have told you, and I repeat it, that senior  
23 people in the department were carrying on the arrangements  
24 with Mr. Edwards and I let it in their hands.

25 Q. Which means then that on this case you gave no direction as



1 to what position ...

2 A. I didn't, if that will help you.

3 Q. ...should be taken.

4 A. If that will help you.

5 MR. SAUNDERS

6 My Lord, if I could interject at this point. Yesterday this  
7 was covered off in extensive detail by my friend ahead, Mr.  
8 Orsborn, and the witness clearly stated that he did not enter into  
9 the forays, I think was his word, or the strategy that was adopted  
10 between his officials and Mr. Edwards who had the conduct of the  
11 case. And I see little importance in pursuing that same line of  
12 questioning with the witness again. He's given the same answer  
13 about three times and he left the development of the argument to  
14 those who were present. We've already heard from Mr. Aronson  
15 and Your Lordships will hear from Mr. Edwards on that.

16 MR. CHAIRMAN

17 The evidence yesterday was that when Mr. How, as  
18 Attorney General, gave instructions to his officials to institute the  
19 necessary, I'm summarizing now, to institute the necessary  
20 proceedings in order to initiate, or firstly to persuade the  
21 Attorney General of Canada to make a reference which is the...his  
22 exclusive responsibility and right, that when that was initiated to,  
23 as I understand it, to take the position that they were to submit to  
24 the Court of Appeal on the reference that in their view Mr. Donald  
25 Marshall, Jr., was innocent of the offence of which he had been

1 convicted. The evidence also was that as to the preparation of the  
2 brief or the factum that was filed or the position taken by the  
3 Attorney General's counsel, that was not referred to him. It seems  
4 to me that whether it should be or should not or whether it should  
5 stop at the permanent head of the department is a matter for  
6 argument given the fact that we...that this witness says he hadn't  
7 seen it and we are getting into the field of , Miss Edwardh, is...

8 MS. EDWARDH

9 I've got...I'm really finished the area. I want to ask, I guess,  
10 just one or two more questions, My Lord. I don't intend to just  
11 engage in argument with the witness on this point, and I'll leave  
12 that area.

13 Q. Let me ask you then to turn you mind to the question of fees.  
14 You'll recall that there was correspondence or I take it today,  
15 sir, you are aware there was correspondence between Mr.  
16 Aronson and members of your department.

17 A. Yes.

18 Q. And I take it you've had an opportunity to see that. But let  
19 me put before you Volume 27. Now...

20 A. Volume what?

21 Q. We've heard from Mr. Aronson and...do you have Volume 27?  
22 I'm sorry I may have missed.

23 MR. CHAIRMAN

24 Yes, I do now, you're safe.

25 MS. EDWARDH

1 It should be before your Lordships. Great.

2 Q. You'll see at page 11.

3 A. Yes.

4 Q. That Mr. Aronson ultimately was offered a Legal Aid  
5 certificate after some suggestion by your department that he  
6 proceed and apply and that certificate involved an  
7 authorization for approximately forty hours of preparation  
8 commencing May 2nd.

9 A. Uh-hum.

10 Q. 1982. Do you agree with that interpretation of the certificate,  
11 sir?

12 A. Forty hours.

13 Q. Yeah, roughly. Forty-two maybe. Thirty-five...

14 A. Well, I don't know, all right.

15 Q. ...divided into fifteen hundred, now my division is notoriously  
16 bad but...

17 A. I just don't pick up...I just don't pick up the forty, but maybe  
18 I'm missing it here.

19 Q. Approximately forty hours.

20 MR. CHAIRMAN

21 Anyway it is a maximum of \$1,500.

22 MS. EDWARDH

23 When we can't divide thirty-five into a hundred...fifteen  
24 hundred we're in bad shape.

25 Q. But let me just ask, I'd just ask you to assume it's roughly in

1 that range of preparation. Would you agree that forty hours  
2 of preparation would not begin to cover the amount of work  
3 that Mr. Aronson had to do as of May 2nd, 1982, in light of  
4 the duty cast upon him to bring the evidence forward,  
5 prepare the affidavits, interview the witnesses?

6 A. You know, it's like asking me how high is up. I don't know  
7 how many hours he put in. I have no way of even estimating  
8 how many hours he put in. It could be forty. It could be four  
9 hundred. I don't know.

10 Q. Much closer to four hundred, sir.

11 A. It could be twenty.

12 Q. No, but when...

13 A. How do I know?

14 Q. But you had some idea of the number of...

15 A. I didn't have any idea of how much time he put in, my dear  
16 woman.

17 Q. I'm not talking about how much time he put in. You had  
18 some idea, sir, that there were a number of witnesses that Mr.  
19 Wheaton had referred to in his reports, that were relevant to  
20 the issues of testimony given that was now retracted.

21 Correct?

22 A. At some stage I knew, yes.

23 Q. Yes. And you had also reason to assume that most of those  
24 witnesses, if not all, would be brought forward in the Court of  
25 Appeal, okay. So, if I read you correctly...

1 A. It might be reasonable to do it. How do I know whether they  
2 were going to?

3 Q. So, I take it you're not prepared to say today that even  
4 looking at the case...

5 A. I'm not prepared to guess today, let's put it that way.

6 Q. I'm not asking you to guess. Even...

7 A. All right.

8 Q. ...being a person who was objectively in part informed, or  
9 relying on information of your dep...on your deputy, or the  
10 information they would give you, that that kind of  
11 preparation would be totally inadequate for a case of this  
12 kind.

13 A. I can't guess that, my dear woman. It's unfair to ask me to  
14 guess how much time it would take, how much effort it would  
15 take, or whatever other ingredients you want to use.

16 Q. Okay. No, I appreciate you're not prepared to make a  
17 comment on that.

18 A> I'm not prepared to guess, no, I'm not.

19 Q. Would you...

20 MR. CHAIRMAN

21 This is argumentative again. I think...my understanding of  
22 legal aid in some of the provinces is that you don't calculate it on  
23 the basis of regular fees. That the law society in its magnanimity,  
24 with the enthusiasm of all practicing counsel, I hope, said "We are  
25 prepared to serve our fellow man and fellow woman at a

1 substantially reduced rate."

2 MS. EDWARDH

3 But it is..

4 MR. CHAIRMAN

5 I think they changed their mind since. Maybe, somewhat.  
6 But that's the concept behind legal aid. It's a great social program.

7 MS. EDWARDH

8 But it is also based, My Lord...

9 MR. CHAIRMAN

10 So I don't know if we can, what I'm getting at Ms. Edwardh,  
11 I don't know if Mr. How can realistically comment on legal aid fees  
12 in the Province of Nova Scotia, the adequacy in 1982, bearing in  
13 mind all the other factors that go into calculating legal aid ...

14 MS. EDWARDH

15 Well it's my understanding that, and I may be wrong...

16 MR. CHAIRMAN

17 I don't know.

18 MS. EDWARDH

19 But the Attorney General's office would have had some  
20 ongoing contact and knowledge of the plan and perhaps even  
21 participated in its funding.

22 Q. Am I correct about that, sir.

23 A. We have a budget item for legal aid, yes.

24 CHAIRMAN

25 Legal aid is a cost-sharing, is legal aid not a cost-sharing

1 program?

2 HIS HONOUR CHIEF JUDGE HARRY HOW

3 Cost-shared with Ottawa...

4 CHAIRMAN

5 Before the Government of Canada...

6 HIS HONOUR CHIEF JUDGE HARRY HOW

7 Ottawa pays for choice of counsel, that area of legal aid.

8 CHAIRMAN

9 And the government of the province. And there's a legal aid  
10 commission that insists on autonomy in administering these funds.

11 These get enough money. Undoubtedly.

12 MS. EDWARDH

13 This is a usual problem.

14 CHAIRMAN

15 But it's a, but I, you know, I'm not sure where all this is  
16 getting us.

17 MS. EDWARDH

18 Well, what I want to...

19 MR. CHAIRMAN

20 It seems to me we have to decide whether or not, in our  
21 view, the question of the reimbursement of Mr. Aronson for his  
22 professional work on behalf of Donald Marshall before and after  
23 this was handled appropriately or adequately by the authorities.

24 MS. EDWARDH

25 But, in part, its handling was by...

1 MR. CHAIRMAN

2 I appreciate that. That's our decision. We, surely we have  
3 to decide whether it was or not.

4 MS. EDWARDH

5 I appreciate what you're saying in that, but in order to  
6 assess this witness' conduct, surely Your Lordships need some  
7 sense of whether he viewed the plan as a satisfactory vehicle for  
8 compensation or it was patent on its face, it was not sufficient, and  
9 that's what I'm trying to establish.

10 MR. CHAIRMAN

11 Well the question you asked him, I think, was whether or  
12 not he felt, based on his years presumably as a practicing lawyer  
13 what he knew of this case. Whether 40 hours' preparation...

14 MS. EDWARDH

15 Couldn't be done.

16 MR. CHAIRMAN

17 Would be, was adequate.

18 MS. EDWARDH

19 Yes, so I'm ...

20 MR. CHAIRMAN

21 And he says he doesn't know.

22 MS. EDWARDH

23 Okay. I'm prepared, then, to go on to the next question  
24 logically, sir, is, were you aware that that was Mr. Aronson's  
25 view and, I take it...



1 A. Oh, yes.

2 Q. As expressed by him to other officials in your Department.

3 A. He didn't think it was adequate, that's right.

4 Q. Okay. Now...

5 A. But let me add it was the maximum that was available to us  
6 under the legal aid system and I explained that, with great  
7 care and patience, and I believe repetitiously with the  
8 Honourable Mr. Munro, the Minister of Indian and Northern  
9 Affairs.

10 Q. Well with the greatest of respect, sir, it wasn't the maximum.  
11 Turn to page 29 in the volume and you'll see that Mr. Coles  
12 and Mr. Murray are discussing, and I put it to you that if you  
13 read this letter, it's clear that obviously overturning wrongful  
14 convictions isn't a tariff item. Not like first degree murder or  
15 murder, but it's an unknown beast and there's no slot to put it  
16 in so here's Mr. Murray writing to Mr. Coles saying...

17 A. All right.

18 Q. Well, even if we expand the hours, you know, you get this.  
19 And even if we treat equivalencies, so what I read Mr.  
20 Murray as saying, sir, and you tell me if you agree with this,  
21 is that he is prepared to be flexible about the hours and he is  
22 prepared to view some things as the equivalent of court  
23 appearances for the purposes of structuring a fee. Do you  
24 read that letter the same way?

25 A. He went as far as he felt he could go.

1 Q. Yes. Right. Now, I take it that, or can you assist us in  
2 indicating whether any of those conversations about your  
3 Department's discussions with Mr. Murray and his flexibility  
4 were ever communicated back to Mr. Aronson so that he  
5 might be aware that the plan would consider something more  
6 than \$1500 worth of preparation?

7 A. I don't know.

8 Q. You have no knowledge of that. So as you understood it  
9 whatever was going on in terms of the negotiations with legal  
10 aid with members of your Department, Mr. Aronson thought  
11 he was fixed at this other rate, and that was when he was  
12 making his protest to the Department.

13 A. Yes.

14 Q. Now, you've testified, sir, that this was an unprecedented  
15 case.

16 A. Yes.

17 Q. It is not only unique, I take it we all hope it remains unique  
18 from your perspective. Correct?

19 A. What would you expect me to answer to that? That I hope  
20 we'd have a lot of them!

21 Q. I hope not.

22 A. Of course not! Who else wants, who would want to see it  
23 happen again?

24 Q. Of course.

25 A. Well, you know...

1 Q. Now, in those circumstances...

2 A. It's kind of a foolish question. Go ahead.

3 Q. Why would you resist the quote "unprecedented payment"?

4 A. Because we had no mechanism or machinery or policy or  
5 program to answer to it, that's why.

6 Q. It was a matter that could have been dealt with as an  
7 extraordinary expenditure for an extraordinary and unique  
8 case by you and your colleagues in Cabinet. Correct?

9 A. I don't know. Perhaps it might have been.

10 COMMISSIONER EVANS

11 Ms. Edwardh, I'm wondering was there an application made  
12 to the Department of Indian Affairs for compensation in this  
13 matter?

14 MS. EDWARDH

15 No, not for compensation. There was, and there is in the  
16 record...

17 COMMISSIONER EVANS

18 For fees, I'm sorry.

19 MS. EDWARDH

20 Yes. There is a request referred to in the record that  
21 actually purports to indicate that Mr. Aronson understood that Mr.  
22 Munro would pay....

23 MR. CHAIRMAN

24 Well that was his testimony as well.  
25

HIS HONOUR CHIEF JUDGE HARRY HOW, EXAM. BY MS. EDWARDH

1 COMMISSIONER EVANS

2 Sort of political promises, I guess. The reason I ask that  
3 because I understood in the original trial certain fees were paid to  
4 Mr. Khattar and certain fees paid to Mr. Rosenblum.

5 MS. EDWARDH

6 I have understood that from many people.

7 MR. CHAIRMAN

8 The testimony, as I recall it, from Mr. Khattar was that...

9 MS. EDWARDH

10 Those fees were not from the Government, though.

11 MR. CHAIRMAN

12 Yes.

13 MS. EDWARDH

14 They came from both the band and the Union. So there was  
15 no gov-, Federal Governmental participation, we're all nodding  
16 here. So the consensus is...

17 COMMISSIONER EVANS

18 The reason I thought....

19 MR. WILDSMITH

20 I think the Department of Indian Affairs...

21 MR. CHAIRMAN

22 They did.

23 MR. WILDSMITH

24 Filed the money through the Union and through the band.  
25

1 MR. CHAIRMAN

2 That was Mr. Rosenblum's fee, I think was paid by Indian  
3 and Northern Affairs albeit through...

4 COMMISSIONER EVANS

5 Channelled through...

6 MR. CHAIRMAN

7 A channel.

8 COMMISSIONER EVANS

9 The reason I asked that because both of, Mr. Khattar said  
10 money was no object and I was wondering...

11 MS. EDWARDH

12 Unusual for defence counsel.

13 COMMISSIONER EVANS

14 Why the same situation would not have existed for this  
15 situation.

16 MS. EDWARDH

17 Well I take it...

18 MR. CHAIRMAN

19 I think one can only speculate as to what would have  
20 happened if Mr. Aronson or the Attorney General's Department  
21 had been aware of the source of funding for Mr. Rosenblum and  
22 Mr. Khattar. Because that would have made a very strong  
23 precedent for Mr. Aronson to say to the Minister of Northern  
24 Affairs, "You've paid one, why not the other?"

25

HIS HONOUR CHIEF JUDGE HARRY HOW, EXAM. BY MS. EDWARDH

1 MS. EDWARDH

2 Yes, indeed it would have. Indeed, it would have.

3 MR. CHAIRMAN

4 Which he, obviously, at least Aronson didn't know it.

5 MS. EDWARDH

6 He doesn't seem to have prevailed in either forum.

7 MR. CHAIRMAN

8 But we'll...

9 HIS HONOUR CHIEF JUDGE HARRY HOW

10 I think, My Lords, that it ought to be said here, I'm looking  
11 back through these letters and the bill, the items in his billing are  
12 for pre-trial preparation and not the whole case. And, again, legal  
13 aid had a certain structure of allowances for that pre-trial process.  
14 That's what we ran into.

15 MS. EDWARDH

16 I appreciate that. I gleaned from Mr. Murray's letters,  
17 however, that because of the unusual nature of the situation that  
18 the traditional number of hours associated with bringing, for  
19 example, a murder to court, which what he was basing the \$1500  
20 for preparation on. He was flexible on because it was an unusual  
21 case.

22 HIS HONOUR CHIEF JUDGE HARRY HOW

23 He stretched it as far as he, he says that, in effect.

24 MS. EDWARDH

25 Q. Yeah.

HIS HONOUR CHIEF JUDGE HARRY HOW, EXAM. BY MS. EDWARDH

1 A. He says that.

2 Q. And he has a discretion in the plan to do that.

3 A. Well he had, to a certain limit.

4 Q. Yes. Let me turn to the area of investigating the police. You  
5 testified, sir, yesterday that in April of '82 you were aware  
6 that there were allegations...

7 MR. CHAIRMAN

8 Before...

9 MS. EDWARDH

10 I'm sorry.

11 MR. CHAIRMAN

12 Are you going to be very long? How much longer do you  
13 expect to be?

14 11:10 - BREAK

15 \*11:29 INQUIRY RESUMES

16 BY MS. EDWARDH

17 Q. Judge, I'd like to deal now with the question of an  
18 investigation or inquiry of some kind into allegations of police  
19 misconduct in relation to the Sydney Police Force. Yesterday  
20 you made it clear that you were aware, at least, that there  
21 were serious allegations about police misconduct as early as  
22 April '82.

23 A. Yes.

24 Q. And that your position as Attorney General was that the  
25 R.C.M.P. were entitled, as a matter of right, to conduct an

1 investigation into any matter that was suitable for police  
2 investigation.

3 A. Yes.

4 Q. Without interference on the part of the Department of the  
5 Attorney General.

6 A. Yes.

7 Q. And I take it you are viewing that as very much in line with  
8 the traditional English approach, which is it is the  
9 responsibility of the police to investigate, to bring forward  
10 charges, and then, at that point, it is the office of the Attorney  
11 General who decides to conduct the prosecution or not.

12 A. Yes.

13 Q. Now you were also though aware, and I just want to  
14 understand your explanation for this. The reports of the  
15 R.C.M.P. were forwarded on to the office or given to Mr. Gale  
16 and summarized for you, as I understood your testimony  
17 yesterday, and your explanation for not reading these reports  
18 yourself was that you didn't budget sufficient time.

19 A. I ascribed that as part of the reason, perhaps, yes.

20 Q. You've described yourself as being a hands-on Minister in  
21 relation to complaints.

22 A. Yes.

23 Q. And I'm going to suggest to you, sir, that the Marshall case  
24 constitutes the biggest complaint that has even been filed  
25 against the administration of justice in Nova Scotia. And I



HIS HONOUR CHIEF JUDGE HARRY HOW, EXAM. BY MS. EDWARDH

1 wonder when you use the term "hands on", why that wouldn't  
2 extend to actually reading the police reports of the  
3 reinvestigation?

4 A. Well, I suppose I have to remind you, again, of the practice of  
5 delegation within a department of that size. It's a practical  
6 necessity. I have to remind you that although I was kept  
7 aware of general progress in this particular case that I had  
8 delegated it to people of, what I considered, able capability  
9 and that, to my knowledge, things were proceeding apace and  
10 they were also proceeding upon a general phased agenda.  
11 The first phase, to get the matter of Donald Marshall's  
12 conviction before the court. Or to get it before the Minister of  
13 Justice in Ottawa for his disposition, as to what procedure he  
14 would desire to follow. Secondly, matters such as I outlined  
15 in my memorandum, I think, of May or so of '82, were  
16 considerations which would follow. But it was considered that  
17 that was the appropriate approach and phasing.

18 Q. What I'm trying to understand, sir, and what I think would be  
19 of some assistance to the Commissioners to understand is  
20 having characterized yourself as hands on in relation to  
21 complaints, why, in fact, you weren't hands on in relation to  
22 this case?

23 A. I just explained it. I don't know what other terms I can  
24 explain it in. There is a process of delegation. If you, for  
25 example...

1 Q. I appreciate that.

2 A. ...think that the Attorney General's Department, even of the  
3 province the size of Nova Scotia can be run by the Attorney  
4 General himself with, say, one or two assistants, I would  
5 invite you to go down and see that Department in operation  
6 and you would quickly be disabused of that. I also outlined  
7 yesterday that an Attorney General is also a political figure.  
8 He is also a member of Cabinet and he has a diversity, if you  
9 will, of matters that he must give attention to. Hence, I said  
10 that I couldn't give everything my personal attention every  
11 step of the way for those reasons.

12 Q. I understand what you've testified to, sir. You yourself  
13 described the basic division reflected in your management  
14 style as dealing directly on a personal basis using the term  
15 "hands on" with matters of complaint.

16 A. I didn't mean "hands on" on every case and every step of  
17 every case.

18 Q. Of course not.

19 A. I couldn't.

20 Q. You've already agree...

21 A. Don't use it simplistically, please.

22 Q. You've already agreed, sir, that the Marshall case is a unique,  
23 unprecedented case.

24 A. I agree.

25 Q. Raising issues about the administration of justice, probably

HIS HONOUR CHIEF JUDGE HARRY HOW, EXAM. BY MS. EDWARDH

1 that no other case. So are you saying that you gave hands-on  
2 treatment to some cases of complaint...

3 A. Oh, don't try and make it...

4 Q. But not Marshall's?

5 A. Don't try and make a case out of what I consider nothing.

6 What you're trying to suggest is that I should have personally  
7 involved myself with every step, every phase of the Marshall  
8 case. And I'm saying to you that was neither necessary nor  
9 indeed possible for me to do.

10 Q. And with respect to any direction, I take it though you don't  
11 dispute you could indeed have given direction in relation to  
12 matters which you did not give direction to.

13 A. And what purpose would that have served, in your view?

14 Q. I'm not here to...

15 A. You're baiting the case here. You're trying to make a case...

16 Q. I'm here to ask questions.

17 A. Against me. Now tell me, what is your case in this regard?

18 Q. I'm here, sir, to ask questions.

19 MR. CHAIRMAN

20 The question was answered. Now let's not get  
21 argumentative, either between the witness or counsel. The  
22 question was just answered by this witness, the last question and  
23 you're now moving, I think, into another area, Ms. Edwardh.

24 MS. EDWARDH

25 Yes, My Lord, I'll move on to another area.

HIS HONOUR CHIEF JUDGE HARRY HOW, EXAM. BY MS. EDWARDH

1 BY MS. EDWARDH

2 Q. The question of the police investigation again, in May of, or  
3 May 20th, approximately, of 1982 when there is this notation  
4 that things are suspended in terms of a further questioning or  
5 any questioning of MacIntyre and Urquhart, I take it, sir,  
6 between that date and May of '83, you were aware that there  
7 was no inquiry or investigation of any kind, formal or  
8 informal, into the police, allegations of police misconduct.

9 A. Well, now you want to suggest that nothing was done. Let me  
10 just remind you again...

11 Q. Excuse me, with the greatest of respect, it's a question that  
12 I'm entitled to an answer.

13 MR. CHAIRMAN

14 That's a fairly simple question.

15 HIS HONOUR CHIEF JUDGE HOW

16 I want to, My Lord, I think in fairness to myself, I should be  
17 allowed to remind the questioner that in the meantime, and I  
18 explained this yesterday, that the, that Mr. Aronson had started a  
19 civil action on behalf of Mr. Marshall in the Supreme Court of  
20 Nova Scotia, even before the Supreme Court of Nova Scotia's  
21 decision. And that that was ongoing until, as I recall it, withdrawn  
22 some time in late 1983 or early '84. And I explained again...

23 MS. EDWARDH

24 And that, may I follow up...

25 HIS HONOUR CHIEF JUDGE HOW

HIS HONOUR CHIEF JUDGE HARRY HOW, EXAM. BY MS. EDWARDH

1           Yeah, but just a minute. I explained again... Look, I am  
2 entitled to make full answer here. You've recited the Charter.  
3 That's what it says in it, in part.

4 MR. CHAIRMAN

5           Now let's start again. There was a question put as to  
6 whether or not there had been any investigation and/or inquiry  
7 into these alleged inappropriate police practices during the  
8 investigation of the Donald Marshall, Jr. case and recalling what  
9 was said yesterday, the answer to that question probably was no.  
10 Then I can see the next question coming, which I suspect you also  
11 saw, Judge How, why not? Now what you're saying...

12 MS. EDWARDH

13           My question, as I recall, My Lord, was was he aware...

14 MR. CHAIRMAN

15           All right, was he aware?

16 MS. EDWARDH

17           That there was nothing taken on an informal or formal basis  
18 to investigate further between May 20th, 1982 and May of '83.  
19 That's my question.

20 MR. CHAIRMAN

21           All right. Well, can you answer that question?

22 HIS HONOUR CHIEF JUDGE HOW

23           Yes, My Lord.

24 A. The reason was because this action was pending in the...

25 Q. Just stop, sir, for a moment...

HIS HONOUR CHIEF JUDGE HARRY HOW, EXAM. BY MS. EDWARDH

1 MR. CHAIRMAN

2 Let's get to the reasons. I know the reasons that have been  
3 advanced by this witness. The first question is, were you aware  
4 that during that period there was no formal or informal inquiry, if  
5 such is the case, into the allegations of police behaviour in 1971,  
6 Sydney Police?

7 HIS HONOUR CHIEF JUDGE HOW

8 I don't know, My Lord, whether there was or not. The police  
9 may have been investigating, as I said much earlier. It was their  
10 right to do so. They may have been doing so. How do I know?

11 MS. EDWARDH

12 That is why I asked you that question, sir.

13 HIS HONOUR CHIEF JUDGE HOW

14 I don't know.

15 MR. CHAIRMAN

16 All right.

17 BY MS. EDWARDH

18 Q. So when in May of 1982, Mr. Gale may have left the  
19 impression with some individuals that there ought not to be  
20 any further inquiry or investigation at this time, I take it you  
21 were unaware of that and had nothing to do with that.

22 A. Right.

23 Q. Now I take it, given your view of the police, that they go  
24 about investigating what they want to investigate, still from  
25 your perspective, you were not made aware that anything

HIS HONOUR CHIEF JUDGE HARRY HOW, EXAM. BY MS. EDWARDH

1 was being done.

2 A. I may have been aware, yes.

3 Q. So if you were aware as to whether anything was or was not  
4 being done, can you assist us in telling us what your state of  
5 knowledge was?

6 A. Well, referring back to my memorandum, there were a  
7 number of times which I felt had to be addressed. That was  
8 my memorandum of May, what, '82.

9 Q. Yes.

10 A. And that was our agenda, or mine.

11 Q. To address those issues.

12 A. Yes, but there were intervening actions taken which I've just  
13 explained. I don't want to repeat them. I don't want to  
14 annoy Their Lordships here with that, but that was my  
15 posi...It was explained to me that we ought not to proceed  
16 formally, but I don't know whether the police were following  
17 any agenda of their own for further investigation, no, I don't  
18 know.

19 Q. Let me raise this issue in this context.

20 MR. SAUNDERS

21 Just so that the record is clear, I believe the memo is dated  
22 May, 1983.

23 HIS HONOUR CHIEF JUDGE HOW

24 Okay, May '83.

25 MR. SAUNDERS

1 Not May, 1982.

2 BY MS. EDWARDH

3 Q. So we'll go back to May '82 when you had not issued such a  
4 memorandum.

5 A. That's right.

6 Q. And let me ask you this question, sir. In May of 1982 when  
7 Mr. Gale gives the impression that people should stop, that  
8 certainly had nothing to do with you. He did that on his own  
9 motion, if he did it at all, and we'll hear from him. Correct?

10 A. Yes.

11 Q. And you were unaware whether there was or was not any  
12 investigation going on.

13 A. I didn't know there was any interruption in anything.

14 Q. But your view was that you shouldn't institute any  
15 investigation because a civil proceeding was ongoing.

16 A. Well, wait a minute.

17 Q. So whatever the police was doing, you didn't do anything  
18 because a civil proceeding was ongoing, is that correct?

19 A. My view was that we take it in stages. That was the way it  
20 was suggested to me. It seemed to make sense and reason  
21 and I followed sense and reason as I saw it.

22 Q. Yes, but in May of 19...

23 A. In May of '82, the case was being prepared to go to court.

24 Q. That's right, but in May of '82, the investigation by the  
25 R.C.M.P. was, in effect, completed. That's what...



1 A. I don't know.

2 Q. Well...

3 A. If you know, you tell me.

4 Q. Let me assume that you familiarized yourself roughly with  
5 what Mr. Wheaton or Sgt. Wheaton did and that by and large  
6 he had completed the investigation in relation to the Marshall  
7 matter by May of 1982 and was then raising the question of  
8 should he go on further, okay?

9 A. Yes.

10 Q. You can take that as a fact. Raising it with members of your  
11 Department.

12 A. Uh-huh.

13 Q. Very shortly thereafter he's told or given the impression that  
14 he shouldn't go on any further. So what I'm trying to find  
15 out, sir, simply is this. Forget what the police might be doing  
16 on their own. From your perspective and from your official  
17 involvement in this whole issue, you would have instructed  
18 them not to proceed because of the civil action. Is that what  
19 you're saying? I don't want to put words in your mouth. I  
20 want to find out what your position was.

21 A. No, you'll never put words in my mouth. I can guarantee you  
22 that. But I think the action was started in January of 1983, if  
23 I remember rightly.

24 Q. And that's some seven or eight months later.

25 A. Yes.

- 1 Q. So between...
- 2 A. But in the meantime, the Department had worked out an  
3 agenda with the Crown Prosecutor, and I presume with Mr.  
4 Aronson for the defence, as to the first order of business;  
5 namely, getting the matter prepared for the Supreme Court.
- 6 Q. And I take it that even though there wasn't a civil action, that  
7 your Department took the view that they would not proceed  
8 to investigate the police until the Supreme Court had dealt  
9 with the Marshall case?
- 10 A. They didn't see a need to address that phase of it at that time,  
11 as I understood it.
- 12 Q. And can you explain now why, with no civil action  
13 outstanding, in that period they didn't see a need to address  
14 behaviour in a police force that gave rise to what they  
15 believed was false testimony? Can you explain that, sir?
- 16 A. Well, I...Can I give you a reason? No, I can't give you a reason  
17 except the reason I gave you. They had worked out a  
18 process of approaches to the various phases of this  
19 unfortunate matter, and they followed them.
- 20 Q. Will you agree, sir, that the effect of that decision is to leave  
21 aside a very important matter pertaining to the  
22 administration of justice at large?
- 23 A. I don't agree that it would leave aside. I said they had  
24 priorities, they followed them.
- 25 Q. Leave it aside for a period of time. Then I take it the civil

1 action interfered?

2 A. Yes.

3 Q. From your perspective.

4 A. Yes.

5 Q. And I take it it interfered in the sense that you felt that the  
6 issues of police misconduct could be dealt with between  
7 private litigants and it should be dealt with between private  
8 litigants, is that your view?

9 A. No, I'll tell you what my view was. I was aware or read the  
10 statement of claim and in it they were contending the various,  
11 the very things, claiming that the very things happened that  
12 you say we should have been addressing at a certain period  
13 of time. Now wouldn't it be reasonable to conclude that those  
14 matters would come forth in that court, a civil court of this  
15 province, and perhaps be answered in the civil court process.

16 Q. And that was your conclusion and your wish.

17 A. Well, please.

18 Q. That it would be addressed in that forum.

19 A. It was my conclusion. I had no wishes at all with regard to  
20 that.

21 Q. Okay. The memorandum found in the materials in relation to  
22 municipal liability, did you, sir, direct that that be prepared to  
23 assist the municipality in defending the action?

24 A. I don't recall, no. I don't recall asking that that be done. In  
25 fact, I noted it with perhaps some surprise. That's all I can

1 tell you.

2 Q. So I take it that if you noted it with surprise, it certainly was  
3 not a memorandum that you instructed Mr. Herschorn to  
4 obtain?

5 A. I don't recall it.

6 MR. CHAIRMAN

7 What memorandum?

8 MS. EDWARDH

9 I'm sorry, excuse me, My Lord. There is a memorandum  
10 commencing at page 239 in Volume 32 and it's a 30-page  
11 memorandum of law pertaining to the question of municipal  
12 liability for the tortious acts of police officers.

13 MR. CHAIRMAN

14 This has been prepared by an articulated clerk in the  
15 Department of the Attorney General for Mr. Herschorn?

16 MS. EDWARDH

17 Yes, that's correct.

18 MR. CHAIRMAN

19 Did this witness say he saw or knew that opinion or was  
20 aware of it?

21 MS. EDWARDH

22 No, he said he did not see it, he did not know it, and it took  
23 him by surprise.

24 MR. CHAIRMAN

25 All right.

1 BY MS. EDWARDH

2 Q. And when you first became aware of it, do I take it, sir, it's in  
3 the course of these proceedings?

4 A. No, I think, let me correct you, I think I said I don't recall  
5 asking that it be done or seeing it until after, well, rather  
6 recently.

7 Q. Rather recently.

8 A. Yeah.

9 Q. Do I take it your recollection is today that you had nothing to  
10 do with either causing that memorandum to come into  
11 existence or seeing it after the fact until these proceedings?

12 A. Oh, I will...

13 Q. Is that what you're saying?

14 A. I'll have to say again, I don't recall.

15 Q. Yes. Was the Department on your instructions working or  
16 cooperating with the municipality to defend the action?

17 A. Not to my knowledge.

18 Q. If your cooperation had been sought, what view would you  
19 have taken of the propriety of giving it?

20 A. I think I expressed a view to some extent on this yesterday  
21 when I said that our view was that we should not conduct a  
22 formal inquiry during the course of those proceedings.

23 Q. No, but what about assisting the municipality to defend the  
24 action, what view would you have taken?

25 A. I would have, I have never given any thought to this. I think

1 I would have suggested that the municipality would defend it  
2 independently of the department.

3 Q. And in the circumstances of this case, ought to. Would you  
4 agree with that?

5 A. Yes, I would go that far, yes.

6 Q. The issue of compensation is another issue I would like to just  
7 briefly touch upon. In April of '82, you made remarks to  
8 certain newspaper columnists and they are set out in Volume  
9 38 at page 10. And as I read the gist of these remarks,  
10 disclose a willingness to pay compensation.

11 A. Yes.

12 Q. Volume 38, sir, page 10.

13 A. Oh, yes.

14 Q. Now I just want to see, sir, whether you agree with the  
15 remarks attributed to you and whether, in fact, you can recall  
16 making similar remarks and I'm looking really to the last two  
17 paragraphs of this article.

18  
19 If Mr. Marshall is cleared, the government has  
20 promised to pay compensation for his ten and  
21 half years behind bars. 'I don't know what  
22 yardsticks we will use,' says Nova Scotia  
23 Attorney General Harry How, 'It might be an  
24 arbitrary lump sum based on a loss of earnings  
25 plus a couple of other factors.'

23 Do you recall, sir, making those comments?

24 A. Yes, those or very similar to them.

25

1 Q. Okay. So I take it in April, you had and were prepared to  
2 make a public commitment to the payment of compensation  
3 for Mr. Marshall.

4 A. Yes.

5 Q. And, again, just to confirm for your own view of the matter,  
6 at page 14, again...No, I'm sorry, it's the wrong reference,  
7 excuse me. Now a year later, I take it that once Mr. Marshall  
8 was, in fact, acquitted, despite the acknowledgement, the  
9 government took, in effect, the view tat they wouldn't  
10 consider compensation unless and until they found out what  
11 Mr. Marshall could get through private litigation with the City  
12 of Sydney.

13 A. I don't know that the two were linked but I think that was a  
14 consideration, because he was claiming against them the very  
15 things that would be involved in a consideration by the  
16 province.

17 Q. And if I were to suggest to you, sir, that for others similarly  
18 situated to Mr. Marshall, without resources in trying to  
19 integrate themselves back into the community after a lengthy  
20 period of incarceration, that to force someone into civil  
21 litigation with no resources except perhaps their welfare  
22 cheque, is an unfair, if not an unseemly process...

23 A. Please, please...

24 Q. Or position of a state...

25 A. Please, we didn't force Mr. Marshall to take that step. As a

1 matter of fact, he...

2 Q. No, I appreciate that.

3 A. Just a moment. It was taken before. You don't want to hear  
4 me but you want me to hear you. Now it was taken before,  
5 initiated before the Supreme Court of Nova Scotia had ruled  
6 on it, as I understand it.

7 Q. You, sir, though made the same statements about  
8 compensation in 1982 well before.

9 A. Yes, yes, yes.

10 Q. Yes. So starting with your commitment on behalf of the  
11 government to rectify a wrong.

12 A. Yes.

13 Q. My question is, is it not unfair to someone similarly situated  
14 to Mr. Marshall to not move expeditiously after an acquittal to  
15 make whatever amends the state can make in this kind of  
16 situation?

17 A. I'll just put it again, that he had taken the initiative through  
18 his lawyer, very capable lawyer, you would agree, to take this  
19 step to exp..to claim compensation from the City of Sydney for  
20 the very things that he would be claiming against the  
21 Province of Nova Scotia. Was it terribly unreasonable for the  
22 Province to say to itself, me to say, department officials, "Let's  
23 see what happens in that case in terms of what he might  
24 recover financially."

25 Q. And that's what you did.



HIS HONOUR CHIEF JUDGE HARRY HOW, EXAM. BY MS. EDWARDH

1 A. Essentially, yes.

2 Q. And it's fair to say that had the government been willing to  
3 step up and say, "We are prepared to negotiate this matter  
4 with you now," it would also be equally reasonable to assume  
5 that that litigation might not have even been launched.

6 A. Well, then, Mr....

7 Q. But no one was doing that.

8 A. Mr. Aronson was free to say that to the government. "I don't  
9 want to pursue it if you'll entertain it," that was his freedom.

10 Q. And in May of 1983, Volume 38, page 35, a year after you  
11 had so graciously offered to assist Mr. Marshall with  
12 compensation, you are quoted, sir, as saying, or it is attributed  
13 to you in the third paragraph of that article:

14  
15 Nova Scotia Attorney General Harry How has  
16 refused to say whether his government will  
17 compensate Marshall for his time in prison or for  
18 the legal fees amassed in trying to prove his  
19 innocence.

18 What caused the reversal...

19 A. Just a minute, where are you reading from?

20 Q. I'm reading the third paragraph in that article. Could I assist  
21 you?

22 A. Yes. Yes, I've got it.

23 Q. Have you found it?

24 A. Yes.

25 Q. What caused that reversal?

1 MR. SAUNDERS

2 Excuse me, My Lord, I don't know that it's a reversal and I  
3 don't think it's fair for my friend to suggest it was.

4 MS. EDWARDH

5 I'm sorry.

6 MR. CHAIRMAN

7 This is not a reversal.

8 MS. EDWARDH

9 I won't characterize it.

10 BY MS. EDWARDH

11 Q. What caused you, sir, to go from saying "We will compensate"  
12 to refusing to say you will compensate.

13 A. I don't recall making a statement which could be  
14 characterized in those words.,

15 Q. So you think perhaps it's a misquote?

16 A. I see the...Oh, wait a minute now, "the legal fees amassed", as  
17 they put it, may have been a question to me and I might have  
18 been referring to that. But I don't recall, as you put it,  
19 reversing myself.

20 Q. Well, let me read the words used, "Harry How has refused to  
21 say..."

22 A. I know what the words say, I can read.

23 Q. Well...

24 A. A little.

25 Q. Whether his government will compensate Marshall for his

1 time in prison.

2 A. I know what it says...

3 Q. Or the legal fees.

4 A. And I'm saying to you I don't recall making a statement in  
5 those terms.

6 Q. Okay, so I take it, sir, then...

7 A. You know every...Do you believe everything you see in the  
8 newspaper?

9 MR. CHAIRMAN

10 This seems to be getting us nowhere. How can a person be  
11 expected to recall making a statement that he says he didn't  
12 make?

13 MS. EDWARDH

14 No, he can't. I mean he's denying...

15 COMMISSIONER EVANS

16 The fact it's in the paper doesn't make it a quote....It's just  
17 some, I won't use the word "dream" again but it's just some  
18 comment made by the writer of this. He does quote the Minister  
19 of Justice MacGuigan and you'll have a little more trouble getting  
20 away from that, I suppose, Mr. MacGuigan, but...

21 MS. EDWARDH

22 All I can do is put it to the witness...

23 COMMISSIONER EVANS

24 The rest is just the...

25 MS. EDWARDH

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1           And he's denied that he said it and that's the end of the  
2 matter.

3 MR. CHAIRMAN

4           This would appear to be something that arose out of a  
5 question in the House of Commons.

6 MS. EDWARDH

7           It may well be. I don't know its origin.

8 MR. CHAIRMAN

9           We can make a judicial note of the fact that provincial  
10 Ministers assiduously avoid, if they can, responding to statements  
11 made in another Parliament.

12 MS. EDWARDH

13           No, I didn't take that from the article.

14 HIS HONOUR CHIEF JUDGE HOW

15           Perhaps I might mention, My Lords, that only today the  
16 headlines in the Daily News and The Halifax Chronicle Herald are  
17 in total conflict as to what I said yesterday.

18 MS. EDWARDH

19           Okay, let me just deal with the...

20 MR. CHAIRMAN

21           We don't take judicial note of headlines.

22 HIS HONOUR CHIEF JUDGE HOW

23           You can take a peek, My Lord, perhaps.

24 BY MS. EDWARDH

25 Q. Let me ask you the question on a humanitarian basis, sir. As

1 Attorney General, you have a duty of fairness to accused  
2 people and convicted people as well?

3 A. No question.

4 Q. As well as a duty to uphold the law of the Province of Nova  
5 Scotia.

6 A. Yes. As Premier Reagan used to say, "That's a penetrating  
7 peek into the obvious," but, yes, to both cases.

8 Q. That's right. Forgive me my triviality.

9 A. No, I didn't say that. I'm just being facetious now.

10 Q. Now let's look at the humanitarian side of compensation for a  
11 moment.

12 A. Yes.

13 Q. Mr. Marshall's release from prison after eleven years would  
14 undoubtedly involve a real and very problematic adjustment  
15 to the community, correct?

16 A. Yes.

17 Q. You were aware of that as probably anybody would, looking  
18 at the situation.

19 A. Yes.

20 Q. Further, that there to enhance the process of reintegration  
21 into the community, some funds would be of great assistance  
22 to an individual in those circumstances. Maybe not the  
23 ultimate amount payable, but some funds.

24 A. I suppose, yes, I can understand.

25 Q. And would you agree with me, sir, in retrospect, given the

1 fact that we were now a body trying to deal with perhaps this  
2 situation and recommendations, what should be available to  
3 someone in similar circumstances, especially when the  
4 Department is also taking the position that a person should be  
5 acquitted, as your Department was, that some form of  
6 compensation should be readily payable to assist in that  
7 transition.

8 A. Readily available?

9 12:00

10 Q. Well, it should be more easily available. It shouldn't take as  
11 long a time...

12 A. It was a subject which invited compensation, yes.

13 Q. And it would be better it could be paid sooner than later to  
14 facilitate someone's transition.

15 A. In general, yes

16 Q. Yes. And to that end, would you agree, sir, that given the  
17 difficulties of sorting how you assess compensation, what the  
18 possible formulas are, it would be better that a statutory  
19 framework be set up dealing with this so that claims can be  
20 expeditiously dealt with in the future.

21 A. Oh, a statutory body of some kind you're talking about. A  
22 structure?

23 Q. Some formal body that has a jurisdiction to do this and knows  
24 what to do.

25 A. Oh, I certainly would, in general terms, agree that having had

1 this experience one might easily contemplate a process.

2 Q. Process.

3 A. Which would, to which, which could address these  
4 unfortunate happenings. In terms of compensation, yes.

5 Q. And that such a process would likely, certainly result in  
6 expediting claims. That part of the, would you agree, and I've  
7 heard you say, part of the delay here is not knowing what to  
8 do in an unusual situation?

9 A. Yes.

10 Q. A unique situation.

11 A. I suppose that's where it was at. We were frantic. We were  
12 perhaps you would say cautiously, we thought, methodically,  
13 feeling our way along.

14 Q. But it wasn't, and to the extent you have to feel your way  
15 along, it's just harder to deal with something quickly. You  
16 agree with that.

17 A. It usually is.

18 Q. Yeah.

19 A. Yes, thank you. Yes, I agree.

20 Q. So that at the end of the day a framework for handling such  
21 claims would and should be welcomed by both the state and  
22 the individuals who have to face making such a claim.

23 A. I could postulate a body similar to the Workers' Compensation  
24 Board for this kind of purpose. In fact, you might even  
25 employ them for that purpose.

1 Q. I'm not going to get into the specifics...

2 A. No, no.

3 Q. But that it would be formulated would be of assistance.

4 A. I would, it could do harm. It might well be of assistance,  
5 especially to the people claiming, yes.

6 Q. Now, one of the things that comes out of this case in my  
7 respectful submission to you, is that there has to be some  
8 mechanism whereby someone can institute an independent  
9 investigation of a wrongful conviction. Do you agree with that  
10 statement?

11 A. There has to be...

12 Q. There should be some mechanism so that you can institute an  
13 investigation into a wrongful conviction. Such as occurred in  
14 this case. There was such an investigation.

15 A. Well, the police normally do that.

16 Q. Do they?

17 A. Do you, no, I mean, in all fairness and seriousness, are you  
18 suggesting something beyond the normal police processes of  
19 investigation?

20 Q. No, I'm saying, sir, do you accept as a fact, I suppose, let me  
21 put the question to you this way. That in the ordinary course  
22 a lawyer can write a letter, such as the one Mr. Aronson got,  
23 or wrote...

24 A. Yes.

25 Q. And that that will precipitate an investigation of this kind. Do



1           you think that's unusual or usual?

2       A. Well, unusual for him to the write the letter claiming an  
3       injustice?

4       Q. No. Let's assume that I don't think it's unusual to write the  
5       letter for a moment. But what I'm querying to you, given  
6       your experience even as a defence lawyer...

7       A. Yes.

8       Q. Is whether or not one would anticipate the result that  
9       occurred in this case. That someone really went out and  
10      seriously spent the time, energy and resources in a re-  
11      investigation.

12      A. Well, I, all right. I'm interpreting your question as asking me  
13      if it would be usual for the police to react as they did in this  
14      case.

15      Q. Yes. Or...

16      A. Well, again, it's pretty hard for me to answer. Much of their,  
17      you know, I might not know any investigations they have  
18      ongoing of that nature.

19      Q. Would you agree, sir, that should the unfortunate situation  
20      arise where the same assertion is being made, "I've been  
21      wrongfully convicted", there should be a mechanism available  
22      that transfers the investigation automatically to another  
23      police force and that an investigation of some substance can  
24      take place.

25      A. Well, I think in line with my previous answers and positions,

1 expressed positions, I would think that if a letter came to the  
2 Attorney General, ie. was a complaint as you've put to me  
3 this morning, I would be in duty bound to take action and to  
4 follow up with a request. For example, if it was a municipal  
5 police force, address it to the RCMP for independent  
6 investigation.

7 Q. But that's an exercise of your discretion and wisdom, in effect.  
8 You would, as Attorney General, decide how best do I deal  
9 with it. But there's no mechanism set out for how to  
10 reinvestigate a conviction. That's what I'm really identifying.

11 A. Well if I were back as a defence lawyer again, you know, if  
12 the Attorney General didn't act on it what I'd do? Let me tell  
13 you. I would apply to the Supreme Court of Nova Scotia and  
14 advise them of what had happened and what had not  
15 happened as well. What I had done and what had, and that  
16 there was no result. I would have asked them for an order  
17 directing him to investigate it. They have inherent powers.  
18 But you say, should there be a mechanism?

19 Q. Yes.

20 A. Again, I can see no harm in doing it.

21 Q. And a mechanism that would bring in a different police force,  
22 perhaps, and a review, that the parameters of which, were  
23 established that included re-interviewing witnesses or  
24 whatever.

25 A. Yes. They might have staff, you mean, to do that.

1 Q. Yes.

2 A. Yes. A sort of an ombudsman, perhaps.

3 Q. Perhaps. Or just somebody who has the understanding of  
4 how you do it.

5 A. Or you might employ the ombudsman. But anyway, yes, I  
6 agree. It would do no harm at all and might do a lot of good,  
7 might I add.

8 Q. So as to not leave the record the way it is in part, and to  
9 clarify any assertions you, sir, have made, I take it today,  
10 March 1988, you are not suggesting to the Commissioners that  
11 it is still your view that there were no difficulties in the  
12 administration of justice and that Marshall was, in fact, the  
13 author of his own misfortune. That that was something that  
14 you relied on in the past...

15 A. I think I would share the view of the Supreme Court of Nova  
16 Scotia in that regard.

17 Q. Still today.

18 A. Yes. Yes.

19 Q. And...

20 A. And I don't know. They said he was the author, I, maybe  
21 their language does, was that strong but, in any event, I  
22 thought it amounted to was in part, or in substantially or  
23 something of that effect, not wholly responsible and I don't  
24 think I ever said that nor did...

25 Q. They always said, sir, that the miscarriage of justice was more

1        apparent than real.

2        A. Yes, they did.

3        Q. And I take it from that that you still, then, from your answer  
4        take that position despite the fact that you are aware of the  
5        importance of the testimony that was given, the nature of the  
6        pressures, the adequacy of the criminal investigation and all  
7        the other factors that have come to light. Do you still take  
8        that position?

9        A. Would you, please, just put that to me again so I can clearly  
10       understand...

11       Q. I'll outline the factors. I just want to understand whether  
12       today you're saying to this Commission that it is your view  
13       that my client was substantially responsible and that the  
14       administration of justice in Nova Scotia is not seriously at  
15       fault.

16       MR. SAUNDERS

17       My Lord, I'm wondering about the relevance of that  
18       question put to this witness as of today. Doesn't it almost  
19       presuppose that he's been in attendance the last 61 days of  
20       testimony before Your Lordships and has heard every jot of  
21       evidence that's been heard.

22       CHAIRMAN

23       That's really what we have to decide.

24       MR. SAUNDERS

25       Exactly.

HIS HONOUR CHIEF JUDGE HARRY HOW, EXAM. BY MS. EDWARDH

1 CHAIRMAN

2 One of the many issues that we will have to direct our  
3 attention to based on all of the evidence. And it's...

4 MS. EDWARDH

5 I think it's certainly relevant to the witness' credibility.

6 CHAIRMAN

7 No, it has nothing to do with credibility. Surely you're  
8 asking the, Chief Judge How whether based on what he knew  
9 when he was Attorney General, he concluded that the Court of  
10 Appeal's comments or findings, be they obit or otherwise, were  
11 valid at the time.

12 MS. EDWARDH

13 I think he said they were and I've asked him to say does he  
14 want to leave that in hindsight today. That's the impression he's  
15 given in his testimony.

16 COMMISSIONER EVANS

17 That's assuming that he's heard all of the evidence that has  
18 been produced.

19 MS. EDWARDH

20 Perhaps I, in fairness to the witness, should put to him the  
21 question, you know, has he followed generally these proceedings.

22 COMMISSIONER EVANS

23 I wouldn't want to miss an important part.

24 CHAIRMAN

25 I think you're asking this witness to conclude what we have

1 to conclude.

2 MS. EDWARDH

3 Q. Let me, then, pose one further, a couple of questions to you,  
4 sir. You said in relation to that, and I find it a remarkable  
5 statement that if Mr. Marshall told the police about the  
6 attempted robbery, that the police would then not have been  
7 in the position where they needed to have their own theory  
8 and disbelieve the witnesses. Remember saying that  
9 yesterday?

10 A. Yes, something to that effect, yes.

11 Q. I suggest, sir, that that is nothing short of saying that the  
12 police are, in fact, entitled to shape the evidence in  
13 accordance with a theory of the crime and that that is the one  
14 thing police officers must not do.

15 A. Well, I think my remarks amounted to this at that this point.  
16 That I accepted the theory or position followed by the  
17 Supreme Court of Nova Scotia when they said what they said  
18 on this point, and I'll come back to it a moment. I accept  
19 what I, the position taken and remarks of a senior RCMP  
20 investigating officer into this case. And I accept similar  
21 remarks from, and positions from, and opinions from Mr.  
22 Frank Edwards. Namely, that by not telling the police of  
23 Sydney the reason that he was there in the Park that night  
24 with Mr. Seale, that is Marshall not telling them, deprived the  
25 police of a plausible motive for someone to stab Mr. Seale.

1 That's what I think I said, what it amounted to. It was not  
2 considered a reasonable motive for someone to stab Mr. Seale  
3 because he didn't like Negroes or to attempt to stab Mr.  
4 Marshall because he didn't like Indians. They didn't think  
5 that was sufficient. They wanted a more, tried to think up or  
6 formulate a more realistic motive to try and understand it.

7 Q. And so when they interrogated adolescent witnesses they  
8 pressured those witnesses to bring about a view of the facts  
9 that the police said.

10 A. I simply said that one could speculate that it may have  
11 played a part in the this alleged pressuring of witnesses, yes.  
12 I said that.

13 Q. And let us assume for a moment, sir, that it did play a part.  
14 Let's assume that.

15 A. Yes.

16 Q. Can there still be any more serious a threat to the integrity of  
17 the administration of justice than even permitted police to  
18 begin to bring that pressure?

19 A. I didn't, I'm not defending it. All I am suggesting is that one  
20 might speculate that in that direction as an explanation.

21 Q. But you don't put the fault there. That's my query.

22 A. Wait a minute. I didn't, I didn't say that I didn't fault them.  
23 I don't, I said yesterday to Mr. Orsborn that I don't condone  
24 the pressuring of witnesses in or out of court.

25 Q. And, indeed, if that pressure resulted in the giving of false

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1 testimony that's the fundamental problem that occurred in  
2 this case. Juries acting and judges acting on false testimony,  
3 is it not?

4 A. Apparently, yes.

5 Q. Yes.

6 A. Yes.

7 Q. One more question, sir. Did you, sir, have any conversations  
8 of any kind with the judges who sat on the Court of Appeal  
9 dealing with the reference, in relation to the reference?

10 A. None, what, none whatsoever. Let me repeat, none  
11 whatsoever, so you'll hear me.

12 MS. EDWARDH

13 Those are my questions, thank you.

14 CHAIRMAN

15 I would hope that that question won't be put again unless  
16 there's some indication that there's some evidence to sustain it.

17 MR. PINK

18 Yes, if Your Lordship's pleases I do feel I could finish my  
19 examination of Mr. How before the 12:30 break.

20 CHAIRMAN

21 Fine.

22 EXAMINATION BY MR. PINK

23 Q. Your Honour Chief Judge, my name is Joel Pink and I'm here  
24 this morning on behalf of...

25 A. I could take judicial notice of that.



1 Q. Thank you. On behalf of Chief MacIntyre. I just have a  
2 number of questions, relatively short. Can you tell me, sir,  
3 whether or not you have any knowledge as to who initiated  
4 the re-investigation of the Marshall matter back in 1982  
5 because it is my understanding from your evidence yesterday  
6 when this matter came to your attention in March of 1982,  
7 the investigation had already commenced.

8 A. That's right. And I'm trying to remember if I, if there was  
9 anything I left out yesterday, but I don't recall anything that  
10 I left out yesterday. Yes, my answer then stands now.

11 Q. And was it not a fact Chief John MacIntyre, who, in fact,  
12 initiated that re-investigation.

13 A. Well, as I understood it from the, certain memoranda in the  
14 files, yes, that he got a complaint from Mr. Aronson that Mr.  
15 Marshall had been wrongfully convicted and that in due  
16 course, and I have to use that term, because I don't know how  
17 readily one followed the other, that he had a conversation  
18 with Mr. Frank Edwards, the Crown Prosecutor of the day, in  
19 1982, I guess it would be...

20 Q. And were you...

21 A. And that Mr., the Chief was there and suggested that, or it  
22 was suggested and he concurred that the RCMP would  
23 investigate because it would not be appropriate for him to.

24 Q. Now tell me, sir, were you aware in March of 1982 or  
25 thereafter that there had been a prior RCMP investigation in

1 1971 which supported the findings that Mr. Marshall was, in  
2 fact, guilty of the offence?

3 A. I was aware, yes, that there was a, that at some stage and I  
4 don't remember it now, it would be, I suspect after the trial  
5 and it's something I saw in the memoranda that I had access  
6 to.

7 Q. And were you aware, sir, that at that time that that initial re-  
8 investigation was instigated by Chief John MacIntyre?

9 A. Yes, it said that, the information I saw, that Chief MacIntyre,  
10 that a Mr. MacNeil, James or Jimmy MacNeil...

11 Q. That's correct.

12 A. Had, one of the ultimately determined participants in  
13 Wentworth Park, had gone to the, in November, I believe, of  
14 198-, of '71, after the trial in Sydney, had gone to the Chief of  
15 Police and revealed that Ebsary had stabbed Mr. Seale and  
16 not Marshall. And the police, the Chief of Police, as I read it,  
17 had asked that the RCMP and, again, not he, investigate.

18 Q. And would you not agree with me, sir, that as the chief law  
19 enforcement officer in the Province of Nova Scotia, that's the  
20 proper procedure that any municipal police force should  
21 follow in case they come in possession of new material that  
22 may show the improper conviction of any person?

23 A. I think that's fair to say. Because they, it is improper for  
24 them to investigate what they, themselves, have done.

25 Q. Now yesterday, Mr. Orsborn asked you, sir, about any

1 approach that Chief MacIntyre had made to you during a  
2 social function where you were a guest speaker at the  
3 Municipal Chiefs' of Police Association. Tell me, sir, in your  
4 opinion as the Attorney General, at any time would have  
5 been, would there have been anything wrong with Chief  
6 MacIntyre approaching either you or any member of your  
7 Department and obtaining advice from them pertaining to  
8 policing or any other criminal justice matter?

9 A. Oh, no, and I didn't treat it as improper. I simply replied that  
10 I felt it was necessary and the Chief didn't pursue it nor did I,  
11 nor would I.

12 Q. But isn't it a fact that municipal police departments look to  
13 the Attorney General for advice in regards to policing and to  
14 criminal justice matters.

15 A. Oh, I suppose that's fair to say.

16 Q. Not at any time, sir, were you ever advised, or did you ever  
17 have any personal knowledge that the full file pertaining to  
18 Donald Marshall had ever been demanded of Chief MacIntyre  
19 by the RCMP?

20 A. No. The only, you saw the full file. I did not, I don't know  
21 whether it was one file, 25, I, you know, those details I had  
22 no knowledge of. All I knew was they said that the  
23 information which they, that the Sydney Police had with  
24 respect to the Marshall investigation and trial was what they  
25 wanted. And they, that they would, they were ent-, the Chief

1 had extended the, to them, the right to look at that material in  
2 the premises and in the filing system that they had in  
3 Sydney. But that they wanted to remove them for, shall we  
4 say, leisurely examination.

5 Q. So I take it, sir, when you wrote that letter of April 20th of  
6 1982 under the Police Act which has been tendered as an  
7 exhibit in Volume 16 at page 221, that you had never been  
8 informed that Chief MacIntyre had ever refused to turn over  
9 his file to the RCMP so they could take it and to examine it  
10 elsewhere.

11 A. I did have the impression that the reason for asking me to  
12 sign the, we call it an order, but it was coached in the term  
13 request, was that the Chief was, again, willing for them to see  
14 them there in situ but not willing for them to take them  
15 away.

16 Q. Would you agree with me, sir, that until a municipal police  
17 force receives a direction from your Department that that  
18 force has the responsibility for the safe custody of the file?

19 A. Oh, I would have to assume that.

20 Q. And would you also agree with me, sir, that without direction  
21 from the Attorney General's Department a municipal police  
22 force is under an obligation to keep their investigation  
23 material confidential.

24 A. Well, I suppose that's a reasonable assumption. I don't know  
25 whether it's a rule or law but, again, I think as in our own

1 Department it probably was a policy.

2 CHAIRMAN

3 You mean confidential from other police departments?

4 MR. PINK

5 No, why, well, that was going to be my next question.

6 Q. Would that, in fact, include other police departments if a  
7 request was made?

8 A. Well, I knew of no rule or even policy which provided that  
9 one police force might demand from another anything, files or  
10 any information, unless they were in the course of an  
11 investigation. Then they might. As a matter of face, in this  
12 particular instance it was suggested that the RCMP might  
13 have resorted to the court for an order to get them but they,  
14 but the Police Act provided another avenue and that's the one  
15 they followed.

16 Q. And tell me, sir, when you gave the direction to Chief  
17 MacIntyre, would you agree with me, sir, that it only  
18 pertained to the material directly relating to the Donald  
19 Marshall prosecution re the death of Sandy Seale and nothing  
20 more?

21 A. Well, I, before answering that I'd like to look at it again. I  
22 don't remember its precise terminology. I do remember the  
23 word "request" in it which upon looking at it again over the  
24 years I found...

25 Q. It's Exhibit 16...

1 A. Pardon?

2 Q. Exhibit, Volume 16, page 221.

3 A. Okay.

4 Q. I'll just read you the letter, Chief How.

5 A. Thank you.

6 Q. It says,

7

Dear Mr. MacIntyre:

8

9 Pursuant to Section 31(2) of the Police Act, I  
10 hereby request you to deliver to Staff Sergeant  
11 H.F. Wheaton of the Sydney Subdivision of the  
12 RCM Police all warrants, papers, exhibits,  
13 photographs and other information or records in  
14 your possession or under your control dealing  
15 with the Donald Marshall, Jr. case commencing  
16 with the initial investigation in 1971.

14 A. Yes.

15 Q. So would that pertain, sir, to only the death of Sandy Seale?

16 And if there had been anything else that Donald Marshall had  
17 been involved with, or any other witnesses.

18 A. Well, I would have to logically agree with that because it talks  
19 about the Donald Marshall case, which, of course, was totally  
20 involved with the tragic death of Mr. Seale.

21 Q. Tell me, sir, during your reign as Attorney General...

22 A. Reign?

23 Q. Reign. Or during the period of time, sir, when you were the  
24 Attorney, tenure, okay. During your tenure as Attorney

25

1 General...

2 A. I don't mind.

3 Q. During the period of time, sir, that you served as Attorney  
4 General did we have in Nova Scotia a Police Act?

5 A. Yes.

6 Q. And can you enlighten us, sir, as to when the Police Act in  
7 Nova Scotia first came into force?

8 A. My guess is about 1973 but that's only a vague recollection  
9 now. It was brought in by, it seems to me, the Regan  
10 government. They took office in 1970.

11 Q. And would you agree with me, sir, that under the Police Act  
12 there are provisions which deals with complaints against  
13 police officers?

14 A. I think so, yes.

15 Q. And under the Police Act there's also provisions for the Police  
16 Commission to investigate complaints against police  
17 departments pursuant to the directions of the Attorney  
18 General, is that correct?

19 A. I believe you're correct.

20 Q. And at no time, sir, are you aware of any complaints under  
21 the Police Act ever being made against Chief MacIntyre or  
22 Sergeant Detective Urquhart, or against the Sydney Police  
23 Department in any way in which they handled the Marshall  
24 inquiry. Is that correct?

25 A. No, I'm not aware.

1 Q. Is it not a fact, sir, that as a result of correspondence you  
2 received from the Royal Canadian Mounted Police that you  
3 felt that the Royal Canadian Mounted Police were, in fact,  
4 doing an investigation into the actions of the Sydney City  
5 Police in dealing with their investigation of Donald Marshall?

6 A. Oh, yes, I got that impression.

7 Q. And is it a fact that if an investigation was, in fact, being  
8 carried on by the Royal Canadian Mounted Police your views  
9 as Attorney General is that the Attorney General office would,  
10 it would not be appropriate for them to intervene or to stop  
11 in any way an investigation being conducted by the Royal  
12 Canadian Mounted Police.

13 A. I think that would, yes, I think that would be my view of,  
14 considering the circumstances of the day and that the police  
15 were already undergoing, had already undertaken the very  
16 kind of inquiry that you're talking about.

17 CHAIRMAN

18 So are we are then entitled to assume, Chief Judge How, that  
19 based on what you've just said that the directive allegedly coming  
20 from Mr. Gale is, in your view, to hold the investigation in  
21 abeyance was improper?

22 HIS HONOR CHIEF JUDGE HARRY HOW

23 No, for this reason, My Lord. Mr. Gale was closely associated  
24 with the police in the development of a, of the information which  
25 would take this matter to the court. I think then it was, at least



HIS HONOUR CHIEF JUDGE HARRY HOW, EXAM. BY MR. J. PINK

1 in my impression, that he was, I shouldn't use the word "quarter-  
2 backing", but he was really, was closely involved with the  
3 direction of this development. And, as I explained earlier, had  
4 worked out an agenda.

CHAIRMAN

6 So you're differentiating between holding in abeyance and  
7 discontinuing.

HIS HONOR CHIEF JUDGE HARRY HOW

9 Very much.

CHAIRMAN

11 All right.

MR. PINK

13 Q. Would you agree, sir, with the result of what you have just  
14 said is that it is your views that the Attorney General may  
15 indicate to the Royal Canadian Mounted Police their priorities  
16 when it comes to a large-scale investigation?

17 A. Well, you see, I think we have to distinguish between the  
18 phases here. The phase, if it were in a police investigation  
19 which had not been completed then nobody in the Attorney  
20 General's Department should intervene. But here we had a  
21 close consultative rapprochement, if you will, between the  
22 Attorney General's Department and the police, both  
23 concurring in this arrangement. And the Attorney General, or  
24 his delegated agent, Mr. Gale, simply saying, as I understand  
25 it, that, "Look, first of all, get all the information we need for

1 phase one, the trial, then we'll deal with those others  
2 afterwards." That was the effect of what I understood his  
3 memo and his action.

4 Q. Okay. So the end result is that at no time did you ever stop a  
5 furtherance of the RCMP investigation into the City of Sydney  
6 Police?

7 A. I'm sorry.

8 Q. You did not prevent the RCMP from a further investigation  
9 into the Sydney City Police.

10 A. Definitely not.

11 Q. You were only, okay. Now you mentioned in direct  
12 examination that there was a possibility that there may be  
13 some irregularities in regards to the Sydney Police  
14 investigation. Other than what you've been told that  
15 witnesses have said in regards to their treatment by then  
16 Sergeant Detective MacIntyre and Urquhart, was there any  
17 other independent evidence to support those allegations?

18 12:30 p.m.\*

19 A. I don't recall any, no, I don't recall seeing any.

20 Q. And, in fact, sir, is it not correct that in reviewing the file that  
21 you did of Donald Marshall that you saw that these witnesses,  
22 in fact, had changed their stories if not once on several other  
23 occasions?

24 A. Well, yes, I think it's a fact that the stories were changed at  
25 least once.

1 MR. PINK

2 Thank-you, sir, I have no further questions.

3 MR. MURRAY

4 There will be no questions on behalf of William Urquhart.

5 MR. BARRETT

6 I have several questions, probably five or ten minutes I  
7 think.

8 MR. CHAIRMAN

9 Well, in that case proceed.

10 MR. BARRETT

11 Pardon. I would indicate probably five minutes, eight  
12 minutes.

13 MR. CHAIRMAN

14 Well, there will be others coming this afternoon too, I think,  
15 maybe not.

16 COMMISSIONER EVANS

17 The nodding of heads indicates otherwise.

18 MR. CHAIRMAN

19 But I have to remind you again, Mr. Barrett, that your  
20 questioning must be restricted to your client's interests.

21 MR. BARRETT

22 I understand that completely.

23 MR. CHAIRMAN

24 Okay.

25 LUNCH BREAK - 12:33 p.m.