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#18

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

**Volume 63**

Held: May 16, 1988, in the World Trade and Convention  
Center, Halifax, Nova Scotia

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

Counsel: Messrs. George MacDonald, Q.C., Wylie Spicer, and David  
Orsborn: Commission counsel

Mr. Clayton Ruby, Ms. Marlys Edwardh, and Ms. A. Derrick:  
Counsel for Donald Marshall, Jr.

Mr. Ronald N. Pugsley, Q.C.: Counsel for Mr. John F. MacIntyre

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

Messrs. Frank L. Elman, Q.C., and David G. Barrett: Counsel for  
Donald MacNeil estate

Messrs. Jamie W.S. Saunders and Darrel I. Pink: Counsel for the  
Attorney General of Nova Scotia

Mr. James D. Bissell & Mr. A. Pringle: Counsel for the R.C.M.P.  
and Counsel for the Correctional Services of Canada

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

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

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

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

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

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

Court Reporting: Margaret E. Graham, OCR, RPR

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May 16, 1988 - 9:35 a.m.

1 MR. CHAIRMAN

2 Good morning. Well, this appears to be somewhat  
3 satisfactory. Are we ready to proceed? We are anyway, if  
4 counsel are ready.

5 MR. MacDONALD

6 My Lord, there's just one minor thing before we  
7 start...resume the evidence of Mr. Herschorn. Mr. Pugsley wanted  
8 to make an application today to have Your Lordships require a  
9 subpoena to be issued to certain witness, specifically Michael  
10 Harris and Heather Matheson. Mr. Murrant, Robert Murrant, is  
11 here, and he represents both of those journalists and Mr. Murrant  
12 has been unable to get full instructions, as yet, from Mr. Harris  
13 and has requested that this application be delayed for several  
14 days. I've spoken to him and Mr. Pugsley and it would be  
15 convenient for everyone if Your Lordships agree to have that  
16 application heard Thursday afternoon at two o'clock.

17 MR. PUGSLEY

18 That's satisfactory, My Lord.

19 MR. CHAIRMAN

20 All right, we'll set it for two o'clock on Thursday.

21 MR. MacDONALD

22 Thank-you.

23 MR. MARTIN HERSCHORN, duly called and previously sworn:

24 EXAMINATION BY MR. SPICER

25 Q. Mr. Herschorn, before we get back in the chronology of the

1 Marshall matter, is there any particular, any particular way in  
2 which a prosecutor comes to deal with a case? In other  
3 words, is there any decision making by the police officer or  
4 by anybody else as to who gets to deal with any particular  
5 matter when it first comes to them?

6 A. Primarily that decision is for the prosecuting officers for each  
7 county.

8 Q. And that would be the senior member in the prosecuting  
9 office in each county?

10 A. That's correct. In some counties we have more than one staff  
11 member. There is...there are a number of counties where we  
12 only have one prosecuting officer. We do have some part-  
13 time assistants in those latter counties, but...

14 Q. Are there any situations where the Attorney General's office  
15 in Halifax is involved in the assignment of a prosecutor to any  
16 particular case?

17 A. There could be.

18 Q. Could you tell me what sorts of situations those would be?

19 Okay, my question was whether or not you could give us any  
20 examples of those sort of situations?

21 A. There may have been a matter which was...where the request  
22 to the police for an investigation came through the  
23 Department or a matter which was brought by the police to  
24 the department, as opposed to a prosecutor in the first  
25 instance, and in that...in those types of cases my office may be



1 involved in speaking with a prosecutor and having that case  
2 assigned to that prosecutor.

3 [Interruption re trouble hearing evidence.]

4 Q. What sort of situations are there where the police would  
5 bring a matter directly to the Department as opposed to a  
6 prosecutor?

7 A. It's difficult to respond to that in general. There may  
8 be...police may have originally received their information  
9 from the Department. The matter may have been referred by  
10 a complainant. I think I touched on last time the fact that  
11 some people make their complaint to the Attorney General or  
12 his office in the first instance, and that through that route  
13 there may be involvement.

14 Q. Other than those circumstances, are there any rules of thumb  
15 that would guide a police officer as to when a situation should  
16 go to the Attorney General's Department in Halifax as opposed  
17 to a prosecutor?

18 A. No, the normal situation is the dealings between the police  
19 and the prosecuting officer or his assistants in a county.

20 Q. Are there any situations where prosecutors have been  
21 removed from cases by the Attorney General's office?

22 A. None that come to mind, none that I can think of.

23 Q. None in your experience.

24 A. I can't be categoric. There may have been some but none  
25 immediately pop into mind.

1 Q. Do I take it that the complexity of the case doesn't make any  
2 difference in terms of whether or not it goes to the Attorney  
3 General's office in Halifax or to a particular, or just the  
4 prosecutor in the County?

5 A. No. Not generally speaking, no.

6 Q. I am correct in that then.

7 A. Now, there may be...I say generally speaking. There may be  
8 exceptions where a matters involves a complex commercial  
9 crime matter emanating from a county other than Halifax  
10 where we have developed some expertise in prosecuting  
11 commercial crime matters, moreso than in other counties, and  
12 there may be a request for that matter to be referred to the  
13 prosecutor with more expertise in that type of work.

14 Q. From whom would that request come if that were the case?

15 A. From the prosecuting officer for the county.

16 Q. But the direction wouldn't come from the Attorney General's  
17 Department.

18 A. Not normally, no.

19 Q. Do you have Volume 31?

20 A. Yes.

21 Q. We'll go back to the specifics of the Marshall matter at this  
22 point. When we broke off we were making our way through  
23 1982, and if I could just draw your attention to page 77 of  
24 that volume. Is that...are those your notes?

25 A. Yes, they are.

1 Q. And could you tell us what they reflect?

2 A. Well, I'd have to read through them, Mr. Spicer...

3 Q. Sure.

4 A. ...to tell you what the reflect.

5 Q. Perhaps you could read through them out loud because I have  
6 some trouble reading your writing.

7 A. Okay. I apologize for that.

8 Q. That's okay.

9 A. "July 9th, Frank Edwards," to the immediate left of the July  
10 9th reference, "Let down."

11 Q. Would that be a tel...sorry to interrupt, would that be a  
12 telephone conversation?

13 A. I would take this to be a telephone conversation with Mr.  
14 Edwards.

15 Q. Okay.

16 A. "Let down, MacKeigan - cautious in his approach. Aronson,  
17 clerk, and Frank. One return July 29th for Aronson and Frank  
18 Edwards." FE standing for Frank Edwards, "To file affidavits  
19 from proposed witnesses as to what their evidence would.  
20 MacKeigan surprised re Frank's suggesting that police  
21 witnesses be called. Put the thing in perspective."

22 Q. If I could just stop you there for a second. "Put the thing in  
23 perspective." Can you...do you have any recollection as to  
24 whose comment that was?

25 A. I would think it would be Mr. Edwards but I can't...I can't be

1       sure.

2       Q. You can't say whether it was him or him commenting on  
3       somebody's else's comment.

4       A. Oh, I can't comment on that.

5       Q. Okay.

6       A. "Frank to meet with MacIntyre Monday, July 12th, to indicate  
7       he is to complete an affidavit," although it says "affidavits."  
8       "Aronson's affidavits in Frank's hands by Wednesday. Date to  
9       be set July 29th. In future, in September or October, before  
10      full bench re what witnesses would be called. Time frame -  
11      nothing in August. Then assuming they will hear viva voce,"  
12      the v's would I think stand for viva voce evidence, "A  
13      November date then final argument later." Over the page,  
14      "July 29th, to apply for release pending appeal. MacKeigan  
15      also indicated that on July 29th brief outlines what is  
16      indicated to be done by each side. Frank to respond to this. "  
17      And finally, "Wednesday, July 14th, Aronson came down to  
18      take the affidavits accompanied by RCMP." Do you wish me to  
19      go on?

20      Q. Yes.

21      A. Page 79, "One", the first word is "destruction," it's probably  
22      "in" the second word although it's not very clear, "1979 of all  
23      files."

24      Q. If I could just stop you there for a second. Is that continuing  
25      on with your notes of your telephone conversation or is that...

MR. HERSCHORN, EXAM. BY MR. SPICER

1 A. I don't believe so.

2 Q. No. No.

3 A. I have no recollection of the continuity of these three pages.

4 Q. Do you have any idea what the date of this third one is?

5 A. No, I do not.

6 Q. Okay.

7 A. Beyond I believe we're talking 1982 here, I can't be specific  
8 as to month or day.

9 Q. Okay.

10 A. "Two."

11 COMMISSIONER EVANS

12 What was that meaning? Oh, sorry.

13 MR. SPICER

14 Destruction.

15 MR. HERSCHORN

16 I believe it to be destruction.

17 COMMISSIONER EVANS

18 Or reconstruction.

19 MR. HERSCHORN

20 I believe "destruction," My Lord. I believe that is a  
21 reference, although I can't be categorical about this as to whether  
22 number one relates to the following, but I believe it to be a  
23 reference to the fact that the bulk of the Department's files  
24 concerning Donald Marshall, the original Donald Marshall matter,  
25 were destroyed in 1979 in accordance with our retention schedule

MR. HERSCHORN, EXAM. BY MR. SPICER

1 at the time. Two...

2 MR. CHAIRMAN

3 What is your retention schedule?

4 MR. HERSCHORN

5 I would have to refer to it, My Lord. It has undergone some  
6 changes in recent years. I believe, my best recollection of the  
7 current retention schedule for general criminal files is a total  
8 document life of twenty-five years currently. That is...that  
9 obviously was not the case in 19...well, in 1981, or '82.

10 MR. SPICER

11 Q. And there is some evidence in some of the later volumes  
12 which deals with the status of that matter at the time. Sorry,  
13 number 2.

14 A. We do, I should point out to My Lords we do have a retention  
15 schedule in place for all departmental files. Number 2, "We  
16 can't..."

17 MR. CHAIRMAN

18 "Say".

19 MR. HERSCHORN

20 A. "Say." Thank-you, My Lord. "...what took place then. Number  
21 3..."

22 Q. Do you know what number 2 means?

23 A. I have difficulty with that, Mr. Spicer, because I can't recall  
24 the context of these notes, when they were made, in context,  
25 and it's difficult. I believe it to be some reference to 1971

1 events, but beyond that I can't be more specific. "Number 3,  
2 we have been able to get a copy pursuant to the call..." I'm not  
3 even sure if that's pursuant, my writing is atrocious. It may  
4 be pursuant, "...to their call in by Sydney City Police," final  
5 words are "Contents of report," and I believe that number 3 to  
6 be some sort of reference to the ability...through the RCMP  
7 filing system we were able to obtain some of the 1971  
8 material. "Number 4, report confirms conversation," or  
9 "Report confirms," perhaps, "Conviction of Marshall." It's an  
10 abbreviation in the middle. I would think it would mean  
11 conviction. "5. Any evidence relevant to the matter ought to  
12 be disclosed to the defence." And, "6. We don't view  
13 ourselves in an adversarial relationship with Donald  
14 Marshall."

15 Q. With respect to 5, "Any evidence relevant to the matter," that  
16 would be the reference matter.

17 A. I believe this...the general context here to be a discussion  
18 perhaps with Mr. Edwards or perhaps after a telephone  
19 conversation with Mr. Edwards, my roughing out some notes,  
20 and I would take that to be a reference to the reference.

21 Q. Did you have any involvement in decisions as to what  
22 material was to be disclosed to Steve Aronson?

23 A. No.

24 Q. Did you have any view as to whether or not, for instance, the  
25 RCMP report ought to have been thought to be disclosed to

1 Mr. Aronson?

2 A. No, it was not a matter that I...an aspect of the matter that I  
3 was dealing with.

4 Q. I believe the material indicate that, at least insofar as direct  
5 involvement is concerned, from July until December or so of  
6 1982 there's really not much reference to yourself.

7 A. I believe that's the case.

8 Q. Can you tell me what, if any, involvement you...continuing  
9 involvement you had with the Marshall matter during  
10 summer and on into the fall?

11 A. I have no recollection of any specific involvement during that  
12 time frame.

13 Q. Did you have any specific responsibilities at all at that time  
14 with respect to Marshall?

15 A. Not that I recall.

16 Q. If I could just now then ask you to turn to Volume 17, page  
17 15. These are Mr. Edwards notes, and you'll see at the bottom  
18 of page 15 on December 6th, '82, "Re telephone conference,  
19 Martin Herschorn, Donald Marshall." Do you have any  
20 recollection of that phone call, speaking with...

21 A. You're talking at the bottom of page 15.

22 Q. Yes.

23 A. Of the Volume...

24 Q. December 6th, '82. Perhaps you'd just want to take a second  
25 and...



MR. HERSCHORN, EXAM. BY MR. SPICER

1 A. Perhaps I can just read it.

2 Q. Yeah.

3 A. Yes. Your question was?

4 Q. My question, my initial question was whether or not you have  
5 any recollection now of that telephone conversation?

6 A. Not beyond these notes, no.

7 Q. On page 16 in the third paragraph.

8 A. I should...to be more accurate I recall a telephone  
9 conversation as to the contents, this would be the only way I  
10 could refresh my memory as to what those contents were.

11 Q. Okay. The third paragraph on page 16, the bottom line was,  
12 "That police had come through in best possible light and  
13 calling them would not have improved their position." Did  
14 you have any concern about the way in which the police were  
15 going to come through in terms of how they fared at the  
16 reference?

17 A. No.

18 9:52 a.m.

19 Q. Did you have any view as to whether or not the police  
20 evidence ought to have been called at the reference?

21 A. It wasn't a matter that I was in charge of or responsible for so  
22 I never formulated a view.

23 Q. Did you have any discussions with Mr. Edwards about it?

24 A. I may have.

25 Q. Did you express a view to him about it?

MR. HERSCHORN, EXAM. BY MR. SPICER

1 A. I have no recollection of doing so.

2 Q. Would you have any idea why Mr. Edwards would have called  
3 you on this particular matter in December of '82?

4 A. No, not, nothing in particular beyond the fact that he, I was  
5 his immediate superior and I think it, as it started off he had  
6 phoned me on an unrelated matter back on the 6th.

7 Q. All right.

8 A. The previous page.

9 Q. As his superior you wouldn't have had any involvement or  
10 any discussions with him as to the manner in which he was  
11 going to be presenting the case on behalf of the Crown?

12 A. No. Not at this point. There were some subsequent  
13 discussions.

14 Q. So up until this point in time, that is in December of '82, had  
15 you had any discussions at all with Mr. Edwards as to the  
16 manner in which the Crown was to proceed in terms of  
17 presenting its case?

18 A. I may have but I have no specific recollection of it. Mr.  
19 Edwards, as I indicated earlier, had the primary carriage, had  
20 the carriage of the case.

21 Q. If I can now ask you to go back to Volume 31 and turn to  
22 page 126. Do you recognize that letter?

23 A. Yes, I do.

24 Q. And perhaps we could look at that letter and beside it if you  
25 could have Volume 17 at page 18 there's notes of a meeting

MR. HERSCHORN, EXAM. BY MR. SPICER

1 of January the 25th.

2 A. Yes.

3 Q. Was this meeting consequent or subse-, sorry, consequent  
4 upon this letter from Mr. Edwards to yourself?

5 A. You'll have to pardon me while I read the letter.

6 Q. Sure.

7 A. And your question was whether the meeting held on the 25th  
8 bore any relationship to this letter?

9 Q. Yes.

10 A. Yes, I believe, I, my best recollection would be that on  
11 learning of the ultimate disposition, ultimate relief which Mr.  
12 Edwards intended to take before the Appeal Decision on the  
13 reference, that a meeting was arranged in Halifax on the 25th  
14 of January '83.

15 Q. Let me just ask you about the ultimate disposition. On the  
16 second page of the letter, on page 127 in the second last  
17 paragraph which Mr. Edwards says, "In view of the foregoing,  
18 a submission of the undersigned to the court will be that  
19 Donald Marshall, Jr. should be acquitted." Was that the  
20 position that was reflected in these notes Mr. Coles had some  
21 difficulty with?

22 A. I believe so, yes.

23 Q. What was your view as to whether or not Mr. Edwards should  
24 be urging acquittal upon the court?

25 A. I tried to see both sides of the dispute which I would

MR. HERSCHORN, EXAM. BY MR. SPICER

1 characterize as a dispute between two lawyers as to a position  
2 to be taken before the court on appeal. On the one side Mr.  
3 Edwards, as his letter indicates, took the position that, as I  
4 understand it, that as he didn't feel there was sufficient  
5 evidence now available to establish the guilt of Donald  
6 Marshall beyond a reasonable doubt, he would be urging an  
7 acquittal of the court, whereas the other view expressed by  
8 Mr. Coles was to the effect that the role of the prosecutor is  
9 not one to secure a conviction or, in this case, an acquittal, but  
10 to put all relevant evidence before the court and to have the  
11 court make the determination. And in this case it was so  
12 important to have an independent tribunal, in this case the  
13 Court of Appeal, Appeal Division of the Supreme Court of  
14 Nova Scotia, reach a decision on its own as to the guilt or  
15 innocence of Mr. Marshall.

16 Q Mr. Edwards had been, or do you know whether or not Mr.  
17 Edwards had been taking the position that Donald Marshall  
18 ought to have been acquitted for some period of time. In  
19 other words, in fact since the spring of 1982.

20 A. I can't say I recall that.

21 Q. If I can just, in Volume 31, if you could have a look at page  
22 22...

23 A. Excuse me, what page?

24 Q. 22. And that's a memo to Mr. Gale from Mr. Edwards. Did  
25 you have occasion to see that memo at the time?

MR. HERSCHORN, EXAM. BY MR. SPICER

1 A. I can't state definitively whether I did or I didn't. I believe I  
2 would have.

3 Q. All right. If I can just draw your attention, then, to page 3 of  
4 that memo and the section dealing with recommendations.

5 Mr. Edwards is saying,

6  
7 If the Minister of Justice agrees then I submit  
8 that the most desirable result of the reference  
9 would be a direction by the Appeal Division that  
a verdict of acquittal be entered on the basis  
that there had been a miscarriage of justice.

10 Are you aware that Mr. Edwards was of that view in April of  
11 1982?

12 A. I may have been.

13 Q. And if he was of that view in April of 1982 why was it that  
14 the matter seems to become an issue in January of 1983?

15 A. If I understand the chronology it was at about that time that  
16 Mr. Edwards was at the point in his carriage of the reference  
17 of making his final submission to the Court of Appeal and I  
18 think that's the answer to your question.

19 Q. And other than that there was no intervening event in the  
20 sense that there was nobody who had spoken to you or  
21 spoken to anybody else in the AG's Department, to your  
22 knowledge, saying, "Look, this is what Mr. Edwards is doing  
23 and we don't think he ought to be doing it."

24 A. Not to my knowledge.

25 Q. If I could take you back now to page 126, back to January of

MR. HERSCHORN, EXAM. BY MR. SPICER

1 '83, I just want to ask you a couple of questions about items  
2 (a) and (b) referred to there by Mr. Edwards. And he says,

3  
4 Among the points which should be emphasized  
5 before the Court are the following: (a) the  
6 appellant must bear considerable responsibility  
7 for the predicament in which he finds himself.

8 Was it your view that that submission should be made to the  
9 Court?

10 A. I did not formulate a view on that issue. The matter was  
11 being dealt with by Mr. Edwards.

12 Q.

13 Had he told either the police or his lawyers in  
14 1971 that he and Seale were attempting a  
15 robbery the subsequent investigation and/or  
16 defence would have taken different directions.

17 Did you have any discussions with Mr. Edwards as to whether  
18 or not that might, in fact, have been the case?

19 A. I may have.

20 Q. Did you express a view to him as to whether or not the  
21 subsequent investigation might have taken a different  
22 direction?

23 A. I think it was a view shared by most people who dealt with  
24 the style in the Department, that this was an aspect or factor  
25 in the case. That had there been more candor and more  
truthfulness in the giving of evidence in 1971 that the  
situation might have been different.

Q. With respect to Mr. Marshall's guilt or innocence on the

MR. HERSCHORN, EXAM. BY MR. SPICER

1 murder charge, what relevance did it have?

2 A. I understand the thrust of the point is that had there been  
3 more candor that the police may have pursued other lines of  
4 investigation.

5 Q. Is that in answer to my question as to what relevance it had  
6 to Mr. Marshall's guilt or innocence?

7 A. I guess perhaps more so to his having been found guilty in  
8 1971.

9 Q. Did you understand it from...

10 COMMISSIONER EVANS

11 Mr. Herschorn, Marshall was charged with murder. What  
12 possible relevance would the possible attempted robbery have?

13 A. If there was a robbery attempt ongoing, a close proximity in  
14 time to the murder of Sandy Seale, it may have led the police  
15 to other suspects and to consider other possible suspects in  
16 their investigation.

17 Q. The last sentence of item (a) says...

18 COMMISSIONER EVANS

19 Is the presumption of innocence still in effect? Why would he  
20 be expected to reveal an attempted robbery?

21 A. I appreciate the realities of the legal position of an accused  
22 and the realities of it but I'm making the observation with the  
23 benefit of hindsight, that had there been more candor with  
24 respect to the giving of evidence in 1971, or the giving of  
25 statements, then the entire situation may have unfolded, may

MR. HERSCHORN, EXAM. BY MR. SPICER

1 have, I'm, it's speculation, My Lord.

MR. SPICER

2  
3 Q. Did you think that it was relevant as Mr. Edwards' superior  
4 for the issue of the attempted robbery to be put before the  
5 Appeal Court?

6 A. Again, I didn't formulate a view on that. Mr. Edwards had the  
7 carriage of the case and I and the Department, with one  
8 exception which you're going to get to, left the carriage of the  
9 matter to him.

10 Q. But he is writing to you on January the 18th as a superior and  
11 saying, "These are the points which should be emphasized  
12 before the Court." Now did you have a view as to whether or  
13 not he was right or wrong about that?

14 A. I accepted his view as being appropriate given his experience  
15 with the file.

16 Q. Did you then accept his view that the question of Marshall's  
17 being involved in an attempted robbery had some relevance  
18 to whether or not he was, whether or not he should be found  
19 innocent of the murder?

20 A. Mr. Edwards was expressing himself as that aspect having  
21 some relevance.

22 Q. And I'm asking you whether or not you thought it did.

23 A. Well, again, I was not involved in the day-to-day carriage of  
24 this case so my opinion, if I had formed one, you know, would  
25 not have been of any great consequence at that point.



MR. HERSCHORN, EXAM. BY MR. SPICER

1 Q. Were you then accepting his opinion as the person in charge  
2 of the case when he wrote you on January the 18th?

3 A. Yes.

4 Q. If you had disagreed with his opinion would you have  
5 intervened?

6 A. Yes.

7 Q. In item (b), "The police investigators in 1971 bona fide  
8 believed they had the guilty party in the person o Donald  
9 Marshall, Jr." Did you have any view as to whether or not  
10 that was the case?

11 A. That was the view that Mr. Edwards was expressing here. I  
12 had no reason to take a different view. He had much more  
13 exposure to the evidence and to the police reports but there  
14 was nothing to the, that came to my attention which indicated  
15 a lack of bona fides on the part of the investigating officers.

16 Q. And, again, were you satisfied that that was an issue, that is  
17 the bona fides of the police, that should have been put before  
18 the Appeal Court on the reference?

19 A. If Mr. Edwards was suggesting that it was then I had no  
20 reason to question his opinion.

21 Q. Do you have any view as to whether or not the bona fides of  
22 the police actions in 1971 had anything at all to do with  
23 whether or not Mr. Marshall was innocent of guilty?

24 A. I'm not sure the two aspects are, I fail to see the connection  
25 between the two.

MR. HERSCHORN, EXAM. BY MR. SPICER

- 1 Q. That's why I'm asking the question. I'm just wondering if you  
2 can help me a little bit with why this question of the bona  
3 fides of the police was a matter that was properly laid before  
4 the Appeal Court on the reference.
- 5 A. Well again, I would have to defer to Mr. Edwards. He, this is  
6 his letter, he wrote it to me and I think the question is better  
7 placed to him.
- 8 Q. Well it was written to you and I'm only asking you whether  
9 or not you agree or disagree that that issue was an issue that  
10 was properly before the Appeal Court.
- 11 A. Mr. Edwards took that position and I had no reason to  
12 question him on it.
- 13 Q. As a result of this letter you had a meeting on the 25th of  
14 January of '83 which is reflected in Mr. Edwards' notes in  
15 Volume 17 at page 18.
- 16 A. Yes.
- 17 Q. Prior to this meeting which, if Mr. Edwards' notes are correct,  
18 was attended by Mr. Coles, Mr. Gale, yourself and Mr.  
19 Edwards...
- 20 A. Yes.
- 21 Q. Is that your recollection?
- 22 A. It is.
- 23 Q. Did you have any discussions prior to that meeting with Mr.  
24 Coles or Mr. Gale concerning what was to be discussed?
- 25 A. I may have, I have no precise recollection of any such

MR. HERSCHORN, EXAM. BY MR. SPICER

1 discussions but it's possible.

2 Q. How long did the meeting, no sorry. You indicated to me  
3 earlier that with respect to the disposition issue, that is  
4 whether or not Mr. Edwards ought to take a view on that, that  
5 you were trying to see both sides of...

6 A. You mean as to recommending an acquittal.

7 Q. Recommending, yes, the disposition. In the fourth paragraph  
8 that begins with a dash in connection with the January  
9 meeting there's a note, "Coles said that there was not time for  
10 him to take me off the case but if there were he would do so  
11 because he was not comfortable with my position." Can you  
12 explain to us in what sense Mr. Coles was expressing the fact  
13 that he was uncomfortable? Why was he uncomfortable  
14 with...

15 A. I can't answer that question, Mr. Spicer.

16 Q. What did he say?

17 A. I have no recollection of the meeting beyond the notes here.  
18 I have no reason to doubt the accuracy of the notes.

19 Q. Up until that point in time, that is the meeting of January  
20 25th, had you had any discussions with Mr. Edwards  
21 concerning the way in which he was going to handle this  
22 case?

23 A. I may have.

24 Q. Do you have any recollection of any specific ones?

25 A. No, the only recollection I have is with respect to the issue

MR. HERSCHORN, EXAM. BY MR. SPICER

1 we're now, the meeting of the 25th of January '83. But I have  
2 no specific recollection beyond that.

3 Q. As Mr. Edwards' superior what was your view as to whether  
4 or not Mr. Edwards was entitled to go to the Court and say, "I  
5 urge acquittal."

6 A. Mr. Edwards is and was an agent of the Attorney General. He  
7 functions under the Prosecuting Officers Act which is before,  
8 which Your Lordships obtained through an admission when I  
9 gave evidence earlier. And the final section of that statute  
10 talks in terms of the prosecuting officers receiving  
11 instructions and following instructions issued by the Attorney  
12 General. And as I alluded to earlier this morning there was a  
13 difference of opinion, legal opinion, as to the position which  
14 the Crown ought to take on the reference and that was being  
15 aired at this meeting.

16 Q. And my question was, what was your view.

17 A. I think my view accorded more so with Mr. Coles than with  
18 Mr. Edwards on this particular point.

19 Q. Can you articulate for us why that would have been the case?  
20 Why would you have felt that way?

21 A. Because the case was of such import that I felt it, I would  
22 have, my feelings would have been that the Crown should  
23 ultimately leave it to the Court to make its own judgement. I  
24 think it would be more important from the point of view of  
25 the accused person, Mr. Marshall, that an independent

1 tribunal, in this case the Appeal Division, assess and weigh  
2 the evidence that was before the Court and reach its own  
3 conclusion without having both counsel, both adversaries  
4 before the Court leading the Court in a particular direction. I  
5 think it might have, I view it to be in the best interest of  
6 justice that that be the approach. As it turns out it was not  
7 the approach taken. Mr. Edwards adopted the point of, the  
8 view that he expressed in the earlier letter of the 18th.

9 Q. Was Mr. Edwards given any directions by yourself or, to your  
10 recollection, by anybody else at that meeting as to the two  
11 items referred to in his letter of January 18th? That is,  
12 indicating that Donald Marshall must bear considerable  
13 responsibility and, secondly, the bona fides of the police.

14 A. Not to my recollection, no.

15 Q. At Volume 4 at pages 39, 40, 41, that's Mr. Edwards' factum  
16 on the reference. Did you have occasion to review Mr.  
17 Edwards' factum before it was submitted to the Appeal Court?

18 \*10:15 a.m.

19 Q. Did he discuss with you...

20 A. I...my recollection was that a copy...Mr. Edwards forwarded a  
21 copy of his factum simultaneous with its filing with the Court.

22 Q. Did you have an opportunity to read it prior to it being  
23 argued?

24 A. I can't answer that. I've got no recollection.

25 Q. Paragraph 83 on page 39. Mr. Edwards is saying, "The

1 respondent disagrees with counsel for the appellant who  
2 argues that the aforementioned order could issue on the basis  
3 that there has been a miscarriage of justice. It is submitted  
4 the latter phrase connotes some fault in the criminal justice  
5 system. " Mr. Edwards was taking the position that there had  
6 not been a miscarriage of justice, as you understand it.

7 A. That's...yes.

8 Q. Did you know that that was the position that he was going to  
9 take prior to the hearing of the appeal, sorry, prior to the  
10 argument?

11 A. I may have.

12 Q. Was it a view with which you, as his superior, agreed, that is  
13 that there had not been a miscarriage of justice?

14 A. I have to reiterate that in this context Mr. Edwards had the  
15 carriage of the case. My involvement with Mr. Edwards with  
16 the odd exception was not one of a super...a hands-on  
17 supervisory role of directing the points of view that the  
18 should be expressing on behalf of the Crown. As I indicated  
19 earlier, our system is a decentralized one of prosecuting  
20 officers for each county and in a large number of areas those  
21 gentlemen express...represent the Attorney General in those  
22 counties and express...express the views of the Crown.

23 Q. My question to you was whether or not it was your view that  
24 there had or had not been a miscarriage of justice?

25 A. I think in any situation where an individual is wrongfully

MR. HERSCHORN, EXAM. BY MR. SPICER

1 convicted and spends eleven years in jail, my personal view is  
2 that there's a miscarriage of justice.

3 Q. Do you...

MR. CHAIRMAN

4  
5 Mr. Herschorn, it would appear from the memorandum  
6 found in Volume 31 at page 22 from Mr. Edwards to Gordon S.  
7 Gale, and in particular page 24. I direct your attention to page 24  
8 in that volume. It would appear that Mr. Edwards' position  
9 changed somewhat between that date and the time that he file his  
10 factum with the Court, because in his memorandum to Mr. Gale he  
11 says, "If the Minister agrees, and I submit," "If the Minister of  
12 Justice agrees, then I submit that the most desirable result of the  
13 reference would be a direction by the Appeal Division that a  
14 verdict of acquittal be entered on the basis that there has been a  
15 miscarriage of justice." In his factum he seems to be urging upon  
16 the Court of Appeal that there has...that there has not been a  
17 miscarriage of justice. Now, can you help us as to why...was there  
18 any departmental direction that would seem to alter that course  
19 of thought, train of thought?

MR. HERSCHORN

20  
21 No, departmental, My Lord, I know of no departmental  
22 direction on the point. The memo to which you refer, the portion  
23 at page 24, was written prior to the reference having been  
24 ordered. With the benefit of additional thought and deliberation  
25 on Mr. Edwards' part I can only assume that if the record

MR. HERSCHORN, EXAM. BY MR. SPICER

1 indicates that there was a variation in that position that I know of  
2 no departmental directive or intervention which prompted that.

MR. CHAIRMAN

4 So, you feel that only Mr. Edwards can tell us or explain that  
5 to us.

MR. HERSCHORN

7 I don't know if only him, but I cannot.

MR. CHAIRMAN

9 You can't. All right.

COMMISSIONER EVANS

11 You have indicated that there was a decentralization in the  
12 department and that Mr. Edwards, for example, as one of the  
13 county prosecutors would be entitled to proceed as he saw fit  
14 without any interference from the Department of the Attorney  
15 General, is that correct?

MR. HERSCHORN

17 That comment is... I would give as a general overview of the  
18 way in which prosecuting officers function in this province, yes.

COMMISSIONER EVANS

20 But in this case.

MR. HERSCHORN

22 And in this case as well, subject to the odd...subject to a  
23 number of situations where the Department did become involved  
24 in discussions with Mr. Edwards.

25



MR. HERSCHORN, EXAM. BY MR. SPICER

1 COMMISSIONER EVANS

2 But in this particular situation Mr. Coles, apparently,  
3 indicated to Mr. Edwards that he wasn't happy with the  
4 disposition and if he had time he would have taken him off the  
5 case. Is that consistent with the decentralization to which you  
6 have made reference?

7 MR. HERSCHORN

8 It can be, yes, I would say so, My Lord. Normally it...that  
9 type of dispute, for want of a better term, doesn't arise, but it can  
10 and the prosecuting officers act. And the structure of the  
11 Department would permit a deputy attorney general to remove a  
12 prosecuting officer from a case if they had a fundamental  
13 disagreement as to the proper approach which should be  
14 expressed by a departmental representative, by the Crown.

15 COMMISSIONER EVANS

16 And in that event then the Crown Prosecutor would be  
17 obliged to follow the directive of the A.G.'s office.

18 MR. HERSCHORN

19 No question about it, My Lord. It's the law. It's required.  
20 My reference being the Prosecuting Officer's Act provision that I  
21 referred.

22 MR. SPICER

23 Q Mr. Herschorn, between the time of the memo to which Mr.  
24 Justice Hickman referred in April and the time of the  
25 submission of the factum in January of '83, did you have any

1 discussions with Mr. Edwards concerning the position to be  
2 taken by the Crown with respect to whether or not there had  
3 been a miscarriage of justice?

4 A. It may have. I have no specific recollection of any, but it may  
5 have been touched on in conversations because we spoke on a  
6 regular basis.

7 Q. Did you have any sense that...from Mr. Edwards that his  
8 position on that issue was changing?

9 A. No, I have no recollection of that.

10 Q. Again, in Mr. Edwards' factum on page 40 Mr. Edwards'  
11 section, "Conclusions", in which he makes a number of  
12 submissions concerning the role of the Court. Did you have  
13 any discussions with Mr. Edwards at any time concerning  
14 whether...whether or not he ought to on behalf of the Crown  
15 be submitting to the Court what its role was in this sort of  
16 situation?

17 A. Your question was did I have any discussions.

18 Q. Yes.

19 A. Again, I may have, I'm sorry to be vague, but it's possible it  
20 came up in a conversation as we had many.

21 Q. I direct your attention particularly to paragraph 86 of the  
22 factum. "For the above reasons it is respectfully submitted  
23 that the Court should make it clear that what happened in  
24 this case was not the fault of the criminal justice system or  
25 anyone in it, including the police, the lawyers, the members of

MR. HERSCHORN, EXAM. BY MR. SPICER

1 the jury or the Court itself." Did you have any discussions  
2 with Mr. Edwards concerning that submission?

3 A. I have no specific recollection of any such discussions.

4 Q. Did you have any idea that he was going to make that sort of  
5 submission?

6 A. No.

MR. CHAIRMAN

8 Do you have some difficulty with the next part, the  
9 beginning of the next paragraph in that factum, number 87? It  
10 says, "To function, our system depends on giving the truth and  
11 that is exactly what it did not get in 1971." Some of the evidence  
12 indicates that Marshall in his description of the assailant had,  
13 indeed, given a fairly accurate account of what happened. I'm not  
14 clear what Mr....again, I guess we may have to wait for Mr.  
15 Edwards as to what he means there.

MR. HERSCHORN

17 I would have to defer to Mr. Edwards, My Lord.

MR. SPICER

19 Q. Other than by yourself, Mr. Herschorn, do you know whether  
20 or not anybody else in the Attorney General's Department  
21 reviewed Mr. Edwards' factum before the hearing of the  
22 argument?

23 A. I can't, I don't know the answer to that.

24 Q. Nobody spoke to you about it.

25 A. Not to my recollection.

1 Q. Is it an unusual position for a representative of the Attorney  
2 General's Department to go to the Appeal Court and not take a  
3 position?

4 A. No, I wouldn't say so.

5 Q. You argued criminal appeals yourself for a number of years.

6 A. Yes.

7 Q. Would it normally be your practise to go...when you went to  
8 the Appeal Court to argue a case to take a position?

9 A. Normal practise would be to take a position, yes.

10 Q. It would be very unusual not to take one.

11 A. I would say so, yes. This...but I think there's a context here,  
12 the context being this Donald Marshall, Jr., case and this is not  
13 the usual case. This is the first time that our Department was  
14 faced with a situation like this. Nothing about this situation is  
15 usual or routine.

16 Q. Let me ask you then, if you could, to differentiate, quite apart  
17 from the contents of the matter. I recognize the Donald  
18 Marshall matter, the contents of it perhaps are different, but  
19 can you explain to me what it is notionally that's different  
20 insofar as the Attorney General's Department is concerned,  
21 from you going in in a normal case and arguing a position,  
22 taking a position and this one where the view of the  
23 Department was that a position should not have been taken?

24 A. As I alluded to earlier we...I take it, I can't speak on behalf of  
25 Mr. Coles, he'll testify later, but I take it that the...what

MR. HERSCHORN, EXAM. BY MR. SPICER

1 underlied his concern was that, and again I'm repeating  
2 myself, that the Court, independent of the adversary before  
3 the Court, reach its own determination, and in its decision if it  
4 was going to acquit Mr. Marshall, that it come to that without  
5 both counsel having, in a sense, agreed prior to the argument  
6 of the appeal with the position that... taken that joint position  
7 before the Court.

8 Q. Do you not think it would have been helpful or did you not  
9 think at the time, in January of '83, when you were having  
10 this discussion, that it would have been helpful for the Court  
11 to have the view of the Crown?

12 10:26 a.m.

13 A. Well, I think my answer would be that if the view of the  
14 Crown could be...would have been better expressed, and I  
15 believe this was Mr. Coles' view, better expressed by the  
16 Crown alluding or referring to all the relevant evidence which  
17 either supported the guilt or the innocence of Mr. Marshall,  
18 and leaving to the Court to make its ultimate decision.

COMMISSIONER EVANS

20 Mr. Herschorn, the Court is going to make its own decision  
21 anyway whether it's an appeal or a reference, and I have great  
22 difficulty in understanding why the position of the Crown is  
23 different on an appeal than it is on this particular reference, and  
24 I'd be grateful if you could help me on that. You've already told  
25 us that you've taken many appeals and at that time you state the

MR. HERSCHORN, EXAM. BY MR. SPICER

1 position of the Crown to the Court of Appeal.

MR. HERSCHORN

3 I guess my only answer, My Lord, can be the...is grounded in  
4 the uniqueness of this situation.

COMMISSIONER EVANS

6 What's unique about it? It was still a search for truth.  
7 What is unique about it? The fact that it is a reference rather  
8 than an appeal, is that the distinction?

MR. HERSCHORN

10 Well, that...that is, I guess, the fundamental uniqueness of  
11 this situation over any other type of appeal that I've been  
12 involved with.

MR. SPICER

14 Q It is an appeal though, is it not, the section itself is...

15 A. It is.

16 Q As if it were an appeal by Donald...

17 A. This case was argued, as I understand it, as if it were appeal.

COMMISSIONER EVANS

19 Well, then that destroys the uniqueness that you're talking  
20 about.

MR. HERSCHORN

22 Well, by uniqueness, My Lord, is the...not the procedure  
23 involved, but the...what type of case that was being dealt with  
24 here. The fact we were dealing with a situation where there was  
25 review of a situation where any individual had been incarcerated

MR. HERSCHORN, EXAM. BY MR. SPICER

1 for a number of years.

2 COMMISSIONER EVANS

3 Does the length of time make the difference?

4 MR. HERSCHORN

5 No, no, My Lord.

6 COMMISSIONER EVANS

7 Mr. Herschorn, if you were arguing an appeal of a man who  
8 had been improperly convicted and you were satisfied with that,  
9 even if he was in jail for ten days, in your presentation to the  
10 Court of Appeal you would take a position that the man was  
11 improperly convicted. For example, if the improper section was  
12 applied. Wouldn't you take that position?

13 MR. HERSCHORN

14 I think so, My Lord, yes.

15 COMMISSIONER EVANS

16 Did it make any difference that this happened to be a very  
17 high profile case?

18 MR. HERSCHORN

19 No, I don't think it did. The view was...the view in the first  
20 instance of the deputy attorney general communicated to Mr.  
21 Edwards, and I could see the logic of both sides of the argument,  
22 and as events proved, Mr. Edwards pursued the approach of  
23 recommending an action of precise disposition to the Court.

24 COMMISSIONER EVANS

25 Well, what bothers me is he recommended the action that

MR. HERSCHORN, EXAM. BY MR. SPICER

1 was proposed by the Department, is that correct? Mr. Edwards  
2 had one view and he discussed it with Mr. Coles, who had a  
3 different view, and you were present at that conversation.

MR. HERSCHORN

4  
5 Yes.

COMMISSIONER EVANS

6  
7 And I think the result of the conversation was that Mr.  
8 Edwards changed his mind and presented the view that was held  
9 by the Department.

MR. HERSCHORN

10  
11 No, excuse me, my understanding is to the contrary. That  
12 Mr. Edwards maintained his view, notwithstanding the discussions  
13 on the 25th of January, that he maintained his view. I would  
14 refer Your Lordship to page 39, the paragraph 81, wherein he  
15 concludes in a direction made that a verdict of acquittal be  
16 entered. And as I understand, my understanding or recollection  
17 was the dispute was as to whether or not Mr. Edwards ought to go  
18 that far in his submissions to the Court.

MR. CHAIRMAN

19  
20 Well, having recommended to the Court that a verdict of  
21 acquittal be entered, why would it be necessary for Mr. Edwards  
22 to go beyond that?

MR. HERSCHORN

23  
24 Again, My Lord, I cannot speak for Mr. Edwards.  
25



1 MR. CHAIRMAN

2 That's the end of it, isn't it, it seems to me?

3 MR. SPICER

4 Q. If in January of '83 the Department was aware that Mr.  
5 Edwards was going to take the position that a verdict of  
6 acquittal should be entered, as he sets out in his letter, was it  
7 still then the view of the Department at the time in January of  
8 '83 that notwithstanding that recommendation, that is, an  
9 acquittal should be entered, that items A and B in that letter  
10 of January 18, '83, that is, Mr. Marshall's responsibility in the  
11 bona fides of the police were still somehow relevant,  
12 notwithstanding the position that you then knew that Mr.  
13 Edwards was going to take?

14 A. Again, Mr. Edwards took that position, as I understand it, and  
15 I have no reason to...I saw no reason at that point in time to  
16 challenge his opinion on it.

17 Q. You said a couple of minutes ago, in response to a question  
18 from of the Commissioners, that what should go before the  
19 Court is relevant evidence concerning guilt or innocence. Do I  
20 take it then that your view, as his superior, was that  
21 notwithstanding the submission of acquittal that that  
22 evidence was relevant?

23 A. Again, Mr. Edwards took that viewpoint and I saw no reason  
24 to impose a different viewpoint on him.

25 Q. All right. Well, you are his superior. If you had disagreed

1 with it could you have intervened?

2 A. Yes.

3 Q. Do I take it from that that you did agree?

4 A. I have to interject another aspect that I was not, as I alluded  
5 to earlier, I was not the individual in the department with the  
6 primary responsibility for this particular matter. My dealings  
7 with Mr. Edwards often arose out of other files that I was  
8 dealing with and my responsibilities vis-a-vis prosecutions  
9 which prompted conversations with him. But Mr. Edwards'  
10 dealings, his liaison in the department was primarily Mr. Gale.  
11 I cite that as a context to answer your question, that it was...it  
12 was not a matter that I would have gone to that point, if  
13 that's a fair way of putting it.

14 Q. Okay. Let me just understand that then. Do I understand you  
15 to be saying that in a normal case, if this were an ordinary  
16 appeal, that Mr. Edwards would have reported to you with  
17 respect or would have reported to you with respect to the  
18 substance of something that he was going to say to the Court,  
19 if he had reported to anybody?

20 A. No, well, in the normal situation a prosecuting officer in the  
21 county would not be arguing an appeal of this...appeals before  
22 the Appeal Division. It would be done by staff.

23 Q. To use a hypothetical then, the position that he's going to take  
24 in Court, is that something that in a normal case a prosecutor  
25 would come to you with?

1 A. No.

2 Q. Who would he go to?

3 A. If he had a question.

4 Q. Yes.

5 A. Perhaps I misunderstood your question.

6 Q. Yes, if he had a question.

7 A. If he had a question, yes, he would come to me.

8 Q. Okay. In this particular case, the Donald Marshall case, was  
9 unusual in that respect, was it?

10 A. In which respect?

11 Q. You indicated to...

12 A. As to the line of authority.

13 Q. ...you have the.. Yes, that's right.

14 A. Yes, I guess you could say it was unusual. My...Mr. Gale was  
15 coordinating the efforts of the Department vis-a-vis obtaining  
16 police reports on the reinvestigation and making a  
17 recommendation to the Minister and then on to the Federal  
18 Minister of Justice, vis-a-vis the reference. So, at that stage  
19 he has the...he was the individual who was basically handling  
20 the Marshall case, the Marshall file.

21 Q. Okay. So, would it then have been...would it have been your  
22 view then with respect to the Marshall that any questions  
23 that Mr. Edwards had concerning the position that he should  
24 or should not take would have been properly directed to Mr.  
25 Gale as opposed to yourself?

1 A. It could have been directed to either of us.

2 Q. And could have been properly answered by either of you.

3 A. Depending on the question, yes.

4 Q. Yes. Between January or so of '83 when the case was argued  
5 and the decision of the Court in May, did you have any  
6 involvement with the Donald Marshall matter at all?

7 A. I may have had some involvement with some aspect of the  
8 file, but I have no specific recollection of anything. Nothing  
9 springs to mind.

10 Q. If I could just now ask you to turn to Volume 32, page 152,  
11 do you recognize that memo, Mr. Herschorn?

12 A. Yes, I do.

13 Q. I just want to go through it with you. "On May 11th at  
14 approximately twelve noon I spoke with Mr. Frank Edwards  
15 and requested that he review the decision of the Appeal  
16 Division to determine what evidence exists which might  
17 support," and then a couple of items. Had you been asked to  
18 speak to Mr. Edwards on May the 11th?

19 A. Possibly.

20 Q. Is it your recollection that you were?

21 A. I have...I cannot answer your question. I have no  
22 independent recollection of whether that was something that  
23 I initiated on my own or whether I was asked to do so.

24 Q. And you've asked...you phoned Mr. Edwards or, sorry, you  
25 spoke with him. Do you know whether or not you saw him or

1 did you speak to him on the phone?

2 A. I would speculate on the phone, but it's possible he was in  
3 Halifax. He may have come to...this is shortly after the  
4 rendering of the judgement, I gather, by the Appeal Division.  
5 It's possible he may have been in town.

6 Q. Okay. "Requested that he review the decision of the Appeal  
7 Division to determine what evidence exists which might  
8 support, (a) charges of perjury, (b) charge of attempted  
9 robbery against Donald Marshall, Jr., together with Mr.  
10 Edwards' recommendation as to whether any such charges  
11 should be proceeded with." Why were those two issues the  
12 issues that you spoke to Mr. Edwards about?

13 A. I believe that it was felt in the Department that those were  
14 issues which arose out of the Appeal Division's decision on the  
15 reference and that it was incumbent upon the Crown to reach  
16 a determination as to whether or not charges were warranted.

17 Q. There is no reference in this memo to any question  
18 concerning the comments of the Appeal Division on the  
19 original investigation in 1971 by the Sydney Police. There is  
20 later, but at this point there is not.

21 A. I don't recall that subject matter as being any focus of...at any  
22 portion of the...at any point in the Appeal Division's decision.

23 Q. When did the...when to your knowledge did the Department  
24 start to think that perhaps an application or some form of  
25 representation by Mr. Marshall for compensation would be

1           made to the Department?

2           A. I can't answer that definitively in terms of the time frame.

3           Q. At about this time, and we don't need to look at the press  
4           clippings, but about this time the then Attorney General Mr.  
5           How was taking the position that Mr. Marshall being partially  
6           to blame was relevant to the question of compensation for Mr.  
7           Marshall. Did you have any discussions with Mr. How about  
8           that?

9           A. I may have.

10          Q. What was your view?

11          A. My view was that that was a factor to be considered on the  
12          question of compensation. I should add though that I was not  
13          the member of the Department who dealt in depth with the  
14          compensation aspect.

15          Q. With respect to your discussions with Mr. How, are you able  
16          to elaborate any more as to whether or not Mr. How said to  
17          you, "Well, what position ought we to take with respect to  
18          this?" or was it that type of general inquiry with respect to  
19          compensation?

20          A. Again, I don't recall specific discussions with the Minister on  
21          the compensation issue or aspect of the case.

22                 10:43 a.m.

23          Q. And your best recollection at this point then, I take it from  
24          what you're saying is that you may have had some discussion  
25          with him but you don't remember the substance of it.

MR. HERSCHORN, EXAM. BY MR. SPICER

1 A. That's correct.

2 Q. Fair comment?

3 A. Yeah.

4 Q. I would just ask you now to turn over to page 169, same  
5 volume...got it?

6 A. Yes.

7 Q. Can you indicate to us how this memo came to be produced?  
8 Was it as a result of a request from the Attorney General?

9 A. I believe it was.

10 Q. And would the request have been, to your recollection, that  
11 you deal with these three specific issues that are referred to  
12 on 169?

13 A. Yes.

14 Q. Insofar as the formulation of the questions is concerned,

15  
16 The following memorandum covers three basic  
17 areas. One, references contained in the decision  
18 of the Appeal Division to the role of the Sydney  
19 City Police Department in investigating the death  
20 of Sandy Seale.

19 Is it your recollection that your instruction was restricted to  
20 the reference contained in the decision?

21 A. Yes.

22 Q. Did you receive this direction directly from the Attorney  
23 General?

24 A. I can't answer. It may have been from either the Attorney  
25 General or the Deputy Attorney General.

MR. HERSCHORN, EXAM. BY MR. SPICER

1 Q. And would it be the same with respect to items 2 and 3 that  
2 the way these questions are phrased is specifically the  
3 direction you were given?

4 A. I believe so, yes. I'm pausing because I may have initiated a  
5 refining, or a definition of these particular three points. I  
6 may have, it may not have been exclusively the origination of  
7 either the Minister or the Deputy Attorney General.

8 Q. If I could just ask you then to turn to page 170. Reference is  
9 contained in the decision of the Appeal Division to the role of  
10 the Sydney City Police. In putting together your comments on  
11 page 170 did you consider yourself restricted to saying  
12 nothing other than, or sorry, referring to nothing other than  
13 what had been adverted to by the Appeal Court in its  
14 decision?

15 A. Yes.

16 Q. Is it fair to say that there was more information within the  
17 Department of the Attorney General concerning the role of the  
18 Sydney City Police than was reflected in the decision of the  
19 Appeal Court? In other words, you had the RCMP reports and  
20 you had various statements?

21 A. I believe that's, the answer to that is "yes".

22 Q. Okay. Do I take it, then, that you didn't feel that it would  
23 have been proper for you to refer to that other material in  
24 putting this memo together?

25 A. Not given the reference as defined. Point number one was



MR. HERSCHORN, EXAM. BY MR. SPICER

1 tied to the decision of the Appeal Division.

2 Q. What was your understanding, Mr. Herschorn, as to why you  
3 were being asked to comment only on the decision of the  
4 Appeal Division with respect to the activities of the Sydney  
5 City Police Department?

6 A. That was a question raised as to whether there were  
7 comments in the decision and I was asked to look at it and  
8 provide some information.

COMMISSIONER EVANS

9  
10 Before you leave that. Dealing with the third paragraph,

11  
12 Finally at pages 65 and 6 of the decision the  
13 Court refers to the concealment of material facts  
14 by Donald Marshall from his lawyers and the  
15 police which if known...(so forth)...might have  
16 permitted the truth of the matter to be  
17 uncovered by the police.

18 How did that get before the Court?

19 A. I have difficulty responding, My Lord, because I wasn't at the  
20 reference as to how that information got before the court. I  
21 think the references are repeated in, with quotations, at page  
22 177 of my memorandum.

COMMISSIONER EVANS

23 I would have thought that there was certain amount of  
24 privacy in the statements made by Marshall to his lawyers.

MR. SPICER

25 Mr. Edwards is probably the best witness to comment on

MR. HERSCHORN, EXAM. BY MR. SPICER

1 how matters got before the Appeal Division.

COMMISSIONER EVANS

3 Okay.

MR. SPICER

5 Q. I would just ask you now to turn to page 177. The question  
6 as phrased at the outset of your memo is the question of  
7 compensation for Donald Marshall, Jr. And you indicate, "The  
8 Department has not received a request from Donald Marshall  
9 or his counsel for the payment of compensation." Was the  
10 Department aware at this point in time, that is at the end of  
11 May, that the question of compensation would, however,  
12 become an issue?

13 A. I can't answer your question because I wasn't involved in  
14 that aspect of the case.

15 Q. Were you aware?

16 A. I believe there were press reports which alluded to the  
17 compensation issue at that point in time.

18 Q.

19  
20 Should a request for compensation be received it  
21 would have to be considered in the light of the  
22 comments of the Appeal Division at page 65  
23 wherein the Court stated... (and then there's the)  
24 ...any miscarriage of justice however more  
25 apparent than real...

and a second quotation. Were there not other issues  
concerning compensation other than the comments of the

MR. HERSCHORN, EXAM. BY MR. SPICER

1 Appeal Court?

2 A. Yes.

3 Q. Why are those not dealt with in your memo?

4 A. This was an initial memo on the subject. It was not intended  
5 to be comprehensive. And my focus was the Appeal  
6 Division's decision and those words struck me as being  
7 important to bring to the attention of the Attorney General on  
8 the issue of compensation. They are not intended to be an  
9 exhaustive list of factors to be considered on the question of  
10 compensation.

11 Q. Is there anywhere in this memo that you make it clear that  
12 there are no other issues to be considered in respect to  
13 compensation?

14 A. No. However, this is, it would be wrong to construe this  
15 memo as the only information flowing to the Minister on this  
16 issue. This was one staff member's response on that  
17 particular question and as the months ensued others became  
18 involved in dealing with the question.

19 Q. Later on, if I could just ask you for a sec to flip to page 203,  
20 the same volume, which is another memo from yourself to  
21 Mr. How, and I take it, or perhaps you can tell us whether this  
22 is the case. On page 208 which seems to be the last page of  
23 that memo there's a date of July 7, 1983 at the bottom.

24 Would that have been, did you find that?

25 A. Yes.

MR. HERSCHORN, EXAM. BY MR. SPICER

1 Q. Bottom of that page.

2 A. Yes.

3 Q. Would that have been the date when this memo would have  
4 been completed?

5 A. On the six-page memo ending on page 208?

6 Q. That's correct.

7 A. Would it, I would take it, yes.

8 Q. Okay. That memo is in July of 1983 and once again you're  
9 directing your attention in item 3 on page 203 to the question  
10 of compensation for Donald Marshall, Jr. And when you come  
11 to deal with that issue a month and a bit later than the memo  
12 of May 31, correct me if I'm wrong, but your comments on  
13 compensation are exactly the same as they were in May.

14 A. That's correct.

15 Q. Why would that be?

16 A. Number one, the recital paragraph, "The Department has not  
17 received a request from Mr. Marshall or his counsel for the  
18 payment of compensation." I gather was still accurate at that  
19 point of time in July.

20 Q. Yes.

21 A. And it may be that the issue had not gone on to further  
22 examination in the Department. And beyond that, as I  
23 indicated earlier, the comments of the Appeal Division at  
24 those two pages, cited pages, were in my view, very relevant  
25 for consideration on the question of compensation.

MR. HERSCHORN, EXAM. BY MR. SPICER

1 Q. Would you agree with me, Mr. Herschorn, that just looking at  
2 those comments and the question of compensation for Donald  
3 Marshall, Jr. that by saying nothing other than referring to  
4 the comments of the Appeal Court that one's left with the  
5 impression that this is a fairly important aspect of the  
6 question of compensation.

7 A. Yes. A fairly important aspect amongst others.

8 Q. Yes. But the only one referred to in either of your memos to  
9 the Attorney General.

10 A. In my memorandums, yes.

11 Q. Were you...

12 A. And I must indicate, as I have before, that I was not the  
13 individual dealing in any detail with the issue of  
14 compensation as it evolved. And that the issue received  
15 extensive consideration by others in later months in the  
16 Department.

17 Q. Are you aware of any legal memos other than the two to  
18 which I've just referred you that were generated in the  
19 Department of the Attorney General dealing with the question  
20 of compensation for Donald Marshall, Jr.?

21 A. I'm not aware of any myself. I'm sure there are some.

22 Q. You're sure there are some?

23 A. I would anticipate there would be some.

24 Q. Why would you anticipate that there would be some?

25 A. Because a number of lawyers, in particular Mr. Endres, was

MR. HERSCHORN, EXAM. BY MR. SPICER

1 involved in the ensuing months with dealing with the issue of  
2 compensation.

MR. SPICER

3  
4 Would this be an appropriate time to take a break, My  
5 Lord?

COMMISSIONER POITRAS

6  
7 I'd like to ask a question just before we did. Would it be  
8 fair, Mr. Herschorn, to say that it was the opinion of Mr. Gale, Mr.  
9 Coles, Mr. Edwards and I suppose, yourself, that Marshall had to  
10 bear substantial responsibility for his conviction and also that this  
11 had to be conveyed to the Court of Appeal for it to make a finding  
12 along that theory in due time?

13 A. It was certainly Mr. Edwards' viewpoint. I can't state, My  
14 Lord, whether it was at that point in time the viewpoint of  
15 the other individuals that you've referred to. Certainly after  
16 the decision of the Court of Appeal and the Court having made  
17 those comments at pages 65 and 66, it, following that point in  
18 time it was certainly the view espoused, I think, by all of us.

COMMISSIONER POITRAS

19  
20 Because if I refer you very rapidly to Volume 31, page 126  
21 being Mr. Edwards' letter of January 18th to you in which he  
22 makes this point, is there a letter from you disagreeing with that  
23 point?

24 A. No, there is not.  
25

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Page 126.

A. No, there is not.

COMMISSIONER POITRAS

Thank you.

10:55 - 11:25 a.m. - BREAK

Q. Mr. Herschorn when we broke I was asking you some questions concerning your references in both your memos to the question of compensation. I'd just like to follow that up a little bit. If I could ask you to turn to page 177 of Volume 32. You say in your, the paragraph prior to the first quote,

Should a request for compensation be received it would have to be considered in light of the comments of the Appeal Division at page 65 wherein the Court stated 'any miscarriage of justice is, however, more apparent than real.'

And then the third paragraph, I just want to draw your attention to, "...by lying he helped secure his own conviction." And then towards the end of the last quotation, "There can be no doubt that Donald Marshall's untruthfulness throughout this whole affair contributed in large measure to his conviction." Did you have any view based on what you knew about the situation giving rise to Mr. Marshall's conviction as to whether or not that by lying Mr. Marshall helped secure his own conviction?

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1 A. My views, at this point in time, arose out of, primarily out of a  
2 perusal of the Appeal Division's decision and that was the  
3 starting point for these references. That may not respond to  
4 your question but at this juncture, or at this point in time,  
5 that's what I was referring to.

6 Q. I know that's what you're referring to. I guess I'm asking you  
7 whether or not you had any sense of whether or not, of  
8 whether you had any sense of whether the Appeal Court was  
9 correct in saying "...by lying he helped secure his own  
10 conviction."

11 A. I accepted the view of the Appeal Division on the point.

12 Q. And did you accept it because you didn't have any  
13 information to contradict it or did you accept it because it was  
14 the decision of the Appeal Court?

15 A. The latter. Because it was the decision of the Appeal Court.

16 Q. And the last quote that I had referred you to at the bottom of  
17 that page. "There can be no doubt that Donald Marshall's  
18 untruthfulness throughout this whole affair contributed in  
19 large measure to his conviction." Once again, did you accept  
20 that by reason of the fact that it was a statement made by the  
21 Appeal Court?

22 A. Yes.

23 Q. Did you have any information, or did you have any doubt  
24 about that in your own mind?

25 A. No.



MR. HERSCHORN, EXAM. BY MR. SPICER

1 Q. And you would agree then with the Appeal Court's statement  
2 that, "There can be no doubt that Donald Marshall's  
3 untruthfulness throughout the whole affair contributed in  
4 large measure to his conviction."

5 A. I'm not sure I'm in a position to make that assessment. I  
6 haven't had the depth of involvement with, as Mr. Edwards  
7 has, as an example, of the file to make that assessment. But I  
8 accept the words of the Appeal Division on the point.

9 Q. Did you have any information yourself that had come to you  
10 in the Department that would cast some question about that?

11 A. No.

12 Q. Did you feel that you had any responsibility to analyze these  
13 comments of the Appeal Division and see whether or not they  
14 stood up?

15 A. No.

16 Q. Why not?

17 A. I did not.

18 Q. No, I said, I know you said you didn't. I'm asking you why  
19 you didn't think you had any responsibility to do that.

20 A. That's not appropriate to do so. I'm not going to set myself up  
21 as an arbiter as to whether the Appeal Division is correct or  
22 not in its decision. It's the court of law. It has spoken on the  
23 subject and that's the end of the matter.

24 Q. Are there not occasions every day when you look at decisions  
25 made by courts with a view to appealing them or commenting

MR. HERSCHORN, EXAM. BY MR. SPICER

1 on whether or not they were right or wrong in any particular  
2 issue?

3 A. In that context, yes, but this is not the context.

4 Q. Can you help me with why this is different?

5 A. Because I was dealing with the issue of compensation at that  
6 point, that early point of the Department's dealings on the  
7 issue and these comments, quoted comments of the Appeal  
8 Division I felt were of relevance to that issue.

9 Q. And do I understand you to say that you were prepared to  
10 accept those comments of the Appeal Division on their face?

11 A. Yes.

12 Q. Did any information come to your attention subsequent to the  
13 date of your first memo, May 31, '83, which would have  
14 caused you to wonder whether or not the Appeal Division was  
15 correct in saying that by lying Mr. Marshall helped secure his  
16 own conviction.

17 A. No.

18 Q. Is that a view that you hold yourself?

19 A. I'm not sure what your question is getting at. I hold the  
20 view...

21 Q. It's not getting at anything.

22 A. I hold that view, yes.

23 Q. Was that a view that, to your knowledge, was held by other  
24 members of the Attorney General's Department?

25 A. To my knowledge, yes.

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1 Q. And, in particular, which members of the Attorney General's  
2 Department to your knowledge held that view?

3 A. The individuals who were dealing with the file. In particular,  
4 Mr. Gale, Mr. Coles and the Attorney General.

5 Q. What about Mr. Endres?

6 A. I can't, that question is better directed to him. I can't answer  
7 it.

8 Q. Upon what facts did you rely in finding yourself to be in a  
9 position to be able to agree with that comment of the Appeal  
10 Court? What did you know that made you think that was  
11 right?

12 A. The reference decision itself. It's, the contents of the decision.

13 Q. Were you doing more than merely adopting the Appeal  
14 Court's opinion or was it a position that you thought was  
15 correct yourself?

16 A. I was addressing the issue of if a request were to be received  
17 what was a relevant factor to be considered. And I referred  
18 to the Appeal Division's, the two quotations from the Appeal  
19 Division's decision.

20 Q. And you've indicated to me, I think, that you held the view  
21 that that comment by lying he helped secure his own  
22 conviction was correct and that was a view that was held by  
23 other members of the Department.

24 A. Yes.

25 Q. Are you able to tell me what information there was in the

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1 Department, other than the decision of the Appeal Court, of  
2 which you were aware that supported that conclusion of the  
3 Appeal Division?

4 A. No, I really can't.

5 Q. Was this view that Mr. Marshall had helped secure his own  
6 conviction by lying, was that a view that was held by, to your  
7 knowledge, by Mr. Coles, by Mr. Gale, by yourself prior to the  
8 decision of the Appeal Court?

9 A. I don't know whether I can characterize it as a view held. We  
10 had information, in particular, you've referred earlier this  
11 morning to the letter from Mr. Edwards which has aspects of  
12 that viewpoint.

13 11:32 a.m.

14 Q. View or opinion. Was it held by the people you mentioned in  
15 the Attorney General's Department prior to the decision of the  
16 Appeal Court in May of '83 to your knowledge?

17 A. I can't speak for those gentleman as to how...what views  
18 crystallized and whether at any given point in time that was  
19 their viewpoint.

20 Q. What about yourself?

21 A. I don't think I ever approached the subject matter of your  
22 question in that fashion. The Appeal Division's decision had  
23 been rendered, there were these observations and I thought  
24 them appropriate to bring to the attention of the Attorney  
25 General.

MR. HERSCHORN, EXAM. BY MR. SPICER

1 Q. Did you do any work on the compensation issue yourself  
2 other than to bring these comments of the Appeal Division to  
3 the attention of the Attorney General?

4 A. Not to my recollection. There may have been the odd memo  
5 that may have had some relationship to that subject matter  
6 which followed this July memorandum but the basic answer  
7 is no.

8 Q. Following the decision of the Appeal Court, let's say in  
9 May/June of 1983, did Mr. Coles ever articulate to you what  
10 his general view of Donald Marshall was? Did he say what he  
11 thought of him?

12 A. Not to my recollection, no.

13 Q. Mr. Gale.

14 A. Not to my recollection, no.

15 Q. Mr. Endres.

16 A. No.

17 Q. The Attorney General.

18 A. No.

19 Q. So you were never involved in any conversations with any of  
20 those people where any of them said, "Look, I think this and  
21 so of Donald Marshall."

22 A. I have no recollection of any such conversations.

23 Q. Did you have any responsibility beyond the production of  
24 these two memos that we've been discussing on  
25 compensation? Did you have any responsibility for

1 developing any further legal analysis of the principles to be  
2 applied in dealing with any compensation application by  
3 Donald Marshall?

4 A. To the best of my recollection, no.

5 Q. If I could just now ask you to turn to the memo of July on  
6 page 203, and in particular item 2, which you address in the  
7 memo, whether a public enquiry ought to examine the role of  
8 the Sydney City Police in investigating the death of Sandy  
9 Seale, really one aspect of it. And the role of the prosecuting  
10 officer, Donald C. MacNeil, in prosecuting the charge of murder  
11 brought against Donald Marshall, Jr.. Again, did this issue  
12 become a matter for this memo because you were asked to  
13 deal with it by the Attorney General?

14 A. Either by the Attorney General or the Deputy Attorney  
15 General, I believe.

16 Q. Okay. And if you could just turn then to page 207.

17 A. Yes.

18 Q. Whether a public inquiry ought to examine the role of the  
19 Sydney City Police. Can I ask you whether or not these were,  
20 when you say, "The following factors are relevant for  
21 consideration," were you saying more than that, for instance,  
22 in one where you say, "The basic difficulty of conducting an  
23 effective enquiry into a matter which occurred over twelve  
24 years ago." Was that merely a factor or was that something  
25 that you really thought was problematic?

- 1 A. It was both.
- 2 Q. Did you ever have any discussions with the Attorney General  
3 concerning this difficulty caused by the passage of time?
- 4 A. No specific recollection of any, but I would think that I would  
5 have, yes.
- 6 Q. Item 4 of that enumeration, "Whether it is desirable to clear  
7 the air in view of the questions raised by certain members of  
8 the public and the media as to the role of the police in this  
9 matter." Beyond that did you articulate a view to the  
10 Attorney General or the Deputy Attorney General as to  
11 whether you thought it was desirable to clear the air?
- 12 A. I don't believe I did beyond this observation, this factor in  
13 number 4.
- 14 Q. What did you understand the Deputy Attorney General's view  
15 to be or did you know?
- 16 A. I don't think I can answer the question, I don't think I know  
17 the answer to it.
- 18 Q. Then on page 209, the same volume, there's a note of July  
19 8th, a handwritten note.
- 20 A. Yes.
- 21 Q. Whose writing is that?
- 22 A. I believe it's the then Attorney General, Harry How.
- 23 Q. He's referring to a meeting with yourself and Gordon Gale.
- 24 A. Yes.
- 25 Q. Do you have any recollection of that meeting?

1 A. No, I don't really.

2 Q. If I could just read his note.

3  
4 Decided not to press any charges against  
5 Marshall or the other witnesses and will hold  
6 action re the Sydney Police Force until we know  
7 the outcome of the civil action Marshall has  
8 brought against them.

9 Do you remember any discussion about that issue at that  
10 meeting?

11 A. Well, that the note indicates that it was discussed and I have  
12 no reason to...I just have no independent recollection of what  
13 was discussed at such a meeting. But I believe it occurred.

14 Q. Okay. If I could now ask you quickly to flip over to page 221,  
15 a memo from yourself to the Attorney General of August 4,  
16 '83, saying, "At the time of our last discussions concerning Mr.  
17 Marshall..." do you think that the last discussions may be the  
18 meeting of July 8th that are reflected in those notes on 209?

19 A. It's possible, I can't state definitively.

20 Q. Okay. Can we just look at 221 for a second? There is a  
21 reference to the inquiry, and then in the second paragraph  
22 you're enclosing a copy of the originating notice and  
23 statement of claim in the action against the City of Sydney.  
24 Then in the last full sentence of that paragraph, "You will  
25 recall our concern that a public enquiry ought not to serve as  
a form for the assembling of evidence for any civil suit  
initiated by Mr. Marshall." Why was that a concern?



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1 A. Beyond what the statement...what the sentence reflects I can't  
2 expand upon it. It was a concern.

3 Q. Was it a concern of yours?

4 A. It was a factor, a concern, I don't know whether concern is  
5 the right word. It was a factor that was one of a number to  
6 be considered.

7 Q. Why would the fact that there was a public inquiry, sorry, let  
8 me rephrase that. Why would the fact that a civil action by  
9 Mr. Marshall be any concern at all in respect to the calling of  
10 a public inquiry?

11 A. Well, there's a traditional stance of the Attorney General's  
12 Department not wanting to intervene in civil actions, to take  
13 sides in any civil action between two citizens and perhaps  
14 underlying that general approach of the Department that may  
15 have given rise to this particular concern.

16 Q. Have there not been...have there been other circumstances to  
17 your knowledge where inquiries have been called by the  
18 government where there is civil actions outstanding?

19 A. I have difficulty responding in the abstract, just that type of  
20 inquiry just doesn't spring to mind as having been called.

21 Q. And the concern, if I read your memo correctly, was that a  
22 public inquiry might serve as a forum for the assembling of  
23 evidence for any civil suit initiated by Mr. Marshall.

24 A. Yes.

25 Q. Why specifically would the government be concerned as to

1 whether or not a public inquiry would bring out facts, hear  
2 witnesses and receive information that might bear...have  
3 some bearing on a civil action?

4 A. I can only repeat what I alluded to earlier that the concern, I  
5 suspect, would have been not wanting to prejudice one side or  
6 the other in a civil proceeding.

7 Q. Is it your understanding that the position of the government  
8 was that as long as there is a civil action outstanding we  
9 shouldn't have a public inquiry?

10 A. I want to pause and refer to Mr. How's notation, because I  
11 believe it touches on that.

12 Q. Yeah.

13 A. It's not a matter that I was...

14 Q. 209.

15 A. ...addressing or... It dealt with the compensation aspect. It  
16 doesn't touch on the public inquiry aspect.

17 Q. It's the memo before, on the paragraph before that it deals  
18 with that. "Will hold action re Sydney City Police force until  
19 we know the outcome of the civil action."

20 A. Right. That was the Attorney General's position and I guess  
21 the consensus of that meeting that particular day.

22 Q. And I'm asking you whether or not one can generalize from  
23 the particular position adopted here in the Marshall case to  
24 other situations in the Department to your knowledge, that is  
25 whether or not it is normally the position of the Department

1 that there will not be an inquiry where there may be a civil  
2 suit outstanding?

3 A. Difficult for me to generalize without any factual base to  
4 compare it to.

5 Q. Yeah, and all I'm trying to get from you is whether or not you  
6 have any knowledge of any other circumstances where this  
7 kind of issue has arisen and if so what its resolution has  
8 been?

9 A. I have no knowledge of an analogous circumstance.

10 Q. Now if I could ask you to turn to 238. There is a memo from  
11 yourself to Mr. Coles.

12 A. Yes.

13 Q. "Re civil action commenced by Donald Marshall." And you  
14 say,

15  
16 In early August when we last discussed the  
17 above-noted matter you suggested that Jim  
18 Fanning, our articulated clerk, prepare a  
19 memorandum on the liability of a municipality  
20 for the wrongful act of its police officers.

21 Do you have any...can you tell us why this memo was  
22 produced? Why it was relevant for the Department to know  
23 the liability of a municipality for the wrongful acts of its  
24 police officers?

25 A. I can only speculate, as the memo indicates it was Mr. Coles'  
suggestion to me, which I was following up by requesting Mr.  
Fanning to prepare such a memorandum. I can only speculate

1 it may have been a possible concern as to whether liability  
2 flowing out of such proceeding might extend to the province  
3 civil liability. Possibly to assist in assessing the viability of  
4 the civil proceeding, how lengthy it might turn out to be. But  
5 I'm only speculating.

6 Q. Do I take it from what you say that other than Mr. Coles  
7 asking you to have this memo generated, you don't have any  
8 knowledge of why it was that he wanted it?

9 A. I may have had at the time but I just don't have a recollection  
10 of it at this point in time. I think if I recall leafing through  
11 the memorandum it does include a portion in its latter stage  
12 that touches upon possible liability of a...of the Attorney  
13 General for the actions of police officers.

14 Q. Page 260 perhaps. The question of vicarious liability for the  
15 wrongdoing by police, if that goes for the Attorney General's  
16 or not.

17 A. Perhaps earlier.

18 Q. In any event, Mr. Coles is apparently the person that's...

19 A. Well, it's a page, for example, page 255 there's a ...

20 Q. Uh-hum.

21 A. Recited in the commencement of a paragraph, "On holding  
22 that the Attorney General is liable for the acts of the police  
23 officers concerned, (Pidgeon(?)), J."

24 Q. On page 272 there is note from Mr. Coles to the Attorney  
25 General at the time, Mr. How, it's relating to a proposed

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1 meeting with Mr. Cacchione. We see in the first paragraph,

2  
3 As you had advised Mr. Cacchione in your letter  
4 of October I did not have an opportunity to  
5 attend," etcetera, etcetera, "...as I thought it  
6 would be more helpful for me to meet when  
7 both Gordon Gale and Martin Herschorn were  
8 available.

9 Did you have any contact or involvement with Mr. Cacchione  
10 in connection with the compensation issue?

11 A. I have a recollection of no departmental involvement. I know  
12 Mr. Cacchione through our dealings as lawyers, and I can  
13 recall an informal conversation on the street when I met him  
14 one day. But in terms of departmental involvement I can't  
15 recall any.

16 Q. And during this period of time, Mr. Herschorn, we're now into  
17 the fall or so of '83, other than the matters that I have  
18 brought to your attention were you having any on-going  
19 involvement with the Donald Marshall matter?

20 A. Not that I recall.

21 11:49 a.m.

22 Q. Now if you could turn to page 315. That's a memo from the  
23 then Attorney General, Mr. Giffin, to yourself dealing with Mr.  
24 Cacchione's request under the Freedom of Information  
25 legislation.

A. Yes.

Q. Did you then prepare the letter which appears on the

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1 following page, on page 316, for Mr. Giffin's signature?

2 A. Yes, I believe I did.

3 Q. At the time that you received this memo on February the 7th,  
4 '84, had you reviewed the information requested had  
5 previously been made by Mr. Cacchione on behalf of Donald  
6 Marshall?

7 A. No.

8 Q. And did you review the file between February 7th and  
9 February the 8th?

10 A. No.

11 Q. How could you respond on February the 8th denying access to  
12 the information if you hadn't reviewed the file?

13 A. The Attorney General had given me instructions as to the  
14 type of letter that he wished drafted and I followed those  
15 instructions.

16 Q. And where he says in his note to you:

17  
18 I believe I have 30 days in which to get back to  
19 him after receipt of the request but as I have not  
20 had an opportunity to review the whole file, I  
21 would appreciate it if you would prepare a letter  
22 for my signature rejecting the appeal citing the  
23 sections involved and I will sign it tomorrow.

24 You knew that Mr. Giffin had not read the whole file.

25 A. Yes, but I also knew from the concluding words that his  
determination was as cited there.

Q. Do you know whether or not Mr. Coles reviewed the Freedom

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1 of Information request?

2 A. No, I have no knowledge of that.

3 Q. When Mr. Giffin on the following day writes to Mr. Cacchione  
4 in the first paragraph, represents to Mr. Cacchione:

5 I have reviewed Mr. Marshall's request for  
6 information and wish to advise that I affirm this  
7 denial.

8 Unless Mr. Giffin had read it that night, that couldn't have  
9 been the case, is that fair to say? He says:

10 I have reviewed Mr. Marshall's request for  
11 information and wish to advise the I affirm this  
12 denial.

13 A. Well, the request in question would, I take to be the letter  
14 received from Felix Cacchione dated January 18th, 1984.

15 Q. Yes.

16 A. Which was a letter addressed to the Attorney General and I  
17 assume he had read it.

18 Q. Would you agree with me when you prepared this letter for  
19 Mr. Giffin's signature, which appears on page 316, that on the  
20 first paragraph that one person receiving that letter might  
21 well take away from it that the material had been reviewed,  
22 not just the letter requesting the information. Particularly if  
23 you go on to the second paragraph where he says,

24 I am satisfied that the information which your  
25 client has requested would be likely disclosed

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information.

1 Et cetera, et cetera.

2 A. That's a possibility, but because of the nature of the request  
3 and because of the exemption contained in the Freedom of  
4 Information Act, it may not have been necessary to do an  
5 exhaustive review. One knew at the outset that the material  
6 in question would fall within that category and, hence, was  
7 not disclosable.

8 Q. And you would be able to ascertain that without looking at it?

9 A. Perhaps looking at it in a cursory fashion as opposed to a  
10 detailed review.

11 Q. In any event, to your knowledge, at the time that this letter  
12 was written on February 8th, 1984 and signed by Mr. Giffin,  
13 he certainly had not reviewed the file, to your knowledge, as  
14 indicated the day before.

15 A. He indicates he has not had an opportunity to review the  
16 whole file.

17 Q. Right. At the bottom of that note, Mr. Herschorn, on page 315,  
18 it says: "Mr. Giffin can be reached at this phone number  
19 today if you need to speak with him." Did you speak with Mr.  
20 Giffin concerning the letter you were preparing for his  
21 signature?

22 A. I don't believe that I did. I may have. I just don't have a  
23 recollection of it.

24 Q. Mr. Giffin, I believe, when he was here, I don't have the  
25



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1 reference right in front of me, but my recollection is that he  
2 indicated to us that he assumed that some senior people in his  
3 department had reviewed the file. Would you have given  
4 him that indication?

5 A. No, I don't believe so.

6 Q. Would it be your view that Mr. Giffin could have said in the  
7 particular circumstances of this case, and because it is so  
8 peculiar, we will release whatever information we have to Mr.  
9 Cacchione. Is that an option that he had?

10 A. It was an appeal under the terms of the Freedom of  
11 Information Act that would be an option. His instructions,  
12 however, were to the contrary.

13 Q. Do you have Volume 33 there?

14 A. No, I don't believe I do.

15 Q. Page 331... Page one of that Volume 33. A memo from Mr.  
16 Giffin to yourself where you're saying:

17  
18 Assuming I will be asked some questions during  
19 Question Period, I would like a short summary of  
20 the reason why it was decided to change or  
21 update the file retention schedule.

22 And then there's a note from yourself on page 332 dealing  
23 with that.

24 A. Yes.

25 Q. Can you just explain for the benefit of the Commission and  
ourselves, having asked the question earlier, what the

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1 situation was at the time in 1984 with respect to file  
2 retention and what it was during the period of time when the  
3 Donald Marshall file was in the department from '71 to '78 or  
4 '79?

5 A. Perhaps the best answer would be reference to the memo in  
6 response at page 332, which indicated starting in the second  
7 paragraph:

8 Police report files, and that would encompass all  
9 reports filed in the department relating to  
10 prosecutions, both before and after 1982, have  
11 been retained for a period of six years and then  
12 destroyed. In light of our recent experience with  
13 the Donald Marshall case, it is now being  
14 recommended that police report files be retained  
15 for a period of ten years.

14 Q. And is that the current practice?

15 A. No, the current practice now is, or in the process of converting  
16 to the retention to a total document life of 25 years.

17 Q. 25?

18 A. For this type of, for this category of file. To carry on:

19 1982 was the first year of operation of our new  
20 central filing system. Prior to 1982, criminal  
21 appeal files were retained indefinitely.  
22 However, after a period of three years, these  
23 appeal files were reviewed and reduced to  
24 include just the appeal book, factums, and the  
25 decision of the court. The introduction of our  
central filing system, the indefinite retention  
period for appeal files was changed to a 21-year

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period.

1 And I should digress here. The Donald Marshall matter may  
2 have been a police report type file in '71 and an appeal file,  
3 because it went on to an appeal, as you're aware, in '71.  
4

5 Since 1982, the only additional change in filing  
6 procedures has been to combine the police  
7 report file dealing with the matter which goes on  
8 appeal with the appeal file. This combined file is  
now retained in its entirety for a period of 21  
years.

9 Have I answered? I'm not certain whether that responds to  
10 all of your query.

11 Q. The current situation now is 25 or is becoming 25, I  
12 understand?

13 A. It's in the process of becoming 25, as I understand it.

14 Q. And as a result of the system that was in effect in the 1970's,  
15 the Donald Marshall material that was in the A. G.'s  
16 Department was destroyed?

17 A. Yes, in approximately 1979, I believe.

18 Q. On page 340 of that volume, Mr. Herschorn, there's a note  
19 which seems to be from Mr. Giffin to yourself dated March 1,  
20 1984, do you remember that, inquiring from Mr. Giffin as to  
21 whether Junior Marshall or Sandy Seale had criminal records?

22 A. Yes, I do.

23 Q. Did you ever respond to that memo in writing? There's  
24 nothing in the material.  
25

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- 1 A. If there's nothing in the material, I doubt that I did. I  
2 undoubtedly responded verbally. It may have, the context  
3 may, again, have been positive, I'm just speculating here, may  
4 have been Question Period.
- 5 Q. It was a Thursday, I think, March the 1st, it might have been  
6 then. Do you recollect any discussion with Mr. Giffin as to  
7 why he wanted that information?
- 8 A. No recollection of any.
- 9 Q. Just for a couple of minutes, if I could just draw your  
10 attention to Volume 28. Now, in general, Volume 28 contains  
11 correspondence back and forth concerning the release by Mr.  
12 Edwards of the R.C.M.P. material and also contains the general  
13 policy statements on disclosure, which you've already talked  
14 about. Were you aware in the fall of 1984, in October or so of  
15 1984, that the R.C.M.P. report had been released, somehow or  
16 another had gotten to Kirby Grant?
- 17 A. I believe I became aware of that. I'm not sure at what  
18 precise point in time.
- 19 Q. Okay. You are, on page four, there's a letter of November  
20 20th to Mr. Edwards in which you're copied.
- 21 A. Yes.
- 22 Q. Did you have discussions with Mr. Coles concerning the  
23 appropriate position that ought to be taken with respect to  
24 the release of this particular R.C.M.P. report?
- 25 A. I have no recollection of any, no.

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1 Q. Did you ever have occasion to look at this particular R.C.M.P.  
2 report?

3 A. Yes.

4 Q. Was it your view at the time in November or so of 1984 that  
5 it was appropriate for that report to have been released by  
6 Mr. Edwards to Mr. Aronson?

7 A. Yes, I think my answer to that is yes.

8 Q. That you thought it would have been appropriate.

9 A. Yes.

10 Q. Do I take it then from your response that you would be,  
11 you're really disagreeing with the position taken by Mr. Coles  
12 that it shouldn't have been released?

13 A. Again, there were two legitimate aspects to both gentlemen's  
14 points of view on the subject. But I think I sided with Mr.  
15 Edwards' view premised upon the need for full disclosure. I  
16 saw, I felt that that was the more appropriate course to  
17 follow.

18 Q. Did you have any discussions with Mr. Coles in which Mr.  
19 Coles articulated to you his reasons why this information  
20 should not have been disclosed to Mr. Aronson?

21 A. No, this exchange of correspondence was dealt with by the  
22 letter, I think which originated at, yes, October 23rd, '84 at  
23 page one. Mr. Gale was involved at the request of the Deputy  
24 Attorney General. He writes: "The Deputy Attorney has  
25 asked that you provide us with a report." This exchange of

1 correspondence between the Deputy was channelled through  
2 Mr. Gale to Mr. Edwards and responses came accordingly. I  
3 wasn't involved nor consulted with regard to the substance of  
4 the letters.

5 Q. At least with respect to this particular one, if I hear you  
6 correctly, you would have come down on the side of Mr.  
7 Edwards, if you had been consulted.

8 A. Yes, I believe so.

9 Q. Were you not consulted?

10 A. With respect to?

11 Q. With respect to whether or not the report ought to have been  
12 released to Mr. Aronson?

13 A. As you're aware, it was, in fact, released.

14 Q. Yes, I'm asking you whether or not when Mr. Coles was  
15 formulating his response to Mr. Edwards on page four on  
16 November 20th, 1984, whether or not Mr. Coles came to you  
17 and said, "What do you think?"

18 A. No, I don't recall being consulted at that point in time.

19 Q. Were you the person who was generally responsible for  
20 dealing with issues of disclosure in the department at the  
21 time in 1984?

22 A. Yes, I would say so.

23 Q. Would you consider it odd that Mr. Coles would not consult  
24 you concerning an issue which seems to go to the question of  
25 disclosure?

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1 A. No, he was dealing with Mr. Gale, as the correspondence  
2 indicates. I wouldn't view it as odd. I, at that point in time, if  
3 my memory serves me correctly, was Assistant Director to  
4 Mr. Gale's position.

5 Q. You would have been Assistant Director Criminal at the time.

6 A. Yes, with specific responsibility for prosecutors and  
7 prosecutions. Hence, my answer to your question about  
8 primary responsibility for the issue of disclosure.

9 Q. If you could turn to page ten. It's a memo from Mr. Coles to  
10 yourself. It might be appropriate, without making specific  
11 reference to this incident. There's nothing on the memo that  
12 indicates what "this incident" is. It is your recollection that  
13 Mr. Coles was referring to this issue of the release of the  
14 report to Steve Aronson?

15 A. Yes, I suspect that the memo of November 20th, page ten,  
16 came to my desk together with the letter which appears at  
17 page four, the copy of the letter which appears at page four.

18 Q. Did you then generate the memo which appears on the next  
19 page, page eleven, November 21?

20 A. Yes, I did.

21 Q. And you say in that memo which you're sending to the  
22 Prosecuting Officers in the Province and Assistant Prosecuting  
23 Officers:

24 I wish to point out this department's policy with  
25

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1                   respect to police reports prepared by police  
2                   investigators for the assistance of the Attorney  
3                   General, his Deputy, and Agents.

4                   Such reports are essentially confidential.

5                   A. Yes.

6                   Q. At that point in time when you received this note of  
7                   November 20th from Mr. Coles and the letter from Mr. Coles  
8                   to Mr. Edwards referring to the Steve Aronson release of  
9                   information, did you then discuss it with him and say, "Now  
10                  look, my view is that it was okay to release the R.C.M.P. report  
11                  on Marshall to Steve Aronson."

12                  A. No, I don't recall doing so.

13                  Q. Okay. Did you consider that the R.C.M.P. report in connection  
14                  with Donald Marshall was, to use your phraseology on page  
15                  eleven, a police report prepared by police investigators for  
16                  the assistance of the Attorney General, his Deputy, and  
17                  Agents?

18                  A. Aspects of the file which came to the Department may have  
19                  had that type of report. There may be other types of reports  
20                  in the file as well. What was being done here was to bring to  
21                  the attention of the prosecutors the need for the non-Crown  
22                  sheet type of police reports, the police report which  
23                  contained, may contain names of informants, confidential  
24                  information which would be inappropriate to release further.  
25                  That type of information should not be disclosed.

                  Q. Okay, and do I take it that from your earlier comments, that



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1 your memo of November 21, 1984 would not be a direction to  
2 the prosecuting officers and assistant prosecuting officers to  
3 refrain from disclosing to defence counsel the type of  
4 information that Mr. Edwards disclosed to Mr. Aronson in  
5 1982?

6 A. I think that's a fair statement, yes, and you'll see the follow-  
7 up memorandum at page 13, dated December 3rd, 1984,  
8 because in the interim, as your material includes, one of our  
9 assistant prosecuting officers in Annapolis County had written  
10 in and my memorandum had caused him some confusion as to  
11 how it dove-tailed with our disclosure policy and I attempted  
12 to set the record straight with the December 3rd  
13 memorandum.

14 Q. And, in your view at least, the directive to continue to make  
15 full disclosure would have covered the situation that Mr.  
16 Edwards found himself in when he gave that material to Mr.  
17 Aronson in the summer of '82.

18 A. Yes.

19 Q. Subsequent to November/December of 1984, have you had  
20 any further involvement at all with the Donald Marshall  
21 matter?

22 A. I had no specific responsibility that I recall towards any  
23 aspect of the matter. Beyond, at the time that Justice  
24 Campbell's Commission, if I'm referring to it correctly, Justice  
25 Campbell was involved, I prepared some working documents

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1 that were forwarded to him, I believe, containing the 1971  
2 record and the 1982 record.

3 Q. Record in what sense?

4 A. Equivalent to a case book, the transcripts of the 1971 appeal  
5 and transcripts of the proceedings before the Appeal Division  
6 in 1982.

7 Q. During the course of discussions back and forth between Mr.  
8 Endres and Mr. Cacchione, were you kept advised as to what  
9 was going on?

10 A. No, I was not.

11 Q. Did you have any involvement at all in the question of  
12 quantum?

13 A. No.

14 Q. Compensation?

15 A. None whatsoever.

16 Q. Other than the matters that you and I have discussed for the  
17 last day and a half or so, are there any other, did you have  
18 any other involvement with the Donald Marshall case beyond  
19 what I've asked you about? Any things I haven't asked you...

20 A. Nothing that I can recall.

21 MR. SPICER

22 Thank you.

23 EXAMINATION BY MS. DERRICK

24 Q. Mr. Herschorn, my name is Anne Derrick and I represent  
25 Junior Marshall. Mr. Spicer has just been taking you through

1 some issues related to disclosure and I just wanted to ask you  
2 a general question. I believe in your direct evidence when  
3 we broke in March, you had testified that disclosure practices  
4 in Nova Scotia can vary from prosecutor to prosecutor. Do  
5 you have any ideas on how disclosure practices throughout  
6 the province can be made more uniform?

7 A. I don't recall my evidence being to that effect. I think that the  
8 practice in terms, or the policy is uniform throughout the  
9 province. There is a directive which is at page 16 which is  
10 the current...

11 Q. Page 16 of Volume?

12 A. Excuse me, page 16 of Volume 28, which reflects the current  
13 position of the department, policy of the department, which is  
14 disseminated to all prosecutors and assistant prosecuting  
15 officers. There are, as was raised during direct examination,  
16 there are individual practices. In particular, Mr. Spicer I recall  
17 alluding to a situation in Lunenburg County where the  
18 prosecutor forwards a, when he provides disclosure to the  
19 defence and forwards with the disclosure a letter indicating  
20 that none of the material is to be used to cross-examine  
21 witnesses. And that's a particular approach, practice followed  
22 by that prosecutor, which is not uniform throughout the  
23 province. But the basic thrust of the policy is uniform  
24 throughout the province.

25 Q. Is there some effort being made to see that differences in

1 practice that may be approved by the Attorney General's  
2 Department are more widely utilized? I mean is this  
3 something that's under active...

4 A. It's under constant review as situations come to our attention  
5 where there may be any misunderstanding of the disclosure.  
6 You'll note that the policy talks about reference to my  
7 position, if there's a questionable situation. So it's a matter of  
8 ongoing attention.

9 Q. So in that policy where it says, for instance:

10  
11 Disclosure may be limited or withheld by the  
12 Crown in any of the following situations where  
13 there are reasonable grounds to believe that  
14 there may be destruction of evidence,  
15 intimidation or threats to the well being of a  
16 witness.

17 Those are the kinds of decisions that are left up to the  
18 individual prosecutor handling a case, is that correct?

19 A. I believe the... No, I don't think that is correct. If you look at  
20 the final paragraph, it says:

21 In any case where it is felt that full disclosure  
22 should not be made, this must be referred to the  
23 Director of Prosecutions for decision and  
24 instructions.

25 Q. I see. So these kinds of issues would...

A. Disclosure is the rule. If there's to be an exception, they  
should resort to the head office of the department for

1 instructions.

2 Q. Right into the Department of Attorney General in Halifax.

3 A. Yes.

4 Q. In Volume 28 at page 11, this is a memo from you, Mr. Spicer  
5 referred you to it, to the Prosecuting Officers and Assistant  
6 Prosecuting Officers, November 21st, 1984. And you refer to  
7 police reports and what they include and you say "and  
8 privileged documents". What was meant by that? What type  
9 of privileged documents? What kind of privilege? Do you see  
10 where I'm referring to?

11 A. Yes, I see it. Why I'm pausing is with respect to whether the  
12 term was used in the strictly legal sense or whether it was a...

13 Q. Yeah, that's my question, whether you meant a particular  
14 type of privilege...

15 A. I don't think it was intended in the strict legal sense, although  
16 there may well be flowing into a crown prosecutor's file  
17 documents which would subsequently be ruled, be subject to  
18 the privilege.

19 Q. What might those be?

20 A. Those might be documents which, if released, might prejudice  
21 a case yet to come before the courts. That might be one  
22 example. I believe the doctrine of crown privilege, even  
23 though it is being...

24 Q. Eroded?

25 A. Eroded or reduced still is maintainable with respect to that

1 type of situation.

2 Q. And you also refer on page 13, I'm looking down the middle  
3 of the page now, this is the, I guess your clarifying memo.

4 A. Yes.

5 Q. Of December the 3rd, 1984. And you say:

6  
7 There will be the exceptional instance where a  
8 Crown sheet includes personal views or opinions  
9 of an investigator or other matters of a  
confidential nature which ought not to be  
disclosed to the defence.

10 What I want to know with respect to that is, was it in your  
11 mind or would you consider that to include, for instance, a  
12 psychiatric report with respect to a Crown witness or a Crown  
13 witness's criminal record?

14 A. Yes, I think I would include that. That, traditionally, has not  
15 been part of our disclosure information to the defence.

16 Q. So that type of information might fall within this  
17 confidential...

18 A. That could be a type of information.

19 Q. Confidentiality and not be disclosed.

20 A. Yes, it's possible.

21 Q. Now specifically with respect to these directions that went out  
22 as a result of Mr. Edwards, basically, I guess, as a result of Mr.  
23 Edwards having released the R.C.M.P. report to Mr. Aronson,  
24 and you said to Mr. Spicer that you basically sided with Mr.  
25 Edwards' decision in that case to have given Mr. Aronson that

1 R.C.M.P. report. But am I to understand that you never did  
2 discuss that with Mr. Coles?

3 A. That's right. I had no consultations with the Deputy Attorney  
4 General on that issue. As I indicated, Mr. Gale was, the  
5 initiating letter, I think if you check it, it will indicate that Mr.  
6 Gale was asked by the Deputy Attorney General to follow up  
7 the matter and he was the person in Halifax who was dealing  
8 with Mr. Edwards on that particular issue on behalf of the  
9 Deputy.

10 Q. But you were not concerned that these directives that went  
11 out were in any way in contradiction with your view that the  
12 particular release of this case was acceptable?

13 A. No, because the context of the Deputy's concern and of the  
14 matter he was addressing was, flowed out of the Marshall  
15 case, which because of its uniqueness, I didn't feel would  
16 extend into or prejudice other, more usual criminal  
17 proceedings.

18 Q. So you weren't concerned that, in the future, matters would  
19 not get disclosed that should be as a result of these directives.

20 A. No.

21 Q. At the time when Mr. Aronson was attempting to get  
22 information from the Attorney General's Department and I  
23 think, in fact, if you refer to Volume 31, Mr. Aronson wrote to  
24 you. This is Volume 31 at page 13.

25 A. Yes.

1 Q. Mr. Aronson wrote to you on March 11th, 1982 advising you  
2 that he acted for Mr. Marshall and saying that he wanted an  
3 urgent meeting between the department and himself, he  
4 wanted access to the report and to establish the best course of  
5 action to follow. Did you have any discussions around that  
6 time with Mr. Coles or with Mr. Gale or with the Attorney  
7 General that such a meeting would be held and that every  
8 effort should be made to cooperate with Mr. Aronson and  
9 provide him with full disclosure?

10 A. No, I was not the primary contact person between Mr.  
11 Aronson and the department. That person was Mr. Gordon  
12 Gale.

13 Q. So even though that letter was sent to you, it would have  
14 been referred on to Mr. Gale and he would have dealt with  
15 that?

16 A. I understand it to be Mr. Aronson's evidence and it's my  
17 understanding that because I was an individual in the  
18 Attorney General's Department, who Mr. Aronson knew  
19 personally, that he chose to write to me in the first instance.

20 Q. Now also in that same volume, on page 85, there was a memo  
21 from you... Sorry, from Mr. Gale to you, this is July 22nd,  
22 1982. Mr. Gale is saying:

23  
24 Frank and I are of the opinion that the Seale  
25 murder charge should not be laid unless Ebsary  
is granted bail on the stabbing case.



- 1 Can you tell us why that was?
- 2 A. Why what was?
- 3 Q. Why was it that Mr. Gale and Mr. Edwards were of the  
4 opinion that the murder charge should not be laid unless Mr.  
5 Ebsary was granted bail?
- 6 A. Perhaps I can just take a moment to read the entire memo.
- 7 Q. Sure, certainly.
- 8 A. I don't really have a strong recollection of the memo. The  
9 memo indicates that Mr. Gale and Mr. Edwards were in  
10 discussion on this thing and...
- 11 Q. You don't recall any discussion...
- 12 A. This may have been passed to me for my information.
- 13 Q. And you don't recall any discussions with yourself about why  
14 that was the position that was being taken?
- 15 A. I don't recall any discussions, no.
- 16 Q. Okay, thank you. Mr. Herschorn, I think you've said that it  
17 was, it accorded with your view that Mr. Marshall had to take  
18 considerable responsibility for his conviction. Is that correct?
- 19 A. No, the view was not mine. The view was that of the Appeal  
20 Division of the Supreme Court of Nova Scotia.
- 21 Q. But you accepted that view and you say that you...
- 22 A. I did.
- 23 Q. Didn't come across anything that caused you to question that.
- 24 A. No.
- 25 Q. So does that not then reflect your view, or do you have a

1 position. It wasn't a part of our stance. The stance was to, at  
2 the outset, information was coming to the department that a  
3 man was innocent of a crime for which he had been convicted  
4 and he was doing. He was incarcerated in a faci... in a  
5 penitentiary and it was our fervent desire to see that  
6 situation rectified, as it turns out, through a reference.

7 Q. So you're telling me that the concern about the position Mr.  
8 Edwards was taking was simply one of feeling that the Crown  
9 shouldn't be adopting a position. It had nothing to do with  
10 not wanting blame attributed to the system...

11 A. I don't think it was a conscious aspect of the department  
12 stance to avoid playing, the chips would fall where they may  
13 in terms of accountability and responsibility for one's actions.

14 Q. In Mr. Edwards' materials, and I'm not suggesting you know  
15 about this, I'm just going to ask you, Volume 17 at page 17, I  
16 think in preparation, this is January 25th, 1983, in  
17 preparation for his meeting in the Attorney General's  
18 Department, Mr. Edwards is making some notes, it would  
19 appear, and he refers to a suggested compromise and says:  
20 "Question: A compromise of my professional integrity." I just  
21 wanted to ask you, were you privy to any discussions within  
22 the department about compromising Mr. Edwards' position,  
23 making any trade-offs with respect to what position he  
24 advanced to the Appeal Division?

25 A. I wouldn't use the term "compromise". That's Mr. Edwards'

1 language that is reflected in that note. I did, in my capacity  
2 as the departmental person dealing primarily with  
3 prosecutors, it was my hope that we could resolve any  
4 disagreements, if it was possible, to Mr. Edwards to come and  
5 discuss the matter and see if a resolution, a mutually  
6 satisfactory resolution was possible.

7 Q. Were you in favour of Mr. Edwards being taken off the case?

8 A. No.

9 Q. So when Mr. Coles... Mr. Edwards refers to Mr. Coles having  
10 said that, basically if there had been time, he would have  
11 taken Mr. Edwards off the case.

12 A. It would not have been my recommendation had I been  
13 asked. Mr. Edwards had been dealing from day one with the  
14 matter, had developed a knowledge of the case which, in my  
15 view, it would have been impossible to replace him with  
16 someone, anyone else who could be as effective as he turned  
17 out to be.

18 Q. At the bottom of page 18 in Volume 17, Mr. Edwards says  
19 that in the course of this meeting at which you were present,  
20 Mr. Coles said: "We're in your hands. Try not to create more  
21 problems for me than I already have." Can you tell us what  
22 kinds of problems Mr. Coles had?

23 A. I can't elaborate on that for you. This question would have to  
24 be directed to Mr. Coles.

25 Q. Do you remember that being said at the meeting?

1 A. I have the recollection of that type of comment. Whether it's  
2 verbatim, I can't say.

3 Q. Do you remember having any reaction at the time, thinking to  
4 yourself what problem is he talking about, or having an  
5 understanding of what those problems were?

6 A. No, not specifically. I didn't, I don't know what precisely that  
7 is a reference to.

8 Q. So today you're saying you don't know what he was referring  
9 to when he used that language.

10 A. Not specifically, no.

11 Q. I just want to refer you to Volume 31 at page 126...

12 A. I should add, the reference may not have anything, it may be  
13 that Mr. Coles on that particular day or that particular  
14 juncture in his career was faced with a number of  
15 problematic situations. The reference to "more problems for  
16 me than I already have", may have nothing to do with the  
17 Marshall case whatsoever.

18 Q. You're speculating that it may be related to other...

19 A. I'm only speculating.

20 Q. Problems Mr. Coles was dealing with. In Volume 31 at page  
21 126, this is a letter written by Mr. Edwards to you on January  
22 18th, 1983.

23 A. Volume 31?

24 Q. Yes, at page 126.

25 A. Yes.

1 Q. Now by looking at the paragraph that's referred to as "B", Mr.  
2 Edwards says:

3 The police investigators in 1971 bona fide  
4 believe they have the guilty party in the person  
5 of Donald Marshall, Jr.

6 When you read that or when you read that now, how do you  
7 reconcile that with Patricia Harriss' statement about, the  
8 statement taken with respect to her?

9 A. I have a difficulty reconciling matters. I didn't, this was  
10 written at a particular juncture in time, particular point in  
11 time. It reflects Mr. Edwards' view at that point in time and I  
12 really can't take it much beyond that. Those are not my  
13 words. They're Mr. Edwards.

14 Q. When he wrote that to you, did you have any problem  
15 accepting that?

16 A. No, I didn't.

17 Q. And are you or were you familiar with the Patricia Harriss  
18 evidence?

19 A. I'm not certain that I was familiar in detail with it. I may  
20 have perused police reports. Again, I should point out that I  
21 wasn't the primary person dealing with Mr. Edwards. Mr.  
22 Gale was the primary liaison person on the Marshall file.

23 Q. Would it be fair to say that later on, if not at the time, you  
24 would have seen Patricia Harriss' statements?

25 A. I believe I've had occasion to read her statements, yes.

MR. HERSCHORN, EXAM. BY MS. DERRICK

1 Q. And having read them, does that cast any doubt with respect  
2 to his comment made by Mr. Edwards?

MR. PUGSLEY

3  
4 I object, My Lord, I don't think this witness can speculate on  
5 something Frank Edwards has written. It's Mr. Edwards' comment  
6 and Mr. Edwards is the individual who interviewed Patricia  
7 Harriss. He sent some reports to this witness. He has seen some.  
8 He has not seen others. Whether or not, I just doubt that any  
9 evidence Mr. Herschorn gives on this point will be of any  
10 assistance to you.

MR. CHAIRMAN

11  
12 It certainly won't be of much assistance because what I  
13 gather we're dealing with now, or he's being asked is since the  
14 events, what would his reaction be to a letter written written in  
15 January, 1983. He's clearly not in a position to react, to give us  
16 any help in 1983 because I gather he had not read the Harriss  
17 statement in detail. So you're quite right, this is not being very  
18 helpful. Mr. Edwards is the one who should, can be properly  
19 asked as to how he reached the conclusion that the police bona  
20 fide believed that the guilty party, that they had the guilty party,  
21 not this witness.

MR. PUGSLEY

22  
23 That's the point I'm making, My Lord.

MR. CHAIRMAN

24  
25 Yeah, it's a good point.

1 MS. DERRICK

2 Thank you, My Lord.

3 BY MS. DERRICK

4 Q. With respect to Mr. Edwards, further along in that paragraph,  
5 saying that the police were certainly not motivated by malice  
6 toward either the accused or, as being suggested in some  
7 press reports, prejudice towards his race, did you ask him  
8 how he could know that? How he could say certainly?

9 A. No, I did not.

10 12:32 a.m.

11 Q. So you didn't, you accepted his assertions but you didn't ask  
12 him to support them in any fashion?

13 A. No, this was a letter to me by Mr. Edwards. It does conclude,  
14 "I trust I will hear from you on this matter," and I believe  
15 what he heard from me was a request that he come to Halifax  
16 to discuss the issue we talked...alluded to earlier, the  
17 ultimate...the position the Crown would take on the relief  
18 sought portion of its factum.

19 Q. Now Mr. Herschorn, when there was a discussion in the  
20 Attorney General's Department about Mr. Edwards taking a  
21 position that Mr. Marshall be acquitted, is it fair to say that  
22 you knew that Mr. Edwards and the RCMP believed Mr.  
23 Marshall to be innocent, that he hadn't committed the  
24 murder?

25 A. Yes.

1 Q. Is that correct? Weren't you concerned to ensure that he was,  
2 in fact, acquitted and not run the risk that that might not  
3 happen? Why was it so important to maintain that this, you  
4 know, impartiality of the Crown not taking one side or the  
5 other?

6 A. Whether the point is accepted or not is for others, but I think  
7 the position was that...was that it was important for a Court,  
8 independent of the two parties who were adversaries before  
9 that Court, in Mr. Marshall's interest, in my submission,  
10 to...independent of any urgings from counsel to independently  
11 come to that conclusion, that there was not a sustainable case  
12 against Mr. Marshall, that he had been, in this case,  
13 wrongfully convicted.

14 Q. But surely it was in Mr. Marshall's interest to have both the  
15 defence and the Crown arguing that he should be acquitted.  
16 You can't argue with that, can you?

17 A. No.

18 Q. So was there no concern that, in fact, the Attorney General's  
19 Department was running some risk by not ensuring that that  
20 was the position advocated?

21 A. I can't answer that question. That's for others to conclude.

22 Q. So there were not discussions along those lines that this might  
23 be a risky position to take with respect to Mr. Marshall.

24 A. No, I think the bottom line in this whole matter that we're  
25 now discussing is that it show a position taken by Mr.



1 Edwards was in accord with the position, I think, that you  
2 would advocate.

3 Q I just refer you now to Volume 32 at page 170, actually it  
4 starts at 169. I'm going to refer you to 170. This was a  
5 memo from you to Attorney General How dated May 31st,  
6 1983, relating to ...

7 A. Yes.

8 Q ...three areas. Mr. Spicer took you through this. I just wanted  
9 to ask you one question. On page 170 of your memo in the  
10 fourth paragraph, which was just at the bottom of that page,  
11 you state, "Aside from the above, their Lordships refrained  
12 from commenting upon or drawing any conclusions as to the  
13 role of the Sydney City Police Department in investigating this  
14 crime."

15 A. Yes.

16 Q Now, I just want to know, why didn't you tell the Attorney  
17 General that the Court of Appeal, in fact, had refused to hear  
18 any evidence from the police?

19 A. The matter I was directing my mind to, as you'll see at the  
20 top of the page, is references contained in the decision, that's  
21 what...that's what it was...that was what was under discussion.

22 Q But would you not agree that it's material that they didn't  
23 hear any of that evidence which would, of course, perhaps  
24 explain why there was no comment or conclusion made?

25 A. It may be.

MR. HERSCHORN, EXAM. BY MS. DERRICK

1 MS. DERRICK

2 My Lords, I will be another few minutes, although I will  
3 certainly try to be as brief as possible.

4 MR. CHAIRMAN

5 We'll give you another few minutes.

6 MS. DERRICK

7 All right.

8 Q. Now in the course of this memo you don't explore any inquiry  
9 into why the witnesses may have lied, and I'm just wondering  
10 why that was not proposed at that time that that be enquired  
11 into?

12 A. I can't...I can only respond with what the paper indicates that  
13 that was the scope of the inquiry at that point in time.

14 Q. So it didn't occur to you or you did not think it at any point  
15 that that is an area that should have been explored?

16 A. It may have occurred to me that that would be an area to be  
17 explored, but that was not what was under...

18 Q. Not within the context of this memo.

19 A. Not in the context of this memo.

20 COMMISSIONER EVANS

21 Wasn't an application made to the Court on the reference to  
22 hear the police officers and that was refused.

23 MS. DERRICK

24 I believe that's correct, My Lord.

25

COMMISSIONER EVANS

1 Well, if they weren't before the Court you could hardly  
2 expect the Court to comment, I suppose.  
3

MS. DERRICK

4 No, I think Mr. Herschorn referred to that. I was simply  
5 asking Mr. Herschorn whether in his role in the Attorney General's  
6 Department, arising out of the fact that it was clear from the  
7 evidence at the reference that the witnesses had lied in 1971  
8 whether that was a matter that he thought should be pursued or  
9 explored further.  
10

11 Q. Now with respect to the issue of compensation which you  
12 addressed very briefly in this memo, would you agree that  
13 the effect of what you set out there is to build a case against  
14 or at least limit compensation?

15 A. It can be interpreted as such, yes. It was not the intention to  
16 do so.

17 Q. That was not your intention.

18 A. No.

19 Q. With respect to the Court of Appeal decision do you recall  
20 reading Superintendent Christen's report to Mr. Gale, the  
21 actual report is found in Volume 20 at page 26. And attached  
22 to that report, I can tell you this is what the materials show.  
23 Attached to this report was a report from Staff Sergeant  
24 Wheaton, which does refer to the comments made by various  
25 witnesses about their treatment at the hands of the police. Do

1           you remember reading that material?

2       A.   The date of Superintendent Christen's...

3       Q.   It was the 24th of June, 1983.

4       A.   I believe I read it, yes.

5       Q.   And in light of the fact that it had attached to it Staff Sergeant  
6           Wheaton's report setting out the witnesses' comments on  
7           their statement-taking, does that call into question some of  
8           the views of the Court of Appeal with respect to the blame  
9           being laid so much at Mr. Marshall's feet?

10      A.   I don't know whether, I don't think I ever approached or  
11         considered the question that you're proposing.

12      Q.   I'm just asking you this because you had said earlier that  
13         nothing later came to your attention that made you question  
14         the decision, and I was just seeing whether that refreshed  
15         your memory.

16      A.   No. I, as a lawyer, am not in a position, I...this is my starting  
17         point, I'm not in a position to question the decision of the  
18         Appeal Court. I have to take that as a given unless it's  
19         appealed. Our system can only function on the basis of that  
20         otherwise we have problems.

21      Q.   Mr. Herschorn, you didn't have any actual hands-on  
22         involvement in the compensation negotiations or...

23      A.   No.

24      Q.   ...you weren't giving advice about whether to make an *ex*  
25         *gratia* payment or anything...

1 A. No.

2 Q. ...like that, is that correct?

3 A. I understand that Mr. Endres was the primary legal adviser  
4 within the Department on that issue.

5 Q. With respect to this information that Mr. Cacchione requested  
6 pursuant to the Freedom of Information Act did you form any  
7 opinion about how fair it was that that information was not  
8 being provided to him?

9 A. No, I did not. I had a memorandum which asked...gave me  
10 instructions as to the type of response to be prepared and I  
11 did so.

12 Q. So you weren't critical of Mr. Giffin's position with respect to  
13 not releasing that information?

14 A. Wasn't my place to be critical.

15 Q. I believe it's been stated in the materials, and perhaps I think  
16 in Mr. Giffin's evidence, as well, that some of Mr. Cacchione's  
17 requests were, in fact, misplaced. That he was asking for  
18 things that were not, indeed, in the hands or not readily in  
19 the hands of the Attorney General's Department.

20 A. I have no knowledge of that.

21 Q. You have no...

22 A. Beyond drafting that reply for the Attorney General.

23 Q. That was the extent of your involvement.

24 A. I had no dealings with the question of a release of  
25 documentation to Mr...at Mr. Cacchione's request.

1 Q. Were you involved in the drafting of the order-in-council that  
2 set up the compensation inquiry, Justice Campbell's inquiry?

3 A. No.

4 Q. So the documents you were referring to were simply getting  
5 together materials for his consideration, is that...

6 A. I put together two thick, very thick books, one of which was  
7 1971 material and the second of which was 1982 material  
8 which included, to the best of my recollection, the transcripts  
9 of the proceedings before the Courts in those years, and  
10 perhaps, no, I guess that...Perhaps also he may have had a  
11 copy of the decision of the Appeal Court on the reference.

12 MS. DERRICK

13 Thank you, those are my questions.

14 LUNCH BREAK - 12:40 p.m. - 2:15 p.m.

15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25

MR. HERSCHORN, EXAM. BY MR. WILDSMITH

2:15 p.m.

1  
2 MR. PUGSLEY

3 I have no questions, My Lord.

4 MR. PRINGLE

5 I have no questions, My Lord.

6 MR. CHAIRMAN

7 Let's proceed with Mr. Wildsmith and if Mr. Ross does come  
8 this afternoon, he may be here by the time we're ready to hear  
9 from him.

10 EXAMINATION BY MR. WILDSMITH

11  
12 Q Mr. Herschorn, my name is Bruce Wildsmith and I'm here for  
13 the Union of Nova Scotia Indians. Mr. Spicer asked you a few  
14 questions last time you gave testimony concerning continuing  
15 legal education programs offered to crown prosecutors in the  
16 province and programs within the Attorney General's  
17 Department might deal with Indians, be it people of native  
18 ancestry. And just to summarize that evidence, as I  
19 understand it, there are no particular programs or no  
20 continuing legal education seminars or activities that are  
21 directed towards native people in Nova Scotia.

22 A. You ought not to take my response as definitive as a response  
23 from the department as a whole. There may be others in the  
24 department who have knowledge of such subjects.  
25

- 1 Q. All right. Your duties, though, correspond to the criminal  
2 justice system.
- 3 A. Prosecutions, sir, in particular, are my responsibility.
- 4 Q. So you would know about programs that were directed at  
5 crown prosecutors.
- 6 A. Yes.
- 7 Q. And you would also know about matters that might be  
8 connected to sentencing?
- 9 A. What aspect of sentencing?
- 10 Q. Well, any aspect of sentencing that might deal with special  
11 facilities, for example, that native people might be directed  
12 towards in their, in need of alcohol treatment, for example?
- 13 A. Possibly, not necessarily, but possibly.
- 14 Q. The bottom line, though, correct me if I'm wrong, is that you  
15 have no knowledge of any such programs.
- 16 A. I have no knowledge of any such programs, that's correct.
- 17 Q. Have you in the past been privy to discussions that might  
18 relate to Indian problems, issues, or programs?
- 19 A. Not that I recall.
- 20 Q. You are familiar with the existence in the past of the native  
21 court worker's program in Nova Scotia?
- 22 A. Not particularly.
- 23 Q. I see. So you did not participate in any discussions where  
24 that court worker program was under consideration?
- 25 A. No. I'm familiar with the phrase and I've heard of the



1 program but I don't know its specifics.

2 Q. Okay. So is that fair for me then to conclude that you have  
3 had no involvement whatsoever in any special programs or  
4 policy issues or problems that concern native offenders?

5 A. Yes.

6 Q. Okay. If I recall part of your testimony previously, you  
7 indicated in your job description that part of your role related  
8 to the formulation of policy within the department?

9 A. Vis-a-vis prosecutions, in particular.

10 Q. Only with respect to prosecutions?

11 A. I'd have to refer to the document, Mr. Wildsmith, to refresh  
12 my memory, but I believe it's tied particularly to  
13 prosecutions.

14 Q. The document you're referring to is Exhibit 148, I believe,  
15 your job description?

16 A. It looks like it. I haven't got it before me.

17 Q. The only matter in there that came to my attention is the one  
18 that says, "The Director of Prosecutions advises the Attorney  
19 General on policies and directives to be issued to prosecuting  
20 officers."

21 A. That's correct. The context there is prosecutions and  
22 prosecuting officers.

23 Q. Okay.

24 A. What page are you referring to?

25 Q. I'm looking at page two on your job description, Exhibit 148.

1 I don't have the transcript of your previous testimony, but at  
2 page 11249, there is some reference to the formulation of  
3 policy in criminal law matters, and while I don't have the  
4 verbatim transcript in front of me, and perhaps you can  
5 correct this statement, what I recall being said, from my  
6 notes, were that you, Mr. Gale, and to some extent, Gerald  
7 Conrad, were responsible for the formulation of policy in  
8 criminal law matters.

9 A. That would not be an entirely complete enumeration. The list  
10 would have to include the Deputy Attorney General and the  
11 Attorney General.

12 Q. But it included yourself.

13 A. Yes.

14 Q. And is it your evidence that it only relates to prosecutions?

15 A. Primarily.

16 Q. Your involvement?

17 A. Primarily.

18 Q. I guess what I'm trying to get a handle on is whether the  
19 matter of the treatment of Indians in the criminal justice  
20 system would be something within your role as the assistant  
21 or as the Director of Prosecutions or not.

22 A. It very seldom happens, Mr. Wildsmith, that I draw any  
23 distinction with respect to the race of any of the individual  
24 files coming before me. It's not a factor in my deliberations.

25 Q. Fine. So any issues that might relate to native people in Nova

MR. HERSCHORN, EXAM. BY MR. WILDSMITH

1           Scotia in the criminal justice system, would they be for the  
2           Director of Criminal and the Deputy and the Minister?

3           A. To the exclusion of my position?

4           Q. Yes.

5           A. Not necessarily. My position could become involved with  
6           such issues.

7           Q. Well, for example, some information I have is that a proposal  
8           was placed to the attention of Mr. Gale in March of 1987 on a  
9           study that the federal government was proposing on the  
10          needs of native people in the legal needs of the native people  
11          in Nova Scotia. Is that something that was discussed with  
12          you?

13          A. No.

14          Q. And is it something that, in your judgement, ought to have  
15          been discussed with you?

16          A. I have no familiarity of the subject matter of what you're  
17          raising, so I can't comment on that.

18          Q. All right. Well, let me move on to something else then. I'd  
19          like to direct your attention to what I found somewhat  
20          curious, a component of the evidence this morning. There  
21          were a variety of memos being referred to that you had  
22          written to the Attorney General, Mr. How, and these appear in  
23          Volume 32 at pages 169, 203, and 221. I don't want to ask  
24          you anything precisely about those memos, but I want to ask  
25          for your impressions on why Mr. How was asking for your

1 input in relation to those matters when Gordon Gale,  
2 according to your testimony, was the person responsible for  
3 coordinating the Attorney General's Department's efforts.

4 A. I guess my initial response would be that the question would  
5 be better directed to Mr. How as to his reasons for directing  
6 them to me. There are, the head office component of the  
7 Attorney General's Department in the criminal law sphere is a  
8 small one. It's, in the era we're speaking of in 1983, it's, from  
9 the bottom rung up, so to speak, myself as Assistant Director  
10 of Criminal, as I then was; Mr. Gale, Director of Criminal; the  
11 Deputy Attorney General; and the Attorney General. It may  
12 well be, and often was the case, that if Mr. Gale was absent  
13 from the province at meetings or was away on vacation, that I  
14 would, and did, and continue to fill in in his stead. That might  
15 be a possible explanation of why the matter would be  
16 directed to me. Or it may be that the Attorney General of the  
17 day may have felt I had a particular background which was  
18 the reason why he would direct something to my attention as  
19 opposed to Mr. Gale.

20 Q. And would you share the view that you had any particular  
21 insight or reason to contribute in the way you did in these  
22 memos at 169, 203, and 221?

23 A. Your question was, did I have any?

24 Q. Yes, or would Mr. Gale have been in as good or better position  
25 than you to have responded?

1 A. I believe he would have.

2 Q. So other than the fact that maybe Mr. Gale was occasionally  
3 out of town, you have no particular reason to suggest why he  
4 went to you rather than to Mr. Gale?

5 A. I go back to my initial response that the question would be  
6 better directed to the author of the memo.

7 Q. Okay. I'd like to turn your attention now to the letter that  
8 appears at page 126 in Volume 31. And just to clarify a point  
9 I don't think that was asked of you directly about this letter,  
10 this is the one from Frank Edwards to yourself.

11 A. Yes.

12 Q. You did not respond in writing in any way to this letter?

13 A. My understanding from the various perusals that have gone  
14 on of our file is that there is no written response to this. As  
15 far as I know, there was no written response, but I do recall  
16 the letter shortly preceded the meeting in Halifax on the 25th,  
17 I believe.

18 Q. Yes, I recall that. So there was no verbal response other than  
19 what took place in the meeting of January the 25th.

20 A. There may have been conversations preceding, between  
21 January 18th or the receipt of this letter on January twenty...  
22 It's marked as having been received on January 24th. There  
23 may have been a telephone conversation.

24 Q. And none that you can recall at the moment.

25 A. In terms of lining up the meeting that was to happen

MR. HERSCHORN, EXAM. BY MR. WILDSMITH

1 involving Mr. Edwards.

2 Q. In any event, I take it your evidence this morning was that if  
3 you disagreed with anything in here, you would have so  
4 communicated with Mr. Edwards.

5 A. Yes, I think that's accurate.

6 Q. Now in Paragraph "b" at the bottom of that page, there is  
7 some reference to the Sydney Police and the question of  
8 whether they were or were not motivated by prejudice  
9 towards his race, meaning the race of Donald Marshall, Jr.

10 A. Yes.

11 Q. It suggests that there were some press reports to that effect.  
12 Were you aware of this allegation prior to the letter being  
13 received?

14 A. I may have been.

15 Q. Can you tell us whether or not, either prior to or after this  
16 letter, there was ever any inquiry into the question of  
17 whether the Sydney Police were motivated by any prejudice  
18 towards Indians? Any investigation or...

19 A. I have no knowledge of any such inquiry.

20 Q. Okay. And I take it that when you received this letter, you  
21 had no evidence on this question one way or the other.

22 2:29 p.m.

23 A. I have difficulty in responding to your question. I don't know  
24 what you mean by evidence in the context of your question.

25 Q. Well I mean you had no knowledge based on matters that

MR. HERSCHORN, EXAM. BY MR. WILDSMITH

1 were called to your attention or that you had in your mind on  
2 the question of whether there was or was not prejudice.

3 A. No.

4 Q. So you had no particular basis of knowledge to judge the  
5 merits of that suggestion.

6 A. No the, my input throughout the piece was primarily from Mr.  
7 Edwards in Sydney.

8 Q. To your knowledge was any evidence directed towards this  
9 issue at the reference itself?

10 A. I have no knowledge of that.

11 Q. Would you agree that it's not proper to put that suggestion to  
12 the Court in argument if there was no evidentiary basis laid  
13 at the hearing itself.

14 A. Could you repeat the question?

15 Q. Would you agree that it's not proper to put that suggestion to  
16 the Court in argument if there was no evidentiary basis laid,  
17 no foundation laid at the hearing itself?

18 A. I can't conclude that definitively. There may be other, the  
19 Court may have asked a question which would raise the issue.  
20 I can't state that categorically one way or the other.

21 Q. Well Mr. Edwards is putting this forward as one of the points  
22 to be emphasized to the Court.

23 A. Yes.

24 Q. And my question to you is would you not agree that it would  
25 be improper to emphasize that point to the Court if there had

MR. HERSCHORN, EXAM. BY MR. WILDSMITH

1           been no evidentiary basis laid at the reference.

2           A. Again, I can't state that definitively that it would be  
3           improper. There...

4           Q. Well, if you had knowledge on this issue and you knew that  
5           there was not evidence at the reference would you direct  
6           your prosecuting officer not to make that representation to  
7           the Court?

8           A. That wasn't the context here. I wasn't directing Mr.  
9           Edwards'...

10          Q. No.

11          A. In the vast majority of issues that he was doing he was the  
12          initiator of the position of the Crown.

13          Q. Yeah. My question to you, though, is if you knew that there  
14          had been no evidentiary basis laid at the reference and you  
15          knew that this was a point to be emphasized to the Court,  
16          would you not think it your function to direct the prosecuting  
17          officer not to make that a point of emphasis to the Court?

18          A. In the end I would leave that to the judgement of the  
19          prosecuting officer.

20          Q. In other words, if there was no evidence he could still do it.

21          A. Well it, I guess what I'm struggling with is your, is the  
22          concept of evidence in your questions.

23          Q. Well, no basis laid.

24          A. There may be discussion or argument, questions, discussion  
25          back and forth between the Court where issues of this type



MR. HERSCHORN, EXAM. BY MR. WILDSMITH

1 might be, discussion may enter into and...so I'm having  
2 difficulty with just saying if there's no evidence it was  
3 improper for a prosecutor to discuss such matters.

4 Q. Well let me put it to you a different way. There had been no  
5 mention whatsoever of this question at the hearing. Do you  
6 think that it's proper to represent to the Court the absence of  
7 prejudice?

8 A. I have difficulty responding to that Mr. Wildsmith. I lose the  
9 train of your question, the thought of your question.

10 Q. Well the thrust of it is to say this. That if the first time the  
11 issue arises is on argument whether it's proper to make this  
12 assertion, especially as a point of emphasis, when there is no  
13 prior discussion of it.

14 A. I think my response is if it's improper, it's for the Court to  
15 advise counsel that it's an improper line to be proceeding  
16 with.

17 Q. So you don't see it as part of your role in directing  
18 prosecuting officers, then, to suggest they refrain from this.  
19 You would leave that to the Court.

20 A. Well it's not issue that I've confronted until you've raised it  
21 with me now. I'd have to take it under advisement and  
22 consider it and ponder it. It's not an issue that surfaces in  
23 day-to-day practice.

24 Q. Okay. So is it fair to conclude from that that you're not in the  
25 habit of directing your prosecuting officers as to what

MR. HERSCHORN, EXAM. BY MR. WILDSMITH

1 representations to make or not make to the Court?

2 A. That is correct.

3 Q. You leave that to their judgement.

4 A. That's their job.

5 Q. Isn't the thrust of this letter to alert you to the arguments?

6 A. Just excuse me for a minute while I reread the letter. No, I  
7 would say the thrust of this letter was to advise me of the  
8 ultimate, the position which Mr. Edwards was planning to  
9 take with respect to disposition of the case.

10 Q. Yes.

11 A. That I would take as the thrust of this letter.

12 Q. So one thrust, and a main thrust is to indicate the  
13 representations on final disposition, i.e. that an acquittal  
14 should be entered. That's one thrust.

15 A. Yes.

16 Q. But he's also alerting you to, if I can put it this way, two  
17 points bearing on the case that soften the impact of asking for  
18 an acquittal.

19 A. He appears to be, yes.

20 Q. And one other point about this is this question of possible  
21 prejudice by the Sydney Police towards Indians relevant to  
22 whether Mr. Marshall is guilty or not?

23 A. If prejudice existed it could be relevant to the question of the  
24 proceedings brought against Mr. Marshall.

25 Q. Yes.

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1 A. I'm not sure if that's fully responsive to your question but...

2 Q. And to put it the other way, this is saying no prejudice. Is  
3 that relevant to whether Mr. Marshall was guilty or not? The  
4 absence of prejudice.

5 A. If it doesn't exist I don't know where relevancy gets, where  
6 you get to a question of relevancy.

7 Q. Quite. So you'll agree with me that it's not a relevant point to  
8 draw to the Court's attention one way or the other.

9 A. Mr. Edwards felt it was relevant and I, on this particular point  
10 (b) I did not challenge him on that aspect of his  
11 representations. That's as far as I can take it.

12 Q. And sitting here in hindsight today you would agree that it's  
13 not relevant to say there was no prejudice.

14 A. I would have to defer to Mr. Edwards' judgement on that  
15 point. It's his origination. These are not my words. These  
16 are Mr. Edwards' words.

17 Q. Well I guess...

18 COMMISSIONER EVANS

19 Mr. Wildsmith, as I understand this letter is following, is  
20 written following the hearing of the reference...

21 MR. WILDSMITH

22 Yes.

23 COMMISSIONER EVANS

24 So we don't know what was raised on the reference according  
25 to this witness. He does not know what was raised in the

DISCUSSION

1 reference. Maybe the Court raised it. And if so, possibly Mr.  
2 Edwards felt that he should answer.

MR. WILDSMITH

3  
4 Yes, on the other hand...

COMMISSIONER EVANS

5  
6 This isn't something that was geared up before the reference,  
7 this is something, this letter arises after the reference.

MR. WILDSMITH

8  
9 After the evidence is brought in.

COMMISSIONER EVANS

10  
11 After the evidence, I'm sorry, yes.

MR. WILDSMITH

12  
13 That's right. And prior to arguments.

COMMISSIONER EVANS

14  
15 Right. This was the argument. Part of the argument.

MR. WILDSMITH

16  
17 And the thrust of my point is what is proper to bring up at  
18 argument. Whether this is proper to bring it up at argument  
19 if the basis was not laid in the evidence.

COMMISSIONER EVANS

20  
21 Well I would think the Court wouldn't permit it.

MR. WILDSMITH

22  
23 And I guess the thrust of my point is neither should Mr.  
24 Edwards' supervisor.

25

DISCUSSIONCOMMISSIONER EVANS

Well this doesn't say that he did it it just says that this was his idea at that time anyway.

MR. WILDSMITH

Yes. Thank you then, those are my questions.

CHAIRMAN

I forgot you, Mr. Barrett. I forgot all about you.

MR. BARRETT

No, actually I've indicated no questions.

CHAIRMAN

So that leaves Mr. Saunders or Mr. Pink.

MR. PINK

We have no questions, My Lord.

CHAIRMAN

Thank you very much, Mr. Herschorn.

WITNESS WITHDREWMR. SPICER


There are no further witnesses this afternoon, My Lord.

Judge Cacchione is on in the morning.

2:40 p.m. - ADJOURNED TO 17 MAY 1988 - 9:30 a.m.

## REPORTER'S CERTIFICATE

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

  
Margaret E. Graham

DATED THIS 16<sup>th</sup> day of May

19<sup>88</sup> at Dartmouth, Nova Scotia