

RS 44
Vol 25A
9

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

Volume 64

Held: May 17, 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

MEDIA POOL COPY

May 17, 1988

INDEX - VOLUME 64

The Honourable Judge F. Cacchione

Examination by Mr. Orsborn	11413
9:54	11414
Examination by Commissioner Evans	11430
Examination by Mr. Orsborn (cont'd)	11435
10:14	11435
Examination by Commissioners	11445
Examination by Mr. Orsborn (cont'd)	11452
10:45	11452
11:08	11465
11:49	11473
12:10	11486
2:07	11498
2:21	11505
2:30	11510
2:52	11522
Examination by Ms. Derrick 3:50	11541
4:03	11549
4:16	11557

May 17, 1988 - 9:35 a.m.

MR. CHAIRMAN

Mr. Orsborn.

MR. ORSBORN

The witness today will be His Honour Judge Felix Cacchione.
THE HONOURABLE JUDGE CACCHIONE, duly called and sworn
testified as follows:

EXAMINATION BY MR. ORSBORN

- Q. Your Honour, may we have your full name, please?
- A. My name is Felix Antonio Cacchione.
- Q. And where do you live, Your Honour?
- A. I live at 1326 Birmingham Street in the City of Halifax,
County of Halifax, Province of Nova Scotia.
- Q. And do I understand that you are presently a Judge in the
County Court in the Province of Nova Scotia?
- A. Yes, I am a Judge of the County Court for District Number
One.
- Q. And when were you appointed to the bench?
- A. I was appointed on June the 12th, 1986. I was sworn on
June the 26th, 1986.
- Q. What is your educational background?
- A. I have a Bachelor of Arts degree from Loyola in Montreal,
which is now Concordia University, majoring in political
science with a minor in languages. I have a LL.B. degree
from Dalhousie granted in 1974. I was admitted to the Nova

1 Scotia Bar in March of 1975.

2 Q. Following your admission to the Nova Scotia Bar and prior to
3 your appointment to the bench in 1986, did you practise
4 law?

5 A. I began my practise in 1975 on April 1 with Nova Scotia
6 Legal Aid. I worked with Nova Scotia Legal Aid until May of
7 1983 at which time I began my own practise. I was alone in
8 that practise until September of that year when I was joined
9 by Mr. Michael Lambert in the partnership of Lambert and
10 Cacchione.

11 Q. During the time that you were with Legal Aid did you
12 practise both criminal and civil law?

13 A. Actually initially from 1975 until October of 1976 I had a
14 combined practise dealing mostly in criminal and family
15 cases. In October of 1976... I should state I was hired to
16 work in the New Glasgow office, a rural office of Nova Scotia
17 Legal Aid. I worked there and covered the Truro office until
18 October of 1976 when I was transferred to Halifax to work
19 in their criminal division. I did exclusively criminal work
20 from October of 1976 through until my appointment.

21 Q. So, even when you were in private practise from 1983 until
22 1986, you were doing exclusively criminal work.

23 A. My practise was restricted to criminal law, yes, criminal
24 defence law.

25 Q. So, prior to your appointment to the bench you...from say

THE HONOURABLE JUDGE CACCHIONE, EXAM. BY MR. ORSBORN

1 1976 to '86, you were practising exclusively criminal
2 defence law.

3 A. That's correct.

4 Q. Can you give us an indication of the range of offences that
5 you would have been involved in defending?

6 A. It ranged from summary conviction matters, shoplifting,
7 theft under \$200 at the time, causing a disturbance through
8 to second degree murder.

9 Q. I take it from that you've had experience with jury trials.

10 A. I should state that most of the indictable matters that I took
11 to trial involving serious offences such as rapes and
12 woundings with intent were all before juries. I did very
13 little work in the County Court. I did a great deal of work
14 obviously in the Provincial or what was then the
15 Magistrate's Court.

16 Q. Did you consider yourself a successful defence counsel?

17 A. I guess one would have to ask my clients that. I felt that I
18 had a good track record.

COMMISSIONER EVANS

19
20 Did you eat regularly?

HIS HONOUR JUDGE CACCHIONE

21
22 My Lords, my weight hasn't changed considerably since
23 then, so I guess I would have to say yes.

COMMISSIONER EVANS

24
25 Then you were successful then.

1 HIS HONOUR JUDGE CACCHIONE

2 I also managed to get upset stomachs rather regularly.

3 MR. ORSBORN

4 Q. Was there a mix in the type of accused that you would
5 defend, and I'm thinking particularly of a racial mix
6 between whites, Indians, blacks or other non-white races?

7 A. Certainly. Dealing...I view my career into phases. The first
8 being my career with Nova Scotia Legal Aid and the second
9 being in private practise. When I worked with Nova Scotia
10 Legal Aid, I represented all racial groups, blacks, Indians,
11 very few Chinese, but basically a mixture. The same applied
12 to my practise in my private firm, however, the...it
13 appeared, at least on retrospect, that the greater proportion
14 of racially mixed clients occurred when I was working at
15 Nova Scotia Legal Aid, the lower socioeconomic groups, I'd
16 say the reason.

17 Q. Can you tell us from the point of view of a defence counsel,
18 what if any differences there were in representing an
19 Indian, a black or a white? Were there differences that
20 were apparent to you as defence counsel?

21 A. That's a pretty broad question, Mr. Orsborn. I'll try to
22 answer it. I recall my experiences representing native
23 accused as being quite difficult in the sense of obtaining
24 instructions. It appeared to me that most accused in that
25 group were prepared to simply go along with whatever was

1 told to them. There was a lack of definite instructions, i.e., "I
2 want to elect to Judge and jury and I want this type of
3 defence put forward." It was mostly, "I'm in your hands,
4 you can do what you want." I found getting instructions
5 very difficult. I found representing black accused difficult
6 in the sense of trying to convince the accused that, in fact,
7 they would be tried fairly and impartially. That is very
8 difficult I found at the time in particularly dealing with jury
9 cases where you would have a panel drawn of
10 approximately two hundred people from which you'd select
11 your jury, and maybe if you were lucky one or two out of
12 the two hundred summonsed were blacks. And then you'd
13 have to explain to the accuse, don't worry, that you will get
14 a fair trial, that the Court will make sure that you're tried
15 fairly and impartially. That is often easier said than done.
16 The appearances at times were difficult to try and
17 overcome. It, as I said the question is pretty broad, and...

18 Q. With respect to your comments about native accused and
19 difficulty getting instructions, was this because of any
20 language difficulties or cultural differences or are you able
21 to...

22 A. Not being an anthropologist I really can't answer because
23 of...whether it was because of cultural differences, but I did
24 feel that there was more of a sense of the matter had been
25 pre-determined and it was just a question of going through

1 and being dealt with in, for lack of a better term, "white
2 man's court." It was often very difficult to have an accused
3 give you firm instructions as to...if you're pleading guilty,
4 the comment would be "If you're going to plead guilty,
5 you're acknowledging that you did this, that you had the
6 intent to do it." And, often I found it difficult to get any
7 feedback. It seemed as if it was a foregone conclusion, "I've
8 been charged, let's get it over with."

9 Q. We've had some discussion before the Commission of the
10 native court worker program.

11 A. Yes.

12 Q. Did you have any exposure to this program...

13 A. Yes, I did.

14 Q. ...while you were in practise?

15 A. In the early stages of my career there was a program in
16 place, native court workers, I found that of great assistance,
17 particularly, as I say, when I was working at Legal Aid. The
18 volume there was incredible. It still is according to what I
19 understand. It was of benefit to me as counsel to have
20 someone, a native person, as an intermediary with the
21 accused to explain perhaps in the MicMac language what the
22 allegation was and what the possible outcomes would be. It
23 appeared over the years that I represented native people
24 that they were just prepared to lay down and accept the
25 consequences, sometimes, I felt, because they didn't

1 understand the process. I had...I've always had difficulty in
2 urging someone to plead guilty if I felt that there was a
3 defence available to them, however, at times, much to my
4 chagrin, the plea of guilty would go in, and that made
5 practising very difficult.

6 Q. Do I gather from that that the presence of the native
7 worker...native court worker program had a positive effect
8 on your ability to get instructions?

9 A. I certainly felt that it did and I was saddened when the
10 program was withdrawn.

11 Q. Yes. You mentioned in dealing with black...

12 A. I should add, as well, that in many instances I dealt with the
13 Black United Front, and that was also of assistance to me as
14 counsel. It appeared, at least to me, that they were more
15 active in making sure that persons who were before the
16 Courts were properly represented, and obviously a more
17 vocal minority.

18 Q. You mentioned in dealing with black accused that there
19 would on occasion be a perception on the part of the black
20 accused in a jury trial that a jury with a small number of
21 blacks on it might be perceived to be something less than
22 impartial. Do I gather that this is simply...this was simply a
23 perception on the part of your client?

24 A. I felt that, with juries, justice would, in most, if not all
25 instances, lead to justice being done. There is that

1 perception. There was that perception. Black accused, white
2 complainant, rape trial, white Judge, white jury. Often an
3 accused would say, "I don't stand a chance, they're going to
4 believe her, they won't believe me." But my experience was
5 that if there was a reasonable doubt, the jury did, in fact,
6 return a verdict of not guilty based on the reasonable doubt.
7 But it is very difficult to explain to someone who perhaps
8 has a grade three education, has never been involved in the
9 criminal justice process, that these people will try you
10 impartially and fairly. It's just a question of simply colour,
11 black and white.

12 Q. Well, correct me if I'm wrong, but I take it from what you're
13 saying is that while there may have been a perception in the
14 minds of some of your clients about the jury system, that
15 from your experience as counsel you did not share the
16 concern that by and large the jury system would function
17 properly?

18 A. I shared to a certain degree the concern, but based on my
19 experience, I felt that it really wasn't founded. But I had
20 the same perception, and I think the matter has been raised
21 just recently in a jury trial involving two black accused
22 charged with criminal negligence causing death, white jury.
23 And, counsel subsequent to the trial made the comment
24 that, at least one of the counsel felt that there should have
25 been a greater representation by the black...from the black

1 community on that jury panel. You're not, as counsel, going
2 to go out and say to an accused person, "Listen, I think
3 you're going to get the shaft because you're black." You
4 know, you do have to believe in the system that we have.

5 Q. From the point of view of your experience as a defence
6 counsel with juries and the selection of juries, are there any
7 changes to the jury system that you might have wanted
8 while you were defence counsel that would go, at least some
9 way, to alleviating this concern?

10 A. Well, certainly the change from the property ownership
11 requirement which has now been done away with. It was a
12 great step forward. I would hope that there would be more
13 representation from minority groups on juries. But then,
14 again, and these are just perceptions, you would have to try
15 and put yourself in the place of a sole black juror amidst
16 eleven white jurors trying to decide an issue where one of
17 the accused is from a racial minority. I think that the
18 pressures, at least I would expect that the pressures would
19 be, if only self-imposed, would be very great.

20 Q. We've had some evidence before the Commission concerning
21 Crown disclosure policies during the time in which you were
22 defence counsel. Both Mr. Giffin and Chief Judge How have
23 testified that the policy of the Crown was to make full
24 disclosure to the defence. Chief Judge How said this would
25 be on request. Mr. Giffin said this was a positive obligation

1 of the...of the Crown. In your ten years as defence counsel,
2 did that policy reflect your experience?

3 A. Actions speak louder than words, Mr. Orsborn. In my
4 experience, and I will not include all Crowns, because as you
5 know there is a distinction between Federal Crown and
6 Provincial Crowns. My experience dealing first with the
7 Federal Crown is that on all occasions, including cases where
8 there have been some serious concerns about security of
9 witnesses, my experience has been that disclosure has been
10 unlimited. And, in one case that I'm familiar with, because I
11 defended, there was a concern with the security of a certain
12 witness and it was on the basis of my relationship with the
13 Crown's office that I was made aware of certain evidence. I
14 cannot say the same with respect to the Provincial Crown.
15 My experience was during my years of practise, including
16 the very last case I handled prior to my appointment, I was,
17 in fact, representing a black accused on a first degree
18 murder charge where disclosure, it seemed to me, depended
19 on how well defence counsel got along with the Crown as
20 opposed to a positive obligation on the Crown to disclosure.
21 I will give you an example.

22 Q. Perhaps if I might interrupt.

23 A. Certainly.

24 Q. I'm quite happy to hear one or more examples that would
25 illustrate any difficulties that you had. I'm not sure for our

1 purposes that it's necessary, certainly at this time, to be
2 aware of names of accused or...

3 A. Oh, no, I wasn't planning on divulging that, just to indicate to
4 you that it depended on who you were as to whether or not
5 you would receive disclosure. I was advised that I couldn't
6 see a complainant's statement in a sexual assault case
7 because I would use or I could use the statement for
8 purposes of cross-examination. My understanding of the
9 criminal justice process was that one attempts to, through
10 cross-examination, to get at the truth, and if there are
11 inconsistencies they should be brought out. I had instances
12 of asking directly at a pre-trial, "Are there any statements
13 either oral or written which the Crown might seek to
14 introduce?" That's pretty broad. And, have been told "No,
15 other than what you have in your possession." And as the
16 trial was concluding Crown stands up and says, "My Lord,
17 we'd like to move into a voir dire on an oral statement," of
18 which I was not aware. I've had instances where the Crown
19 indicating full disclosure would supply me with a volume of
20 material this thick, and the investigator would be walking
21 around with a volume of material that thick, and I would
22 ask, "Why can't I see the rest?", "It's not relevant." Well,
23 there are statements in there that I might feel are relevant,
24 either for purposes of cross-examination or for wanting to
25 call the witnesses myself. That, and I refer to the last case

1 that I dealt with, did not happen. When I was appointed, I
2 retained other counsel who had formerly been with the
3 Department and it's my understanding that the entire file
4 was made available to that particular counsel. You see, it
5 seemed that there was some difficulty because in many
6 cases Crown felt that the accused was guilty and why was I
7 bothering taking this matter to trial when obviously on the
8 evidence the accused was guilty. And my response was
9 that wasn't my decision to make. It was the Court's decision
10 to make and I would defend the person to the best of my
11 abilities.

12 9:54 a.m.

13 A. (Cont'd.) And at the conclusion of the trial when the accused
14 was acquitted there was a certain degree of resentment. The
15 adversarial process is what we deal with but in that
16 adversarial process we do have a code of conduct. And the
17 Canadian Bar Association Code of Conduct speaks quite clearly
18 of the obligation a lawyer when prosecuting and that is to
19 make sure that all of the evidence is put before the Court. It's
20 not a win or lose situation. Unfortunately, I found that in,
21 with certain persons it, in fact, was how many notches can
22 you have on your win belt.

23 Q. Well let me get a little more detail from you. I gather from
24 what you're saying that...

25 A. I'm saying that full disclosure doesn't really exist as Mr. Giffin

1 is saying that it should exist or does exist.

2 Q. Are you saying that in your experience you got full disclosure
3 from some Crowns and less than full disclosure from other
4 Crowns?

5 A. Yes.

6 Q. In your experience, both in private practice and particularly
7 with Legal Aid, were those difficulties shared by, to your
8 knowledge, by other defence counsel?

9 A. Those difficulties were shared and are still difficulties that
10 face defence counsel. Particularly, and I would say this,
11 particularly with people dealing with Legal Aid clients.

12 Q. In the Halifax office of Legal Aid how many defence counsel
13 would be working in the criminal law section?

14 A. At the time that I was there initially there were four and
15 then there were five dealing exclusively with criminal
16 matters.

17 Q. Do you have any idea of what percentage of criminal law
18 cases would be handled by Legal Aid as opposed to private
19 lawyers?

20 A. I would, I don't have figures but I would say that the
21 majority, well over 50 percent. I would think probably over
22 70 percent.

23 Q. And was the topic of disclosure of the Crown's case discussed
24 among the Legal Aid counsel when you were working there?

25 A. It was.

1 Q. To your knowledge, I think you've said the difficulties were
2 shared by the other Legal Aid counsel.

3 A. Not all of them. Some of the counsel, perhaps because of the
4 social relationships that they had outside the courtroom, were
5 able to access information more easily. I think if one looks at
6 criminal trial lawyers as a group you will find that they tend
7 to be loners and, as such, it makes it difficult to socialize with
8 others, other lawyers, particularly criminal trial lawyers on
9 the Crown side. I found, I never spent time with these people
10 socially and I think that made my job a bit more difficult.

11 Q. Were you aware that the policy, at least of the Department,
12 was to provide full disclosure?

13 A. There had been rumours that that was the policy. There'd
14 been rumours that there was a policy manual that espoused
15 full disclosure. I never experienced full disclosure. I can
16 assure you of that.

17 Q. Did you have occasion, then, to make any complaints to the
18 superiors in the Department, either formally or informally?

19 A. I, yes. I recall speaking with Mr. Herschorn on several
20 occasions. I recall speaking with Mr. John Wade on several
21 occasions. I recall speaking with Mr. David Thomas on many
22 occasions. And the reply would always be the same. "It's up
23 to the prosecutor to decide." It was a fairly wishy-washy
24 attitude. In the case I referred to concerning the statement of
25 the complainant I went to the immediate supervisor of the

1 prosecutor who indicated that he would look at the matter. I
2 did not receive the information. I then went to Mr.
3 Herschorn. As a result of a phone call from Mr. Herschorn, I
4 gather, to Mr. Wade who subsequently transferred the
5 information I was able to get that information. One shouldn't
6 have to go through that route. It, I think I annoyed people in
7 the Department certainly. I approached, I recall approaching
8 a prosecutor handling an attempted murder charge which
9 had, he was dealing with a retrial. I had done the initial trial,
10 the one I referred to about the statement not being known to
11 me until the time that counsel stood up. There was a
12 conviction entered. An appeal was launched. The only time
13 in my career where I arrived in the Appeal Court and was
14 told by the Chief Justice, "We don't need to hear from you,
15 we're granting a new trial. There were so many errors." We
16 returned for a re-trial and I approached counsel, my client
17 having served time in a penitentiary and I approached
18 counsel and indicated based on the evidence that came out at
19 the trial would you consider a reduced charge on a plea of
20 guilty. That is a bodily harm on a plea of guilty and we would
21 consent or recommend and not oppose a custodial sentence of
22 a lesser magnitude than had been imposed. And the response
23 was, "The charge has been laid, let the Court determine." And
24 the Crown was well aware that they certainly had difficulties
25 with their key witness. With that attitude we went to trial

1 and obtained an acquittal.

2 Q. I understand you were retained by Junior Marshall in 1983.

3 A. I was.

4 CHAIRMAN

5 Before you move into that area Mr. Orsborn, Judge Cacchione
6 are you in a position to give us the, based on your experience,
7 any evidence or comments as to categories of Crown
8 Prosecutors. My understanding is that some Crown
9 Prosecutors are full-time public servants in the, on the staff
10 of the Department of the Attorney General while others are
11 retained to prosecute while still remaining in private practice.
12 Is that...

13 A. That, My Lord, was not the case when I was practising. It
14 seems that it was only recently as a result of certain high-
15 profile cases that private counsel were retained to act as
16 prosecutors. In the years that I practised I can't recall a
17 situation, actually I recall someone from the, a judge of the
18 Probate Court who had been a former prosecutor and then
19 become a judge of the Probate Court acting as a prosecutor in
20 a situation that involved a police officer. But that was the
21 only instance that I recall of private counsel being retained.

22 CHAIRMAN

23 And with respect to Federal Crown Prosecutors is that the
24 same situation, that they're public servants?

25 A. I think that's a little different. I think that Federal Crown

1 Prosecutors outside the Halifax-Dartmouth area are generally
2 people in private practice who get a contract to do the Federal
3 prosecutions. Fisheries, sometimes the smaller narcotics
4 matters. Actually I'm trying, I'm scheduled to hear one
5 involving a fairly large narcotics matter that has private
6 counsel representing the Crown.

7 CHAIRMAN

8 Well, in your practice did you detect any, with respect to
9 disclosure, any difference in approach between, let's say in
10 the case of the Federal Crown, between those in private
11 practice and those who were retained full time?

12 A. There was a certain degree of difference and I think it was
13 just because of the private practitioner acting as Crown
14 counsel was not as comfortable in his role and would,
15 therefore, be more cautious in the type of disclosure. But I'm
16 sure that once a request was made and it was channelled
17 through to the head office that disclosure was forthcoming as
18 a result of that. I can honestly say that I never had
19 difficulties with Federal Crown Prosecutors. It wasn't a
20 matter of, "Well you can look at the file," which was often the
21 case with the Provincial Crown. "You can't take a photocopy
22 of the statement." Initially it was, "You can't even dictate the
23 statement on your own machine." That changed after a while
24 when you'd surreptitiously arrive with your dictating
25 machine and start dictating the statement. With the Federal

1 Crown I recall photocopies being made of the Crown sheets.
2 And if there were problems with the investigation, if there
3 were allegations made by my client vis-à-vis an officer, that
4 those would be explored. The same could not be said of the
5 Provincial Crown. And it depended certainly on the defence
6 counsel's relationship with the particular Crown Prosecutor.
7 It depended on the area of the province that you practised in.
8 When I did go into private practice I had occasion to travel
9 throughout the province doing representations and, again,
10 certain Crowns felt that full disclosure meant full disclosure
11 and you would be able to see their entire file. Other Crowns
12 would not let you see anything other than the Crown sheet
13 which, in effect, gave you nothing. A very one-sided view of
14 what the evidence was anticipated to be as opposed to what
15 the statement said that the evidence was or would be.

16 COMMISSIONER EVANS

17 Q. Mr. Cacchione would they let you have a look at your own
18 client's statement?

19 A. Yes. I think that there's a provision in the Criminal Code that
20 allows for that, My Lord...

21 Q. I'm aware of it. I was wondering of the Crown was.

22 A. I'm sorry, I didn't...

23 Q. I am aware of it and I was wondering if some of these Crowns
24 you referred to were aware of it.

25 A. My Lord, I really don't want to taint all of the Provincial

1 Crowns with the statements that I've made. I do, however,
2 want to make the Commission aware that not all of the them
3 follow the policy that has been outlined before this
4 Commission and that is in that policy manual.

5 Q. You were aware of the manual.

6 A. Certainly. I recall being at a class at the Dalhousie Law School
7 speaking to a group of students with Mr. Herschorn and we
8 had a great discussion over the contents of that policy
9 manual. Mind you, I've not yet seen it. He had it in his
10 possession but I didn't see it, didn't read it.

11 Q. There was no distribution to the defence bar?

12 A. No, My Lord.

13 Q. So I take it that this operated on an old school tie attitude.
14 Some got disclosure, some didn't get disclosure.

15 A. I would say that that's a fair statement.

16 Q. And if the Crown was happy with the defence he revealed a
17 certain amount more or less depending upon the degree of
18 familiarity.

19 A. Yes.

20 Q. But when you got into that position, I believe you said that
21 you only found out about a statement once you arrived before
22 the Court. And he said, "Now I want to hold a voir dire on the
23 statement" of which you had no prior knowledge.

24 A. That's correct, My Lord.

25 Q. And did you get an adjournment of that trial?

1 A. We proceeded with the voir dire after I was made aware of
2 the oral utterance. As I recall it, the charge was attempted
3 murder and the statement allegedly made in the police
4 vehicle on the way to the court house was, "I hope the bitch
5 dies" or something to that effect...

6 Q. Slightly incriminating...

7 A. Slightly, My Lord. We had a voir dire. It was ruled
8 admissible. We felt at the time that there was such a
9 magnitude of errors on the part of the rulings of the trial
10 judge that we were fairly certain that we would get a new
11 trial. So we did proceed with the trial. The statement was
12 admitted. There was a conviction. There was a sentence of
13 five years. There was a new trial and an acquittal.

14 Q. I think what I'm concerned about was there any comment by
15 the trial judge, I assume you objected to...

16 A. Certainly, My Lord. I objected to it. The unfortunate thing
17 was that the, as I recall the scenario, the trial judge was not
18 the judge who had done the pre-trial and I voiced my
19 objection to the statement being brought to light at that
20 particular time and as I recall it, the comment was, "Well,
21 we'll have a voir dire and determine the admissibility of it."
22 And it was left at that.

23 Q. The other factor, you said that there was a, can you give me
24 any reason for the low number of Indians and Blacks on the
25 jury panels? Jury roster?

1 A. Well certainly when I was practising and before the change in
2 the Juries Act, it was a question of ownership of property.
3 And that certainly affected the roles. I really, I would only
4 be speculating to say why that is still the case. I don't think
5 that there's a concerted effort to exclude people but it would
6 appear that they are not proportionately represented.

7 Q. Well, is that because Blacks or native peoples do not wish to
8 serve on juries?

9 A. I really have no basis for answering that question, My Lord. I
10 wouldn't, no I've never asked somebody whether or not
11 they'd want to serve on a jury if they could.

12 Q. But when they come before you as a judge...

13 A. Yes.

14 Q. Are they asking to be relieved of jury duty?

15 A. My Lord, I don't sit with a jury. I'm a Section 482 judge in
16 Nova Scotia. We're without jury. So I'd have no basis for
17 answering that.

18 Q. Another question. I'll let you do a little work after while.
19 The program of the native worker, you found that to be very
20 helpful then as I got your evidence. You were unhappy when
21 it was terminated.

22 A. Yes.

23 Q. And was there any such program for the Blacks?

24 A. No. No, there wasn't a particular program in place. However,
25 the Black United Front, and I guess it's "the old squeaky

1 wheel gets the oil." If an accused felt that he was having
2 difficulty either in obtaining representation or a perception
3 that the process was being unfair to him or her, that Black
4 United Front would become involved and they would contact
5 counsel. They would contact me and ask questions and
6 perhaps make representations on behalf of the particular
7 accused person. So it seemed that they had a higher profile.

8 Q. And they had an advantage, too, I take it that they were more
9 articulate in English than the natives.

10 A. Yes. As, not speaking Micmac myself but understanding that
11 there is no word in Micmac for "guilty," I think emphasizes
12 the point that, the difficulties that counsel would have with
13 an accused saying "I'm guilty." I'm perhaps being blamed for
14 it. Obviously if you're being charged you're blamed for it.
15 But that and guilt are two different things.

16 Q. I have no final question to you. You say that you appeared on
17 a panel, I take it, with Mr. Herschorn.

18 A. It was a class discussion.

19 Q. And he indicated certain things that were really news to you.

20 A. I knew that the manual existed. I really wanted to read the
21 manual. I never was given the opportunity to read the
22 manual. Being told that full disclosure was a policy did not
23 stand in, or was not in keeping with what I had experienced
24 in practice.

THE HONOURABLE JUDGE CACCHIONE, EXAM. BY COMM. EVANS

1 10:14 a.m.

2 COMMISSIONER EVANS

3 Did you make any formal complaint to the Attorney
4 General's office that their words of wisdom were not being carried
5 out by the prosecutors?

6 THE HONOURABLE JUDGE CACCHIONE

7 My Lords, my complaints to the Attorney General's
8 Department generally fell on deaf ears and I felt that there would
9 be really no...nothing gained from writing the Attorney General. I
10 had discussions with Mr. Herschorn in his office and perhaps
11 because of my Latin temperament I became too emotional for his
12 liking and wasn't as calm and collected as I am this morning.

13 COMMISSIONER EVANS

14 I was thinking with your Latin temperament you might
15 have blown down the wall over there.

16 THE HONOURABLE JUDGE CACCHIONE

17 Well, certainly the door had to be shut on several occasions.

18 COMMISSIONER EVANS

19 Thank-you, very much.

20 THE HONOURABLE JUDGE CACCHIONE

21 Thank-you, My Lord.

22 MR. ORSBORN

23 Q I understand that you were retained by Mr. Marshall in May
24 of 1983 immediately following the handing down of the
25 decision on the reference.

1 A. That's correct.

2 Q May I ask how Mr. Marshall came to be your client?

3 A. Stephen Aronson, who represented Donald prior to my
4 involvement, was one year ahead of me in law school and
5 Stephen, his former partner John Clifford, and I, spent a lot
6 of time together, both professionally and socially. They had
7 their offices at the Dartmouth Professional Centre. I would
8 visit them generally every time I was in Dartmouth Court
9 I'd stop in for a coffee or actually they drank tea, and I was
10 aware that this matter was being handled by Stephen. I
11 recall discussions with Stephen at my home concerning what
12 was happening. I wasn't privy to the particulars of the
13 situation but certainly that there was a...there was some
14 evidence of a wrongful conviction and of an appeal and a
15 reference hearing. As a result of our discussions, I met with
16 Donald, I spent some time at my home with Donald and with
17 Stephen, and after the reference hearing in December,
18 Stephen approached me and indicated that he was thinking
19 that he had had enough of private practise. And, at the
20 same time I was experiencing difficulties with Legal Aid in
21 terms of volume, caseload, and lack of support services. I
22 had made my views known to the administration and the...I
23 recall writing a sixteen-page letter, handwritten letter, to
24 the executive director outlining my concerns, and when he
25 read it he said, "When are you leaving?" at which point I

1 said, "Fine, I am leaving," and so it was as a combination of
2 those factors that led me to, when requested by Stephen, to
3 agree to represent Donald. I felt that Junior and I had a
4 good rapport. I could in some ways understand where he
5 was coming from. He felt comfortable with me. I agreed to
6 take the file on. I left private practise, I'm sorry, I left Legal
7 Aid in May of 1983. I think I resigned effective April 30 or
8 somewhere in that area, and it was...I became his solicitor
9 once the decision from the Nova Scotia Court of Appeal was
10 handed down, which I believe was May the 13th.

11 Q. Yes. Following the handing down of that decision were you
12 briefed by Mr. Aronson on what his views were of what
13 needed to be done in the days ahead?

14 A. Stephen, as I recall, sent me....sent me a covering letter with
15 the file indicating that there had been an originating notice
16 issued, what materials were being forwarded to me and, yes,
17 we did have discussions concerning particularly the civil suit
18 and what the purpose of that was.

19 Q. What was the purpose of the civil suit?

20 A. It was, in essence, to protect Junior's rights should
21 everything else fail. It appeared to me that Stephen was
22 saying, and subsequently I agreed after spending some time
23 on the file and dealing with the system, that it would be a
24 long road to hoe. We didn't know whether or not Junior
25 would be able to make it through the whole civil suit. I had

1 never, as I have indicated, practised civil law before, was
2 unaware of the machinations that go on in a civil suit and
3 the interlocutory applications and the ex parte applications
4 and the motions that are made, of which I'm very familiar
5 now, and discoveries, et cetera, notices to produce. It was
6 felt that that would be difficult. It would be difficult to
7 establish the claim. It would also be more difficult on Junior
8 trying to proceed with the claim.

9 Q. You, in fact, did renew, I think, the...

10 A. Yes, we renewed it simply...

11 Q. ...statement and...

12 A. ...not to let it lapse, and to give us some more breathing
13 room and to see. But our purpose, quite frankly, after
14 having done a review of the law and malicious prosecutions
15 and looking that Municipal Act and the Police Act and all of
16 that was that we could proceed with the action. It would be
17 very difficult to establish, not only legally, but it would be
18 more difficult in terms of what it would take out of Junior to
19 go through that and to be faced with having the suit in
20 Sydney, which is where it was filed, and knowing that
21 obviously very competent, probably the most competent
22 counsel would be retained to defend the various parties and
23 that we would be in Court a lot on motions and having dealt
24 with Junior and knowing what his reaction was to Courts
25 and proceedings, we felt that it was...it would be very

1 difficult to maintain that claim.

2 Q. Tell us a little bit about that then from your perception,
3 what was Mr. Marshall's reaction to Courts and proceedings?

4 A. I think it's safe to say that Donald didn't trust Courts. That
5 may be an understatement based on his experience. I recall
6 occasions of being with Donald and it would it be a very
7 pleasant evening. We'd chat, we'd laugh, we'd talk about
8 fishing and hunting and native MicMac culture and my
9 growing up in the east end of Montreal, various things. The
10 closer we came to a schedule Court hearing, i.e., Ebsary's
11 preliminary, one of the numerous Ebsary trials, you could
12 physically see the change in the man. Emotionally there was
13 a change. Psychologically there was a change. He would
14 become nervous. He would become tense. He would at
15 times just decide that...go out and get drunk. And the
16 pressure, once the pressure was on, if he knew it was
17 coming up, it was as if he couldn't control himself in the
18 sense that we can say, "Let's be rational about this,"
19 I...certainly I draw from my own experience. I had
20 reservations and a bit of anxiety about testifying just
21 because I have never testified before, not because of the
22 contents of my testimony. But with the assistance of my
23 wife who says, "You just go and you say what you have to
24 say and be rational," and being a rational person, for all
25 intents and purposes, I can do it. But with Donald there was

1 always that feeling that "I'm the one that they want to get,
2 I'm not the accused in this matter but I'm the one that
3 they're going to try and get." And, it became clear to me at
4 Ebsary's preliminary hearing that, in fact, he might have had
5 a basis for that feeling, because the...the Crown at Ebsary's
6 preliminary hearing did not even interview their key
7 witness, which was Donald Marshall. Now, I practised for a
8 fair number of years and I thought that it was a common
9 rule that you at least interview your witness to find out
10 what they're going to say, instead of putting him on and
11 then deciding that you're going to do a section 9(2) Canada
12 Evidence Act application on him. So, I felt that he might
13 have had a basis for that. The fact that not all of the
14 evidence that was available on the second degree murder
15 charge against Mr. Ebsary was led. And I'm not saying that
16 the Crown always leads all of the evidence, but they
17 certainly lead sufficient evidence to establish a committal.
18 That wasn't done. And, just the night before that we went
19 up to Sydney, we flew up together. He had to pay his way
20 up. I had to pay my way up. Now, I didn't expect the
21 Attorney General to pay my way, but certainly he is their
22 witness, they've got to make a...make sure that he gets
23 there. We paid for the...for his flight up, he was nervous.
24 We got to Sydney, he said, "Let's go see my parents." We
25 went and we saw Mr. and Mrs. Marshall at which point

1 Donald said, "I'll see you later" and he was gone. And I
2 wondered whether or not he would show up the next
3 morning and, in fact, he did show up after I had to knock on
4 the door of his hotel room in which he hadn't slept, but he
5 was there, and he was under the influence of alcohol. He
6 was nervous. He was confused. Had to put him in the
7 shower and try to get enough coffee into him that he would
8 be presentable. That pattern repeated itself. It repeated
9 itself. I spoke with him several days before Ebsary was
10 granted a re-trial, and Ebsary had been convicted, the
11 matter was appealed and Donald felt that was fine and he
12 was getting on with his life. He was driving back from, I
13 think it was Bridgewater, and he heard on the radio that
14 Ebsary had been given a new trial and he just went on a
15 tear. And I received a phone call in the middle of the night
16 with him being at his wit's end. That pattern was
17 continuous.

18 Q. You've had an opportunity to observe Mr. Marshall then and
19 to talk about his reaction to proceedings, you also had an
20 opportunity in your practise to represent a number of
21 people. Thinking specifically of natives that you had
22 occasion to represent, are you able to say that Mr. Marshall's
23 reaction to Courts and proceedings was the same as other
24 natives that you've represented or markedly different?

25 A. It was different. I wouldn't say markedly.

1 They're...certainly both shared the same apprehensions. I
2 think Donald's were more pronounced, obviously because of
3 his experience.

4 Q. Did Mr. Aronson hand you over his files?

5 A. Yes, he did.

6 Q. Are you able in a general sense to indicate what those files
7 contained, and I'm thinking specifically of whether or not
8 they contained any...one or more RCMP reports, statements
9 of witnesses form 1971, the 1971 RCMP review?

10 A. I'm not sure if the 1971 RCMP review was there. I know
11 that there was a report from Staff Sergeant Wheaton in
12 which he outlined some of the deficiencies in the case in the
13 initial investigation. I recall seeing copies of Patricia Harriss'
14 first statement at eight o'clock in the evening and then the
15 other one at one, one-thirty in the following morning.
16 Maynard's Chant statement with the signatures, that report
17 was in. I think it was a 1982 report.

18 Q. Do you recall if there was more than one RCMP report?

19 A. I'd have to say that there was only one RCMP report. I
20 recall it being fairly thick. It was stapled together with the
21 statements attached to it.

22 Q. Did Mr. Aronson indicate to you any restrictions of any kind
23 on which this material could be...for the uses it could be put?

24 A. No, none whatsoever.

25 Q. When you took Mr. Marshall as your client, what were your

1 objectives?

2 A. My primary objective was to have a full public inquiry into
3 the circumstances surrounding his arrest and conviction. As
4 a corollary, my objective was to obtain compensation for
5 Donald Marshall for the years that he'd been incarcerated,
6 for the damage that had been done to him as a result of that
7 wrongful incarceration. It was hope that if a full, frank and
8 impartial inquiry were conducted that criminal charges
9 would be laid against some of the participants in this
10 miscarriage of justice. In particular, it was felt that, and this
11 was my opinion, that Detective MacIntyre and Urquhart
12 should be charged with either obstruction of justice or
13 counseling perjury. Those...and we did not...I should state
14 that was my feeling. We did not push that issue of the
15 laying of charges. We didn't feel that Patricia Harriss,
16 Maynard Chant or John Pratico should be charged because of
17 their age and the circumstances that they were operating
18 under. But primarily a public inquiry to get all of this into
19 the open to make sure that it never happened again to
20 anyone. And, with respect to the question of compensation,
21 that was secondary.

22 Q. Was this...the issue of compensation secondary to...in Mr.
23 Marshall's mind or just in your mind or are you able to tell
24 us?

25 A. I think I can state that in Donald's mind the matter could

1 have been handled by an inquiry in the laying of charges.

2 Q. He was less concerned with compensation.

3 A. I don't think that money really meant very much to Donald.
4 We felt that as...and I use the word "we" because I consulted
5 with my partner, Michael Lambert, on numerous occasions,
6 that...and with other people in the criminal justice system
7 who dealt with Donald, in particular Jack Stewart, that if we
8 could obtain some compensation for him that we could, in
9 fact, set aside a trust fund and use that to obtain some much
10 needed assistance for Donald in terms of alcohol
11 rehabilitation, in terms of either psychiatric or psychological
12 rehabilitation that wouldn't be available here. That if you
13 could plug him into a native drug rehabilitation program
14 you would certainly be going quite a ways in salvaging what
15 was left.

16 Q. Other than the file material provided to you by Mr. Aronson,
17 did you obtain any documentation from the RCMP?

18 A. Obtained nothing from the RCMP.

19 Q. Did you obtain any information from the Department of
20 Attorney General?

21 A. No, as I recall it all our requests were denied. There were
22 requests made under the Freedom of Information Act which
23 were denied. We were told that files had been destroyed.
24 We...no.

25 Q. What about the Correctional Services of Canada?

1 MR. CHAIRMAN

2 Sorry, before you leave that, did you ask for any reports
3 from the RCMP?

4 THE HONOURABLE JUDGE CACCHIONE

5 We didn't ask for, no, we didn't ask the RCMP directly for
6 any reports. Our feeling was that anything would be coming
7 through the Attorney General's Department, that the RCMP on
8 their own would not release information. We didn't...we didn't
9 follow that path leading to the RCMP because in our view the
10 RCMP were the ones that had, in fact, uncovered this thing and
11 brought about Junior's acquittal. We felt that they were on our
12 side at the time and we were unaware that there were other
13 reports, quite frankly.

14 MR. CHAIRMAN

15 Were you aware of the Inspector Marshall report in 1972?

16 THE HONOURABLE JUDGE CACCHIONE

17 I think that that was referred to in Staff Sergeant Wheaton's
18 report the...that there had been a polygraph examination, yes, we
19 were aware that there had been a polygraph examination, that
20 MacNeil came out untruthful and Ebsary...or inconclusive and
21 Ebsary was truthful or passed the polygraph. We were aware of
22 that. I think it was...it formed part of the...I think it was the 1982
23 report.

24 MR. CHAIRMAN

25 But the report itself, I take it, you didn't see, that is the

THE HONOURABLE JUDGE CACCHIONE, EXAM. BY COMMISSIONERS

1 Inspector Marshall report.

2 THE HONOURABLE JUDGE CACCHIONE

3 As I said, My Lord, I'm not sure if that was attached to
4 Inspector or Staff Sergeant Wheaton's report or not. I know I've
5 read it. The question is whether I read then or I've read it
6 subsequent to my handling of the file.

7 COMMISSIONER EVANS

8 Mr. Cac...Judge Cacchione, Mr. Aronson had certain reports in
9 his file.

10 THE HONOURABLE JUDGE CACCHIONE

11 Yes.

12 COMMISSIONER EVANS

13 When he turned them over to you.

14 THE HONOURABLE JUDGE CACCHIONE

15 Yes.

16 COMMISSIONER EVANS

17 And then subsequently he returned...he received reports
18 from Frank Edwards.

19 MR. ORSBORN

20 My understanding is, My Lord, that those, whatever reports
21 Mr. Aronson received from Mr. Edwards were during the currency
22 of Mr. Aronson's representation of Mr. Marshall prior to May of
23 '83. I believe in around June of 1982 there were reports handed
24 over by Mr. Edwards to Mr. Aronson. I think it was somewhere in
25 the documents; there is a file note to that effect.

THE HONOURABLE JUDGE CACCHIONE, EXAM. BY COMMISSIONERSCOMMISSIONER EVANS

1
2 Those are the ones that certain objection was taken by the
3 AG's office.

MR. ORSBORN

5 In 1984 I believe.

COMMISSIONER EVANS

7 That's '84. So, that you had a very limited file when you
8 started out.

THE HONOURABLE JUDGE CACCHIONE

10 Based on what I understand to have been in the file, what I
11 had was very limited, yes, My Lord.

COMMISSIONER EVANS

13 And stopping there for a minute, you said you did not ask
14 the RCMP for any files because they were on your side.

THE HONOURABLE JUDGE CACCHIONE

16 Yes.

COMMISSIONER EVANS

18 Am I to infer that had you asked them for anything they
19 would have provided it?

THE HONOURABLE JUDGE CACCHIONE

21 I...no, I don't think we can infer that. I...I didn't feel that
22 we would be getting files from the RCMP in light of the fact that
23 the RCMP were investigating this for the Attorney General's
24 Department. Now, my mistake perhaps for not asking, but I felt
25 that we would be met with the, "Well, you'll have to get the

THE HONOURABLE JUDGE CACCHIONE, EXAM. BY COMMISSIONERS

1 Attorney General's authorization."

2 COMMISSIONER EVANS

3 The reason I asked you is you have indicated earlier that
4 anything you wanted by way of disclosure from the RCMP you
5 would get.

6 THE HONOURABLE JUDGE CACCHIONE

7 I...

8 COMMISSIONER EVANS

9 On other cases.

10 THE HONOURABLE JUDGE CACCHIONE

11 Federal Crown, My Lord.

12 COMMISSIONER EVANS

13 Well, Federal Crown, yes.

14 THE HONOURABLE JUDGE CACCHIONE

15 But I've never...I don't think I can recall ever asking an
16 RCMP officer for a document, because the chain of command
17 would be that you would get it through the Crown's office.

18 COMMISSIONER EVANS

19 If the Federal Crown were going to prosecute, you would at
20 least go to him.

21 THE HONOURABLE JUDGE CACCHIONE

22 Yes.

23 COMMISSIONER EVANS

24 And if it were that he was not going to prosecute and it was
25 information in the hands of the RCMP, you felt that would go to

THE HONOURABLE JUDGE CACCHIONE, EXAM. BY COMMISSIONERS

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

the Provincial Crown.

THE HONOURABLE JUDGE CACCHIONE

I'm sorry, I don't follow that.

COMMISSIONER EVANS

Okay. I was trying to draw a distinction between your view and your comments made that you had no difficulty with the Federal Crown in getting disclosure. Am I correct in that?

THE HONOURABLE JUDGE CACCHIONE

That's correct, sir.

COMMISSIONER EVANS

You did not get the same cooperation from the Provincial Crown.

THE HONOURABLE JUDGE CACCHIONE

That's correct.

COMMISSIONER EVANS

Now, if a case were being investigated by the Federal Crown, which is the great part of by the Federal...the RCMP.

THE HONOURABLE JUDGE CACCHIONE

Yes.

COMMISSIONER EVANS

Who police a great part of Nova Scotia, their reports would apparently go to the local Crown.

THE HONOURABLE JUDGE CACCHIONE

Yes, they would, in all matters except for narcotics, food and drugs, et cetera.

THE HONOURABLE JUDGE CACCHIONE, EXAM. BY COMMISSIONERSCOMMISSIONER EVANS

1
2 It would go to the local Crown.

THE HONOURABLE JUDGE CACCHIONE

3
4 Yes, it would.

COMMISSIONER EVANS

5
6 And, therefore, you would be back in the same box as you
7 were if the prosecution and the investigation have been made by
8 the local police.

THE HONOURABLE JUDGE CACCHIONE

9
10 I would say that that's accurate.

COMMISSIONER EVANS

11
12 I guess I understand the distinction now. If the Federal
13 Crown were prosecuting, you had no difficulty; if the local Crowns
14 were prosecuting, it would depend upon how well they liked you
15 and who they...

THE HONOURABLE JUDGE CACCHIONE

16
17 That had a bearing on the relationship, certainly, in the
18 disclosure.

MR. ORSBORN

19
20 Just for your assistance, My Lord, there is in Volume 31 at
21 page 69, there is a letter from Mr. Aronson to Mr. Edwards in June
22 of 1982 which makes reference, at least, to a couple of the RCMP
23 reports provided to Mr. Aronson by Mr. Edwards. So, presumably
24 they would have formed part of the file passed over to Mr.
25 Cacchione.

THE HONOURABLE JUDGE CACCHIONE, EXAM. BY COMMISSIONERS

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

THE HONOURABLE JUDGE CACCHIONE

May I find out what those reports were?

MR. ORSBORN

There is reference at Volume 31, which I'm not sure if you have there.

THE HONOURABLE JUDGE CACCHIONE

I don't have Volume 31.

MR. ORSBORN

Your Honour, at page 69.

COMMISSIONER EVANS

Are those not the files that Mr. Edwards had some difficulty with as far as the AG's office was concerned?

MR. ORSBORN

Latterly in 1984, yes, My Lord, that's my understanding.

COMMISSIONER EVANS

I know the uproar was later, but the files have been delivered long before that.

MR. ORSBORN

That refers to at least two reports, one dated 82-05-04, which I think the easiest place to find that one is in Volume 34 at page 76, and there is also reference to one dated 85-02, which I think means 85, 82-05-20, which is found in Volume 34 at page 88. Volume 34 is Exhibit 99. The Volume 34, pages 76 and 88 are the two reports I think that are referred to in the letter.

THE HONOURABLE JUDGE CACCHIONE, EXAM. BY MR. ORSBORN

1 MR. CHAIRMAN

2 What is it in, Volume 34?

3 MR. ORSBORN

4 Volume 34, there are two reports, one at page 76 and one at
5 page 88. Those are at least two of the reports referred to by date
6 in Mr. Aronson's letter. I don't know if Judge Cacchione can
7 indicate from his memory whether or not he recalls seeing those
8 reports.

9 THE HONOURABLE JUDGE CACCHIONE

10 I recall seeing the report at page 76, 82-05-04.

11 MR. ORSBORN

12 Yes. There's a further one at page 88, a shorter one.

13 THE HONOURABLE JUDGE CACCHIONE

14 I don't recall seeing that report.

15 10:45 a.m.

16 Q. There is a further report I'll draw your attention to, Judge,
17 while you are in that volume at page 9, which is a lengthy
18 report with a number of statements attached to it. I believe
19 it was Staff Wheaton's first comprehensive report dated
20 82/02/25.

21 A. It's familiar but I'm, I can't really say. It is of the length that
22 I recall the report that I had. The other reports that you've
23 referred to, I can't recall if those were in the file. As I say,
24 they were all stapled together so they could have been, those
25 three could have been together. I'm not really sure. They

1 were '82 reports as I recall it.

2 Q. Well did Mr. Aronson indicate that he had any information
3 that he was not passing over to you?

4 A. No, he didn't. He didn't.

5 Q. We have correspondence on file. Just for the record it's
6 Volume 30, which indicates that you made some requests of
7 the Correctional Services of Canada for certain information?

8 A. Yes, it did.

9 Q. And am I correct that through exchange of correspondence
10 with them you did receive certain information from Mr.
11 Marshall's files?

12 A. We received a fair amount of material from Mr. Marshall's
13 file. The material that we wanted we didn't receive.

14 Q. What was that?

15 A. Any correspondence between the Attorney General's
16 Department, the Parole Board, the City of Sydney Police force
17 and the Parole Board. Anything that would indicate that
18 those two agencies, in particular, felt that Donald shouldn't be
19 released because he would be a threat to the community. Or
20 anything that would have restricted his parole eligibility,
21 apart from the fact that he wasn't admitting and showing
22 remorse for the offence, which in and of itself wouldn't have
23 made him eligible for parole because he had to admit his guilt
24 before they'd consider him for parole.

25 Q. Did you have any knowledge that such material existed?

1 A. I wasn't aware that there were particular letters but in
2 dealing with other criminal clients I was aware, and in
3 conversation with parole officers I was aware that those
4 requests were routinely made before a person was considered
5 for release, either on a T.L.A. or any sort of a temporary
6 release. So I would have expected that those would be on file.

7 Q. So your request, then, was based on your general knowledge
8 rather than knowledge...

9 A. Specifics, yes.

10 Q. Knowledge of specifics, thank you. What avenues did you
11 consider in terms of getting the type of inquiry that you were
12 looking for in Mr. Marshall's case?

13 A. Well, we requested that one be held. That was denied.

14 Q. Requested who?

15 A. Well we requested that the Attorney Generals, Mr. How, Mr.
16 Giffin, consider a public inquiry. That was denied. We
17 certainly felt that as a result of dealing with the file that
18 nothing would be done vis-à-vis Mr. Marshall by the
19 Attorney General's Department unless a significant amount of
20 public pressure was brought to bear. We were being
21 stonewalled, there's no question.

22 Q. You were just asking really at this point for almost a listing of
23 available options that you felt you had to conduct an inquiry.

24 A. Well the Public Inquiries Act, the good graces of the
25 government. The fact that there had been an acquittal from a

1 murder conviction. That somebody had spent ten years, ten
2 months in a federal institution.

3 Q. You did have some correspondence, I think, with the Federal
4 Government, as well?

5 A. Well there was also the International Covenant signed by
6 Canada which we brought to Mr. Chrétien's attention and, I
7 believe, Mr. MacGuigan's attention, that, dealing, not with the
8 issue of public inquiries but with compensation. And we
9 were advised that, they took out of context a certain portion
10 of that treaty and said, "Well, Donald was the author or his
11 own misfortune so we can't compensate him."

12 Q. Our file, our...

13 A. Those are my words.

14 Q. Our exhibits indicate some correspondence also with a House
15 of Commons standing committee on justice?

16 A. Yes, there was.

17 Q. So do I gather that there were a number of sort of options
18 that you were looking at for an inquiry?

19 A. Well we were trying to explore anything that would shed
20 some light on this. We were aware of the New Zealand
21 inquiry into Arthur Alan Thomas, or it's known as the Crewe
22 murders and we felt that only that type of an investigation
23 would achieve two purposes. One, to prevent the repetition of
24 this miscarriage and, two, to deal with the issue of
25 compensation. When, it was amazing actually, the number of

1 people, private citizens who would write and, in fact, it was as
2 a result of Mr. Mosley, Morley from BC who pointed us in the
3 direction of the Crewe murders.

4 Q. Yes. We'll...

5 A. This was, no one had ever done this before and so there
6 wasn't really a precedent for how you go about obtaining a
7 public inquiry and compensation. It was really sort of putting
8 one foot ahead of the other and hoping that you aren't going
9 to fall flat on your face. And there are often times when we
10 felt that, in fact, we had fallen on our faces. But then the
11 support that was generated by concerned citizens of all walks
12 of life, a cross-section of political thoughts. Conservatives,
13 Liberals, NDPers, Marxist-Leninists. Everyone who came
14 together in a certain room to say, "We're behind you. We
15 hope that this will help." We enlisted, actually we didn't
16 enlist, it was offered to us, the assistance of Father Comeau
17 who, as I understood it, was an influential Conservative. Mr.
18 Mitchell who was a former minister in the Liberal
19 government. Mr. Shaw who is a well-known NDPer and Dean
20 Charles who, at that time, was dean of the law school. They
21 came together to see if anything could be done to encourage
22 the government to deal with this issue. Because, as I stated,
23 we were being stonewalled. They just didn't want to hear
24 about it and we would be given excuses. "Well, the Ebsary
25 matter is before the Courts." "He's as much to blame for what

1 happened to him so why bother."

2 Q. Some of these matters you've touched on, I think we'll,
3 perhaps elaborate on as we go through the chronology.
4 Perhaps if I might touch on one matter before we, before I
5 suggest taking a break. I gather that you were with Junior
6 Marshall during the preliminary and one or more of the
7 Ebsary trials?

8 A. Yes, I was.

9 Q. They were held in Sydney?

10 A. That's correct.

11 Q. During your time in Sydney did you interview any of the
12 witnesses that had testified in 1971?

13 A. No.

14 Q. Did you interview either Mr. Rosenblum or Mr. Khattar?

15 A. The only contact I had with Mr. Rosenblum was, as I recall it,
16 is the opening of Mr. Ebsary's first trial when Mr. Rosenblum
17 came up, I recall this vividly. He came up to Donald and sort
18 of patted him on the back and it was, "How are you doing?"
19 you know, "Good to see you." da-da-da-da. And Donald just
20 sort of turned around and walked away and Mr. Rosenblum
21 came to me and said, "You know, if he told me the truth I
22 would have gotten him off." At which point I turned and
23 walked away. I spoke with a police officer by the name of
24 Mroz, who was on the force at the time and he indicated to
25 me that he had some information that would be very relevant

1 to what we were trying to do and, but that he couldn't discuss
2 it then because I think he was under subpoena as a witness
3 but really wanted to meet with us and indicated his support
4 for our position. Unfortunately, he died shortly thereafter.

5 Q. I was wondering why, if you were concerned about getting a
6 full inquiry, why you would not take the opportunity to talk
7 firsthand to a number of these people while you were in the
8 Sydney area.

9 A. It was my feeling that the RCMP had quite conclusively stated
10 in their report that the wrong person had been charged and
11 convicted. That there were some very serious allegations
12 about how the matter was investigated. That witnesses had,
13 at the December reference hearing had stated that they were
14 pressured into testifying to facts that were known to be
15 wrong. What more would one require. I didn't feel that my
16 going and speaking to a witness and then sending the
17 statement that I took from the witness to the Attorney
18 General's Department would have any more influence than a
19 report prepared by competent skilled investigators.

20 Q. I'd just ask you to turn for a moment to Volume 32 at page
21 210. There is about five pages there of what appear to be
22 typed notes. Volume 32 at page 210.

23 A. That's correct. That date should be...

24 Q. Are those your notes, Your Honour?

25 A. Yes, they are. This is a memo, as I recall it, and I stand to be

THE HONOURABLE JUDGE CACCHIONE, EXAM. BY MR. ORSBORN

1 corrected, but as I recall this memo it was dictated upon my
2 return from the preliminary, Mr. Ebsary's preliminary which
3 I think was held in August. This is the 11th of August '83. It
4 reads '73 but it should be '83. I recall being...

5 Q. I'm just wondering, Your Honor, if it should read the 7th of
6 November because you do make reference in the body of the
7 memo, the first page, to a September 15th date and a
8 November 4th date.

9 A. Could be. Could be.

10 Q. That may be the...

COMMISSIONER EVANS

12 What's the right date?

13 A. It could be November, My Lord. It would have to be
14 November.

15 Q. And it would be '83.

16 A. '83, certainly. I recall dictating the memo. I recall being so
17 upset that I decided that I would have to start putting this
18 stuff down on paper in order to substantiate what I felt was
19 going on and what I had perceived as happening in Sydney.
20 And I recall doing it after a hearing involving Mr. Ebsary, be
21 it the preliminary or the trial. Obviously it must have the
22 trial and it must have been the second trial, I think, so...

23 Q. You say you were upset. And from reading the note I gather
24 that the focus of your concern was the way Mr. Marshall was
25 being used as a witness, is that correct?

1 A. Yes.

2 Q. And you touched on that earlier, I believe.

3 A. Yes.

4 Q. Just a couple of factual matters, Your Honor, I'd like to ask
5 about in that memo. On page 212, the bottom paragraph, you
6 say:

7
8 Wheaton is an experienced and very competent
9 police officer who apparently has written a
10 report to the RCMP which is being forwarded to
11 the Attorney General with his recommendations
regarding the laying of charges and seven to
eight major procedural irregularities.

12 Did you ever see a report in which Staff Wheaton
13 recommended the laying of charges?

14 A. No. It, as I, I was being fed a lot of information from people
15 who would say, "This is what I understand the case to be." "I
16 spoke with, you know, so-and-so, or Wheaton told so-and-so
17 something or other." I never saw the report.

18 Q. Can you tell us who advised you that he had forwarded a
19 report which recommended that laying of charges? Was it
20 Staff Wheaton?

21 A. No, it wasn't Staff Wheaton. Staff Wheaton and I did not
22 really have much conversation. He, I read in the material
23 some notes where I had a conversation with him. I think that
24 may have been one of the few conversations that I had with
25 him. He was quite guarded in terms of what he would

THE HONOURABLE JUDGE CACCHIONE, EXAM. BY MR. ORSBORN

1 disclose. Now I'm, I don't know the reason why. I recall one
2 incident at one of the Ebsary trials where he approached me
3 and said something about, "Do you know who released my
4 report to the CBC or a reporter?" And I just smiled and he
5 said, "You don't have to answer the question, I know the
6 answer now."

7 Q. Are you able to tell us then the basis for that statement in
8 your notes?

9 A. I can't, at this time, recall. Obviously I wouldn't have made it
10 up.

11 Q. I appreciate that. On page 214...

12 CHAIRMAN

13 I missed that. Where were you referring?

14 MR. ORSBORN

15 Volume 32, page 214.

16 CHAIRMAN

17 No, no. Before that. The last question.

18 MR. ORSBORN

19 Oh, page 212. The bottom paragraph on page 212. A
20 suggested report by Staff Wheaton about the laying of
21 charges.

22 CHAIRMAN

23 Before we go on to page 214, Judge Cacchione, the bottom of
24 page 211. You suggest that John MacIntyre had urged Oscar
25 Seale to lay a complaint against Edwards to the Bar Society.

THE HONOURABLE JUDGE CACCHIONE, EXAM. BY MR. ORSBORN

1 Where did you get that information?

2 A. As I recall it, My Lord, I believe that that information came
3 from Mr. Edwards, Frank Edwards.

COMMISSIONER EVANS

5 One minor, I think, misprint on page 210, about ten lines
6 down. "To the best of my knowledge he has paid any conduct
7 money whatever." He has not been paid, I take it's what you
8 meant.

9 A. That's correct. And it, obviously that concerned me because it
10 wasn't in keeping with the Crown practice. If you have a
11 witness who's from out of town you pay him conduct money
12 or you arrange for his transportation. And it, my impression
13 at the time, and I still share it, is that they would have been
14 just as happy if he didn't show up as a witness.

MR. ORSBORN

16 Q. Was Mr. Marshall under subpoena?

17 A. He was under subpoena.

18 Q. He was?

19 A. As I recall that I think I had been served with the subpoena
20 or I had been given the subpoena. I had undertaken to have
21 him there.

22 Q. And was he a resident of Halifax at the time?

23 A. Yes, he was. He was living in Ogilvie Towers.

24 Q. To your knowledge was any conduct money requested?

25 A. I don't recall requesting conduct money.

THE HONOURABLE JUDGE CACCHIONE, EXAM. BY MR. ORSBORN

1 Q. And do you know how his travelling expenses were, in fact,
2 paid?

3 A. I know that, I think our firm paid to get him up there on at
4 least one occasion. I know, at least I've been told that there's
5 some reference to receipts from our firm acknowledging
6 payment from the Attorney General's Department for some
7 conduct money. But that was a reimbursement as I recall it.
8 I mean I wouldn't have made the note if he'd been given
9 conduct money and a plane ticket to get to Sydney.

10 Q. You make some rather strong comments about Chief
11 MacIntyre on page 214 in the top six or seven lines of that
12 page.

13 A. That's right.

14 Q. With respect to your comments about, "Also known by his
15 men as being a rascist and particularly so towards Indians
16 and Blacks..." are you able to tell us the basis for that
17 statement?

18 A. If I'm not mistaken that may have been part of the
19 conversation that I had with Leo Mroz.

20 Q. Were any particulars provided or just a general comment?

21 A. No, it was a general comment but it, I wasn't a resident of
22 Sydney but it was quite evident from speaking with people
23 that I knew in Sydney that there really was no love lost
24 between the Blacks and the Indians. I mean just speaking
25 with Donald you got the feeling that...it's very consistent with,

1 you know, the stronger picking on the weaker and then the
2 next step down on the ladder, those people picking on those
3 below them. And the whites didn't like the Blacks and the
4 Indians and the Blacks didn't like the Indians or the Indians
5 didn't like the Blacks. I mean they used to have
6 confrontations. I don't think that, that's a pretty general
7 statement. But I think that that's the way it was viewed at
8 the time. That doesn't mean that there weren't relationships
9 between Indians and Blacks that were friendly and sociable.

10 Q. Did you speak to any other members of the Sydney Police
11 force other than Cst. Mroz?

12 A. No.

13 Q. You say later on on that page:

14
15 The original investigation into Seale's murder
16 was to be conducted by another investigator,
17 however, MacIntyre and Urquhart took the case
18 away from this investigator and did all the
19 interviewing of witnesses themselves.

18 Again, could I ask you the basis for that statement?

19 A. My understanding, I can't recall if it was as a result of what
20 was contained in one of Staff Sergeant Wheaton's reports, was
21 that there had been an investigator who, I think MacDonald
22 was his name, who had been assigned the case or was on duty
23 at the time that it occurred and he started the investigation
24 and then for some reason he was no longer investigating it.
25

1 I...I can't recall who would have made that comment to me. I
2 would expect that the comment would have been made and it
3 would have been confirmed by the notes that I had with
4 respect to Detective MacDonald doing the initial part of the, or
5 being at the hospital or being at the scene or something to
6 that effect. And when the comment was made to me by, and
7 I'm sorry, I don't know the person, that would have
8 confirmed it and, thence, that's why it would have been put in
9 this memo.

10 Q. I see. You didn't talk to Detective MacDonald yourself.

11 A. No, I didn't.

12 11:08 - BREAK

13 11:33 p.m.

14 Q. Judge Cacchione, just one point on the conduct money for Mr.
15 Marshall we've touched on. It's my understanding that Mr.
16 Edwards, Mr. Frank Edwards, will testify that conduct money
17 for airfare and accommodation and the like was paid, I think,
18 in some measure to your firm subsequent to Mr. Marshall's
19 appearance at the trials. Do you have any knowledge of that?

20 A. My recollection is that we, in fact, did receive reimbursement
21 for the conduct money. I would think, judging from this
22 memo that you've referred to in Volume 32, that it would
23 have been subsequent to the November date that the monies
24 would have been paid.
25

1 Q. In August and September of 1983, you had an exchange of
2 correspondence with Mr. MacGuigan, who was then federal
3 Minister of Justice, in which you requested compensation
4 under the International Covenant on Civil and Political Rights.
5 For the record, that correspondence is found at Volume 30 at
6 pages 26 and following. Do I understand that your letter,
7 which is found on page 26 of Volume 30, was the first written
8 request that you had made to anybody for compensation?

9 A. I believe it was.

10 Q. Any reason you picked that forum first rather than the
11 province or elsewhere?

12 A. Well, it was the only legislation or treaty that, in fact, spelled
13 out that compensation should be paid. Canada was a signing
14 party to the agreement. Mr. Marshall had been incarcerated
15 in a federal institution, had been convicted under federal
16 legislation, and I was aware that the, obviously, the
17 prosecution was conducted by the provincial Attorney
18 General. However, in light of the International Treaty, it was
19 felt that that would be the forum to first approach.
20 Obviously, we didn't succeed then.

21 Q. Mr. MacGuigan replied to you at page 29 and following of that
22 volume, and would I be correct in saying that Mr. MacGuigan
23 said to you that because of Mr. Marshall's role in this matter,
24 he does not comply with the conditions in the covenant and,
25 therefore, cannot receive compensation?

1 A. That's the, what I drew from his response. It typified the
2 difficulty that we were faced with in trying to pursue any
3 avenue for compensation or for a public inquiry because the
4 comments of the Court of Appeal that are outlined at pages 29
5 and 30, in fact, kept being thrown in our face.

6 Q. Tell us a little bit about that. You say "thrown back in your
7 face," in what instance?

8 A. I think there's, I recall an interview conducted by Barbara
9 Frum on the then Attorney General Mr. How and he referred
10 to Mr. Marshall not coming out of this smelling like roses, that
11 the correspondence we had, discussions that we had with the
12 Attorney General's Department, it was always referred to
13 that, in fact, he wasn't absolved, that he came out pretty
14 tarnished by the comments of the Appeal decision. It was
15 another hurdle that we had to overcome and, in fact, we kept
16 saying to people, "Listen, you know, in fact, you've convicted
17 him of an offence for which he was never charged. You've
18 referred and keep referring in terms of his examination at the
19 Ebsary preliminary and trial to a statement that he gave to a
20 police officer while he was incarcerated." It was my legal
21 opinion that that statement, if ever tendered at trial, would
22 never be ruled admissible because of the inducements made.
23 I'm not talking about the contents, but I'm just talking about
24 the admissibility of that as a piece of evidence. That, in fact,
25 in the public eye and to a certain degree after the reference

1 hearing and the decision was handed down in the media, he
2 was convicted of what's been referred to as a "robbery", an
3 "attempted robbery", "rolling", "bumming money", whatever
4 you want. But the perception was there that he was up to no
5 good and he got what he deserved. And if he had, if he had
6 been charged and had been convicted of robbery in 1971, my
7 reading of the cases would indicate that he would have
8 served no more than a year. It's only in recent times that we
9 have bench-mark decisions on robbery cases saying that
10 three years is a starting point. And assuming that three years
11 is a starting point, then that's what he would have gotten in
12 '71, which I don't think he would have received that kind of a
13 sentence. He would have been paroled after a third of his
14 sentence. So it just, it was really very difficult to get over
15 that perception that here's a man who was, obviously, up to
16 no good and it clouded the issue that somebody died,
17 somebody went to jail as a result of that death who did not
18 cause the death.

19 Q. These comments of the Court of Appeal that you refer to,
20 were they, in your view, a hurdle for the matter of
21 compensation.

22 A. Certainly.

23 Q. And an inquiry, or one or the other?

24 A. Definitely with respect to compensation. I would think that
25 they would have had some bearing on an inquiry, but most

1 certainly with compensation. I recall being told by Mr.
2 Endres, well, you know, he was there to rob somebody and
3 the Appeal Court has said that that, you know, he was hiding
4 things from his lawyers. He wasn't truthful. There were
5 references made as to his credibility at the reference hearing
6 taken completely, I wouldn't say out of context, but without
7 an appreciation that this man had for ten years, ten months
8 been incarcerated, said that he hadn't committed the crime,
9 that nobody listened to him, had been convicted by a court
10 composed of white people, was now again before a court
11 composed of white people, had not been prepped for trial and,
12 in fact, had the feeling that he was, again, on trial. And
13 findings of credibility were made which caused me some
14 concern. It seemed that the focus was on his credibility and
15 what he was doing in the park on that evening, as opposed to
16 the fact that he had been charged and convicted on evidence
17 that had been obtained through pressure, that the evidence,
18 in fact, was false, that someone else had committed the
19 offence, and that the police had reinvestigated that and had
20 determined that somebody else had committed the offence.
21 None of that was dealt with.

22 Q. The comments that you refer to of Mr. Endres, were they in
23 the context of the compensation negotiations?

24 A. Yes, they were.

25 Q. In 1984?

1 A. Yes, they were.

2 MR. CHAIRMAN

3 If we could, I'd like to get this in sequence, if we can, if it's
4 possible. Are we to assume that the reply of the Minister of
5 Justice and Attorney General of Canada, found in Volume 30 at
6 page 29, dated September the 2, 1983, was the first time that the
7 findings of the Court of Appeal and the reference had been raised
8 as a reason for not acceding to your request, that consideration be
9 given to compensation, compensating your client?

10 HIS HONOURABLE JUDGE CACCHIONE

11 I would think, given the date of the letter, that that would
12 be accurate, My Lord.

13 MR. CHAIRMAN

14 And then subsequently...

15 HIS HONOURABLE JUDGE CACCHIONE

16 Because there was a hiatus there from the handing down of
17 the decision to the opening of my practice. The anticipation on
18 our behalf that an approach would be made that something would
19 be done to deal with this issue, which was very much alive and so
20 we felt that we would just sit back for a little while and see if
21 anything occurred. Nothing did occur and then we started by
22 writing to the Minister of Justice. I believe we also wrote to the
23 Attorney General Mr. How, at the time. And, as I recall the
24 correspondence, and I stand to be corrected, I wanted to meet
25 with him. I kept getting letters from Gordon Coles and I kept

1 saying, "I want to talk to your boss, I don't want to talk to you,"
2 and Coles kept replying that he was the one that was handling the
3 matter.

4 BY MR. ORSBORN

5 Q. Speaking then of that exchange of correspondence between
6 yourself and Mr. How, which is contained at Volume 32 and
7 page 262 and following, that starts off in September 21, 1983,
8 and you make what appears to be a formal request for an
9 inquiry.

10 A. Yes.

11 Q. Do I take it from what you've just said that this was not done
12 earlier because you were in the process of establishing your
13 practice and you wanted also to see if any initiative was
14 coming from...

15 A. Yes.

16 Q. Other parties?

17 A. That's correct.

18 Q. Also in this letter to Mr. How, there's no reference to
19 compensation. It focuses on the inquiry.

20 A. No, there wasn't. Initially, it was just an inquiry and we felt
21 that the federal government should deal with the
22 compensation issue because of that treaty. Obviously they
23 declined jurisdiction on that matter and then we approached
24 the provincial government with respect to that.

25 Q. I won't take you through each page but there is an exchange

1 between you and Mr. How, and some notes, I think, from Mr.
2 Coles saying you want to meet with Mr. How, you don't want
3 to meet with Mr. Coles, and one or other of them is away and
4 the thing goes on. Why did you not want to meet with Mr.
5 Coles?

6 A. Because Mr. Coles is the Deputy Attorney General. I felt that
7 because of the nature of this particular case, the profile
8 involved, that it was a matter that the Minister should handle.
9 This was not your ordinary appeal of a conviction or a
10 sentence appeal or any discussions with the department. This
11 was a matter dealing with the administration of justice in the
12 Province of Nova Scotia and who better to deal with it than
13 the person who is in charge and responsible.

14 Q. Was there anything to prevent you meeting with Mr. Coles to
15 at least start up the dialogue and get the lines of
16 communication going?

17 A. Well, obviously, from the first reply that we got, we didn't
18 assume that they were prepared to deal with us. I mean
19 denying even just a meeting with the Attorney General was a
20 forebearer of future dealings.

21 Q. Yes, I guess I go back to my question. Was there anything to
22 prevent you from meeting Mr. Coles? I understand from,
23 certainly from Mr. How's evidence, Judge How's evidence and
24 from Mr. Coles' note, which is found on page 272, that Mr.
25 Coles appears to be willing to meet you.

1 A. My understanding from my conversations with Stephen
2 Aronson were that Coles, Mr. Coles was directing the way
3 matters should be dealt with in terms of how the reference
4 hearing was to be conducted, what the Crown's position was
5 to be at the reference hearing. It was my feeling that he
6 would not be a good person to deal with, that the Attorney
7 General, who is and was his boss at the time, would be a
8 preferable person. Because I assumed in my mind that his
9 position might be somewhat different in that he was not a
10 career civil servant but, in fact, an elected member of the
11 legislature and a member of the Cabinet and that, politically,
12 it would be better for him to deal with it than a civil servant.

13 Q. Did you have any firsthand knowledge of the approach that
14 Mr. Coles might take with respect to a request for an inquiry?

15 A. In September of '83?

16 11:49 a.m.

17 Q. Yes, when this exchange was going on.

18 A. No, no, firsthand knowledge.

19 Q. Any firsthand...

20 A. Assumptions.

21 Q. Okay. Any firsthand knowledge of the approach that Mr.
22 Coles might take with respect to a request for
23 compensation?

24 A. None at that time, other than, as I've stated, the discussions
25 that I had with Stephen Aronson and what...you see Stephen

1 and Frank Edwards seemed to have had a good working
2 relationship and they were quite open and frank, at least
3 that's what I gathered from my conversations with Stephen.
4 But at some point I think the pressure was put on Mr.
5 Edwards and when I became involved initially, Frank, who
6 was a classmate of mine, and I had some discussions and
7 then it appeared that he just backed off completely and it
8 became very formal, our relationship. I wasn't able to get as
9 much information from him as Mr. Aronson had been able to
10 obtain. And it would...my understanding was that they were
11 both on the same wavelength in terms of what the Court of
12 Appeal should do and what should be presented to the
13 Court.

14 Q. What type of information were you seeking from Mr.
15 Edwards?

16 A. Well, just anything that he would have in terms of
17 background information, whether or not he had been told to
18 adopt a certain position, what he felt about the investigation
19 in 1971, what he knew about Donald C. MacNeil and his
20 approach to prosecuting cases, what he knew about
21 Detective MacIntyre and his approach. Things that would
22 have been of assistance.

23 Q. Is it fair to say though, Judge Cacchione, that as between Mr.
24 Aronson and Mr. Edwards they were at least counsel
25 involved in the same matter, whereas you would not have

1 had that relationship with Mr. Edwards?

2 A. Yes, obviously there was no litigation before the Courts, but
3 I would have...I assumed at the time that since he had dealt
4 with the file from...since Mr. Edwards had dealt with the file
5 from the beginning, since I was now representing Mr.
6 Marshall's interests and since I understood Mr. Edwards'
7 view to be that there had been a miscarriage of justice and
8 that the matter should be examined, that we were operating
9 on the same path, that that wasn't the case.

10 Q. You never did meet Mr. How, I take it?

11 A. No, never did meet Mr. How.

12 Q. In November of '83 did you have occasion to meet with a
13 Heather Matheson of, I think, CBC?

14 A. I met with Heather Matheson of CBC in my office. I can't
15 recall when I met with her. I've tried to find my Daytimers
16 but I don't know where they are right now.

17 Q. Did you have occasion to provide her with any
18 documentation from your file?

19 A. Yes, I did, after a long conversation with her. See it was
20 quite obvious to me that the government wasn't going to
21 move on this issue, and...

22 Q. I'll just stop you there.

23 A. All right.

24 Q. Other than to this point your exchange of correspondence
25 about who you were going to meet with.

1 A. Uh-hum.

2 Q. How did you determine it was obvious that they...that they
3 were not going to move?

4 A. Read Mr. How's comments to Barbara Frum and the position
5 that he was taking was quite opposed to the position that we
6 were espousing. The letters refusing to meet MacGuigan's
7 comments. The Court of Appeal decision basically not
8 dealing with some of the key issues I felt that should have
9 been addressed in the decision. It was just the atmosphere
10 at the time, I took it from that that we weren't being given a
11 very attentive or receptive ear from the...from both levels of
12 government.

13 Q. On the...

14 MR. CHAIRMAN

15 What were the key issues that you felt should have been
16 dealt with by the Court of Appeal of Nova Scotia on the reference
17 that were not dealt with?

18 THE HONOURABLE JUDGE CACCHIONE

19 The question of how the evidence that inculpated Mr.
20 Marshall was obtained and the fact that Mr....as I read the
21 decision, it was a trial of Donald Marshall for a robbery and that
22 excused everything that went on, that that sort of condoned the
23 fact that he spent ten years, ten months incarcerated. I felt that
24 they should have addressed the issue of how he came to be
25 charged and convicted. There were...there was evidence before

1 the Court, there was some evidence, as I understood it, that never,
2 in fact, was tendered as evidence, affidavits, that were filed but
3 never tendered as evidence that somehow seemed to have made
4 it into the decision or at least portions of it were reflected in the
5 decision. I felt that those issues should have been addressed
6 instead of focusing on the question of what he was up to that
7 night in the park. And, I still feel that the major hurdle we had to
8 overcome was the last four pages or five pages of that decision,
9 which seemed to...they just don't seem to fit when one reads the
10 entire decision. It seems as if you have sixty-odd pages of recent
11 judgement and then four pages of attempting to portray Donald
12 Marshall in a less than favourable light and I think it's been said
13 to exonerate the system of justice. It's been said by other
14 witnesses at this inquiry, at least from what I've read. Those
15 were my concerns at the time. Any my concerns were that the
16 decision would be used as a shield for any sort of an inquiry or
17 any effort at compensation, and in effect my assumptions were
18 correct, that we were faced with that. Well, the Court said that
19 your client was the author of his own misfortune and any
20 miscarriage of justice is more apparent than real. How anyone on
21 the evidence that was before that Court could make that
22 statement that the miscarriage of justice was more apparent than
23 real shocked me and made my question how it...how that
24 conclusion could be arrived at based on what I knew of the file at
25 the time. I did not sit through the reference hearing, My Lord.

1 MR. ORSBORN

2 Q. With respect, Judge, to your views on the position taken by
3 government on these matters in November of 1983 I'd just
4 like to try to be a little more precise. You said in your
5 opinion that they were throwing up roadblocks, but am I
6 correct in saying that on the issue of compensation you had
7 not made an approach to the provincial government at that
8 time?

9 A. If the documents maintain that they I stand by the
10 documents that no approach for compensation had been
11 made. There had been an approach made for a public
12 inquiry.

13 Q. Yes. And on the approach made for a public inquiry out of
14 that arose this exchange of correspondence, who was going
15 to meet with who?

16 A. Yes.

17 Q. Okay. You had not been turned down on a public inquiry?

18 A. No.

19 Q. Do you recall what documents, what typed documents you
20 gave to Heather Matheson?

21 A. The only documents that I gave to Heather Matheson was, as
22 I recall it, the RCMP reports, Staff Sergeant Wheaton's
23 report, which as I recall it outlined what the investigation
24 had been, the statements of Patricia Harriss, the eight o'clock
25 and the 8:00 p.m. statement, the 1:30 a.m. statement,

1 Pratico and Chant. I think there was a comment, I'm not
2 sure if it was Dr. Mian, as to Pratico's reliability as a witness.
3 The Chant statement with the attached page of signatures,
4 alleged signatures.

5 Q. Okay. Had you discussed with Mr. Marshall the possibility
6 of providing this kind of information to the media?

7 A. To the media.

8 Q. Yes.

9 A. Not in terms of "Donald, I will...do I have your permission to
10 provide this particular document to that particular reporter
11 or media person." The instructions that I had from Donald
12 were to seek a public inquiry and to make every effort to
13 obtain that public inquiry. I took it from that that there was
14 an implied consent to deal with the matter in that light.

15 Q. Did you place any restrictions on the use to which this
16 material could be put?

17 A. No, I'm sorry.

18 Q. Did you place any restrictions...

19 A. Did I?

20 Q. Did you say to Heather Matheson...

21 A. To Heather Matheson, yes, I did. I told her that I didn't
22 want the report quoted and that she would have to confirm
23 what was in the report through other sources, that she
24 couldn't just sort of, as has been done, take somebody's
25 notes, read them into the record, and say this is a reporting,

1 and she would have to confirm it. And, I understood that
2 she, in fact, did confirm it, and where that report went to
3 after and how Kirby Grant got it, I have no idea. I
4 understood that there was a furor over that.

5 Q. Yes, I think, in 1984. Did you provide any RCMP reports
6 from your files to any other member of the media or indeed
7 member of the public?

8 A. I don't believe that I did. I think they may have been
9 shown to...there was a committee that was established of
10 concerned citizens in Nova Scotia that may have seen the
11 report, but certainly copies weren't...

12 Q. Did you provide any reports to Michael Harris?

13 A. I think Michael Harris had the reports actually. I think he...I
14 know he was aware of them. He was in close contact with
15 Stephen Aronson. I can't recall providing Michael with the
16 reports.

17 Q. The documentation indicates that you, in fact, met with
18 Attorney General Giffin in November of 1983.

19 A. Yes.

20 Q. And, Mr. Giffin has testified, and I think the documents
21 reflect that the meeting was set up for a Wednesday the
22 23rd and then was accelerated to the 21st because he heard
23 in the media that you were...that there was supposed to be a
24 meeting. Do you have any knowledge of the media
25 becoming aware of a proposed meeting with Mr. Giffin?

1 A. I don't have any specific recollection. It wouldn't surprise
2 me if I had been asked by a reporter "Have you met or are
3 you going to meet?" that I would have said, "Yes". I didn't
4 think that there was anything too secret about that and
5 after long last we're finally going to meet. His response, as I
6 read it in the Commission minutes surprised me, that he was
7 so upset about the media knowing about this. I had met
8 with Mr. Giffin shortly after his appointment, quite
9 informally seeing him on the street, and having known him
10 from my days in practising in Truro where he was also a
11 practitioner and I approached him causally and I said, "Mr.
12 Minister, this matter really should be dealt with, " and I
13 said, I recall saying that, "Politically you could come out of
14 this very good because you can stand up and say it wasn't
15 our government, this was a Liberal government that was in
16 power at the time, and we as Conservative government
17 government acknowledge that there was some miscarriage
18 of justice and, therefore, we will deal with this issue," and I
19 felt that that would have given him a way out of dealing
20 with it and he just...he listened to me, didn't say anything
21 and walked away. But I thought that the opening was there.
22 I mean if they wanted to use it politically it could have been
23 done on that basis.

24 Q. Do you remember meeting with Mr. Giffin?

25 A. I recall meeting with him.

1 Q. Around the 23rd of November.

2 A. Yes. In his office.

3 Q. Was anybody else present?

4 A. Michael Lambert, my partner was present, and Mr. Coles
5 was present, Gordon Coles.

6 Q. Do you remember if he took any notes of that discussion?

7 A. I recall Mr. Coles having a foolscap pad in his hand and
8 having a pen in his hand. Whether or not he wrote down
9 anything I'm not sure, but I know that the four of us met in
10 that office, Mr. Giffin behind his desk, Mr. Coles to his left as
11 he was facing us, and Mr. Lambert and I on a couch in that
12 office. And we talked about the Donald Marshall situation.

13 Q. Was...and I take it this was your first face-to-face discussion
14 with members of the department about the matter?

15 A. Yes, yes.

16 Q. Okay. And what issues were raised?

17 A. As I recall it we asked for a public inquiry into the
18 conviction of Donald Marshall and, as well, I believe we
19 raised the issue of compensation for the years that he had
20 been incarcerated. I really don't have specific recollection of
21 the details of that conversation. I recall that the meeting
22 was not very long. It may have been twenty to thirty
23 minutes at the most. But other than that I remember I
24 didn't take any notes, and I'm not sure if Mr. Lambert took
25 some notes.

1 Q. Who was piloting the discussion?

2 A. Well, I started by indicating why we were there, what we'd
3 like. I think Mr. Giffin made the comment that, well, the
4 Court of Appeal seems to think a bit differently than you do
5 on the issue of what happened that evening. And, I recall
6 saying that that's why there was a need for an inquiry that
7 would not be as limited in its focus. But the conversation, in
8 essence, came from our side. Mr. Coles may have asked one
9 or two or three questions, and I think that was the first
10 occasion when any miscarriage of justice is more apparent
11 than real came back at us in a face-to-face discussion.

12 Q. Was the matter of the civil proceeding raised?

13 A. Quite honestly, I can't recall if that was raised. I know that
14 it was subsequent to that it was obvious to us that the civil
15 proceeding was a bar to any sort of dealings on this matter.
16 The Premier had made statements. The regular...the matters
17 before the Court, the Ebsary matters before the Court were
18 not going to deal with this and there's the outstanding issue
19 of the civil suit against the City of Sydney. Now, what that
20 had to do with the Province of Nova Scotia was beyond me,
21 but it was clear to me that after hearing that on several
22 occasions that, in their minds at least, it was a bar to their
23 dealing with it and hence we wrote a letter saying, "We're
24 dropping the civil suit."

25 Q. And are you indicating that also the Ebsary matter being

1 before the Courts was raised as an impediment to what, an
2 inquiry?

3 A. Yes, yes, and quite frankly I could see...I could see their
4 concern but I couldn't see that as being a bar when they
5 could have just said, "We will have an inquiry, you have our
6 commitment that there will be an inquiry once the Ebsary
7 matter is finally disposed of." That would have been fine,
8 but that wasn't said.

9 Q. So, do I understand you correctly, you recognized the, at
10 least the validity of their point about the Ebsary matter but
11 you were not happy with the fact that you couldn't get a
12 commitment to hold an inquiry when that matter was
13 concluded.

14 A. That's right. I came away feeling that they didn't want this
15 thing looked at in any more detail than necessary, hence it
16 surprised me that this inquiry was called.

17 Q. If you turn to refer to the letter to Mr. McGuigan which is
18 found in Volume 30 at page 33, in December, Volume 30,
19 page 33. And it appears that this is a general request for
20 some action by the Government of Canada. I have some
21 questions on some statements that you make in the letter.
22 On page 34, I think it just touches on what we touched on
23 before, top of page 34. You say fourth line, "The
24 government has refused to follow recommendations made to
25 it by RCMP..."

1 MR. CHAIRMAN

2 Volume 30.

3 MR. ORSBORN

4 Volume 30, at page 34.

5 Q. The top of page 34 you say "The Government has refused to
6 follow recommendations made to it by Staff Sergeant
7 Wheaton and Crown Prosecutor Edwards, both of whom
8 were asked to submit reports and opinions." Could I ask you
9 the basis for that statement, Your Honour?

10 A. I can't recall if we...

11 Q. Did you...

12 A. ...talked about this and questioned how I knew that those
13 things were in existence is beyond me. I'm satisfied they
14 were in existence, how I knew about them or from whom I
15 found out I can't recollection whether or not in passing a
16 conversation with Mr. Edwards the comment may have been
17 made. Certainly there were no friends in the Attorney
18 General's Department that would have been leaking
19 information to me.

20 Q. But the statement that you make is a fairly strong one, that
21 the government has refused to follow recommendations.
22 That assumes, number one, that recommendations were
23 made, and number two, that the government refused to
24 follow...

25 A. My understanding was that Staff Sergeant Wheaton had

1 given them eight recommendations as to what to do when
2 dealing with young witnesses, and taking evidence or
3 statements from young people. That's what I was referring
4 to. Now, where I got that information I can't tell you.

5 Q. But you also had some information from somewhere that the
6 government refused to follow these recommendations.

7 A. Well, refused perhaps was too strong. Weren't acting on the
8 recommendation.

9 Q. Later on in that paragraph you say "From my reading of the
10 materials in this case and from conversations with persons
11 close to the re-investigation it seems that Mr. Marshall was
12 framed," and the word "framed" is in quotes so I'll assume
13 that's your word.

14 A. That's my word.

15 12:10 p.m.

16 Q. "Reading of the materials in this case..." Was the file provided
17 to you by Mr. Aronson?

18 A. Yes, and in particular, the, Staff Sergeant Wheaton's report.

19 Q. "...persons close to the re-investigation." Who were they?

20 A. At that point I would have probably had, I did have some
21 discussion with Staff Sergeant Wheaton. I remember speaking
22 to him in Sydney.

23 Q. And the statement you make in the last sentence of that
24 paragraph:

25

THE HONOURABLE JUDGE CACCHIONE, EXAM. BY MR. ORSBORN

1 Two of these witnesses filed affidavits and
2 testified viva voce in the Supreme Court of Nova
3 Scotia in 1982 to the effect that they were
4 pressured by the Sydney police re MacIntyre
5 and Urquhart, into testifying to a set of facts
6 they knew were false.

7 And it's just a question, last four words, "...they knew were
8 false." Are you referring to the witnesses or are you referring
9 to MacIntyre and Urquhart?

10 A. I think the sentence reads that the witnesses knew that they
11 were false.

12 Q. I see. So that sentence is not suggesting, then, that they are
13 testifying to a set of facts that MacIntyre and Urquhart knew
14 were false.

15 A. No, but my belief was that MacIntyre and Urquhart knew
16 that the facts that they were forcing those witnesses to testify
17 to were, in fact, false.

18 Q. Is that a belief backed up on anything else than your review
19 of the file?

20 A. Just, well you've got a statement from a witness who says, "I
21 was in the park and I saw Donald Marshall, Jr." and these
22 other people were there and describes Mr. Ebsary and
23 another person and then four hours later the statement is
24 completely different. It says, "No, just Donald Marshall and
25 Sandy Seale were in the park." And speaking with Stephen
Aronson. See there was a fair amount of conversation with
Stephen Aronson as to what he was aware of that wasn't

THE HONOURABLE JUDGE CACCHIONE, EXAM. BY MR. ORSBORN

1 contained in the file, in notes or affidavits. And a lot of this
2 was obtained through, my understanding was, Staff Sergeant
3 Wheaton, because he and Mr. Aronson seemed to have a good
4 working relationship.

5 Q. Page 35, Your Honor, bottom of paragraph four. The last four
6 lines of that paragraph you say,

7
8 During the polygraph examinations (this would
9 be November '71) the examiner asked Detective
10 MacIntyre if Marshall was to be tested, but
11 Detective MacIntyre indicated that Marshall,
12 through his counsel, had refused to take the test.

13 I can point out to you that we have had no evidence before
14 the Commission that would in any way link Detective
15 MacIntyre with the request to test Marshall and I'm
16 wondering if you can give us any back-up for that particular
17 statement.

18 A. My understanding, and I take it from conversations with Mr.
19 Aronson, that that was the case. That's the only source that I
20 can think of.

21 Q. A similar vein on page, top of page 39. The, starting the third
22 line, the "he" which is referring to the provincial Attorney
23 General, "He was also aware in 1974 that another person
24 again came forth and pointed the finger at Roy Ebsary."
25 We've had evidence to the effect that David Ratchford and
Donna Ebsary spoke with the RCMP and/or Sydney Police in
1974. Do you have any knowledge of the provincial Attorney

THE HONOURABLE JUDGE CACCHIONE, EXAM. BY MR. ORSBORN

1 General being aware of that? Which is what your sentence
2 says.

3 A. I have no personal knowledge of the Attorney General being
4 aware of that.

5 Q. Second paragraph on that same page, Your Honor, seven or
6 eight lines down. You say, "The provincial government asks
7 that Mr. Marshall barter away his civil claim against the
8 Sydney City Police with the possibility of compensation being
9 paid to him." Was that position put to you?

10 A. Well you don't have to spell things out, you know. When the
11 Premier says, "Well, the civil suit is still there." I think the
12 only inference you can draw from that is that that's an
13 impediment. You have to be aware that you're dealing with
14 politicians who can say things in many different ways but the
15 bottom line is the same. The civil suit is there.

16 Q. And in January of 1984 you, in fact, dropped the civil suit.

17 A. That's correct. We didn't want anything to stand in the way
18 of them dealing with what we were asking for. And at that
19 stage as I recall it, we were asking for a full public inquiry
20 and compensation.

21 Q. You spoke earlier of the exchange of correspondence you had
22 with the Department in early 1984 with the request for
23 information under the Freedom of Information Act and, again,
24 for the record, that's found in Volume 32 at 309 and
25 following. I won't ask you to turn to it but was there any

THE HONOURABLE JUDGE CACCHIONE, EXAM. BY MR. ORSBORN

1 specific information you were looking for from the
2 Department of Attorney General?

3 A. Well I think that...

4 Q. Your letter is pretty broadly worded.

5 A. I'm sorry?

6 Q. I say your request is pretty broadly worded.

7 A. Sometimes when you don't know what you're looking for you
8 ask for everything and the kitchen sink.

9 Q. That was my question. Was there information that you
10 specifically knew existed that you were looking for?

11 A. The reports of Wheaton with respect to an investigation into
12 the Sydney Police, with the laying of charges, the procedures
13 to be adopted with respect to taking statements from
14 witnesses. What, if any, correspondence there was between
15 the Sydney City Police and the Attorney General's Department
16 with respect to Donald Marshall. Anything that would shed
17 some light on why that position was being taken by the
18 Department. It's, I view it now in light of an application,
19 what's referred to as a Wilson application, to contest the
20 validity of an authorization in a wiretap case. And you have,
21 the B.C. Court of Appeal saying that you have to establish a
22 prima facie case of fraud before you can get the information
23 in the packet and then you have other courts saying, no, that
24 you should have it as a matter of right because how are you
25 going to contest the validity if you don't know what's in the

THE HONOURABLE JUDGE CACCHIONE, EXAM. BY MR. ORSBORN

1 affidavit. And it was one of those "just give us what you have
2 so that we can look at it" but we never did receive anything.
3 So we didn't know if those reports had been acted on. We
4 had a suspicion that those reports were available, that Staff
5 Wheaton had supplied them with reports.

6 Q. Okay, just in the chronology, then, I'll point out at page 319 of
7 Volume 32 that you again write Mr. Giffin, I take it, on
8 January 18th, 1984, asking for an inquiry and for comments
9 on compensation. And then two pages later is the letter of
10 January 23rd, '84 which you formally notify them that the
11 civil suit has been dropped.

12 A. Yes.

13 Q. Now in February of, or before I do. I would take it that you
14 discussed with Mr. Marshall the matter of dropping the civil
15 suit?

16 A. My recollection was, yes, that we did have a discussion with
17 respect to the civil suit. I, as I indicated this morning, had not
18 dealt with civil matters before. My partner at the time was
19 quite experienced with civil litigation and as a result of
20 discussions with my partner and with Donald we came to the
21 conclusion that the burden on him as a plaintiff in that civil
22 suit would be so onerous that it would be very difficult given
23 the client that we had, given the nature of the suit to be
24 brought, given the resources that we were to be confronted
25 with, that it would be very difficult. I said also this morning

THE HONOURABLE JUDGE CACCHIONE, EXAM. BY MR. ORSBORN

1 that we were using that, Stephen had, Stephen Aronson had
2 started the civil suit to protect Donald's interests and we had
3 renewed it just for the same reason. However, given, when
4 we discussed it with Donald as to what he could expect from a
5 civil suit and what was being said by the Government with
6 respect to that being, in fact, an impediment, we discussed it
7 with him, came to the conclusion on instruction that the
8 matter be withdrawn.

9 Q. In February of 1984 the documents indicate you had some
10 communication with a group that you mentioned earlier, with
11 a Father Comeau and Mr. Shaw, Dean Charles?

12 A. Yes.

13 Q. And Mr. Mitchell.

14 A. Yes, I recall that meeting. We met at the Lord Nelson Hotel in
15 one of the rooms upstairs.

16 Q. Did you initiate the formation of that group?

17 A. No. No, that group came about, as I recall it, because Lloyd
18 Shaw had taken an interest in the case and felt that
19 something could be done. If persons...

20 Q. And you...

21 A. In the community, other than the ordinary citizen would
22 approach the government.

23 Q. What did they do for you?

24 A. They met with me, Donald wasn't there. We discussed the
25 matters that had transpired since the May reference, or the

THE HONOURABLE JUDGE CACCHIONE, EXAM. BY MR. ORSBORN

1 May decision. The government's approach to things. And we
2 hoped that, at least I hoped that that group would be in a
3 position to convince the government to hold an inquiry and to
4 deal fairly and honorably with Donald Marshall, Jr. in terms of
5 both the inquiry and compensation.

6 Q. To your knowledge did that group, in fact, meet with the
7 Premier or any member of government?

8 A. I'm not sure that they met or whether or not the letter was
9 sent. Well obviously the letter was sent. Well I'm not sure if
10 it was sent actually. It's there on file.

11 Q. Turning to page 324 there are some handwritten notes on
12 that page, can you identify those notes?

13 A. That's my handwriting.

14 Q. There's reference at the top to "D.M., Jr." and then what
15 appears to be "Father Comeau."

16 A. Yes. "Committee recommends public inquiry, strongly
17 recommends..."

18 Q. Are you able to tell us the context in which those notes were
19 made? Is this information coming to you from Father Comeau
20 or what?

21 A. This would have been a telephone call to me from Father
22 Comeau and outlining what they had concluded as a result of
23 our discussion. I can't recall when we had the meeting at the
24 hotel, the Lord Nelson.

25 Q. I just have one question on those notes and...

THE HONOURABLE JUDGE CACCHIONE, EXAM. BY MR. ORSBORN

1 A. Obviously he did meet personally with the Premier. You see,
2 the thing was that Father Comeau, to my knowledge, was
3 quite involved in the Conservative party or had Conservative
4 party affiliations and that's why it was felt by others, not
5 myself, but by others in the group that he would be the
6 contact person.

7 Q. Okay. About a halfway down the page there's a note which
8 says, "Chief Justice sd. ..." I presume means "said" does it?

9 A. Yes.

10 Q. "P.I. (public inquiry) may be contempt of court."

11 A. Yes.

12 Q. Can you tell us anything at all about that comment?

13 A. Only that that was what Father Comeau told me. Now I'm not
14 sure if from that note whether or not the Premier told Father
15 Comeau that the Chief Justice had told him, I don't know.

16 Q. You don't know. Okay.

17 A. I'm not sure.

18 Q. Eight or ten lines from the bottom of the page there's a note
19 there, "Immediately after Ebsary's decision the government
20 will immediately move on public inquiry." Again, this is a
21 report from Father Comeau to you?

22 A. Yes.

23 Q. And from what you said earlier is this not what you were
24 looking for?

25 A. That's certainly what we were looking for was a public

THE HONOURABLE JUDGE CACCHIONE, EXAM. BY MR. ORSBORN

1 inquiry. This is February 10th, 1984.

2 Q. Yes.

3 COMMISSIONER EVANS

4 He skipped over that.

5 MR. ORSBORN

6 Q. But in terms of a resolution at least of the issue of the inquiry,
7 would not this, assuming it were true, resolve it from your
8 point of view?

9 A. Assuming it was true.

10 Q. Yes.

11 A. I didn't assume that it was true.

12 Q. I see. I was about to move, My Lord, into a...

13 COMMISSIONER EVANS

14 Before you leave that, 325, on page 325...

15 MR. ORSBORN

16 Yeah, I think that's perhaps out-of-date order in the volume.

17 COMMISSIONER EVANS

18 Is that what you mean? I beg your pardon?

19 MR. ORSBORN

20 I believe that note is out-of-date order in the volume, My
21 Lord.

22 COMMISSIONER EVANS

23 Yeah, I'm not concerned about the date but it says, "Ron
24 Giffin, 1:59 p.m., will meet privately. No reporters." Then it gives
25 a date, "2 p.m. Third floor." And that's the meeting that was

THE HONOURABLE JUDGE CACCHIONE, EXAM. BY MR. ORSBORN

1 subsequently advanced.

2 A. I'm not, Mr. Orsborn has referred to the meeting as taking
3 place on the 21st of November. If that's when it took place
4 then obviously it was advanced.

COMMISSIONER EVANS

6 All right. But that, it's clearly from the note that it was to be
7 a private meeting between you and Ron Giffin.

8 A. That's right.

COMMISSIONER EVANS

10 And it was changed because somehow or other there was a
11 leak and reporters and so forth were apprised of it?

12 A. My understanding, My Lord, was that the media knew that
13 there was to be a meeting. I also recall that there was no
14 indication where, when the meeting was to take place.

COMMISSIONER EVANS

16 No, I understood though, that your evidence earlier today
17 was that you did not feel there was anything wrong if the
18 reporters were available because it was going to be, even though
19 it was going to a private meeting. Am I right on that?

20 A. I don't recall saying that but certainly I agree with the
21 statement, that I didn't feel that there would be anything
22 wrong with them being present. Not during the meeting but
23 certainly after the meeting.

COMMISSIONER EVANS

25 Well, of course, of those scrums that appear after a meeting

THE HONOURABLE JUDGE CACCHIONE, EXAM. BY MR. ORSBORN

1 between a Cabinet minister and yourself in that situation, I take it
2 that would not make it a very private meeting.

3 A. No, but some interesting revelations have come as a result of
4 those scrums.

COMMISSIONER EVANS

6 Yes. Some are factual, some otherwise.

7 A. Certainly.

8 LUNCH - 12:28 - 2:00 p.m.

9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25