

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. Charles Broderick: Counsel for Sgt. J. Carroll
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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

11six-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 you 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

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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
the legal fees amassed in trying to prove his
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.

INQUIRY RESUMESMR. CHAIRMAN

Mr. Murray. Mr. Barrett.

EXAMINATION BY MR. BARRETT

Q. Yes, Judge How, my name is David Barrett and I represent the Estate of Donald C. MacNeil, and I just have a few questions of you.

A. Yes.

Q. Your Honour, yesterday you testified that following Mr. Marshall's reference hearing you were concerned about any possible wrongdoing on the part of the Sydney Police force or the actions of the prosecutor, Donald C. MacNeil.

A. Yes.

Q. And I understand you wrote a memo on the 25th of May, 1983, to Mr. Cole expressing those concerns.

A. Yes.

Q. And you testified yesterday that the Crown's role was not studied by the R.C.M.P..

A. I could...I don't recall much in...with reference to the Crown save and except there was reference to Donald C. MacNeil as being firstly a very capable, secondly aggressive, and thirdly that he was a sort of prosecutor in the style of a district attorney.

Q. But that didn't come from the R.C.M.P. reports.

A. I don't know whether it was in that or Edwards...some of

1 Edwards rather lengthy memorandums, Mr. Edwards. I
2 would say one or the other.

3 Q. And in your conclusion yesterday you stated that fault
4 possibly lies with the prosecutor MacNeil in regard to his
5 conduct as prosecutor, and I believe twice yesterday you
6 alluded to alleged pressures placed on witnesses by Mr.
7 MacNeil.

8 A. Well, there was some indication of that and, for example, it
9 was...it was related in these memoranda that in the course of
10 the trial in Sydney in 1971 that one of the witnesses who had
11 some misgivings about the statement he had given was
12 cautioned through the process of the Evidence Act, Canada
13 Evidence Act as a hostile witness, and then...which was some
14 indication that the person was a reluctant witness, of course,
15 and that Donald C. MacNeil had asked for this of the Court,
16 this process.

17 Q. Judge How, during the 1982 reinvestigation you've indicated
18 you either had access to the R.C.M.P. reports or were briefed
19 on those reports by senior staff in the Attorney General's
20 Department.

21 A. Mostly the latter, I would say almost exclusively. I...as I've
22 said I have recollections of seeing some of their reports and
23 analyses but in large part I...my recollection is that I saw
24 much more of Edwards, Edwards' reports.

25 Q. Can I have it from you then that the basis for these

1 | allegations in pressuring witnesses was from these reports?

2 | A. Yes.

3 | Q. Sir, I'd like to show you one R.C.M.P. report and I understand
4 | you may not have had that report but I want to know if the
5 | comment in that report was made known to you.

6 | A. Yes.

7 | Q. And I wonder if you could turn to Volume 19.

8 | A. Yes.

9 | Q. I believe that's in front of you, and it would be page 26.

10 | A. Yes.

11 | Q. And just to refresh your...that's a report by Staff Wheaton
12 | dated the 25th of February, 1982, that would be the first
13 | R.C.M.P. report that Staff Wheaton submitted.

14 | A. Oh, yes.

15 | Q. And turning to paragraph 18 of that report.

16 | A. Yes.

17 | Q. At page 26.

18 | A. Yes.

19 | Q. About halfway through that paragraph is the comment by Mr.
20 | Wheaton,

21 | 'He,' meaning Chant, '...emphasized that he was
22 | fourteen, turning fifteen years of age at the time
23 | and felt pressured into helping the police and
24 | the prosecutor. He advised that the prosecutor
25 | threatened him with a charge of perjury if he
 changed his story after the lower Court hearing.'

1 A. Yes.

2 Q. And, sir, I'm wondering were you made aware of that
3 comment in that report by the senior staff of the A.G.'s
4 Department?

5 A. Oh, I may have been and as, again I may have...I may have
6 read it myself. I...it's very difficult, in fact, with me it's
7 impossible to remember that.

8 Q. Sir, I can advise you that that is the only reference of
9 pressure being placed on any witness by Mr. MacNeil in the
10 R.C.M.P. reports.

11 A. I see.

12 Q. And would this comment in Staff Wheaton's report, your
13 knowledge of it, be the basis of your concern about pressure
14 being placed on witnesses by Mr. MacNeil?

15 A. I would have thought there were other references to it, and
16 then again there was the...there was the...

17 Q. Mr. Chant...

18 A. ...procedure followed in the...and I almost think it was with
19 Chant in the Supreme Court trial.

20 Q. Yes, and, sir, I wonder then if this comment by Staff Wheaton
21 proved to erroneous in this report and...

22 A. You say if it did.

23 Q. And was denied by Mr. Chant that the comment in that
24 report.

25 A. Yes.

1 Q. Can I assume that the basis for some of your concerns about
2 Mr. MacNeil's pressure on witnesses would not exist?

3 A. I don't know. It's hard to say, I suppose. I...to repeat, I
4 indicate...as I indicated earlier, there was not a great deal of
5 comment, that's what I had, my recollection, about the
6 performance of the Crown Prosecutor. There was some. Now,
7 whether this is the only one. You say it is, I can't challenge
8 that.

9 Q. Yes. I can advise you it's the only copy.

10 A. And if it... but your question is pretty hypothetical. If this
11 weren't here would I have any misgivings.

12 Q. Well, the...

13 A. I don't know.

14 Q. ...only reason I ask you that, Judge, is that yesterday you
15 indicated that in your comment...or in your testimony was
16 there was suggestions through the police investigation, the
17 investigation conducted by the R.C.M.P. to be more specific,
18 that there may have been pressure applied to witnesses by
19 the Crown Prosecutor in the 1971 trial.

20 A. Yes.

21 Q. And I'm just wondering if that comment I've just attributed
22 to the R.C.M.P. report proved to be false and that was the only
23 comment in the reports as to pressure being placed on
24 witnesses by Mr. MacNeil, would that change your opinion as
25 to the pressure?

1 A. Oh, I suppose it would.

2 MR. BARRETT

3 Those would be all my questions.

4 MR. CHAIRMAN

5 Mr. Pringle. Mr. Bissell.

6 EXAMINATION BY MR. BISSELL

7 Q. Yes, Chief Judge How, my name is Jim Bissell and I am
8 representing the R.C.M.P.. Now, I just have a couple of areas
9 that I wanted to ask a few questions on.

10 A. Yes.

11 Q. The first one really is to ask for your thoughts and your
12 experience with respect to disclosure.

13 A. Yes.

14 Q. You're aware that in November of 1971 following Mr.
15 Marshall's conviction that James MacNeil came forward and
16 gave the...

17 A. Yes.

18 Q. ...story about Roy Ebsary being the person responsible.

19 A. Yes.

20 Q. And I wonder if you feel that that's the type of information
21 that the Crown ought to disclose to a defence?

22 A. Oh, I would think so. It goes to a question of guilt, and of
23 course that's...isn't that the primary purpose of the police
24 investigation.

25 Q. I would think so.

1 A. And indeed, and indeed, isn't it a most important bit of
2 information for a defence.

3 Q. Yes. Well, I would think so and I was curious to see if you
4 would agree with that proposition.

5 A. Yes, I do.

6 Q. The other...the other question, the other area that I had for
7 you and that's really in response to a response that you gave
8 to my friend Joel Pink when he was asking you questions
9 earlier. And, he suggested that as a result of R.C.M.P.
10 correspondence you felt at the time that you were Attorney
11 General that the R.C.M.P. were doing an investigation into the
12 Sydney Police Department.

13 A. Yes.

14 Q. Is that correct? Is that what you felt?

15 A. Did I..

16 Q. Did you feel that?

17 A. At what stage, I'm sorry.

18 Q. While you were...at any time while you were Attorney
19 General. I don't think that Mr. Pink when he asked the
20 question specified any particular time or date.

21 A. Oh, did I think they were looking into the R.C.M...the Sydney
22 City Police.

23 Q. The Sydney City Police Department.

24 A. Well, it's pretty hard to be precise on that. My best thought
25 is...for you is that I would have...I would have expected it

1 would include an examination of the police procedures,
2 Sydney City Police procedures.

3 Q. Yes.

4 A. As well as examining the evidence and persons who gave it in
5 terms of their statements.

6 Q. Yes. I guess my question was did you believe at any time
7 that the R.C.M.P. were conducting an investigation into the
8 practises of the Sydney Police Department?

9 A. Well, I must say my recollection is that I thought they
10 would...there would be...one would be associated with the
11 other. That...do you...that an investigation of an allegation
12 that...are you speaking of 1971?

13 Q. Well, no, no, I'm talking now...at the time period that you
14 were Attorney General my friend, Mr. Pink, suggested that
15 you were of the view that the R.C.M.P. were doing an
16 investigation in '82 of the...

17 A. Yes.

18 Q. ...practises of the City Police Department.

19 A. Well, I frankly didn't distinguish in my mind as to what they
20 were concentrating on but I think it was a reasonable
21 conclusion to me at that time. They were investigating the
22 whole background of the conviction of Mr. Marshall and,
23 therefore, that it might well involve allegations of pressures
24 by the Sydney City Police.

25 Q. Mr. Pink said that conclusion was based upon R.C.M.P.

1 correspondence and you agreed with that and I was
2 wondering...

3 A. Yes, I think I...

4 Q. ...what R.C.M.P. correspondence it was that led you to that
5 conclusion that they were examining the police practises of
6 the Sydney Police Department?

7 A. Well, it was either...I either saw it in their report, was briefed
8 on it by Mr. Gale or Mr. Coles, probably Mr. Gale, or read it in
9 one of the rather lengthy incisive reports of Mr. Edwards.

10 Q. I see. Then you're quoted and, again, I realize the hazards of
11 relying on a quotation, but in a newspaper article, April 11th,
12 1982, there's a direct quote that says, I'm sorry, it's Volume
13 31, page 44 if you have it there. Page 44, My Lord.

14 A. Yes.

15 Q. It's page 44 and it appears to be an article April 11th or 12th
16 of 1982.

17 A. Yes.

18 Q. And it's the...it's the second-last paragraph in that article, sir,
19 where it says, "However Attorney General How said yesterday
20 he had," and in quotation marks, "'not even considered' an
21 investigation of the role of the Sydney Police Department in
22 convicting Mr. Marshall. 'We've never investigated the
23 investigators before.'"

24 A. Well, I don't remember saying precisely that. I think what I
25 ...what I may well have said is that at that stage in April '82

1 that the concern was investigating the case with respect to
2 the claim by Mr. Aronson that his client, Mr. Marshall, had
3 been unjustly convicted and that that was the stage that our
4 department was concentrating on at that time that article
5 appeared.

6 Q. Rather than the practises and procedures of the police
7 department, rather whether or not Mr. Marshall was guilty of
8 the offence.

9 A. That was, as the Ford Motor Company says, job one.

10 Q. Right. So, in April of '82 then, I take it, you didn't expect or
11 think that the R.C.M.P. were conducting an investigation into
12 the practises and procedures of the Sydney Police force.

13 A. Well, I don't know. I didn't know. They were...they were
14 investigating, as I understood it, a claim that...by Mr. Aronson,
15 that claim addressed to the Chief of Police of Sydney, as I
16 understood it, and eventually dealt with by our prosecutor,
17 Mr. Edwards, and assigned to the R.C.M.P.. That's what I was
18 dealing with. How it broke down, what it...but I did know too
19 that the main...that the purpose and focus at that time was to
20 assemble what evidence there was to support or to verify or
21 otherwise the claim by Mr. Aronson of improper conviction.

22 Q. Thank-you. And I gather from your own handwritten note of
23 July 8th, '83, that's in Volume 32 at page 209.

24 A. Of Volume 32.

25 Q. Volume 32, sir, yes. Page 209 of that.

1 A. Yes.

2 Q. That certainly in July 8th of 1983 you didn't think that the
3 Attorney General's Department or the R.C.M.P. were taking
4 any action on the Sydney Police force, with respect to the
5 Sydney Police force.

6 MR. MURRAY

7 With respect, My Lords, I don't think...that...I think that's
8 interpretative of what that note is saying and not necessarily the
9 only interpretation of what that note says.

10 HIS HONOUR CHIEF JUDGE HARRY HOW

11 I'm sorry, would you...

12 MR. BISSELL

13 Q. Well, the notes says, "Decided not to press any charges against
14 Marshall or the other witnesses and will hold action re the
15 Sydney Police force until we know the outcome of the civil
16 action Marshall has brought against them."

17 A. Well.

18 Q. I would interpret that to mean there was no investigation
19 going on in the practises of the Sydney Police Department at
20 that particular time under your direction, is that...is that a fair
21 conclusion?

22 A. Well, the...I think I explained this before, but let me try it
23 again. July 3rd, '83, yes. July 8, we...the phase one had been
24 completed, if I may use that term.

25 Q. Yeah.

1 A. When that had been completed there was in process a civil
2 action against the City of Sydney, against Chief MacIntyre,
3 I've forgotten who else, if any, oh, yeah, Mr. Urquhart, and
4 that that had been started before the Supreme Court had
5 ruled some two, three months before, by Mr. Aronson on
6 behalf of Mr. Marshall. That process could be, in our view at
7 that time, very revealing as to the conduct of the Sydney City
8 Police. After all it was the purpose of the action to expose
9 anything that they were able to expose in terms of the
10 processes of the Sydney City Police in this context. And so,
11 that was the reason for this comment in my view, it's my
12 recollection.

13 Q. That there would be no investigation at that point in...

14 A. Well, we...the whole action, I said, not investigation, the whole
15 action re the Sydney City Police force.

16 Q. So, you thought...

17 A. Mean...no, meaning...meaning, say for...an inquiry such as this.

18 Q. Uh-hum. I see.

19 A. That was the action that was intended there, but investigation
20 again in my view then, in my view now, the police were free
21 to proceed in that...any direction they wanted to on that
22 subject matter. Any subject matter they felt worthy of their
23 attention as I said.

24 Q. But you're aware now, even though you may not have been
25 then, that in May of '82 Mr. Gale had suggested that that

1 action be held in abeyance.

2 A. Well, I know, a lot has been read into that.

3 Q. Yeah.

4 A. It's like beauty, in the eye of the beholder if you want to look
5 at it one way you can, if you want to look at it another you
6 can, you can read, and therefore read... perhaps even
7 conflicting views might emerge from that.

8 Q. That's my...

9 A. I've explained by understanding of what he meant at that
10 time.

11 Q. That's fine, sir. Thank-you very much.

12 A. Thank-you.

13 MR. CHAIRMAN

14 Mr. Ross.

15 EXAMINATION BY MR. ROSS

16 MR. ROSS

17 Thank-you, My Lord.

18 Q. Your Honour, as you will recall my name is Tony Ross.

19 A. I do indeed.

20 Q. You've had your pleasure of bouncing me around in your
21 courts, now I've got you.

22 A. You counted it a pleasure, did you?

23 Q. Yes.

24 A. You came off rather well one day there.

25 Q. Yes, I did. Your Honour, there are one two questions I would

1 like to ask you about Sandy Seale.

2 A. Yes.

3 Q. When this investigation, for all intents and purposes, became
4 focused early in 1982, it is my understanding that Oscar Seale
5 came to see you.

6 A. Correct.

7 Q. You recall meeting with Mr. Seale.

8 A. I recall one meeting with Mr. Seale, yes, I've just forgotten
9 the exact time, but...

10 Q. Sure. Sure. I'm not going to get on to the details of time. My
11 understanding is that Mr. Seale was concerned that the
12 reputation of his son was being impugned some eleven years
13 after he had been buried.

14 A. That's true.

15 Q. And Mr. Seale expressed serious concern and wanted to know
16 what, if anything, was going to be done to protect the
17 reputation of his son.

18 A. Yes.

19 Q. In that regard, was there anything that you saw which your
20 department could have done to further advance the
21 investigation with respect to the circumstances of the death of
22 Sandy Seale?

23 A. Anything the department would have done?

24 Q. Your department, yes.

25 A. No, I think I, while very much sympathizing with Mr. Seale

1 and the fact of his son's death in these tragic circumstances,
2 the fact that the re-trial would open up the past, a very
3 painful past, one had to say at the time that the process
4 would essentially have to take its course.

5 2:30 p.m. *

6 Q. Well, the evidence that...sorry, the testimony of Sergeant
7 Wheaton, as I recall, when I questioned him he indicated to
8 me that his emphasis was on testing whether or not Marshall
9 had been convicted on perjured testimony, that was his first
10 test.

11 A. Yeah.

12 Q. And in that regard he interviewed Chant and subsequently
13 Pratico and formed the belief that Marshall could have been
14 convicted on perjured testimony.

15 A. Yes.

16 Q. That subsequent to that he interviewed Marshall and after a
17 short meeting with Marshall he himself, Wheaton, became
18 convinced, as he put it, of Marshall's innocence.

19 A. Yes.

20 Q. Now, this would have been as early as March 1982. Was the
21 conviction of Staff Sergeant Wheaton that Marshall was
22 innocent, was that communicated back to your department
23 early in '82, do you recall?

24 A. I don't recall at what precise time I learned of it.

25 Q. I see.

1 A. I made some statements in the House, I think, in response to
2 questions or, indeed, outside the legislature, but I just forget
3 whether it was it was in this precise time frame.

4 Q. Well, as I continued to question Staff Sergeant Wheaton, the
5 bottom line of his testimony as it relates to Sandy Seale was
6 that it was not part of his terms of reference, so to speak, to
7 look into the circumstances of the death of Sandy Seale as
8 much as it was to look at the improper conviction of Junior
9 Marshall. Was this the understanding of the department of
10 what the R.C.M.P. would be doing?

11 A. I don't know what their understanding was. But I...my
12 impression was that they were generally investigating the
13 evidence and persons giving...who gave evidence which
14 convicted him and that, as I said earlier, that this might
15 include what was...was all inclusive of any circumstance
16 surrounding that conviction.

17 Q. As I listened to your testimony yesterday and today, Chief
18 Judge, I got the impression that the office of Attorney General
19 as opposed to the Attorney General's Department, the office of
20 Attorney General is to a large extent administrative and
21 political and the people with the hands-on experience on the
22 matters which flow through the department to a large extent
23 would be the department heads, for instance Mr. Herschorn,
24 Mr. Gale, perhaps Reinhold Endres, who could give specific
25 answers on day-to-day happenings. Am I correct with that?

1 A. Yes.

2 MR. ROSS

3 Those are my questions, thank-you, very kindly, sir.

4 MR. CHAIRMAN

5 Mr. Wildsmith.

6 EXAMINATION BY MR. WILDSMITH

7 Q. Mr. How, my name is Bruce Wildsmith and I'm here on behalf
8 of the Union of Nova Scotia Indians.

9 A. Yes.

10 Q. And the questions I have for you relate to Indians in the
11 criminal justice system. Just before I do that though, there is
12 one point I want your comment on and that concerns the
13 documentation surrounding the civil action started against the
14 City of Sydney.

15 A. Yes.

16 Q. If you'll turn in Volume 32 to page 220.

17 A. Yes.

18 Q. You'll see an order that was signed by a local Judge of the
19 Supreme Court, Judge Ryan, on July the 22nd, 1983.

20 A. Yes.

21 Q. You'll see that that renews the originating notice that had
22 been started.

23 A. Yes.

24 Q. And, if we flip over two pages we'll see that the originating
25 notice appears there, the date isn't exact on it but it appears

1 as though it was issued in January of 1983.

2 A. Not exact, it's absent, but...

3 Q. Pardon.

4 A. ...the calendar date, the month...

5 Q. Yes.

6 A. The date or the month is absent, yes.

7 Q. That's right. And the stamp of the prothonotary is not there,
8 as well.

9 A. No.

10 Q. But in any event, it appears as though the notice was issued
11 in January and not served on the defendants. Would you
12 understand that that is the reason for the order that Judge
13 Ryan made on July the 22nd?

14 A. Oh, I wouldn't know whether it was served. You are
15 suggesting that because it wasn't served that it had to be
16 renewed.

17 Q. Exactly.

18 A. Well, it might.

19 Q. That sounds sensible.

20 A. It might be. I haven't practised since 1978. One gets a little
21 rusty on those.

22 Q. Yes.

23 A. But you can get caught on that procedurally, yes, so it
24 could...that could be the proper interpretation.

25 Q. At page 221 Mr. Herschorn is drawing to your attention the

1 fact of the renewal.

2 A. All right.

3 Q. And I take it from the thrust of this that what he's attempting
4 to do is bring you up to date on the status of the civil
5 proceedings.

6 A. He's trying to educate me, you mean, no. I think he was just
7 informing me more or less.

8 Q. Yes. Informing you of the status of the legal proceedings.

9 A. Yes, very well.

10 Q. In other words, that there was a need for renewing the
11 originating notice and that step had been taken.

12 A. Surely.

13 Q. And I'm putting it to you, but perhaps in your knowledge as
14 Attorney General you don't have this knowledge, but the only
15 reason for renewing the originating notice is it had expired
16 because it had not been served on the defendants.

17 A. Yes.

18 Q. That's correct.

19 A. Oh, I'm prepared to take your suggestion on that.

20 Q. Okay. Well, if we could...

21 A. It has to be served. There is a time period for service, yes.

22 Q. And if we could turn over to page two hundred and...no, my
23 notes have gotten beyond me, here. There is another memo.

24 COMMISSIONER EVANS

25 Do you think there is any dispute about that, Mr. Wildsmith?

1 MR. WILDSMITH

2 Well, I think the point I'm attempting to make to this
3 witness is that he was informed at least that there was a need to
4 renew the originating notice and I think that he should have
5 drawn the assumption it had not been served and that was the
6 reason for renewal. And there is another note in here which I
7 can't quite lay my hand on. I just saw it...well, here it is at page
8 274, 274. It's a note from Mr. Endres to your deputy, Mr. Coles.

9 HIS HONOUR CHIEF JUDGE HARRY HOW

10 A. Oh, yes.

11 Q. And in this note it indicates that the document now tells us
12 the date January the 24th, '83. The solicitor on record had
13 been changed, that there had been an order renewing it and
14 finally that no defence had been filed.

15 A. Yes.

16 Q. And I guess the first question is were you made aware of the
17 contents of this memo to Mr. Coles?

18 A. Oh, I don't think so. My understanding was the action was
19 still in progress.

20 Q. Yes. It had not been abandoned, that's certainly true.

21 A. That's right.

22 Q. Yes, but I'm wondering is whether you realized that it had not
23 been, the documents had not been served on the defendants.

24 A. No, I didn't.

25 Q. Okay. Mr. Aronson testified that the only reason to start the

1 legal proceeding was to protect against limitation periods. Is
2 that consistent with your understanding?

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

4 MR. SAUNDERS

5 What's consistent is...

6 HIS HONOUR CHIEF JUDGE HOW

7 A. I didn't know there was any problem in that area or he had a
8 problem, I didn't know that.

9 Q. Okay.

10 COMMISSIONER EVANS

11 I don't know where we're going with this but he says he
12 didn't know anything about it.

13 MR. WILDSMITH

14 Yeah.

15 COMMISSIONER EVANS

16 It's consistent with good legal practice, that if you issue it
17 and the limitation period is going to expire, you issue an
18 originating notice or something. If you don't serve it, you renew
19 it.

20 MR. WILDSMITH

21 Exactly.

22 COMMISSIONER EVANS

23 There doesn't seem to be any argument around the table
24 about that.

25

HIS HONOUR CHIEF JUDGE HOW, EXAM. BY MR. WILDSMITHMR. WILDSMITH

1
2 No. I'm wondering whether it went into the Attorney
3 General's mind as to why the action had not really been proceeded
4 with. It had been started, not served, no defence was filed, that
5 no progress had been made on the suit.

COMMISSIONER EVANS

7 What difference would it make?

MR. WILDSMITH

9 He was wondering why...

HIS HONOUR CHIEF JUDGE HOW

11 A. I didn't know there had been no progress. I could perhaps
12 have concluded it hadn't been served.

13 Q. Okay.

14 A. If you call that progress.

15 Q. Let's move on to something else. Yesterday, Mr. How, you
16 made a few comments about Indians. I think the first thing
17 you said is that you had never defended an Indian in your
18 practice?

19 A. I said I couldn't recall precisely that.

20 Q. Yes, and can you recall in your 19 or 20 years of practicing in
21 Wolfville ever representing an Indian?

22 A. Not a precise person, it doesn't come to mind. I might well
23 have.

24 Q. Okay.

25 A. I had a long period, I know that.

1 Q Is there an Indian reservation within your constituency of
2 Kings South?

3 A. No, but there was one in Kings West and, indeed, I think I
4 mentioned earlier or yesterday that I grew up in Annapolis
5 Royal and there was a reservation next to that town. And let
6 me add too that some of the finest people in our area lived on
7 that reservation.

8 Q All right, which reservation was that that was next to
9 Annapolis Royal?

10 A. I forget the name. I'm not so sure it had one, but it certainly
11 was a community of Indians and I think it must have had a
12 name, but I don't remember it by name.

13 Q That was a long time ago then, was it, when you were growing
14 up?

15 A. Yes.

16 Q I don't mean an insult by that, but...

17 A. You might assume that.

18 Q All right. I take it in your...

19 A. It wasn't yesterday, I can tell you that.

20 Q In your role as Attorney General, you would have come in
21 contact with some Indian issues?

22 A. I beg your pardon?

23 Q In your role as Attorney General, you would have come in
24 contact with some Indian issues.

25 A. Oh, yes...

- 1 Q. I'm not going to ask you for details.
- 2 A. Only because I was the designated Cabinet member to consult
3 with some Indian representatives who were concerned with
4 policing on reservations. What else? Perhaps that's the main
5 issue that comes to mind.
- 6 Q. Do you recall some discussions about a court worker
7 program?
- 8 A. Oh, yes, I know what it was. The other was court workers,
9 yes.
- 10 Q. Okay. We had some testimony from Mr. Giffin that the
11 Minister of Social Services was the main contact person with
12 the native community?
- 13 A. Well, yes, I think when Mr. Morris came along. I forget
14 whether he came in in '74 but... No, I'm sorry, he came in in...
15 Well, I can't remember the year but, in any event, he was
16 designated to succeed me as the person who... the liaison with
17 the Indian representatives.
- 18 Q. So for part of the period that you were Attorney General in
19 the late seventies, you were the designated person?
- 20 A. Yes, in the early...late seventies, yes.
- 21 Q. And that was because...
- 22 A. Probably for a couple of years.
- 23 Q. Was that because of your capacity as Minister of the Attorney
24 General's Department?
- 25 A. I don't know. Perhaps it was because, perhaps one of the

1 main issues, the two main issues I just mentioned did concern
2 our department.

3 Q. I'm wondering if you had any other contact or communication
4 with Indian people outside of your formal role as an Attorney
5 General? You've mentioned the friends of yours growing up...

6 A. Well, I do remember that there was some claim against
7 the....or some...What? Claim, I suppose, is the best word,
8 request might be better, for the government to re-examine
9 the environmental situation at Pictou which resulted from an
10 agreement signed in the Stanfield era, I think.

11 Q. Did you have some dealings with that?

12 A. By which certain rights over the reservation there were
13 conveyed.

14 Q. What contact did you have with that issue?

15 A. Well, I remember Mr. Walter Goodfellow coming and seeing
16 us about it.

17 Q. Was that when you were Attorney General?

18 A. Yes, and indeed...

19 Q. Okay, I'm talking about outside of your role as Attorney
20 General now.

21 A. Did I have any contact with people...

22 Q. Outside of your role as Attorney General of the province?

23 A. Well...

24 Q. I'm just trying to get a little background.

25 A. Well, I, you know, I met people of the Indian race a number

1 of times but I don't think it's indicative of anything except I
2 met them.

3 Q. Okay. I'm just trying to get some understanding of how
4 much contact you have had, but I think I have a judgement
5 on that now.

6 A. Yes.

7 Q. And would Indians have appeared before you in your
8 capacity as a judge as well?

9 A. Not very many, but no doubt some.

10 Q. You can't recall of a particular incident.

11 A. No.

12 Q. Is that correct?

13 A. I certainly don't recall that their numbers were greater than
14 any other segment of the population. I think that most times
15 that they would appear before me was at Shubenacadie which
16 would, of course, be natural.

17 Q. Okay, so you are saying that some did appear.

18 A. Oh, yes.

19 Q. I'm wondering...

20 A. In fact, one of them was named "Howe", H-O-W-E.

21 Q. I'm wondering whether upon assuming your office as a judge
22 whether you received any particular training or attended any
23 particular courses, workshops, seminars, that dealt with
24 Indians and special Indian problems in the criminal justice
25 system?

1 A. Well, we had meetings with Indian leaders, one of them I do
2 remember very distinctly was Viola, Mrs. Viola Robinson
3 from Bear River. And she was a very capable spokesperson
4 for them.

5 Q. You understand her to be President of the Native Council of
6 Nova Scotia?

7 A. Well, I think she holds a very high office, or did until very
8 recently, if not now.

9 Q. Yes.

10 A. Yes, and a Mrs...

11 Q. What was the purpose of her meeting with you?

12 A. Well, because these were meetings with respect to Indian
13 matters, and as I said, particularly...

14 Q. Were you Attorney General then?

15 A. Yes.

16 Q. I'm sorry, maybe you misunderstood my question. I'm asking
17 about after you were appointed a judge...

18 A. Oh.

19 Q. Whether there were any seminars to acquaint you, as a judge,
20 with special problems dealing with cross-cultural
21 understanding...

22 A. No, I don't.

23 Q. With Indians or other races.

24 A. I haven't participated in any...

25 Q. Okay, thank you.

1 A. Meetings of that nature.

2 Q. Do you know if any were sponsored that you could have
3 attended?

4 A. That I could have? You mean since I have become a judge?

5 Q. Yes, since 1983.

6 A. I don't recall any. Of course, on the other hand, I don't recall
7 any call for that sort of... but anyway.

8 Q. Perhaps I could just follow up on your last comment there.

9 One of the issues that this Commission is dealing with,
10 wrestling with, are problems of Indians in the criminal justice
11 system. I'm wondering whether you have any particular
12 observations from your role as Attorney General, from your
13 role as a practicing lawyer, from your role as a judge, that you
14 would care to make now?

15 A. Well, at the risk of seeming self-serving, I don't have a
16 prejudice against anybody that comes in the court.

17 Q. Of course. I'm not asking you that question.

18 A. Well...

19 Q. I mean whether you have any general observations about
20 Indians coming into contact with the criminal justice system,
21 any observations you'd like to share with us?

22 A. Not really.

23 Q. All right. I'd like to direct your attention to Volume 41 now.
24 Do you have Volume 41? It's a fairly thick volume. Most of
25 the material I'll refer you to is in this Volume 41. Would you

1 look at page 43?

2 A. Yes.

3 Q. This appears to be a letter sent by Gordon Coles to Dr. Fred
4 McKinnon in the Department of Social Services. And you'll see
5 that it refers to a National Conference on Native Peoples and
6 the Criminal Justice System that Mr. Coles attended?

7 A. Oh, yes.

8 Q. I direct your attention to the third paragraph.

9
10 Perhaps more than anything else, the conference
11 did point out the need for attitudinal changes on
12 the part of those involved in the criminal justice
13 system and the need for the system itself to be
14 more sensitive to native peoples who come in
15 conflict with the law.

16 A. Oh, yes, yes.

17 Q. Is that a sentiment that you would agree with?

18 A. It's fairly hard for me to assess or speak for others in it. I
19 myself have not seen evidence of prejudice against "native
20 peoples". I haven't detected that.

21 Q. So you don't see any need...

22 A. Maybe I'm naive, I don't know, but I haven't seen it. I
23 haven't felt it. And I don't know what they said at this
24 conference, because you understand, that was before my time
25 in government.

Q. Sure.

A. But I suppose your point is does it reflect something that I

- 1 saw when I became Attorney General?
- 2 Q. Indeed, and whether you saw any "need for the system to be
3 more sensitive to native people," part of his comment?
- 4 A. Well, the only thought that was ever expressed to me about
5 the judicial process was, I think, in connection with what I
6 mentioned moments ago that there was some requests for
7 native workers.
- 8 Q. Court workers, yes.
- 9 A. Court workers, and that request was not acceded to...
- 10 Q. Well, we'll come to that in more detail in a moment.
- 11 A. I see, all right.
- 12 Q. But I think my question to you was whether you, from your
13 observations, would agree or disagree that the system needed
14 to be more sensitive. And I take your response to be that you
15 have no observations on that one way or the other.
- 16 A. I haven't seen the prejudice that may be suggested by that.
- 17 Q. Do you see Indian people having any problems understanding
18 when they come into court?
- 19 A. I think any disadvantaged people have problems.
- 20 Q. Yes?
- 21 A. Perhaps more so in the economic sense.
- 22 Q. What do you mean "any disadvantaged people"?
- 23 A. Well, people who have not been as much a part of the main
24 stream of life in any given country as others have been.
- 25 Q. And you include Indian people in that category?

1 A. Well, because they have had a, they've had a background of
2 isolation through reservations, for example. Which, of course,
3 in my view didn't serve them well but that was the policy of
4 successive governments, federal governments. And so that's
5 the only reason I say it is because that didn't give them the
6 opportunity to participate as fully as I personally think they
7 were capable of.

8 Q. So is that fair to think that when they come into a criminal
9 justice system that they are at a disadvantage?

10 A. Not at a disadvantage in terms of the attitude of the court, in
11 my view.

12 Q. No.

13 A. No.

14 Q. But in terms of understanding...

15 A. But perhaps...

16 Q. What's going on.

17 A. In understanding their rights, that may well be.
18 2:52 p.m.*

19 Q. Assuming that there are some problems, and if you have
20 some problem in perhaps accepting that, do you think that
21 the province has some responsibility, because of its general
22 responsibility for administration...

23 A. Well...

24 Q. To assist in insuring that Indians get a fair shake in the
25 criminal justice system?

1 A. We want everybody to have a fair shake in the criminal
2 justice system.

3 Q. Okay. And so if there are...

4 A. Well, just for a moment, that's why we actively supported the
5 concept of legal aid, so that people could be represented, so
6 people could consult.

7 Q. Indeed.

8 A. And that's been available all the time I was Attorney General
9 and, indeed, before.

10 Q. And so if there are problems that Indian people experience,
11 would you see it as part of the provincial role to assist in
12 alleviating those problems?

13 A. Well, that might be if one were to develop a program of court
14 worker service generally. My answer to the Indian
15 representatives was, they have a rather special opportunity
16 to receive that kind of service through the Federal
17 Government.

18 Q. Yes.

19 A. Do you understand? We had no budget for it, for anybody,
20 and if we had embarked on that at that time, that we would
21 then have been susceptible to be called upon for other racial,
22 by other racial groups who felt at a disadvantage. What we
23 had in mind was, if I recall correctly, was to develop a court
24 worker service generally that would be available. Granted...

25 Q. Well...

1 A. No, just a moment. Granted a person might feel more
2 comfortable talking with someone of their own race, yes, but
3 we sort of, if my memory serves me correctly, felt that in due
4 course we would consider a general court worker approach
5 but the program would have to be worked out.

6 Q. Okay. Are you suggesting you have any less of a
7 responsibility because an accused person is an Indian?

8 A. What was the question?

9 Q. Any less of a responsibility because an accused person is an
10 Indian?

11 A. Who would have lesser?

12 Q. The Province?

13 A. Oh, no.

14 Q. I think what you're saying, I got some sense of this, anyway,
15 that because Indians are in some senses a federal
16 responsibility, that you ought not to have a special program
17 from them.

18 A. Well, to be perfectly frank, one saw illustrations of
19 tremendous expenditures by the federal government with
20 respect to Indian, matters of concern to Indians in this
21 country. And it was my feeling they could devote a small
22 part of that to this kind of program, if indeed the Indian
23 population or leaders felt that they were at some
24 disadvantage in the courts.

25 Q. Okay, we'll come back and trace a little bit of that in a second.

1 A. I'm not saying we wouldn't have taken it over eventually, but
2 I'm saying that for the moment, that seemed to me to be the
3 most immediate answer.

4 Q. And you're saying take it over as part of a general court
5 worker system...

6 A. Yes.

7 Q. That would be available to all citizens of Nova Scotia.

8 A. Yes, you have to remember the court worker system was a
9 rather novel or new idea at that time and we didn't have, I
10 know the Salvation Army had some representatives in the
11 courts, I can remember that, and they did some of that work.
12 But it was felt by the Indian leaders, at least, that that should
13 be extended.

14 Q. Okay. Putting aside for a moment the court worker program
15 and putting aside the policing issue you mentioned, were
16 there any other special programs offered through your
17 Department while you were Attorney General to provide
18 special services to Indians?

19 A. No, we didn't have, I don't recall any special programs.

20 Q. Thank you. Now let's turn to the court worker program.
21 You've indicated why you thought there should perhaps be a
22 general court worker program and not a special one for
23 Indians. Do you have any reason to think that the court
24 worker program would not be effective in providing useful
25 services to Indians?

1 A. Well, what I felt was that a court worker program should
2 perhaps be, if properly implemented, should perhaps
3 embrace follow-up programs to the court. First of all, it
4 should be an information program, a guidance program for
5 those coming into court. It should be, it should carry on that
6 function throughout the court process and it would be useful
7 and helpful if it carried on after the program, whether the
8 person was acquitted or not. Because my general attitude
9 was that crime is often associated with disadvantages of one
10 kind or another.

11 Q. Okay, so if I understand you correctly, you're saying the court
12 worker idea is a useful one, correct?

13 A. And perhaps deserves a larger concept than just the court
14 itself.

15 Q. Yes, okay. Do you recall taking an Indian court worker
16 program to Cabinet with your approval, with your
17 recommendation?

18 A. I don't recall doing that.

19 Q. Perhaps we could look at page...

20 A. For the reasons I gave.

21 Q. Yes, look at page 146 in that Volume 41.

22 A. All right.

23 Q. Page 146, it looks like "Memorandum to Executive Council". Is
24 that a document that normally submits material to Cabinet for
25 consideration?

1 A. Well, I guess my memory isn't as good on it as I thought. Let
2 me just read this.

3 Q. Just for the record, it says:

4 Subject - Native Court Worker Program.
5 Submitted by the Honourable Harry W. How, PC,
6 Attorney General.

7 A. I'm looking at that, yes.

8 Q. Yeah, I just wanted that on the record.

9 A. The amount was 200,000 requested, yes.

10 Q. Yeah, and the summary says "To provide the re-
11 establishment of a native court worker program."

12 A. Just a moment now.

13 COMMISSIONER EVANS

14 Mr. Wildsmith, am I correct that that program was in effect
15 from 1974, at least, since April the 1st, 1974? I'm looking at page
16 53 in this same volume.

17 MR. WILDSMITH

18 Yes.

19 COMMISSIONER EVANS

20 Where there was a joint contribution by the federal and
21 provincial governments.

22 BY MR. WILDSMITH

23 Q. Yes, my understanding, to put a cap on this, is that before Mr.
24 How was Attorney General, a predecessor Attorney General,
25 maybe a predecessor government, did support the program

1 between 1974 and March 31st, 1976. So there was a period
2 there for about a year and a half or so when there was
3 provincial support for the program.

4 A. For the years '74 to '76?

5 Q. Yes. This document recites the years in Paragraph 174 to 77,
6 but I don't find the documentation supports beyond March of
7 '76.

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

9 Q. In any event, the point I'm making to you, Mr. How, is that
10 you did support the program apparently at one point in time
11 and, indeed, took it to Cabinet.

12 A. Yes, I guess I...

13 Q. And recommended the program.

14 A. I guess I did.

15 MR. CHAIRMAN

16 You should take your kudos while you have the chance.

17 HIS HONOUR CHIEF JUDGE HOW

18 You mean they're rather rare around here, I suppose, Your
19 Lordship?

20 MR. WILDSMITH

21 Q. Perhaps you could turn back a couple of pages to 143 now.

22 A. Just let me add, I don't think anything resulted from this.

23 Q. Okay, well, that was a question I had for you.

24 A. I'm sorry if my memory wasn't as good as it ought to be in
25 that, on that point.

1 Q. Just to finish off your last comment, it's correct, to your
2 understanding, that Cabinet did not go along with your
3 recommendation.

4 A. I don't think so.

5 Q. Now going back to 143, we see what looks like a file copy of a
6 memo from R.A. MacDonald, Director of Programs
7 Administration to yourself. And it says:

8
9 Attached is a memorandum to Executive Council
relative to the native court workers program.

10 Now this doesn't say from whom the memo goes and to
11 whom, but am I correct in thinking that the way you usually
12 set up memorandums in the Attorney General's Department,
13 this is going from MacDonald to yourself?

14 A. Yes.

15 Q. Okay, and the second sentence says, "I am asking that
16 Executive Council review their position," and that's Mr.
17 MacDonald talking then?

18 A. Yes, but he is saying that he drafted it and that he is, his
19 words are in the memorandum.

20 Q. Yes.

21 A. I would be signing it.

22 Q. Yes, okay. Well, that's what I wanted to clarify that Mr.
23 MacDonald was the person who actually put this in front of
24 you for your support.

25

1 A. But let me just add that, perhaps in defence of myself,
2 sometimes these were drafted but didn't proceed beyond...

3 Q. Ah-hah.

4 A. The drafting. But I'm not saying that this didn't. I just don't
5 remember now.

6 Q. Okay, and there appears to be no indication on the document
7 itself whether you actually signed it. It doesn't bear a
8 number or date...

9 A. Or signature.

10 Q. In the other stuff. It could be just a draft.

11 A. Or a signature.

12 Q. Yeah. So do you recall whether you accepted or did not
13 accept?

14 A. I think I had trouble with this one before. I don't recall.

15 Q. Is it customary for an official in your Department to prepare a
16 document like this...

17 A. Oh, lots of times.

18 Q. For Cabinet?

19 A. Lots of times.

20 Q. Without your prior authorization or direction?

21 A. They might.

22 Q. Okay. Notice the second sentence, second paragraph, sorry,
23 says: "As I indicated to you verbally," that suggests that there
24 may have been prior discussion with you about this.

25 A. Yes.

1 Q. So, presumably, it's fair to think you did discuss it and you
2 authorized him to continue.

3 A. Yes.

4 Q. And then the second sentence or the second part of that says:
5 "I think this is one area where the Province of Nova Scotia
6 could show good faith with the Union of Nova Scotia Indians."

7 A. Yes, I see that.

8 Q. You agree?

9 A. Oh, I'm, I wouldn't disagree at all.

10 Q. Okay.

11 A. It's a matter of money.

12 Q. Now there's some background to this documentation, which
13 I'd like to show to you. If you look now on page 148 in
14 Volume 41. This is a letter by that same Mr. R. A. MacDonald,
15 this time to Treasury Board. And you'll see that this was back
16 now in January of '79. The previous documentation was in
17 March of '79.

18 A. Yes.

19 Q. So this is the earlier document. This is a submission to
20 Treasury Board asking them to support a native court
21 worker's program, correct?

22 A. Yes.

23 Q. And it indicates that there was a meeting with status and
24 non-status Indians and the meeting recommended that the
25 native court worker program be reestablished.

1 A. Yes.

2 Q. So that sounds like a meeting with the Indian community...

3 A. Well, I said we, they met with me.

4 Q. Yeah.

5 A. And maybe there were meetings when others were present,
6 too.

7 Q. Okay, so everyone seemed to agree after that meeting that
8 you should reestablish the program. And then the first step
9 was to submit to Treasury Board?

10 A. Yes, you have to get the money from them.

11 Q. At that meeting, can you recall anything of what transpired?

12 A. What meeting?

13 Q. Well, the one that was...

14 A. Tuesday, you said?

15 Q. January the 16th, apparently.

16 A. Yes, January 16th.

17 Q. And it is awhile back, but I just wonder if you remember
18 meeting and whether you can give us any...

19 A. I remember meeting with them several times and, no doubt,
20 that was one. Well, obviously, it was.

21 Q. Okay. Since you were present and since the meeting
22 recommended reestablishing the program, would it be fair to
23 think that you made a commitment to try and reestablish the
24 program?

25 A. No, I never made commitments, or tried not, that I couldn't

1 guarantee I could carry out.

2 Q. No, but you, what I'm saying by commitment is that you
3 would recommend it, you would take it forward.

4 A. I was sympathetic to it, but that was as far as I could go at
5 the time, yes.

6 MR. CHAIRMAN

7 I think you should bring to Mr. How's attention page 149,
8 the last line: "It would appear that he was a bit more than
9 sympathetic."

10 MR. WILDSMITH

11 Yes, indeed.

12 BY MR. WILDSMITH

13 Q. Do you see the last line on 179, Mr. How?

14 MR. CHAIRMAN

15 149.

16 BY MR. WILDSMITH

17 Q. I'm sorry, 149.

18 A. Okay.

19 Q. "The Attorney General requests consideration of establishing
20 this program."

21 A. No doubt.

22 Q. Yeah, so it's clear that you're supporting it and putting it to
23 Treasury Board.

24 A. Yes, it looks like that.

25 Q. Now we flip over to 150 now, we see a letter back to your

1 Deputy from Secretary of Treasury Board.

2 A. Yes.

3 Q. And the Board declined approval.

4 A. Turned me down.

5 Q. And now the second paragraph is of interest. It says:

6

7 However, at the discretion of the Attorney
8 General, the board will allow the reallocation of
9 funds in your '79-'80 budget.

10 I take that to mean Treasury Board was saying, you have a
11 budget, you are authorized to reallocate internally the money
12 you have to assist in the program.

13 A. Providing they approved.

14 Q. Yeah, but they're saying this is a way that you can accomplish
15 the purpose you have in mind.

16 A. Yes, they are.

17 Q. Now flip again to 151, Gordon Coles, your Deputy, writes back
18 to Treasury Board saying that your budget estimates do not
19 enable any reallocation of funds.

20 A. That's what he said.

21 Q. Okay. And then it says, "The Attorney General has no
22 alternative but to so advise the advocates of the program." Do
23 you recall being consulted on that internal...

24 A. Oh, I think so.

25 Q. Pardon?

1 A. I said much, much earlier that I didn't think we ever
2 approved any. It was a matter of money and I think Mr.
3 Coles' final letter verifies that.

4 Q. Yeah, do you recall any...

5 A. Even though I did, I was unable to recall that, any submission
6 to Cabinet.

7 Q. Do you recall any personal involvement yourself in looking at
8 the budget to see whether there could be a reallocation?

9 A. I don't remember, Mr. Wildsmith.

10 Q. You'd leave that to Mr. Coles?

11 A. Yes, I think so.

12 Q. Now if you look at 153, we'll see back a letter to Mr. Coles,
13 copied to yourself.

14 A. Yes.

15 Q. From The Honourable Roland J. Thornhill, Chairman of
16 Treasury Board. And his comment to Mr. Coles is that the
17 Board found it difficult to understand how it could be
18 determined that such a reallocation was not possible given
19 that the budgetary process itself is not yet complete and
20 suggests that because of the apparent priority of this
21 program, that decision be deferred to a later date.

22 A. Yeah.

23 Q. Now I don't understand all the internal workings of the
24 government, but I take it the Chairman of Treasury Board
25 was telling Mr. Coles that the process of, the budgetary

1 process not being complete, it was premature to say that the
2 money wasn't there.

3 A. They appear to be saying that.

4 Q. Pardon?

5 A. They appear, it appears to be a difference of opinion between
6 him and Coles.

7 Q. Okay, do you expect the Chairman of Treasury Board to
8 understand the...

9 A. I don't know what we were to be taking it from. I can't recall
10 and it's not really in here. And Coles may have said to me,
11 "Look, we need every dollar of that particular allocation and,
12 therefore, can't spare any for a native court worker program."
13 That may have been, but I don't recall.

14 Q. But it's also fair to say that the thrust of this is for the
15 Chairman of the Treasury Board to rap Mr. Coles' knuckles a
16 little bit.

17 A. I wouldn't see it that way.

18 Q. Well, he's saying "apparent priorities".

19 MR. CHAIRMAN

20 As long as we don't get a way off on a tangent.

21 MR. WILDSMITH

22 Okay.

23 MR. CHAIRMAN

24 I don't if there's ever been a refusal by a Treasury Board in
25 any government in Canada that didn't say "reallocate funds from

1 some other subhead".

2 MR. WILDSMITH

3 Okay.

4 HIS HONOUR CHIEF JUDGE HARRY HOW

5 Thank you, My Lord.

6 MR. CHAIRMAN

7 It's a...

8 MR. WILDSMITH

9 One other comment before I leave this.

10 MR. CHAIRMAN

11 It's a curious way of saying "no".

12 MR. WILDSMITH

13 Thank you.

14 BY MR. WILDSMITH

15 Q. This letter is copied to you. It's to Mr. Coles but it's copied to
16 you.

17 A. Yes.

18 Q. Is that normal practice for letters to your Deputy to be copied
19 to you, the Minister, or is it normal for one Minister to always
20 copy another Minister?

21 A. Normally, it came to the Minister but I didn't take offence at
22 that and we were a tad informal in that way. You know, we
23 didn't have a rigid structure of...A layered society there, so to
24 speak.

25 Q. Well, what it says to me is that Mr. Thornhill wanted to insure

1 that this letter came to your personal attention.

2 A. Yeah.

3 Q. And so...

4 A. Probably.

5 Q. Probably it did.

6 A. Yes.

7 Q. Do you recall anything developing as a consequence? Any
8 further discussions with Mr. Coles about internal allocation?

9 A. I don't think so and, again, I think it came to a halt, if you
10 will.

11 Q. Okay. Assuming you did take this to Cabinet, which isn't
12 absolutely clear on these documents, can you just help me
13 understand the process here? You go to Treasury Board.
14 They say no. You look at your internal budget and decide no.
15 And then Mr. MacDonald is recommending you take it to
16 Cabinet. Now can you just help me out with understanding
17 the significance of sort of trying the first two steps, failing,
18 and then going to Cabinet?

19 A. Well, it's like appeal in the courts. The highest court is the
20 Cabinet. In fact, there's one above that, the Premier.

21 Q. So if Cabinet were to approve, the money would come from
22 somewhere?

23 A. I beg your pardon?

24 Q. If Cabinet were to approve, the money would come from
25 somewhere.

1 A. Yes.

2 Q. And it would come from somewhere outside of your
3 Department.

4 A. They would direct the Treasury Board to say yes.

5 Q. Okay. And I take it from your previous evidence, you have
6 no recollection of actually doing that.

7 A. Not really, Mr. Wildsmith, no.

8 Q. Okay.

9 A. I knew we dealt with it, I knew we didn't get it, we didn't get
10 it underway. That's really basically my recollection.

11 Q. Okay, and then it looks like, if you turn to 154 now, a few
12 months after this, there was another meeting on June the
13 18th with the Union of Nova Scotia Indians.

14 A. Yes.

15 Q. Do you see the first sentence, the second half, says:

16
17 I undertook to deal directly with the Union of
18 Nova Scotia Indians with respect to the Native
Court Workers program.

19 A. Yes, I see that.

20 Q. Does that mean that, is it fair to think that the Union would
21 have requested your personal attention?

22 3:15 p.m.

23 A. They always did.

24 Q. Yeah. They always did?

25 A. Yes.

1 Q. Okay. And when you say, "I undertook to deal directly with
2 them", what you are saying is I will give it my personal
3 attention.

4 A. Yes.

5 Q. Now, as we move through this documentation again it
6 appears, oh, I guess the first point is. On that page, 154, the
7 meeting was in June, mid-June, June the 18th of '79 and you
8 advised Mr. Coles of it July the 17th? Kind of a month later.

9 A. Well it might be, yes.

10 Q. Is that a normal kind of timeframe for you to communicate
11 with your Deputy?

12 A. Perhaps when you get a lot of things it might well be, yes.

13 Q. Normal.

14 A. Well, all right, yes.

15 Q. I have no idea so I'm just asking you. The next page, 155,
16 sorry, I wanted to direct your attention on a couple of pages.
17 You can look at that if you want. To 158. That's a letter to
18 the Union of Nova Scotia Indians from Mr. MacDonald, August
19 the 10th.

20 A. Yes.

21 Q. And there it appears that Mr. MacDonald is advising no
22 provincial funding for this fiscal year.

23 A. Yes.

24 Q. That would take you to March the 30th, 1980?

25 A. Yes.

1 Q. And then it says, "We're prepared to entertain a submission
2 for the fiscal year which would start April the 1st, 1980.

3 A. Yes.

4 Q. Just one little point. That letter is coming from Mr.
5 MacDonald rather than from yourself.

6 A. Yes. Mr. Wildsmith, I think I should mention here that from
7 what I'm seeing of these memoranda, the programs in the
8 1970s, before we took office in 1978, were shared programs
9 with the Federal Government and maybe the original one was
10 a government program, a Federal Government, I'm sorry,
11 program. It was often the practice of the Federal Government
12 to start these programs, give them three years, then
13 withdraw and unload it, or attempt to, on the Provincial
14 Government.

15 Q. Yes.

16 A. And I can't say for certain but I detect that kind of pattern
17 here.

18 Q. Well I think if you did you go back...

19 A. And I think we wanted, we wanted them to come back in in a
20 shared program.

21 Q. Well...

22 A. I always object to...

23 Q. Well if you did go back and look at the documents I think you
24 would find consistently that Court Workers has been a 50-50
25 program. 50 Federal, 50 Provincial.

1 A. Right. All right. But they dropped their 50.

2 Q Well...

3 A. Apparently.

4 Q I would say not. I would say that you dropped your 50 and
5 that dropped the program and the Federal Government was
6 always willing to put their 50 in.

7 A. Whatever. Have it your way.

8

9 CHAIRMAN

10 [There's something in there?] about the dropping the
11 program. Where did I see that? Somewhere. The program was
12 dropped in 1977 before Mr. How was Attorney General, I think.

13 HIS HONOUR CHIEF JUDGE HOW

14 Yes.

15 CHAIRMAN

16 Yes. Page 148.

17 MR. WILDSMITH

18 Page 148?

19 CHAIRMAN

20 Yes. This was, the submission of Mr. MacDonald to Treasury
21 Board. It says,

22

23 You will, no doubt, recall that from the years
24 1974/75 through 76/77 we, in fact, were
25 involved with a Native Court Worker Program.
This was terminated in March of 1977 due to a
difference of opinion as to the distribution of

DISCUSSION

1 funds between the Federal and Provincial
2 Governments and the then Minister, Mr. Pace,
3 was not prepared to remit the monies from the
4 Provincial Government through to the Federal
Government, having the Federal Government act
as the carrier agent of the program.

5 MR. WILDSMITH

6 Yes.

7 CHAIRMAN

8 So I guess that explains the mystery of the...

9 MR. WILDSMITH

10 Why the program was terminated?

11 CHAIRMAN

12 Presumably.

13 MR. WILDSMITH

14 I think, I'll put to this witness because he wasn't there then
15 but the earlier documentation seems to suggest that there was a
16 dispute about whether the services would be rendered to non-
17 status as well as status Indians. And there was some difficulty
18 about the Union of Nova Scotia Indians being a carrier agent that
19 would support or service the non-status Indians. And that that
20 was part of...okay.

21 CHAIRMAN

22 A carrier agent of the Federal Government, you see.

23 MR. WILDSMITH

24 Q. So continuing on with this...
25

DISCUSSIONCOMMISSIONER EVANS

1
2 And also at 155 there's some correspondence there
3 indicating that the Federal Government were prepared to pay
4 from September to, the full amount from September the 1st, '79,
5 or from September the 1st to March the 31st, 1980 and then after
6 1980 it would be the responsibility of the Province, as I read it.

MR. WILDSMITH

7
8 I think what was transpiring there, My Lord, is that the
9 Federal Government was trying to keep the program and they're
10 saying, "Well, for this block of time, we'll pay it all. And you'll
11 make your 50 percent contribution by making a full contribution
12 for a different block of time. And that way we'll span a block of
13 time with 50/50 contributions."

COMMISSIONER EVANS

14
15 I thought that the witness' answer was that they were
16 trying to unload the whole thing on the Province and the Province
17 wasn't going to buy it.

MR. WILDSMITH

18
19 That was a comment that he made. Perhaps I'll go back...
20
21
22
23
24
25

DISCUSSIONCOMMISSIONER EVANS

1 [There was?] some justification, too, in the material. But
2 then he seems to have disappeared from, this witness seems to
3 have disappeared from the negotiations around that time. In '79,
4 April the 8th, '79. I don't see him as being present at the meeting,
5 page 161. And 160, he doesn't appear there.

MR. WILDSMITH

7 Yes. That's right. He wasn't present at that meeting which
8 was a kind of vehicle between the Native community and the
9 Province. But the Court Worker Program, I believe, came up in
10 that meeting.

COMMISSIONER EVANS

12 I have no idea who the Honourable Laird Stirling and the
13 Honourable Bruce Cochrane are. I take it they're Provincial...

MR. WILDSMITH

15 It indicates on 161...

COMMISSIONER EVANS

17 Pardon?

MR. WILDSMITH

19 It indicates on 161. The first gentleman was chairman of
20 this committee, the Minister of Social Services.

COMMISSIONER EVANS

22 And I take it that's Nova Scotia.

MR. WILDSMITH

24 Yes.

DISCUSSIONCOMMISSIONER EVANS

1
2 And he was also present in 160, that August the 8th
3 meeting. That's the same meeting.

MR. WILDSMITH

4
5 Yes.

CHAIRMAN

6
7 I suspect we're entitled to assume that in 19-, whatever
8 date that, 1979, by August 1979 the Minister of Social Services for
9 Nova Scotia had been given the responsibility to deal with matters
10 relating to the Indians. And you knew then, I think you said this
11 morning, moved off that Committee.

HIS HONOUR CHIEF JUDGE HOW

12
13 Yes.

CHAIRMAN

14
15 Or were moved off.

HIS HONOUR CHIEF JUDGE HOW

16
17 Or was moved. I don't know which. I can't remember.

MR. WILDSMITH

18
19 Yes, although I'm not sure that, all this means is that there is
20 a formal vehicle for communicating between the Native
21 community and the Province. What it doesn't mean is that a
22 Minister, whose Department is involved, would not become
23 involved in that issue.

CHAIRMAN

24
25 No, I assume that, well, there are items coming up related to

DISCUSSION

1 various Departments of Government, but then by that Committee
2 be referred to...

3 MR. WILDSMITH

4 Yes.

5 CHAIRMAN

6 The appropriate Department.

7 HIS HONOUR CHIEF JUDGE HOW

8 I think, My Lord, the explanation is in part which you've
9 said. The other is that the Department that would liaise with
10 Indian representatives was the, was made the Department of
11 Social Services and taken away from the Attorney General's
12 Department. Because I think the reason was there were larger
13 issues than merely legal ones.

14 MR. WILDSMITH

15 Q. Now, I'd like to take you to the minutes of that meeting that
16 happened on August the 8th...

17 A. Where's that meeting referred to, please?

18 Q. Page 165.

19 A. Where's the meeting referred to, please?

20 Q. The portion I want to refer you to is on 165.

21 A. Yes.

22 Q. Dealing with the Court Worker Program. And perhaps this
23 helps explain what we were just speaking about. It says,

24
25 The Union of Nova Scotia Indians understands

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

1 the Attorney General's Department had agreed to
2 finance the program on a 50/50 basis with the
3 Federal Government effective September 1, '79,
4 and wishes confirmation. They are requesting a
5 letter of confirmation to Indian Affairs and to
6 the Union...(It goes on to say.) Following the
7 meeting an inquiry was made of the Attorney
8 General's Department and officials indicating a
9 letter had been sent to the Union of Nova Scotia
10 Indians indicating the terms and conditions
11 under which the Province would participate.

8 A. Yeah.

9 Q. I don't know whether it's the same letter but there is a letter
10 of August the 10th which precedes these minutes by Mr.
11 MacDonald to the Union of Nova Scotia Indians at 158. We've
12 already looked at this letter.

13 MR. CHAIRMAN

14 I think there may be mistake in, on page 165, in that second
15 paragraph, when they say, "August 17th."

16 MR. WILDSMITH

17 Well, that was discussion of the letter on August the 17th.

18 MR. CHAIRMAN

19 No, no. It says here, "Mr. Stirling discussed the contents of
20 this letter...."

21 MR. WILDSMITH

22 "...while in Sydney on August the 17th."

23 MR. CHAIRMAN

24 Oh, I see.
25

1 MR. WILDSMITH

2 So, presumably, it's prior to August the 17th and the only
3 letter in our record is the one of August the 10th, from the
4 Attorney General's Department to the Union and instead of having
5 terms and conditions as the minutes suggest, it says, "No resubmit
6 for the following fiscal year."

7 MR. CHAIRMAN

8 There was, apparently the Nova Scotia Union of Indians
9 were satisfied with the response. That's what it says here.

10 MR. WILDSMITH

11 Yes, it does.

12 Q. Next on 175 in here is a letter in September now, September
13 the 26th of '79 from the Department of Social Services to you.
14 And it says in this letter that the Union of Nova Scotia Indians
15 called to say that, "The Government of Canada would not fund
16 the above program for the remainder of the current year
17 unless the Province made a significant contribution." Which
18 translated in dollar terms into \$5000. Do you recall that
19 episode, if I can call it that, about the Province's \$5000
20 contribution?

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

22 Q. Okay.

23 COMMISSIONER EVANS

24 This witness was no longer the representative of the
25 Cabinet, was he?

1 MR. WILDSMITH

2 No, but he was the Minister of the Attorney General's
3 Department and what I've been attempting to suggest is that
4 while there was this formal mechanism, Departmental Ministers
5 dealing with issues in their Department still would occasionally
6 deal directly with the Union or, as we see here, that Department's
7 representatives are funnelling the issue to the right Minister, to
8 the Minister of the Attorney General's Department, Mr. How. So
9 they're asking if the Department was in a position to provide the
10 \$5000 to keep the program going.

11 COMMISSIONER EVANS

12 Right.

13 MR. WILDSMITH

14 Q. If we turn over to 178 now we see Mr. Gale sending a note to
15 you referring again to the \$5000 and Mr. Renee, in your
16 Department, in the absence of Mr. MacDonald saying no
17 surplus funds that could be applied.

18 A. Yes.

19 Q. Correct?

20 A. Yes.

21 Q. Is that note at the bottom of the page your handwriting or
22 Mr. Gale's or somebody else's?

23 A. No. That's not mine.

24 Q. Not yours?

25 A. No.

1 Q. Okay. Now at page 185 we see the Union putting together
2 another Court Workers' proposal dated October '79. And at
3 page 203, now, Mr. How, I think we see a solution to the
4 \$5000 problem. Apparently you had a meeting with Mr.
5 Henderson and Mr. Paul of the Union of Nova Scotia Indians?

6 A. I think I remember that, yes.

7 Q. Yes.

8 A. I remember those names.

9 Q. And these are notes of yours that you made of that meeting?

10 A. That's what it says.

11 Q. These are notes you made of that meeting?

12 A. I think, yes, it indicates that, yes.

13 Q. Yeah, and the first item says that you will accept \$5000 from
14 the Indians providing it is explained to the Feds. "Mr.
15 Henderson will approach the Federal Government on their
16 and our behalf..."

17 A. Yes.

18 Q. "The Premier agreed with this when I told him today."

19 A. Yes.

20 Q. So the thrust of that is that the Union of Nova Scotia Indians
21 would give to the Province the \$5000...

22 A. Yes.

23 Q. And call that the Province's contribution to the program.

24 A. Yes, it looks like that.
25



1 3:30 p.m.

2 Q. And at page 206 we see a meeting with officials in your
3 Department and the Union going over the terms of how the
4 Court Worker Program would operate. And then at page 209,
5 now, you are writing to the Federal Minister of Justice...

6 A. Yes.

7 Q. And in the second paragraph you're telling the Federal
8 Minister that you agree to accept from the Union the \$5000....

9 A. Yes.

10 Q. And to make that the Provincial contribution.

11 A. Yes.

12 Q. And then you enclose a signed agreement and that has the
13 net effect of keeping the program going from December 1st,
14 '79 to March 31st, '80.

15 A. Yes.

16 Q. And you're quite careful to say no assurance of continuation
17 beyond March the 31st, 1980.

18 A. Yes.

19 Q. And it's at this point, at least in the documentation, we first
20 see the comment that you made at the outset about singling
21 out one disadvantaged group.

22 A. Yes, I do, yes.

23 Q. The agreement that you signed on, starting on page 211...

24 A. Yes.

25 Q. I don't know how carefully you looked at an agreement like

1 this but I just can't help but noticing that the two "whereas"
2 clauses on that page seem to be in contradiction to the
3 statement in your letter.

4 A. Contradicts what?

5 Q. To the statement that, "We ought not to favour one
6 disadvantaged group." It says, "This program would provide
7 great assistance promoting equality of justice."

8 A. Yeah. How do you think it conflicts?

9 Q. How do I think it conflicts? It seems to suggest in these two
10 paragraphs that this program is needed to ensure equality in
11 the level of justice received by Native people.

12 A. Well, I think it supports what I said. I said it's the right of
13 every individual to equality before the law.

14 Q. Yes.

15 A. And that was my misgiving that if we did it for one and didn't
16 do it for others we would not be adhering to that principle.

17 Q. And does that also lie with the notion that Indians are a
18 Federal responsibility?

19 A. That what?

20 Q. Indians are a Federal responsibility.

21 A. Well, no, but you only have to look back to see that there
22 were shared programs because the Feds did acknowledge
23 some responsibility. My point was, yes, they had
24 responsibility. And, indeed, until we had a general Court
25 Worker Program and they wished it, or the Indian

1 representatives wished it on behalf of their constituents, then
2 we would have to ask the Federal Government to assume, or
3 at worst or best, share it.

4 Q. Thank you. I also notice at page 242 in here, perhaps before
5 we get to that in August of 1980, there's no documentation in
6 here to suggest that the program continued after March the
7 31st, 1980.

8 A. I see. Well, you've got the advantage of me there. You've
9 read it.

10 Q. Okay. You have no knowledge of it continuing?

11 A. No.

12 Q. And the bottom line on what we've learned up to this point in
13 time is that while you were Attorney General no Provincial
14 contributions, except to the extent that the Union of Nova
15 Scotia Indians' \$5000 represented a Provincial contribution.

16 A. I think, Mr. Wildsmith, it illustrates perfectly a half-baked or
17 half-thought out program. What happens often to them or
18 often happens to them. And this is just exactly what's here.
19 This apparently didn't go beyond 1980 which was of little
20 help to anyone.

21 Q. Yes. Whose responsibility?

22 A. Pardon?

23 Q. Whose responsibility?

24 A. I don't know.

25 Q. Not the Indian people.

1 A. Well, obviously not.

2 Q. Okay. This letter at page 242, addressed to Mr. Dwight Dorey.

3 A. Yes.

4 Q. What you're saying is in your view any such program ought
5 to be funded entirely by the Federal Government.

6 A. Yes, I did feel that way. Certainly at that time.

7 Q. Do you know anything about the constituency of the Native
8 Council of Nova Scotia?

9 A. The what?

10 Q. Who are members of the Native Council of Nova Scotia?

11 A. I wouldn't recall at the moment.

12 Q. Any difference between...

13 A. I do remember a Mrs. Robinson, for one, but...

14 Q. Yeah. Any distinction in your mind between their
15 constituents and the constituents of the Union of Nova Scotia
16 Indians?

17 A. Only as I think was pointed out. One were, I think, classified
18 as status, the other non-status.

19 Q. All right. And what makes somebody non-status?

20 A. Well, status were those who were, resided on reservations, in
21 general terms. And non-status not residing. That's the main
22 distinction I understood.

23 Q. Let me offer a different one to you. That non-status Indians
24 are ones not recognized by the Federal Government as being
25 Indians.

- 1 A. All right. Sure.
- 2 Q. Agreed? No basis for disagreeing?
- 3 A. That may well have been.
- 4 Q. Well the point I'm putting to you is what you're, in effect,
5 doing is telling people who aren't recognized as Indians by
6 the Federal Government that any program for them should be
7 done by the Federal Government.
- 8 A. Well, Mr. Wildsmith, I'm sure you would agree that
9 traditionally the Native people of Canada were under, were
10 assigned a special Department of the Federal Government.
- 11 Q. Yes.
- 12 A. And the Federal Government had an elaborate program of
13 supports for those people giving them a special status under
14 the Federal regime. So what I'm saying here is that in the
15 absence of the ability of the Province to fund Native Worker
16 Programs and if, indeed, as we believed sincerely, that such a
17 program was desired by Native leaders then what was wrong
18 with asking the Federal Government to fund it until such time
19 as a shared or transferred responsibility could take place.
- 20 Q. Did you know that Nova Scotia was just about the only
21 province in Canada that wouldn't share in the program?
- 22 A. We were singular in many ways.
- 23 Q. A point of distinction here.
- 24 A. Well, we were. We were. I can't tell you.
- 25 Q. I just want to make sure I have this straight. What you're

1 saying is that...

2 A. Some of them could afford much more than we could.

3 Q. The Province's position was not to pay anything in relation to
4 Indian programs because the Federal Government ought to do
5 it.

6 A. No. The position we took in general terms was that until we
7 could afford an all-embracing one, or even if we took the step
8 of affording an Indian one, that the Federal Government
9 ought to, if they believed it to be a benefit to the Indian
10 people, they ought to fund it.

11 Q. I guess Nova Scotia receives equalization payments?

12 A. Pardon?

13 Q. With respect to provision of various justice services?

14 A. Yes. I don't know what was in that whole package. We got
15 equalization payments, yes.

16 Q. We've had some testimony that legal aid was much more than
17 50 percent paid for by the Federal Government.

18 A. Oh, no doubt.

19 Q. No doubt?

20 A. Yes. But, Mr. Wildsmith, you can't take it for lawyers and
21 take it for court workers at the same time, can you?

22 Q. No.

23 A. Well then, you can't spend a dollar twice.

24 Q. I refer you to page 270 in the volume.

25 A. Yes.

1 Q. This is a letter from the President of the Union of Nova Scotia
2 Indians...

3 A. Yes.

4 Q. Not directed to yourself but it attaches a letter from Premier
5 Buchanan.

6 A. It's what?

7 Q. You've seen Premier Buchanan's letter before? The one that's
8 on 271.

9 A. All right. What page? 270-...

10 Q. 271 has the letter from Premier Buchanan.

11 A. 271.

12 Q. Yes.

13 A. Okay.

14 Q. And this was in response to a request for the Province's
15 official position in relation to Indians?

16 A. Yes.

17 Q. It says, amongst other things, "The Federal Government has
18 not only jurisdictional authority but responsibility for
19 Indians."

20 A. Yes.

21 Q. And goes on to say, however, the Province, through various
22 Departments, not including yours, would continue to assist
23 whenever responsibly can.

24 A. Yeah.

25 Q. Now Mr. Doucette, the President of the Union, writes in the

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

1 letter on the previous page that one of the outcomes of this
2 letter is to say that the Province will not cost-share of the
3 Court Workers Program.

4 A. Yeah.

5 Q. And he suggests that the Province of Nova Scotia equalization
6 payment with respect to the administration of justice be
7 transferred directly, at least the Indian share, to the Micmacs.

8 A. Yeah.

9 Q. What do you think of that idea? Forlorn hope?

10 COMMISSIONER EVANS

11 That would have been a pretty forlorn hope.

12 A. I would have thought it would not have any chance of
13 success.

14 Q. Indeed.

15 CHAIRMAN

16 Well, before we leave that, is there such thing as
17 equalization payments with respect to the administration of
18 justice in the Province?

19 HIS HONOUR CHIEF JUDGE HOW

20 I'm sorry, My Lord?

21 CHAIRMAN

22 Is there such a thing as equalization payments covering the
23 administration of justice in the Province?

24 HIS HONOUR CHIEF JUDGE HOW

25 Oh, possibly, I don't know.

DISCUSSIONCHAIRMAN

I didn't think there was but there may be.

MR. WILDSMITH

I don't know myself.

CHAIRMAN

The cost, the Native Court Worker Program and the Legal Aid Program, they're not under equalization. They're separate cost-shared programs, are they not?

HIS HONOUR CHIEF JUDGE HOW

I think the Legal Aid Program is separate, My Lord, yes, it is.

MR. WILDSMITH

Yes. And certainly the Court Workers was set up that way as well.

CHAIRMAN

Yes.

HIS HONOUR CHIEF JUDGE HOW

I do know that we negotiate each year as to amount...

CHAIRMAN

I'm not sure you can equate these programs with equalization. Maybe you could then, you can't now.

MR. WILDSMITH

Let me briefly...

COMMISSIONER EVANS

Mr. Wildsmith, I know you're coming to some point and I'm just wondering what is the point you're trying to get out from this

DISCUSSION

1 witness?

2 MR. WILDSMITH

3 I'm looking at the level of support of the Attorney General's
4 Department for this Court Workers Program and I'm wondering
5 about any comments he may make as we go along through the
6 documents. I want to make sure the record is clear about the
7 history of what happened, at least to the extent that these
8 documents out of the Attorney General's files and out of the
9 Union's files are complete.

10 CHAIRMAN

11 It's pretty well, it's documented in great detail, isn't it.

12 COMMISISONER EVANS

13 Yes.

14 CHAIRMAN

15 Meaning that...

16 MR. WILDSMITH

17 Well there certainly are some gaps in it.

18 CHAIRMAN

19 Not many.

20 MR. WILDSMITH

21 For example, what happened after 1980. We seem to have
22 broken into a different mode. Originally we get support from the
23 Attorney General's Department for the program. Indeed, in the
24 past they had supported it and then all of a sudden there's a shift,
25 if I can put it that way, where this Minster and/or the

DISCUSSION

1 Government is saying, "We aren't going to cost-share on court
2 workers anymore."

3 COMMISSIONER EVANS

4 So there came a point when it stopped.

5 MR. WILDSMITH

6 Yes.

7 COMMISSIONER EVANS

8 And you say that it was because the Province of Nova Scotia
9 said, "We are not going to contribute."

10 MR. WILDSMITH

11 Yes.

12 COMMISSIONER EVANS

13 That's the point you were driving at?

14 MR. WILDSMITH

15 Yes. And...

16 COMMISSIONER EVANS

17 Aren't you there?

18 MR. WILDSMITH

19 And a complementary point, if I can put it this way, is this
20 issue has been one that the Indian community has placed on the
21 Provincial agenda since well before Mr. How was Attorney
22 General....

23 COMMISSIONER EVANS

24 Right.

DISCUSSION

1 MR. WILDSMITH

2 We saw the same thing when Mr. Giffin was here. There's a
3 history, through the 70s and 80s, of some verbal support, very
4 little financial support.

5 COMMISSIONER EVANS

6 Well, what's, isn't that usual with politicians? Lots of verbal
7 support, very little financial support? That's not unusual, is it?
8 As I understand what he was doing, this witness, he was
9 recommending it to Treasury Board, Treasury Board turned it
10 down, says, "If you have money in your own budget, take it out of
11 that" and then the response was, "We have no additional money in
12 our budget to fund it."

13 MR. WILDSMITH

14 Yes.

15 COMMISSISONER EVANS

16 And then you got back to the fight between how much
17 contribution would be made by the Province. Whether it was
18 going to be 50-50 and the Province said, "No". Mr. Buchanan says
19 that is a Federal responsibility and that seems to have been the
20 end of the social worker program.

21 MR. WILDSMITH

22 Yes. As far as this Minister's involvement with the Attorney
23 General's Department.

24 COMMISSIONER EVANS

25 Right.

DISCUSSION

1 MR. WILDSMITH

2 But we heard some different evidence, I think yesterday,
3 and...

4 CHAIRMAN

5 Well, anyway, if we can sort of speed things up. As I see it...

6
7 MR. WILDSMITH

8 Q. Sure. I want to move away from the Court Workers Program
9 now to ask you a couple of questions about Indian policing.
10 okay. If you turn back in this volume to page 144...

11 A. Yes.

12 Q. You see a letter to yourself from the Union discussing the
13 concept of policing on Indian reserves.

14 A. From (Sergeant?) Henderson, yes.

15 Q. I'm sorry? From Sergeant Henderson, yes. And then we see a
16 fairly long gap until page 202. November of '79 now.

17 A. Yes.

18 Q. Which you write to your Deputy concerning a meeting with
19 you had with Mr. Henderson and Mr. Paul and you seem to
20 say in this memo at 202, "Indians can do more for their own
21 people than an outside policeman can."

22 3:45 p.m.

23 A. Yes.

24 Q. They prefer something called "Option 3(a), which would give
25 them their own police force. You've pointed out one of the

1 advantages of this is it may reduce your R.C.M.P. requirement.

2 A. It might do what?

3 Q. Reduce your R.C.M.P. requirement in the province?

4 A. Oh, yes, yes.

5 Q. And, finally, in the last paragraph, you say:

6
7 Personally, I would like to see innovations
8 introduced this year, if that is at all feasible.

9 Are you telling Mr. Coles then that you support this concept
10 and your instructions to him are to implement?

11 A. I would say it was very clear that I was.

12 Q. Good. And you notice the next page, again your notes on this
13 meeting, Item #2 says:

14
15 I will recommend Indian personnel on
16 reservations, Option 3(a).

17 A. Yes.

18 Q. And I take it, going away from the meeting with you, which
19 the representatives of the Union of Nova Scotia Indians had,
20 they would think you are committed to this program.

21 A. I would think so.

22 Q. Okay. Now if you look at page 217, you'll see a letter that Mr.
23 Coles sends to the Union of Nova Scotia Indians.

24 A. Oh, yes.

25 Q. And in that letter, he says at the end of the first paragraph:

1 I understand the Attorney General approved in
2 principle subject to the feasibility of the
3 implementation of such a program.

4 A. Yes.

5 Q. Now I'll put it to you that's not quite correct, that it wasn't
6 just an agreement in principle subject to the feasibility of
7 implementation. What you understood is you thought this
8 was the right way to go and your direction to Mr. Coles was to
9 implement.

10 A. I've forgotten what I said to Coles but...

11 Q. I think you've just agreed with me that was your instructions
12 to him.

13 A. Well, I think you're splitting hairs. I can agree with it in
14 principle. The question is then, can it be implemented?

15 Q. Yeah.

16 A. Now I don't see a conflict in terms.

17 Q. Well, if you look at the second paragraph of Mr. Coles' letter,
18 what he's saying is, "I'm sure you're aware there are pros and
19 cons," et cetera.

20 A. Yes.

21 Q. And let's get together and determine the feasibility.

22 A. Yeah.

23 Q. Now the purpose of the Indian community with you was to
24 get your agreement to implement it.
25

1 A. Yes.

2 Q. Now if you look over...

3 A. I told him I thought it was a good idea.

4 Q. Yes.

5 A. Yes.

6 Q. And you said...

7 A. Mr. Coles said, "We'll do it if it's feasible." You see a problem,
8 I take it?

9 Q. Yeah.

10 A. All right.

11 Q. Especially in light of the Union's response to you, or to Mr.
12 Coles' letter. This is December the 3rd.

13 COMMISSIONER EVANS

14 Doesn't that letter of December the 3rd indicate that there
15 was some disagreement among Indian Bands as to which was the
16 proper type of force to be employed?

17 MR. WILDSMITH

18 Can you help me out as to what page now?

19 COMMISSIONER EVANS

20 103...I'm sorry, 215.

21 MR. WILDSMITH

22 215, right. I think what it's saying, My Lord, is that nine of
23 the Bands in the province, each Band makes its own decision.
24 Nine Bands said, "We want Option 3(a)," and the purpose of
25 meeting with Mr. How was to get his support. It wasn't to talk

1 about feasibility. It was to get the approval of the Attorney
2 General of the Province to do this.

3 COMMISSIONER EVANS

4 3(a) or 3(b)?

5 MR. WILDSMITH

6 3(a). 3(b) is a different concept. Some Bands seem to prefer
7 3(b). The position of the Union has always been to let each Band
8 make up its own mind as to what it wants. And nine Bands were
9 saying, "This is what we want is a Micmac police force."

10 BY MR. WILDSMITH

11 Q. If you look at page 233 now, this is now January the 22nd,
12 the next year, is a submission on Option 3(a) to Mr. Coles.

13 A. Yes.

14 Q. You'll notice that the funding source mentioned on page 234
15 is solely from the federal government.

16 A. The what? The option?

17 Q. At the end of the first paragraph, it says: "Funding is
18 expected solely from the federal government for this limited
19 police force on reserves in Nova Scotia."

20 A. Yes.

21 Q. "Similar to existing arrangements on Quebec reserves."

22 A. Yes.

23 Q. Now did you have any involvement in this beyond the
24 meeting and the note that we've already looked at?

25 A. I'm not sure, Mr. Wildsmith, but this is familiar to me, when I

1 read this again. I don't think beyond that that anything took
2 place. I think, I've forgotten what 3(a) was. It seems to me it
3 was to have the R.C.M.P. assign people of Indian background
4 to the police dealing with reservations.

5 Q. No, that was Option 3(b). 3(a) was...

6 A. 3(a) was for them to have a separate police force.

7 Q. Yes, along the lines of municipal police forces.

8 A. All right, then we...

9 Q. And you explained that in your notes.

10 A. We had to settle for 3(b). I think that's the outcome of all
11 this.

12 Q. Why?

13 A. I don't remember why but I could speculate and say the feds
14 weren't prepared to provide the separate funding necessary
15 to police the reservations. They may have felt it was a
16 provincial responsibility, I don't know. If you have any
17 memoranda to that effect in your files.

18 Q. Well, I'd like to direct your attention to more memoranda but
19 the record now seems to be completely silent from 1980
20 through...

21 A. Well, that's what Mr. Coles probably meant by whether it was
22 feasible. You...Mr. Wildsmith, let me explain to you that when
23 you get into programs like this where there is a dual
24 jurisdiction, federal had jurisdiction over reserves and
25 Indians, right?

1 Q. Yes.

2 A. The province had jurisdiction over policing. You might well
3 find that there were difficulties in implementing a change of
4 policy on reservations. Indeed, I'd be surprised if there
5 weren't.

6 Q. Well, if you look back to this December 3rd letter on page
7 216, you'll see that all the Union was asking for from the
8 province was a letter confirming that 3(a) is considered a
9 valid program for policing.

10 A. That's the one where you explain...

11 Q. A Micmac police force.

12 A. You reminded me that that meant that there would be
13 Indians operating on reservations but not under a separate
14 police force, is that right?

15 Q. No, they would be like a municipal police force.

16 A. Oh.

17 Q. Like a municipal police force.

18 A. All right, then what did you say? All we need is a letter
19 confirming?

20 Q. Yes, that Option 3(a); that is, the municipal police force is
21 considered as a valid program for policing.

22 A. Well, you must remember that this went to Alan Clarke, not
23 to Harry How.

24 Q. Yeah, and Alan Clarke is in the Department of Social Services.

25 A. A copy went to me, yes, apparently.

1 Q. And you understand him to be the Coordinator for Aboriginal
2 Affairs in the province?

3 A. Well, all I can say, Mr. Wildsmith, we did not get 3(a). I can't
4 remember the reason. But you saw my support for it. The
5 question probably is, or the answer probably lies between the
6 two governments.

7 Q. Probably between the two provincial and federal
8 governments?

9 A. Yes.

10 Q. In any event, the letter that's requested here, apparently
11 from the documentation, was never forthcoming.

12 A. What wasn't forthcoming?

13 Q. The letter saying that the province considered 3(a) a valid
14 program. In other words, a letter of provincial support.

15 A. Oh, I don't know. Maybe it did.

16 Q. Well, it's not in the documents we have here. Do you have
17 any recollection of ever writing such a letter?

18 A. No, but I was in sympathy with the proposition but I can't
19 point to you a letter, no.

20 Q. Now we've talked about policing to some extent. We've
21 talked about court workers. And just to summarize the
22 previous evidence that you gave, while you were Attorney
23 General, there were no special programs supported by the
24 province to assist Indians in the criminal justice system.

25 A. That's right.

1 Q No workshops, seminars, or training programs for judges,
2 lawyers, legal aid lawyers, prosecutors, probation officers.

3 A. Wait a minute. What's your...What's your...

4 Q I'm saying that there was no training provided while you
5 were Attorney General to legal aid lawyers, judges, probation
6 officers, prosecutors on special problems that Indians have in
7 criminal justice.

8 A. We didn't call them in to train them, no.

9 Q Pardon?

10 A. We didn't call them in to train them, no.

11 Q No training program, no workshops, no seminars.

12 A. Yes, we didn't, no.

13 Q Right, okay.

14 A. I don't know what we'd train them in, but maybe you have an
15 idea.

16 Q How about cross-cultural understanding?

17 A. Cross-cultural?

18 Q Yeah, "buzz" word. Cross-cultural understanding.

19 A. What's that mean?

20 Q Does it mean anything to you?

21 A. Well, since it doesn't seem to, you tell me what it means to
22 you then, if you want me to answer it.

23 COMMISSIONER EVANS

24 Perhaps, Mr. Wildsmith, you tell him what you mean by it,
25 so he'll be able to answer you.

1 MR. WILDSMITH

2 Certainly. I mean...

3 HIS HONOUR CHIEF JUDGE HOW

4 A. There's lots of "buzz" phrases today. Maybe this is one of
5 them. Perhaps I should know.

6 Q. I mean programs that are designed to assist members of one
7 culture in understanding the differences of other cultures.

8 COMMISSIONER EVANS

9 Like Irish and Scotch, and reconcile those two, understand
10 their problems.

11 BY MR. WILDSMITH

12 Q. Nothing directed towards that, Mr. How?

13 A. I'm just sitting here thinking. Maybe common sense could be
14 perhaps involved here and a person might know what to say
15 to someone of the Indian extraction. Just by common sense
16 without a cross-cultural course. Maybe they're going to give
17 courses in common sense after awhile.

18 Q. One little question of a different sort. There's a letter in
19 Volume 25. We don't have to turn it up if you don't care to,
20 page 24, where Supt. Christen of the R.C.M.P. in July of 1978
21 says that...

22 A. I have to get that.

23 Q. Well, I can give you the upshot of it. We don't need to take
24 the time to turn it up.

25 A. All right.

- 1 Q. But in this letter, he refers to the Attorney General of Nova
2 Scotia commissioning a "criminal justice support group of
3 Nova Scotia."
- 4 A. Who says this?
- 5 Q. It's Doug Christen of the R.C.M.P.
- 6 A. Oh, yes.
- 7 Q. Do you ave any knowledge of such a entity, a "criminal justice
8 support group of Nova Scotia"?
- 9 A. Not immediately, no.
- 10 Q. Okay.
- 11 A. Does he indicate what it is?
- 12 Q. No. Nobody else seems to know either. I'd like to talk to you
13 for a moment about a newspaper clipping that's in Volume 41
14 at page 272.
- 15 A. Now which volume?
- 16 Q. 41?
- 17 A. 41. 272?
- 18 Q. Yes.
- 19 A. Thank you.
- 20 Q. This concerns a letter that you wrote to the Indo-Canadian
21 Association regarding the appointment of a librarian at
22 Acadia University?
- 23 A. Oh, yes.
- 24 Q. And there was some suggestion that your comments were
25 discriminatory?

1 A. Mrs. McDonough was frequently making those assertions.

2 Q. Yes.

3 A. In fact, I was surprised each day if she didn't have one.

4 Q. It suggests in there that your letter said something to the
5 effect that other things being equal, we ought to give native
6 Canadians a preference.

7 A. Yes.

8 Q. For positions where government funds are a major
9 contribution to the institution concerned. I'm wondering
10 about this expression "native Canadians".

11 A. Well, I didn't have a precise definition, more of a concept.
12 That is, people who are born and brought up in this country
13 might be roughly what I had in mind.

14 Q. Okay. It appears as though at the time that this gentleman
15 was a Canadian citizen.

16 A. I learned that afterwards, yes.

17 Q. And when you were apparently pressed as to what you
18 meant about "giving a preference to native Canadians," I think
19 you made a remark similar to what you just did, that "things
20 being equal, persons living for some time in a country have
21 earned some kind of preferred position.

22 A. Yes.

23 Q. I guess Indians as native Canadians are in a very preferred
24 position.

25 A. Well, I didn't make a distinction between races in the country,

1 no.

2 Q Indians have been here longer than anybody else.

3 A. Well.

4 MR. CHAIRMAN

5 ...Natives Indians, are we?

6 MR. WILDSMITH

7 Q In any event, what I want to focus on is the last portion of
8 this article, it says generally you quoted:

9 I am concerned today on every occasion
10 that some person of minority race applies for a
11 position and is not accepted, then it's proper to
raise the complaint of discrimination.

12 A. Yes.

13 Q. My reading of this, and please correct me if I'm wrong, is that
14 you wrote this letter and were mistaken about the factual
15 basis behind it.

16 4:00 p.m.

17 A. No, no.

18 Q. In other words...

19 A. No, I wasn't.

20 Q. That Mr. Jain was a Canadian citizen and you didn't know it.

21 A. Mr. Jain... Was it Janos?

22 Q. J-a-i-n, in this article.

23 A. Yes. Mr. Jain was admittedly a naturalized Canadian, I think
24 recent naturalized, but that wasn't the point. His contention
25 was that he was discriminated against because he was of a

1 minority group in this country, if I remember rightly. And
2 my answer to him was that the employer might want in the
3 person employed certain skills or characteristics; i.e. might
4 want someone who got along well with people; (b) might
5 want someone who was good at managing; might want
6 someone who was good at, in terms of the library,
7 organization. There were a number of factors besides colour
8 or anything else. Colour would not enter into it, in my view,
9 or should not. But those other characteristics; that is, the
10 characteristics which recommended a person for the
11 particular position to be filled were, I think, an employer's
12 right and responsibility to select the person who best suited
13 those criteria. That was my basis...

14 Q. Sure, and you would expect that to be set out in a job
15 description.

16 A. Pardon?

17 Q. When they're advertising the position.

18 A. Well, I suppose, Mr. Janos or Jain, then when he didn't get it,
19 he complained to it and also, as many of those kind of people
20 did, they frequently wrote an open letter, which was Mrs.
21 McDonough's favourite avenue to get something to the public
22 and they would write their, send a copy to each Member of
23 the legislature.

24 Q. Is that why you wrote, by the way?

25 A. That's why I replied.

1 Q. Because it was to the Human Rights Commission. It wasn't to
2 you as an Attorney General.

3 A. It was me as a member, as a person, as a citizen.

4 Q. And you saw fit to respond to it.

5 A. Well, I got a little annoyed about accusing Acadia of racial
6 bias.

7 Q. Did you...

8 A. When there was nothing in the letter to indicate Acadia had
9 been.

10 Q., Would you acknowledge that sometimes those complaints are
11 justified?

12 A. Well, they had a hearing on it. It was found it wasn't
13 justified.

14 Q. Yeah.

15 A. All right.

16 Q. Your letter was before the hearing, was it?

17 MR. CHAIRMAN

18 I don't know how...

19 MR. WILDSMITH

20 All right, I'll leave that topic.

21 MR. CHAIRMAN

22 This is related in any way to your client's interests, Mr.
23 Wildsmith. I take it these are...

24 MR. WILDSMITH

25 Well, I think discrimination doesn't...

1 COMMISSIONER EVANS

2 I thought it favourable to your clients.

3 MR. WILDSMITH

4 Well, in one sense, it was.

5 MR. CHAIRMAN

6 All right.

7 MR. WILDSMITH

8 Except we didn't see the preference accorded in the court
9 worker or policing programs.

10 MR. CHAIRMAN

11 To complete the record, whoever this person was that
12 complained, it was dealt with by some commission?

13 HIS HONOUR CHIEF JUDGE HOW

14 Yes, by a judge.

15 MR. CHAIRMAN

16 The Human Rights Commission?

17 HIS HONOUR CHIEF JUDGE HOW

18 Yes.

19 MR. CHAIRMAN

20 And then the case was dismissed?

21 HIS HONOUR CHIEF JUDGE HOW

22 Yes.

23 MR. WILDSMITH

24 Speaking of...

25

1 COMMISSIONER EVANS

2 That's like quoting a dissenting judgement to support a
3 problem, a legal problem.

4 MR. WILDSMITH

5 No, I think part of the point is...

6 MR. CHAIRMAN

7 Anyway, can we move on?

8 MR. WILDSMITH

9 I've only got a couple of more points.

10 BY MR. WILDSMITH

11 Q. One is about judicial councils. I'm wondering if you ever
12 made a complaint to the Judicial Council?

13 A. I passed through the Judicial Council a complaint made to me,
14 I believe through the Attorney General against a judge in
15 Digby, yes.

16 MR. MACDONALD

17 My Lord, I think, again, we'd better be cautious about
18 identifying other people in other cases.

19 MR. WILDSMITH

20 Q. Certainly, and I'm not going to ask about particular cases. I
21 only wanted to know whether he had and whether it was in
22 his capacity as Attorney General or in his capacity as Chief
23 Judge.

24 A. Capacity of Chief Judge.

25 Q. And say that this was a case that was referred to you by the

1 Attorney General?

2 A. I think the complaint came to the Attorney General, yes, and
3 was passed to me for my consideration and either action or
4 recommendation.

5 Q. And you referred it on to the Judicial Council.

6 A. I took the action.

7 Q. And it's fair to say, is it, that one of the responsibilities of a
8 Chief Judge is to bring matters involving his court members to
9 the attention of the Judicial Council?

10 A. Well, it doesn't have to go directly to them, but he has to deal
11 with complaints about the court, the functioning of the court,
12 yes, and the individuals in the court.

13 COMMISSIONER EVANS

14 Anybody can make a complaint, can they not?

15 HIS HONOUR CHIEF JUDGE HOW

16 Yes.

17 MR. WILDSMITH

18 Certainly.

19 COMMISSIONER EVANS

20 And then it goes to the Judicial Council and they deal with it.
21 If it's made to the Chief Judge, then he passes it on to the Judicial
22 Council. If it's made to the Attorney General, he passes it on to
23 the Judicial Council and they deal with it.

24 MR. WILDSMITH

25 Well, I'd like his advice on one point.

1 BY MR. WILDSMITH

2 Q. And it's this, whether if you have knowledge of something in
3 the absence of a complaint that appears to be judicial
4 misconduct, do you feel that it's part of your responsibility as
5 Chief Judge to refer it yourself, based on your knowledge,
6 without complaint to the Judicial Council?

7 A. Well, it's my responsibility to deal with it and that might
8 include what you suggest.

9 Q. Okay. And one last item dealing with juries. What I wanted
10 to ask you is based on your experience, some 19 years as a
11 practicing lawyer in criminal courts, as well as Attorney
12 General, and I'm wondering if you would have considered it
13 advisable if you were defending a white man charged with
14 killing an Indian, whether you would think it advisable to try
15 to keep Indians off the jury, putting on your defence hat?

16 A. I really don't think so. Our jury selection system is somewhat
17 difficult in the sense that you don't have the latitude to
18 examine the applicants, if you will.

19 Q. But you, as a defence attorney, have...

20 A. No, I...

21 Q. Peremptory challenges?

22 A. Pardon?

23 Q. You have peremptory challenges?

24 A. Yes, but I said earlier, and I repeat now, I think the jury
25 system evokes a chemistry in people who serve on it of

1 dedication to rendering a just verdict. I believe that very
2 firmly.

3 Q. So does that mean you don't exercise peremptory challenges?

4 A. I...Of course you do, but not on the basis of race, I'm saying.

5 Q. I see, so you wouldn't have a concern about...

6 A. I might not like the look of the person, I might know
7 something about their background, but I'm not, I'm not
8 agreeing that I would look at the colour of their complexion.

9 Q. So what you're saying is it would not be advisable as a
10 defence counsel to keep an Indian...

11 A. I can't think so. I wouldn't do so.

12 Q. Okay.

13 A. And I wouldn't recommend anybody else do so.

14 Q. Let me move on to a different point about the jury system
15 then. And I guess this would be Exhibit now 147. It's an
16 article that will be put in front of you. Exhibit 147 is an
17 article by Parker Donham on jury selection.

18 A. Yes.

19 Q. Of course we don't know anything about the truth of this
20 article, but I only want to put a couple of propositions that
21 flow from it to you.

22 MR. SAUNDERS

23 Well, before my friend does that, we've had a lot of
24 introduction of news clippings over the last couple of days, My
25 Lords, and I have difficulty with this one. My friend has just said

1 that we have no idea about the truthfulness of the commentaries
2 or the facts so-called cited in the report. Is my friend intending to
3 put all of this article before the witness and ask for his comments,
4 or portions thereof, or to test this witness's experience as a former
5 defence counsel over some 19 years with respect to what Mr.
6 Donham asserts as being so? Or is my friend putting these
7 propositions to this witness as a present judge, to which I would
8 take exception, because I don't think it's proper for any judge to
9 be before Your Lordships expressing opinions on matters like this.
10 So I have all of those concerns and I'd like my friend to be very
11 specific in what he intends to do with this thing before it's, indeed,
12 introduced as an exhibit.

13 COMMISSIONER POITRAS

14 Well, my question is, do we need the article for the
15 question?

16 COMMISSIONER EVANS

17 I'd like to ask, don't you have a Juror's Act in Nova Scotia?

18 MR. SAUNDERS

19 Yes, we do, My Lord.

20 COMMISSIONER EVANS

21 Isn't it the same in every county?

22 MR. SAUNDERS

23 Oh, absolutely. We can have a copy of that made and
24 introduced tomorrow, if it's of any use to you.

25

1 COMMISSIONER EVANS

2 And there's a certain procedure that goes through.

3 MR. SAUNDERS

4 Exactly.

5 COMMISSIONER EVANS

6 Put all the names in like you do in a bingo game and you
7 pull them out.

8 MR. SAUNDERS

9 That's right and the function of the Prothonotary as to what
10 happens in the determination of names from the polling lists is set
11 out in the civil procedure rules and we can introduce that as an
12 exhibit as well.

13 COMMISSIONER EVANS

14 So it's the luck of the draw.

15 MR. SAUNDERS

16 Yes.

17 COMMISSIONER EVANS

18 I'm not sure what the...

19 MR. WILDSMITH

20 I want to ask him on the assumption that the information in
21 here is correct, but in answer to your...

22 COMMISSIONER EVANS

23 That's an assumption I don't think anybody should make. If
24 you're going to pick out something...If it agrees with what's in the
25 Juror's Act, then, that's fine. But if it's some, just some...

1 MR. WILDSMITH

2 It's really talking about how the Juror's Act operates in
3 practice.

4 MR. CHAIRMAN

5 But don't we know?

6 MR. WILDSMITH

7 Well, this came as a revelation to me.

8 MR. CHAIRMAN

9 What?

10 MR. WILDSMITH

11 What's in here.

12 COMMISSIONER EVANS

13 Well, that may be because it's inaccurate.

14 MR. WILDSMITH

15 Perhaps so.

16 COMMISSIONER POITRAS

17 Well, can you not ask the question without the benefit of the
18 article?

19 MR. CHAIRMAN

20 Look, Nova Scotia has a Juror's Act. That's the law. That's
21 the way the juries have to be selected.

22 MR. WILDSMITH

23 Indeed. I simply want to draw attention to one effect or
24 impact that it may well have and seek his opinion as former
25 Attorney General on it.

1 MR. CHAIRMAN

2 Just so I won't be accused of being biased or anything, but if
3 somebody from Newfoundland comes over to Canada and gets
4 himself into trouble and is going to be tried in North Sydney,
5 there may not be one former Newfoundlander drawn to serve on
6 that jury. Are you going to suggest that that person is going to be
7 discriminated against? They may think they are, but the Juror's
8 Act is there.

9 MR. WILD SMITH

10 If Your Lordship's point is that Indians are in no different
11 position in terms of discrimination than anybody else, then if you
12 were in Newfoundland, then I would...

13 MR. CHAIRMAN

14 What I'm saying is that you have a Jury Act, as I understand
15 it, in Nova Scotia. And that Jury Act, obviously the mix of the
16 people you get out of the jury lists depends on the make of the
17 population in the area in that particular county, isn't it?

18 MR. WILD SMITH

19 Yes.

20 MR. CHAIRMAN

21 I would suspect that if you try to bring people in from other
22 counties, you will be overwhelmed with protestations that people
23 are not being tried by a jury of their peers. So...

24 MR. WILD SMITH

25 The thrust of what this article is suggesting is that even

1 under our existing Juror's Act that you don't get a proportionate
2 representation of Indians on the juror's list, for whatever reason.

3 COMMISSIONER EVANS

4 Well, that could well be. What do you want, it weighted in
5 favour of minority groups?

6 MR. WILDSMITH

7 No. Well, I'm not advocating that at the moment but I'm
8 saying as a minimal proposition, the juror's list should be
9 representative of the make-up of the population from which it is
10 selected. If it's not working out that way, there must be
11 something wrong.

12 COMMISSIONER EVANS

13 I don't think that follows because if it is made up the same
14 and the people who are eligible for jury duty, if their names are
15 put in that box, and the selectors do that, if there's something
16 wrong with the method of selection, then there may be some
17 cause of action against those selectors. But assuming that they
18 follow out their instructions properly, all the names go into a box.
19 Then they are cut down again by selectors and finally you will get
20 a bingo game going and you pull them up as court. I'm having
21 trouble...

22 MR. WILDSMITH

23 If it was a true and random process, you would expect the
24 proportion of Indians on the master list to be the same as the
25 representation amongst the electorate.

1 MR. CHAIRMAN

2 You know, Mr. Wildsmith, we're having a great deal of work
3 done by very knowledgeable people...

4 MR. WILDSMITH

5 Okay, well, I'll leave this one then.

6 MR. CHAIRMAN

7 Into these areas, but I don't want to leave it there. And we
8 will get that information. If it turns out, for instance, that in the
9 compilation of jury lists, forget the drawing of the jury, the first
10 thing is that someone, I presume, goes from door to door in the
11 county and takes down the name of every person over 19 years of
12 age, and under 65, I think, that's the general provision in the Jury
13 Act. And they are eligible for jury duty, unless they're...

14 VOICE

15 Not the electoral lists, voters' list.

16 MR. CHAIRMAN

17 Voters' list, is it? All right, the voters' list, and they all go in
18 there. Now if that isn't the most satisfactory method of selecting a
19 jury list as it relates to native persons, then the people who are
20 doing the work for us will certainly spot it and bring it to our
21 attention.

22 MR. WILDSMITH

23 Thank you. I'll wait for that report then.

24 MR. CHAIRMAN

25 Mr. Saunders?

1 MR. SAUNDERS

2 My Lords, I'm satisfied that all issues have been
3 exhaustively covered and we have no questions for Judge How.

4 MR. CHAIRMAN

5 Speaking of exhaustion, we certainly are. Thank you very
6 much, Chief Judge How.

7 HIS HONOUR CHIEF JUDGE HOW

8 Thank you, My Lord.

9 MR. CHAIRMAN

10 We'll adjourn until tomorrow.

11 4:20 p.m. INQUIRY ADJOURNED UNTIL MARCH 24TH AT 9:30 A.M.

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REPORTER'S CERTIFICATE

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



Margaret E. Graham

DATED THIS 23day of March 1988 at Dartmouth, Nova Scotia