

2:07 p.m.

1 Q. Judge Cacchione, I'd like to move to early 1984 and the  
2 appointment of the Campbell Commission and subsequent,  
3 and by and large I'll be referring you to Volume 33. We start  
4 off with a letter from Mr. Giffin to yourself which is found on  
5 page 344 of that volume, a letter dated March 6th. And as I  
6 understand that letter, it's a response by Mr. Giffin to your  
7 various requests and, in that letter, he states that the matter  
8 of costs and compensation will be looked at by Mr. Justice  
9 Campbell and on the second page of that letter, second  
10 paragraph, page 345, he indicates to you that a decision on a  
11 complete public inquiry will await the completion of the  
12 Ebsary proceedings. That was a response you had from Mr.  
13 Giffin?

14 A. Yes.

15 Q. What was your reaction to the appointment of the Campbell  
16 inquiry?

17 A. Quite frankly, I saw it as a means of taking public pressure  
18 off the government. I should point out that in keeping with  
19 the attitudes that were displayed towards my office, we were  
20 not advised that this was in the offing until the  
21 announcement, in fact, had been made in the House. We were  
22 not aware that there would be such a commission established.  
23 It was only, I was in the office that evening, I recall, working  
24 on a jury trial that I was in the process of defending when  
25

1 someone called the office and said you should get yourself  
2 down to the legislature right now because they're going to  
3 deal with an inquiry into Marshall and I went there just to  
4 get the end of the statement made and it was, I believe, the  
5 following day that this letter was sent to me. And that was  
6 the first that I had heard of it officially, apart from getting a  
7 portion of the address in the House. With respect to my  
8 initial views, they were that the Commission would be looking  
9 at the issue of compensation only, which was just one of the  
10 factors that we had asked the government to address. I  
11 personally felt that, in fact, this was just another delaying  
12 tactic. I had no basis at the time other than my degree of  
13 cynicism for thinking that. However, once it became clear  
14 what the mandate of that commission would be, I was  
15 satisfied in my own mind that my initial views were quite  
16 correct in that the commission could not inquire into the  
17 reason for the conviction but solely compensation for the  
18 incarceration. I was of the view that they should look at the  
19 entire picture in order to arrive at a proper resolution of  
20 compensation. You simply can't say that there's a given that  
21 someone spent ten years ten months in jail and we should  
22 compensate him without viewing the reasons why that person  
23 was incarcerated and how he came to be incarcerated.

24 Q. You expressed the view that this was simply a delaying tactic  
25 by government. Did you have a preferred alternative of your

1 own for the compensation matter to be dealt with?

2 A. Quite frankly, I didn't. I was, as I said, that was my initial  
3 personal reaction. Once it became clear that their scope, the  
4 Campbell Commission's scope, was to be restricted, then I  
5 became more convinced that the matter was just one of delay,  
6 that Mr. Justice Campbell would be quite restricted in his  
7 approach to the matter.

8 Q. Did you discuss the upcoming inquiry with your client?

9 A. I did. I discussed it with him and I discussed it with him  
10 initially after I received this letter. I further discussed it  
11 with him once the terms of reference were made known and I  
12 recall a conversation that we had as a result of a letter I  
13 received from Mr. MacIntosh outlining what Mr. Marshall  
14 would have to establish and what the Commission would want  
15 to look at and I recall him being quite upset with respect to  
16 information concerning his father and what his father's  
17 business was and how much money they had made, et cetera.  
18 I believe there's some reference in the materials to that list of  
19 questions or topics that were to be dealt with.

20 Q. Did your client express any, either optimism or reluctance  
21 about going into the process of an inquiry?

22 A. I don't think optimism was ever expressed. As I've stated  
23 before, Donald was quite leery of the process. That was, that  
24 feeling was strengthened once we received Mr. MacIntosh's  
25 correspondence, again, as a result of that correspondence,

1 Donald, it's my understanding, felt that he, again, would have  
2 to establish things and he would have to prove the loss of  
3 income and various other factors. That, in fact, it wouldn't be  
4 a commission such as this, which would be empowered to call  
5 the evidence that it determines is required, but, in fact, he  
6 would have to undertake the burden of establishing.

7 Q. Could I ask you to turn to page 369 of this same volume? Are  
8 those notes in your handwriting?

9 A. Yes, they are.

10 Q. The top part of the page is dated March 19th, '84 and headed  
11 "Junior Marshall," and there's some comments and some  
12 figures under that. Are you able to indicate if these  
13 comments are as a result of a discussion with Mr. Marshall?

14 A. Yes, they are.

15 Q. A half dozen lines from the top, there's reference about  
16 "Pension, unable to work" and then "\$90 per visit to a  
17 psychologist."

18 A. Yes.

19 Q. Do you know if Mr. Marshall was visiting a psychologist at the  
20 time?

21 A. I believe that Donald had seen a psychologist on one or two  
22 occasions subsequent to his release from the penitentiary, and  
23 had been, in fact, charged some monies for that. That's why  
24 the note is there that... It was at my urging that he undertake  
25 some sort of psychological or psychiatric counselling.



1 Q. Can you give us your view of how Mr. Marshall was to deal  
2 with as a client at this time? Were you able to get adequate  
3 properly informed instructions from him?

4 A. As I stated this morning, when dealing with Junior, there  
5 would be days when things would be fine, when instructions  
6 would be very clear, which could be followed the next day by  
7 instructions not being so clear. The closer one came to a court  
8 proceeding or what he perceived as being a court proceeding,  
9 the more difficult it became to obtain instructions. I recall  
10 evenings, I should say early mornings, where the phone  
11 would ring and it would be Donald who would be in bad  
12 shape, would have been drinking, confused, crying, angry,  
13 situations I recall spending one morning from approximately  
14 two a.m. until 5 a.m. at the Ardmore Tea Room on Quinpool  
15 Road with him, just trying to fill him with coffee and try to  
16 get him to be a bit more rational because he was angry. Not  
17 angry at me, but just angry in general. The instructions  
18 would change from day to day depending on, at times, who he  
19 came into contact with. I could spend several days with him  
20 and feel that we had arrived at a consensus on what our  
21 approach would be, only to come back the following day and  
22 be advised that, no, I'm not doing it this way. "So-and-so says  
23 that I'm getting jerked around", or you know, "they can just  
24 stick it..." You know, just very difficult to obtain concrete  
25 instructions. And as I said, my experience had been solely

1 with criminal matters. I had never negotiated any sort of a  
2 settlement. I had never involved myself in defending or  
3 bringing forth a claim on the civil side. My instructions in  
4 criminal matters, generally, were very clear. "I'm not guilty.  
5 I wasn't there." Or "I'm not guilty and they can prove it." Or  
6 "I have an alibi." Something that one would go down the list  
7 of criminal defences and say this falls into that particular  
8 category. With respect to obtaining instructions from Junior,  
9 it wasn't that easy. It, at times, was very difficult. It was  
10 trying for both of us. I recall evenings at his apartment,  
11 which he was sharing with a lady friend of his at the time,  
12 where he would just be in tears, not rational, and go from just  
13 crying to becoming upset, physically upset, pacing, then  
14 sitting down, calming down, and saying, "Yes, I understand  
15 what you're saying. It's okay. I can deal with it." And within  
16 the next five minutes, be back on the same topic of, you  
17 know, "They don't want to know why I got there or how I got  
18 there." And then we'd go off on this tangent and try to deal  
19 with that. It was very, very difficult.

20 Q. On that same page, about halfway down, there's a figure of  
21 five million dollars mentioned.

22 A. That was Donald's figure.

23 Q. A suggestion made by him to you. There's a note on that  
24 page...

25 COMMISSIONER POITRAS

1           What page was that?

2           HIS HONOURABLE JUDGE CACCHIONE

3           369, My Lord.

4           BY MR. ORSBORN

5           Q. Almost...

6           A. Yes, midway.

7           Q. About halfway, right in the middle of the page.

8           A. Yes, "Wants money to help support his immediate family."

9           Q. Just below that, there's a date of March 20th and it appears to  
10          refer to a telephone conversation with Mr. Justice Campbell?

11          A. Yes.

12          Q. Two points arising out of that. It indicates about the middle  
13          of that note, "FC to lay client's claim before Campbell." Do I  
14          take it from that that you were prepared to take the onus and  
15          the burden of laying the case out before Mr. Justice Campbell?

16          A. I'm not sure if that refers to my indicating that I would be  
17          prepared to take the onus or whether Mr. Justice Campbell  
18          was saying, "You will have to present the plaintiff's, or Mr.  
19          Marshall's case."

20          Q. Were you prepared to do that?

21          A. We, at the time, I was prepared to do it as his counsel.

22          Q. Another matter raised there a couple of lines from the  
23          bottom. "No idea of (I guess) A.G.'s response."

24          A. Yes.

25          Q. "Re interim compensation."

1 A. Yes.

2 Q. There was an amount of \$25,000 paid within a couple of  
3 weeks, I think, of Mr. Justice Campbell's appointment. Was  
4 that at your initiative that Mr. Justice Campbell  
5 recommended that?

6 2:21 p.m.

7 A. As I recall and I can't be specific as to the dates. It was a  
8 Friday afternoon. I recall Mr. Justice Campbell flying into  
9 Halifax, having a meeting, I think it was in the morning,  
10 with the Attorney General's Department, and in the  
11 afternoon he came to my office. It was the first time that I  
12 had met him in person. We discussed the matter. I laid  
13 before him the situation as I saw it. I told him of Donald's  
14 needs at the time. I told him that he was impecunious, that  
15 he did require money, that if this Commission was going to  
16 have any merit in his eyes that he should see if anything  
17 could be done with the view to obtaining some immediate  
18 relief for his financial situation. I should point out that at  
19 that stage in March of 1984 Donald owed approximately  
20 \$79,000 in fees to Mr. Aronson. Our bill had not been  
21 submitted. We had no idea of what he owed us. And he  
22 basically had...he had little if no income.

23 Q. Now, Mr. Justice Campbell wrote to you on March 23rd, and  
24 I'd refer you to page 374 and 375, and in particular  
25 paragraph 4 on page 375 in which he sets out a number of

1 items and he says in the middle of paragraph 4 at page 375:

2  
3 It is understood that your client may wish to  
4 adduce evidence relative to the police  
5 investigation that preceded his prosecution for  
6 the crime of which he was subsequently found to  
7 be not guilty. The relevance of this to the terms  
8 of the order is intended to be raised under this  
9 item.

10 Do I gather from that that you had had discussions with Mr.  
11 Justice Campbell about the scope of the evidence?

12 A. Certainly. Certainly. I made it very clear to him that it was  
13 my feeling that the only way to deal realistically with the  
14 question of compensation would be for him to examine all of  
15 the factors and I was thinking in terms of punitive damages  
16 because of how Mr. Marshall came to be incarcerated. It  
17 was my feeling after speaking with Justice Campbell that he  
18 shared that view. That he could not...as I said to him,  
19 you're looking at it in a vacuum if you're just going to say,  
20 "Well, okay, he spent ten years in jail or eleven years in jail,  
21 now how much does that cost the state?" without any  
22 reference as to why or how he got there. I felt Justice  
23 Campbell was of the same view.

24 Q. This comment...

25 A. It would have been very difficult to establish given the fact  
that we were not receiving any information that would have  
assisted us in putting that claim forth.

1 Q. This comment, I would suggest to you, simply indicates that  
2 he is prepared to hear your case on relevance, he's not  
3 saying, "Yes, I will definitely hear it, " or "No, I won't, but I'll  
4 listen to you as to whether or not it is relevant to my order."

5 A. Yes, that's an accurate reflection.

6 Q. We have in the documentation correspondence, and it's page  
7 407, you don't need to turn to it, from Mr. Coles to Mr.  
8 MacIntosh who was appointed as counsel for the inquiry,  
9 casting considerable doubt on the extent of the terms of  
10 reference, particularly extending to pre-conviction matters.  
11 Were you aware of that correspondence?

12 A. I was never made aware of that. I, I guess, it's just sort of  
13 what came to be an innate feeling for this particular file that  
14 we weren't going to get any...any assistance and it followed  
15 that we did have a meeting with Mr. MacIntosh, Mr. Coles,  
16 Mr. Endres and myself when it became abundantly clear to  
17 me at that stage that Mr. Coles' position was, and I assume  
18 the government position, that we were not going to be  
19 looking at any matters pre-conviction and that was their  
20 position and they would fight us on that issue. So I saw it as  
21 being, well, here we go again, the same as a civil  
22 proceeding. We're going to get tied up in technicalities,  
23 we're going to get tied up in procedural matters, this  
24 Commission is going to go on and on and on.

25 Q. Let's just turn to that meeting, I believe it was a meeting

1 held on May 16th.

2 A. That's correct.

3 Q. Of 1984. And if I could turn to page 424 of this...of this  
4 volume. Are those notes in your handwriting, Your Honour?

5 A. Yes, those notes are.

6 Q. And there are some notes which follow that which, I believe,  
7 My Lords, will be identified as being in the handwriting of  
8 Mr. Endres, and I will be referring to those also. Your notes  
9 are somewhat shorter than Mr. Endres, Your Honour.

10 A. Well, I was trying to speak and make notes at the same time  
11 whereas Mr. Endres was sitting there writing the notes  
12 while Mr. Coles was having the discussion.

13 Q. Okay. Let's turn to Mr. Endres' notes, then, at page 426.  
14 And do I gather that present at this meeting were yourself,  
15 Mr. Coles, Mr. Endres and Mr. MacIntosh?

16 A. Yes, that's correct. It was held at 1649 Hollis Street on the  
17 second floor. It was the office building we occupied, but we  
18 were on the ninth floor. This was on the second floor.

19 Q. Yes. Now at the top of that page there's a note attributed to  
20 yourself. "Agrees with Coles proposing that Commission  
21 bring before the evidence it wants to hear. The burden  
22 should not rest with Marshall, but Commission."

23 A. Yes.

24 Q. This seems to be a shift from the earlier suggestion that...

25 A. That was my first knowledge that they'd be prepared to



1 deal with it in that fashion. I was under the impression, as a  
2 result of Justice Campbell's letters and discussions, that the  
3 onus would be on Donald to bring forth the evidence.

4 Q. Can you suggest any reason why a meeting of this nature  
5 would even take place? The order-in-council had been  
6 passed, the Commission had been set up with a  
7 Commissioner, it appointed counsel. And, the sort of  
8 immediate parties now involved seemed to be getting in and  
9 talking about the procedure to be followed.

10 A. I think it was at the request of Mr. MacIntosh that the  
11 parties get together and try to firm up some sort of a  
12 procedure for the inquiry. We were looking at starting  
13 dates of June, mid-June, and nothing had transpired. As I  
14 recall Justice Campbell met with me in March at some point  
15 and then left for a winter vacation to be...to return in May  
16 and nothing had been established. There had been no  
17 renting of facilities, the obtaining of transcribing services,  
18 there was nothing, no infrastructure was in place.

19 Q. The middle of that page 426 a comment attributed to Mr.  
20 MacIntosh reads, "Seems sympathetic to Felix's proposal on  
21 the scope of the inquiry. He feels that Commission would  
22 like to have submissions on scope of the inquiry." Does that  
23 reflect your memory of the position taken by Mr.

24 MacIntosh?

25 A. Yes, it does.

1 2:30 p.m.

2 Q. On page 429, Your Honour, again a comment attributed to  
3 yourself. In the middle of the page is, "Felix, why spend all  
4 this money with the inquiry? Why not settle," something,  
5 "...an amount we can all agree on and close the book."

6 A. Yes.

7 Q. Is that an accurate reflection of your comments at the time?

8 A. It became quite clear to me as a result of that conversation  
9 with Mr. Coles that, as I said, we were going to be in and out  
10 of court dealing with procedural issues, the scope of the  
11 inquiry and my feeling was, "Well, listen if you're going to,  
12 you know, do it this way, if you're going to say that the  
13 inquiry can't look at this issue, then we're going to take  
14 prohibition to prevent the Commissioner from looking at this  
15 thing. We're going to get tied up procedurally, why not just  
16 deal with the issue of compensation?"

17 Q. Did Mr. Coles actually indicate the proceedings would be  
18 taken or did he say, well, that's a matter that we'll have to  
19 argue before the Commissioner and let him decide on the  
20 scope of the inquiry?

21 A. Well, I guess you don't have to say things in...or have them  
22 in black and white to be able to infer from what's being said.  
23 I mean, you've got to appreciate I was coming at this with  
24 the background of May '83 through until that date of dealing  
25 with this government and this department on that particular

1 issue, and they hadn't budged. They weren't prepared to  
2 accommodate us in any fashion and I didn't expect that they  
3 would all of a sudden change and say, "Here you are, here  
4 are all the materials that we have that show that there was  
5 a miscarriage of justice and we're prepared to agree and  
6 examine the matter of the investigation and the conviction."

7 Q. Leaving aside your suspicions, was there anything said at  
8 this meeting of May 16th which would indicate to you that  
9 the Department of Attorney General or the government was  
10 not prepared to let Mr. Justice Campbell decide on the  
11 relevance of the pre-conviction matters after hearing  
12 submissions from both sides?

13 A. I would have to read through his...these notes. There is a  
14 note at 427 that says, "Gordon, we have the right to hear  
15 from the Commission what his starting point is,  
16 incarceration, before or what? We must know from him  
17 where he starts." And the page before, 426, "We can't agree  
18 that the Commission may consider police involvement in the  
19 matter of conviction." That was very clear. They weren't  
20 going to look at the matter of conviction.

21 Q. Now, we can come back to that.

22 A. So it had gone from a suspicion to a reality and it wasn't a  
23 figment of my imagination.

24 Q. And is it your evidence that it was the restricted nature of  
25 the inquiry that led you to think about a negotiated

1 settlement?

2 A. It wasn't only the restricted nature. The restricted nature  
3 certainly had a large part to play in our decision to try and  
4 negotiate a settlement. It was the effect that such...the  
5 effect that the position of the government would have on  
6 Donald with respect to the inquiry itself, that is assuming we  
7 began the inquiry, we raise the issue of the investigation,  
8 the government says, "No, we can't look at that, " the  
9 Commission decides that it can and then all of a sudden the  
10 Attorney General's decide that they're going to take the  
11 matter to a Justice of the Supreme Court to have that  
12 determined. We get tied up in that. Then we look at an  
13 appeal from that decision, one way or the other, bearing in  
14 mind that Keable got adjourned for two years pending the  
15 resolution of the Supreme Court of Canada. We could  
16 foresee that those things would tie us up procedurally. I  
17 was also dealing with a client who was, to understate it, in  
18 the most fragile frail state I have ever seen a person before.  
19 He was on the verge of cracking. And that is no reflection  
20 on him as a human being. But he had just had enough. He  
21 was at his wits end. Here was just another example, and I  
22 put to him, "Junior, this is what's going on. We can go with  
23 the Commission and run the risk of doing this or we can try  
24 and deal with the issue of compensation without the  
25 inquiry."

1 Q. Had that been put to him before you went to this meeting of  
2 May 16th?

3 A. No, subsequent to that.

4 Q. In that vein, on page 431 there is a note attributed to  
5 yourself, it says, "Felix, Marshall now in need of  
6 psychological assistance. It may be advantageous for him to  
7 settle now."

8 A. Yes.

9 Q. Is that an accurate reflection of a comment you made at that  
10 meeting?

11 A. Those are my comments. I made it quite clear what Mr.  
12 Marshall's psychological and financial status was at that  
13 particular time. I now know better that in civil negotiations  
14 one does not put their bottom line first, and that's what I  
15 did, and unfortunately for Mr. Marshall I regret having done  
16 that. I should have played hardball. But I was trying to  
17 deal with a human being who was cracking and I was  
18 hoping that the matter would be dealt with honourably.  
19 Unfortunately, in my view, Mr. Orsborn, it wasn't dealt with  
20 in that fashion.

21 Q. Did you give any indication that Mr. Marshall would or  
22 would not have any difficulty in proceeding to an inquiry?

23 A. As I recall it, I did make the comment that what his  
24 standing was at that particular time. I'm not sure if I said,  
25 you know, he needs psychological assistance or I said he is

1 breaking at this stage, he goes from crying to being happy.  
2 It was almost a manic-type of a situation. The ramblings  
3 that I would get about, you know, why this was done, how it  
4 came to be, "Nobody believes me, I'm still on trial, this is  
5 just another example." I laid those out to the persons that I  
6 was dealing with. I recall, in particular, a conversation in  
7 Mr. Endres' office, I believe, subsequent to this where I  
8 made it quite clear to him what Donald's status was.

9 Q. Okay. I'd just direct your attention to page 435 and 436.  
10 It's a letter from Mr. Coles to Mr. MacIntosh, immediately  
11 following your meeting of May 16th, and in particular the  
12 last paragraph of the letter on page 436, which in essence  
13 says, "There need not be any debate about the scope of the  
14 inquiry. If there is any debate then the Commissioner  
15 should seek clarification and we can amend the order-in-  
16 council if needs be." Did you have any knowledge of that  
17 correspondence?

18 A. No, sir. I had no knowledge of any discussions that had  
19 been...that had taken place between Mr. Coles and Mr.  
20 Justice Campbell.

21 Q. Did you discuss with your client following that meeting of  
22 May 16th the possibility of short-circuiting the inquiry  
23 through a settlement process?

24 A. Yes, I did.

25 Q. What was his reaction?

1 A. As I stated, his reaction was to view this inquiry as just  
2 being another continuation of Donald Marshall is on trial  
3 because he did something wrong and he has to establish that  
4 he lost income, that his liberty was deprived for ten years,  
5 ten months, that he suffered psychologically. And you've  
6 got to appreciate dealing with someone who has a great deal  
7 of machismo and it's very difficult for Donald Marshall to  
8 admit that he was being psychologically affected. He kept  
9 putting up this front, but he was falling apart. And he  
10 viewed the inquiry as just being a repetition of this, that we  
11 were going to get tied up procedurally in wranglings, that  
12 the matter would, no doubt, be before the Commission for an  
13 extended period of time without resolution and he was  
14 agreeable to my negotiating a settlement on his behalf.

15 Q. Page 438 there's a notation of a conversation with yourself  
16 and I believe it will be identified as being with Mr. Endres  
17 in which he confirms that he has the okay to go ahead and  
18 negotiate, and the second paragraph reads, "That all  
19 negotiations are to be in confidence without prejudice, and  
20 the claim is to start from date of imprisonment and to  
21 exclude punitive damages." The bottom says you'll provide  
22 them with a proposal. Did you agree with a settlement on  
23 the basis that excluded punitive damages?

24 A. I must have.

25 Q. And following that a few pages over on 453, after some



1 actuarial reports and whatnot, you, on June 7th, '84, you  
2 submitted a proposal to Mr. Coles. You see from the files  
3 that you had assisting you the report of an actuary to look at  
4 lost income for Mr. Marshall.

5 A. Yes, yes.

6 Q. What other research or other avenues of assistance did you  
7 avail of?

8 A. We had...we had looked at the Arthur Alan Thomas, the  
9 Crewe murders. We had some information, I believe on  
10 another case of wrongful conviction. There was some  
11 research which we had available to us. We did not have  
12 psychological reports available. Those we were prepared to  
13 undertake to have done.

14 Q. You generated in that submission a global figure of \$550,000  
15 plus the twenty-five already paid, all in including Mr.  
16 Aronson's fees and your own fees. Can you give us some  
17 indication of how you arrived at that amount?

18 A. As I recall we had a meeting in my office with Mike  
19 Lambert, Donald and myself, and we were bantering back  
20 and forth as to the amount that we should be looking for.  
21 Junior started off asking for five million dollars. We had  
22 looked at Arthur Alan Thomas who was given one million  
23 dollars, New Zealand dollars, and he had, I believe, a fair  
24 amount of property that he had lost as a result of his  
25 incarceration. We didn't feel that the figure of five million

1 dollars would be realistic, nor did we feel that one million  
2 dollars would be realistic in light of the Crewe murder  
3 report. That was a figure that was arrived at between the  
4 three of us, a figure that Donald at the time felt that he  
5 could live with. It would have netted him approximately  
6 375 to \$400,000, and it was our feeling that that money  
7 invested at the current rates would provide him with a  
8 sufficient income on a yearly basis to enable him to  
9 maintain himself.

10 Q. The net amount that you mentioned that Mr. Marshall would  
11 receive, I take it is after your fees and Mr. Aronson's fees.

12 A. That's right. We were...we were considering approximately  
13 \$80,000 in Mr. Aronson's fees. There was an agreement  
14 signed initially by Donald and myself concerning twenty-  
15 five percent compensation for whatever was recovered.  
16 That, in effect, was really just there to...as a guideline. I  
17 wasn't...I wasn't prepared to live by that agreement,  
18 ultimately I didn't. So it was clear to Donald that that figure  
19 would be negotiable, our fees would be negotiable. It wasn't  
20 a situation, and I guess this was, this was probably my  
21 biggest problem in private practice, I was never a  
22 timekeeper. I never did note down a telephone call or read  
23 a letter, point three of an hour or whatever. I started  
24 keeping time and then...then I stopped because I couldn't  
25 put down the hours of talking to Donald in the park or at his

1 apartment or at my house, or just going for a walk. I wasn't  
2 a very good timekeeper, not a very good businessman.

3 Q. Was Mr. Marshall aware that, for example, Mr. Aronson's  
4 fees of \$80,000 would be deducted from any settlement  
5 received if it was an all-in settlement?

6 A. Oh, yes, yes.

7 Q. Was he aware of the amount?

8 A. Yes, he had been provided with a copy of Mr. Aronson's bill,  
9 which I believe was \$79,000-odd.

10 Q. When you submitted this global of five-fifty plus twenty-  
11 five, was that amount in any affected by the thought that  
12 the government is saving some money on the Campbell  
13 Commission so, therefore, we'll push this up a bit?

14 A. No question.

15 Q. No question what?

16 A. No question that we considered the fact that the government  
17 was going to spend, in our view, I think it was probably  
18 several hundred thousands, if not half a million dollars, to  
19 deal with this inquiry, if they were going to start paying  
20 counsel fees and recording services and whatever is  
21 required. And we felt that if they're prepared to set up this  
22 Commission and pay that kind of money then they should be  
23 able to kick in to the claim.

24 Q. So do I gather from that that had you been making a  
25 proposal without the Campbell Commission ever being

1 thought of that you figure would have been lower?

2 A. Probably not. Probably not.

3 Q. In submitting this figure, did you have in mind what your  
4 bottom line was that you'd want to...you'd want to settle at  
5 to give yourself some room to move?

6 A. Yeah, bottom line was \$550,000. That's what we...and, as I  
7 said before, that's the...my naivete in civil negotiations led  
8 me to believe that this was a fair amount that the  
9 government would look at, if they might dicker a bit, we  
10 probably would settle for a half a million, \$475,000. But it  
11 was pretty close to what we felt was appropriate in that  
12 case.

13 Q. Now, you had a reply from Mr. Endres which is found at  
14 page 467 of that volume and he raises some concerns about  
15 the amount of the lost income, whether it should be reduced  
16 by living expenses and what have you, and talks about the  
17 limits for non-pecuniary damages. It does not come back to  
18 you with any sort of counter...counterproposal, is that a fair  
19 reading of that correspondence?

20 A. Yes.

21 Q. And you subsequently meet on June the 26th, I believe, and  
22 there are notes of a meeting as found at page 474. The  
23 numbers are hard to read on the page because they're  
24 blacked out. It's probably easier to go from 475 and work  
25 back a page. Do you have 475? I don't think the number

1 474 can be read, but it is a note June 26th, "Met with Felix."

2 A. Yes.

3 Q. And I believe that will be shown to be in Mr. Endres'  
4 writing. And if I can read the middle of the paragraph  
5 there, the middle of the page is a bit hard to read. "Said  
6 subject to Cabinet's approval, " I believe, "We could agree to  
7 pay a further \$225,000 plus \$10,000 (for Felix) for a total  
8 payment of 235 which, and the \$25,000 paid," I believe.  
9 "Will give you a total of 260 all inclusive including Aronson's  
10 account."

11 A. Uh-hum.

12 Q. Do you recall that proposal being made to you, Your Honour?

13 A. I recall that, I think that that was...I think this meeting was  
14 in Mr. Endres' office.

15 Q. Do you recall any discussion of \$10,000 being sort of thrown  
16 in as a contribution towards your own fees?

17 A. Must have been brought up if it's in the notes. I have no  
18 specific recollection. I...there was some conversation about  
19 my fees. I had indicated at the time that I had not taken  
20 fees in this matter.

21 Q. What was your reaction to that proposal?

22 A. Pretty disappointed.

23 Q. Page 477, there's a note, I believe again will be identified as  
24 being in Mr. Endres' handwriting, I believe. But it appears  
25 to reflect a discussion with Mr. MacIntosh. The first

1 paragraph reads, "I told him that we are making good  
2 progress, that Felix has a figure which he will recommend to  
3 his client but that he can't reach Marshall before next week."  
4 And on page 475 there is, indeed, a letter which you write  
5 to Mr. Marshall asking to speak to him about the proposal.

6 A. Yes.

7 Q. I'm interested in the comment attributed to you that you  
8 would recommend that settlement. Is that accurate?

9 A. I'm not sure if I use the word "recommend". Recommend  
10 implies that I would have agreed with the figure.

11 Q. Yes.

12 A. And would have suggested that Donald accept it. I most  
13 likely would have said that I would put it to him and let him  
14 decide whether or not he was prepared to agree to that  
15 figure.

16 Q. Did you recommend that figure to Mr. Marshall?

17 A. I never recommended the figure to Mr. Marshall. I left it to  
18 Mr. Marshall to deal with the issue. "This is what they're  
19 offering, Junior, what do you want to do given your  
20 knowledge of what the proceedings have been so far and  
21 their attitudes have been?"

22 Q. Did you advise him against taking it?

23 that Felix has a figure which he will recommend to his client  
24 but that he can't reach Marshall before next week." And on  
25 page 475 there is, indeed, a letter which you write to Mr.

1 Marshall asking to speak to him about the proposal.

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4 would recommend that settlement. Is that accurate?

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6 implies that I would have agreed with the figure.

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8 A. And would have suggested that Donald accept it. I most  
9 likely would have said that I would put it to him and let him  
10 decide whether or not he was prepared to agree to that  
11 figure.

12 Q. Did you recommend that figure to Mr. Marshall?

13 A. I never recommended the figure to Mr. Marshall. I left it to  
14 Mr. Marshall to deal with the issue. "This is what they're  
15 offering, Junior, what do you want to do given your  
16 knowledge of what the proceedings have been so far and  
17 their attitudes have been?"

18 Q. Did you advise him against taking it?

19 2:52 p.m.

20 Q. Did you advise him against taking it?

21 A. I don't believe I advised him one way or the other. I put to  
22 him the various scenarios that he could face if he accepted the  
23 offer, if he didn't accept the offer. I don't think I said, "This is  
24 a good offer." I know I didn't say, "This is a good offer."

25 COMMISSIONER EVANS



1 Did you tell him that that was as far as the government was  
2 prepared to go?

3 HIS HONOURABLE JUDGE CACCHIONE

4 I'm not sure I said that, My Lord. I believe that I may have  
5 told him that we would look at it further, I would ask them to  
6 look at it further. Because the, and I say that simply because the  
7 final settlement figure was higher than the 235,000 that was  
8 offered on the June 26th note. I believe that when we got to that,  
9 the final figure of 245,000 plus the 25 that had been paid out,  
10 that I did say to him that that was the bottom line and it was  
11 either that or face the prospect of going with an inquiry and hope  
12 that the inquiry would achieve or arrive at a higher figure. But  
13 the proviso there was that whatever the inquiry said was not  
14 binding on the government. It could have been a  
15 recommendation. It wasn't as if they were the final arbiters of  
16 the figure.

17 COMMISSIONER EVANS

18 So that you could be in the position of having gone through  
19 an inquiry getting an award of four or five hundred thousand  
20 dollars, it going back to the government, and you're still back  
21 negotiating.

22 HIS HONOURABLE JUDGE CACCHIONE

23 That's correct, and my view, be it right or wrong at the time,  
24 was that I didn't trust the government to accept whatever  
25 recommendation. I felt personally that Justice Campbell looking

THE HONOURABLE JUDGE CACCHIONE, EXAM. BY MR. ORSBORN

1 at this would come out with a figure in the ballpark that we were  
2 looking at, which was a half a million dollars. But I didn't feel  
3 confident in my own self to say to Mr. Marshall, "We'll go with  
4 this. Justice Campbell will come out pretty close to what we've  
5 asked for and the government will pay because he's  
6 recommended it to them." I didn't feel that they, the government,  
7 that is, were bound by any of the recommendations. And that  
8 was my dilemma. A bird in hand versus two in the bush, that was  
9 the...

COMMISSIONER EVANS

11 Plus the fact you had a pretty fragile client by this time, to  
12 put him through this process.

HIS HONOURABLE JUDGE CACCHIONE

14 I probably dealt with well over a thousand criminal clients,  
15 including people who were found not guilty by reason of insanity,  
16 and never felt that I was dealing with somebody as fragile as Mr.  
17 Marshall at this particular point. And I was aware of Mr.  
18 Marshall, because of the conversations I was having with his  
19 girlfriend at the time, of him waking up in the middle of the night  
20 screaming in nightmares, crying, leaving the apartment, going out  
21 for a drive. What I also had in mind was what's going to happen  
22 if this thing continues, we go to a commission, we're on for a year,  
23 and all of a sudden, Mr. Marshall as a result of frustration or  
24 intoxication or whatever, becomes involved in a commission of a  
25 criminal offence, as subsequently occurred, i.e., an assault, and

1 then we're back to square one, if not farther down than square  
2 one.

3 BY MR. ORSBORN

4 Q. Did you, in your discussions with Mr. Endres, did you make  
5 him aware of Mr. Marshall's psychological state at the time?

6 A. Mr. Endres and, I would assume, people who he reported to  
7 were well aware of Mr. Marshall's condition throughout these  
8 negotiations and I have a great deal of difficulty, with all due  
9 respect, to the former Attorney General in accepting his  
10 comment that these negotiations were being conducted by  
11 two experienced counsel who were on an equal footing.  
12 Because, in my view, we were not on an equal footing.

13 Q. Well, I'll take that one step at a time. If it's your view that  
14 they were aware of Mr. End...

15 A. They were aware because I told them.

16 Q. That was my question.

17 A. I told them, "The guy is falling apart. He's cracking up."

18 Q. Who did you tell?

19 A. Mr. Endres.

20 Q. On how many occasions, to your knowledge?

21 A. Several occasions.

22 Q. Did you tell anybody else?

23 A. And he was aware. You know, we'd have these telephone  
24 conversations. I'm not sure if it was just before this  
25 that Donald was arrested on an impaired driving charge, or if

1 it was subsequent to the negotiations. I was having difficulty  
2 in getting instructions. One day Donald would be here, the  
3 next day Donald wouldn't be here. There's no doubt in my  
4 mind that Mr. Endres was fully aware of his precarious  
5 psychological situation.

6 Q. During these negotiations, did you deal with anybody in the  
7 department other than Mr. Endres?

8 A. No, sir.

9 Q. Now you say you do not consider that you and Mr. Endres  
10 were operating on an equal position. In what respects did  
11 you not consider yourselves to be dealing equally?

12 A. I guess I was expecting that he would appreciate the trauma  
13 that Mr. Marshall had experienced over the years. That he  
14 would have a certain degree of compassion for that situation.  
15 That he was aware that Mr. Marshall was having troubles  
16 dealing with the publicity surrounding his acquittal. And I  
17 think that those facts were used to the benefit of his client.  
18 And, as I see it now, as a judge, having heard civil cases, I can  
19 appreciate that he was concluding a hard bargain. I expected  
20 him to deal with it on a more compassionate basis. Obviously,  
21 I was wrong.

22 Q. Did you consider that the process was an adversarial one?

23 A. At that stage, I thought that we had reached the point where  
24 we were no longer adversaries. That we were, in fact, we had  
25 agreed that there should be compensation, and it was just a

1 question of determining the proper figure. I may have been  
2 mistaken. Obviously, I probably was.

3 Q. You mentioned "the circumstances surrounding Mr. Marshall's  
4 acquittal". In your discussions with Mr. Endres, were those  
5 circumstances raised as being relevant to compensation?

6 A. I recall the matter being raised, at least the passing comment  
7 being made as to, "Well, he didn't come out of this smelling  
8 like roses." You know, "He lied, he did this, he's changed his  
9 story," et cetera, et cetera. And I recall specifically saying,  
10 "You have convicted him of an armed robbery when there is  
11 no evidence of that fact." And I was referring to the 1982  
12 February statement given to Staff Sgt. Wheaton. That's not  
13 admissible. There's no evidence.

14 Q. What was the reaction to that?

15 A. It was just, that was just in passing. I don't think that there  
16 was a reaction such as, "Yes, we can obtain a conviction," or,  
17 "No, we couldn't." Mr. Endres is a very shrewd man who sat  
18 back and took in a lot of what I was saying and gave very  
19 little.

20 MR. CHAIRMAN

21 Was there any reference to the findings of the Court of  
22 Appeal on the reference during your negotiations?

23 HIS HONOURABLE JUDGE CACCHIONE

24 I believe that's what I was referring to, My Lord, when I  
25 said that he didn't come out of this smelling like roses. I don't

1 recall a specific reference to, you know, "this is page 64 of the  
2 decision." But the feeling that I got from the comments that were  
3 made were that that decision, in a large part, loomed over the  
4 negotiations. That it wasn't that here is a virginal person who,  
5 through no fault of his own, just got caught up in the machinations  
6 of the system and was spit out at the other end. There was, in  
7 terms of the negotiations, reference, however oblique they were,  
8 to him being... "Well, the Court of Appeal said the miscarriage of  
9 justice was more apparent than real."

10 MR. CHAIRMAN

11       Apropos what you... Your testimony this morning then, is it  
12 your view that if the Court of Appeal on the reference that it  
13 simply acquitted Donald Marshall, Jr., that your bargaining  
14 position would have been stronger?

15 HIS HONOURABLE JUDGE CACCHIONE

16       I have absolutely no doubt in my mind that our position  
17 would have been much stronger. The gratuitous comments stood  
18 in the way of these negotiations. It kept coming back. Mr.  
19 MacGuigan writes us and lets us know that he's, in fact, the author  
20 of his own misfortune. The comment is raised through the  
21 Attorney General's Department. It just kept haunting us. Any  
22 media coverage would often refer to that. I recall the day that the  
23 decision came down from the Appeal Court, a CBC reporter who  
24 had been covering the issue who had sat through the entire  
25 reference hearing, focused on those pages of the decision. Instead

1 of, in my view, focusing on what had occurred and what had  
2 transpired throughout that hearing. That, in fact, there were some  
3 improprieties that led to his conviction. And it was a hurdle for  
4 us to overcome. It was a hurdle with respect to the concerned  
5 citizen's group. When we would have to establish or convince  
6 them that, yes, those statements were made but here are the facts  
7 as we see them, as the R.C.M.P. saw them. So there's no question  
8 in my mind that it was an obstacle.

9 BY MR. ORSBORN

10 Q. There appears to be further communication with yourself and  
11 Mr. Marshall and Mr. Endres about these various offers. They  
12 culminate, I believe, at page 485, July 18th, I think, 1984.  
13 They're handwritten notes there. Is that your handwriting,  
14 Your Honour?

15 A. Yes, it is.

16 Q. It appears to be reporting a telephone conversation with Mr.  
17 Endres and the, about the middle of that page, it says: "Out of  
18 question. 325,000 plus Stephen Aronson."

19 A. That was your bottom line at that stage.

20 Q. That was the response you had put to them after the 260 had  
21 been offered to you.

22 A. Yes. So that would have meant approximately \$400,000.

23 Q. And that had been, does this reflect Mr. Endres comment to  
24 you that that was out of the question?

25 A. That's correct.



1 Q. And the \$270,000, is that his offer coming back to you?

2 A. Yes. That's inclusive of...

3 Q. That's all in.

4 A. All in.

5 Q. Do you recall if he made any comment to you that that was  
6 their absolute bottom line?

7 A. I can't recall that.

8 Q. Did you subsequent communicate that to Mr. Marshall?

9 A. Yes, I believe that I did. However, I'm not sure... The  
10 following page, the letter is dated the 25th of July, refers to a  
11 24 July conversation. I'm not sure if those same figures were  
12 discussed on the 24th of July. But that proposal was put to  
13 Junior.

14 Q. Again, Your Honour, did you recommend that figure of  
15 270,000 in the sense that this was a figure that you, Junior,  
16 should accept?

17 A. No, I sent it to him, said this is what they're prepared to offer.  
18 He wanted time to think about it. We met. We discussed it. I  
19 let him know what I thought the situation was in terms of  
20 rejecting the offer, what he would be looking at, if the inquiry  
21 did proceed, if its recommendations were above that figure,  
22 whether or not the government would accept those  
23 recommendations. I recall a conversation in the park, in Point  
24 Pleasant Park, saying to Donald, "If you want to put this  
25 behind you and start your life, then take it. But I'm not

1 forcing you to take it. I'm prepared to go with the  
2 commission. You're aware of what that entails."

3 Q. In your view and from your knowledge of Mr. Marshall at the  
4 time, was the commission a viable option?

5 A. Not at all. Not at all.

6 Q. And...

7 A. It would have been just like putting him back on the stand at  
8 Ebsary's preliminary or at Ebsary's trial, in his mind, in that  
9 he would have been the focus. He felt that he was the one  
10 that was under attack.

11 Q. And had you, in any way, conveyed to Mr. Endres that going  
12 to the Commission was not a viable alternative for your  
13 client?

14 A. Perhaps not in those words, but certainly I conveyed to him  
15 what my client's status was at the time, psychologically,  
16 physically.

17 Q. There's a note, I believe in Mr. Endres' writing, on page 488, I  
18 believe which is shortly after he offered you the \$270,000.  
19 And in the large paragraph on that page, I believe it reads:

20  
21 Advise Minister that we should hold the line that  
22 if they settle, they will take this and if they  
23 don't, it would be because of other pressures, not  
24 the adequacy of the offers.

24 I'm curious about the reference to "pressures not to settle".

25 Were there any pressures that you were aware of that

1 mitigated against settling?

2 A. There were no pressures from my... I did not impose any  
3 pressures on him to reject the offer. It's very difficult to try  
4 and paint for you the picture of the person that I was dealing  
5 with, without you having met him and spent time with him. I  
6 could spend an evening with Donald and we could have a  
7 very logical, rational conversation and feel that we had  
8 agreed on certain points. I could meet him the next afternoon  
9 after he had spent some time with someone in a bar or some  
10 other person and he would come back and say, "This isn't  
11 acceptable. So-and-so tells me that I could get five million  
12 dollars or a million dollars." And so it depended on whom he  
13 was with at the time and it was almost like you never really  
14 were sure of exactly what his feelings were. They would be  
15 one thing with me on one day and another completely  
16 different thing on another day. And if I would sit down and  
17 talk to him and say, "Listen, Junior, this is what we're dealing  
18 with." He would say, "Yeah, I agree," You know, "but so-and-  
19 so up in Membertou says that I'm a fool." "Well, then let so-  
20 and-so represent you." "No, no, I want you to represent me."  
21 "Okay, so do you agree?" "Yes, I agree." The next day, "Well, I  
22 was talking to so-and-so and I don't think I want to." So  
23 that's why I wasn't responding immediately to proposals that  
24 were being put to us, because I knew that I might get an  
25 acceptance in one minute and I may get a rejection the next.

1 I wanted him to have time to think it over, to talk to  
2 whomever he was talking to, and then come to a conclusion in  
3 his own mind.

4 Q. Do I understand you to be saying that with respect to this  
5 offer of 270,000, you did not advise him one way or the other  
6 that he should take it or that he should go the inquiry route.  
7 But that you laid out the...

8 A. I laid it out to him...

9 Q. The factors and left it to him.

10 A. And when he finally in the park asked me what I thought, I  
11 again laid it out to him in terms of what the inquiry would  
12 involve, what experiences he had had so far, and based on  
13 that, it was a bird in the hand is worth two in the bush. And  
14 I said "The offer is on the table. If you want to get it behind  
15 you and start dealing with your life, then you're assured that  
16 that money is there."

17 Q. Were you with him when he decided to accept the offer?

18 A. I was with him, yes, I was. I was also with him when he  
19 signed the releases. I was also with him at the police station  
20 after he struck the police officer because he was intoxicated.  
21 I was also with him that entire night into eight o'clock the  
22 next morning at the Carlton Centre, when Jack Stewart and I  
23 tried to convince him and thought we had convinced him, that  
24 he should attend a native drug rehabilitation program in the  
25 United States. And when I went home to change and shower,

1 I came back and I was met with the attitude, "I can do it on  
2 myself, I can do it myself. I don't need experts."

3 Q. There's a fair bit of correspondence going back and forth that  
4 I won't trouble you with, talking about releases and what  
5 have you. I understand that there was some involvement of  
6 Mr. Justice Campbell following your settlement and that it  
7 culminated with a report being prepared.

8 A. Yes.

9 Q. And signed by Mr. Justice Campbell simply basically  
10 recommending the settlement.

11 A. The rubber stamp.

12 Q. Yes, and it was drafted, I believe, by the department. You  
13 reviewed it?

14 A. Yes, I reviewed it.

15 3:14 a.m.

16 Q. And with your knowledge and approval, presumably it was  
17 sent to Mr. Justice Campbell.

18 A. Yes. It was a housekeeping matter, as far as I was concerned.

19 Q. Page 518, there's a note in August. Again, Your Honour, is  
20 that in your handwriting?

21 A. Yes, it is.

22 Q. Does that reflect a telephone discussion with Mr. Justice  
23 Campbell?

24 A. Yes.

25 Q. It appears to be discussing the settlement that had been

1 reached. Do you recall if you advised Mr. Justice Campbell  
2 that the settlement was satisfactory to you, the amount was  
3 satisfactory?

4 A. If he felt it was satisfactory?

5 Q. No, no, if you advised him that you, as Junior's lawyer, felt  
6 that it was satisfactory?

7 A. I can't recall indicating to him that I felt it was satisfactory,  
8 but it was something that we had agreed on.

9 Q. Now of the \$270,000, the amount was paid over October 1st  
10 to you and then to Junior. 225 had been paid previously and  
11 70,000 was paid to Mr. Aronson and \$27,000 was paid to  
12 yourself.

13 A. Yes.

14 Q. I take it that simply represents a 10% of the 270 rather than  
15 the 25% already agreed?

16 A. That's correct.

17 Q. Can you give us any indication at all of whether or not that is  
18 reflective of the time that you spent on the file?

19 A. 27,000 included our disbursements, reflective of the time it...  
20 No, I think I was billing myself out at that time at \$100 an  
21 hour. That would be about 270 hours. I don't think that  
22 that's at all reflective.

23 Q. And there is a press release, I believe prepared certainly on  
24 behalf of Mr. Marshall at pages 544 and following.

25 A. Yes.

1 Q. And I just draw your attention to one paragraph on page 546.

2 Was this prepared by you, this press release?

3 A. Yes, it was.

4 Q. Okay, page 546, the paragraph reading:

5 The strain and pressure on Donald since he was  
6 acquitted by the Appeal Division has been  
7 incalculable and, at times, intolerable. It is with  
8 a view to putting behind him the nightmare of  
9 the last 13 years that Donald has chosen to  
10 accept the offer of compensation.

11 Was that your understanding for his reasons for accepting the  
12 offer?

13 A. Yes, it was.

14 Q. Page 562 of that volume, there is a letter from yourself to  
15 Donald dated October 25th, 1984. You say:

16 I'd like to discuss with you matters concerning a  
17 partnership (and you say) as well as matters  
18 relating to Chief MacIntyre.

19 A. Yes.

20 Q. Can you tell us what you're referring to there?

21 A. I think that was with reference to a, either the institution of  
22 an action against the chief, as opposed to the City of Sydney,  
23 and as well, the question of pursuing the avenue of criminal  
24 charges.

25 Q. Following the payment of the money to Mr. Marshall, did you  
continue to represent him in matters arising out of this case?



1 A. I did. I continued, I believe that I... I had made  
2 arrangements to have the award invested and I think we did  
3 place the bulk of it in short term notes initially.

4 Q. I'm thinking more in terms of legal matters or investigations.

5 A. I believe that I continued to represent Donald Marshall until,  
6 at least I felt that I was his counsel, until the matter, until I  
7 was appointed, I guess.

8 Q. I guess what I'm asking you is you refer in this letter to  
9 "matters relating to Chief MacIntyre." Were they pursued in  
10 any way?

11 A. No. No, they weren't.

12 Q. Four or five isolated questions in conclusion, Your Honour.  
13 Did you have occasion in early 1984 to visit Judge Robert  
14 Anderson in connection with the Marshall matter?

15 A. I did.

16 Q. What was the reason for going to see him?

17 A. I was attempting to establish in my own mind whether or not  
18 the reinvestigation in 1971 had been brought to the attention  
19 of the Attorney General's Department, whether or not a report  
20 had been submitted to that department, and whether or not  
21 that report had, in fact, been made available to Mr. Khattar  
22 and Mr. Rosenblum, who were representing Donald in his  
23 appeal. It was my understanding that Judge Anderson was in  
24 the Attorney General's Department at the time. I went to see  
25 him with a view to determining whether or not, in fact, he

1 was in the department, whether or not, in fact, he had seen  
2 the report, and what he had done with that report.

3 Q. What do you remember of your visit with him?

4 A. I remember the visit taking place in his Chambers, which  
5 were then located on the fifth floor, southwest corner of the  
6 Law Courts Building. It was over a lunch hour period, as I  
7 recall, and I'm really not sure if it was late '83 or early '84. It  
8 was in that time frame. It may have been March of '84, I'm  
9 not sure. And I recall speaking with him on this matter and I  
10 recall discussing... He had known me as a Legal Aid lawyer  
11 and I had appeared often in his court and we discussed the  
12 various cases, how I was happy to be out of Legal Aid because  
13 I had found it quite depressing the last going on. And he  
14 indicated to me that he wasn't in the department at the time  
15 which would have been late '71, late December '71 or... His  
16 conviction was on the 5th of November '71. So it would have  
17 been December the 5th, '71, through to January of '82. He  
18 had no knowledge. He advised me that he had no knowledge  
19 of the subsequent reinvestigation. And, in fact, he did make  
20 the comment which he has acknowledged to have made to  
21 me.

22 Q. You appreciate why I'm asking is because the questions were  
23 put to Judge Anderson with the anticipated foundation of  
24 your later evidence and you've read the comments that were  
25 put to him and are indicating that he did, in fact, make those

1        comments to you?

2        A. Those words are very difficult to forget. I recall the comment  
3        being made. I've also had discussions with Judge Anderson  
4        prior to his testifying at this inquiry and my testifying at this  
5        inquiry and he accepts that they were made. At least he  
6        indicated to me that I would have more reason to recall the  
7        comments than he would. I would indicate that at the time  
8        that the comments were made, I felt them to be racist. I  
9        assumed from the maker of the comments that the comments  
10       came from a racist. I have, in the last two years, had occasion  
11       to work with Judge Anderson in the same court. I am  
12       satisfied in my own mind that Judge Anderson is not a racist.  
13       It's a very difficult term to label or to try to define and I  
14       would ask anyone in this room to stand who has not at any  
15       point in his or her life had thoughts about persons from  
16       minority groups, from different cultures, who has not made or  
17       participated jokes involving people of foreign extraction,  
18       myself included. I don't consider myself a racist. I, as well as  
19       other people, have made jokes concerning minority groups,  
20       including Italians and Newfoundlanders, Mr. Orsborn.  
21       Obviously, it's a very difficult situation and certainly, as I've  
22       indicated, the words, when they were said, were taken by me  
23       as being racist. And I, I guess that's because my mind set  
24       was that way at that particular time. That here we were  
25       dealing with Donald Marshall, who really nobody gave two

1 hoots for, and this was just in keeping with everything that I  
2 had encountered along the way.

3 Q. In connection with the issue of dealing with compensation for  
4 somebody who has been wrongfully incarcerated, do you  
5 have any suggestions for the Commission based on your  
6 experience as to, you know, if it should happen again, that  
7 how possible compensation may be approached?

8 A. Well, just don't leave it up to the lawyers to determine. I  
9 would hope that this situation would never occur again.  
10 However, we're all human and it's likely that it will at some  
11 point occur. If it does, I would suggest that immediately upon  
12 the determination of a wrongful conviction, that someone  
13 impartial, preferably a justice of the court, trial division or  
14 another bench, be empowered to examine all of the  
15 circumstances and be empowered to act in a fashion akin to  
16 this inquiry but moreso akin to the European system where  
17 the judge is the one who determines what evidence he or she  
18 wants to hear and that the recommendations be binding upon  
19 the parties and not just left to political whims. Other than  
20 that, I really have no other recommendations. I find it very  
21 difficult to hear Crown counsel, as I've heard Crown counsel,  
22 argue that Legal Aid is wasting the taxpayer's dollars and the  
23 court's time because they are not convincing their clients that  
24 they should plead guilty. I have a great deal of difficulty  
25 with that particular position. And that has been espoused. I

1 think that we have, as all citizens, have a right to be  
2 presumed innocent until proven guilty in accordance with all  
3 of the principles that we established in our laws. And that  
4 should not be whittled away for the sake of expediency and  
5 because somebody decides in their own mind that a person is  
6 guilty. A quick review of this particular case and the factual  
7 situation would lead one to a conclusion that Donald Marshall  
8 was guilty of murder. A thorough investigation obviously  
9 determined that he wasn't and I would hope that all persons  
10 involved in the administration of criminal justice would take  
11 their tasks as seriously as this Commission has taken its  
12 duties.

13 MR. ORSBORN

14 Thank you, My Lord.

15 3:29 p.m. COURT RECESSED UNTIL 3:50 p.m.

16  
17 EXAMINATION BY MS. DERRICK

- 18 Q. Mr. Cacchione, I just have a few questions of a miscellaneous  
19 nature to start with. With respect to, I believe it was the first  
20 Ebsary trial and you commented concerning the Crown not  
21 having interviewed Mr. Marshall before he took the stand.  
22 Did Mr. Marshall not know then when he took the stand that  
23 he was going to be examined by the Crown with respect to his  
24 statement given to the R.C.M.P. at Dorchester?
- 25 A. That was my understanding.

1 Q. And just another question, Judge Cacchione, on the issue of  
2 disclosure. When you were describing problems that you  
3 experienced as a lawyer with provincial Crown, were you  
4 describing problems that you had with full-time employees of  
5 the Attorney General's Department?

6 A. Yes, I don't believe that there are any provincial Crowns who  
7 are contracted, other than very recently for specific cases, but  
8 that are contracted from the private Bar. All of my dealings  
9 that I referred to involved members of full-time staff of the  
10 Attorney General's Department.

11 Q. Thank you. Now you actively represented Mr. Marshall's  
12 interests from May of 1983 when you took over the file from  
13 Mr. Aronson, to September and October of '84 and beyond  
14 that period when compensation was finally paid. And your  
15 representation specifically included seeking a public inquiry,  
16 compensation, and then the various Ebsary proceedings in  
17 which he was a Crown witness. Was that really the main  
18 focus of your role as his lawyer?

19 A. I would think that that would be accurate.

20 Q. And is it accurate to state then, Judge Cacchione, that from  
21 your evidence, Mr. Marshall's first concern was not money  
22 but was, in fact, getting to the bottom of why he spent eleven  
23 years in prison for a crime he didn't commit?

24 A. That's very accurate. I believe that I've made, in the past, the  
25 comment that Mr. Marshall would have been satisfied and felt

1 vindicated if certain criminal charges had been laid.

2 Q. In fact, when you, and I'm referring to Volume 30 at page 34.  
3 This is one of the letters that was exchanged between you and  
4 Mark MacGuigan in December of 1983. I hope I'm referring  
5 to the... Sorry, I just need to find the reference. I'm actually  
6 looking for a reference that I don't immediately see, but I  
7 know it's in the materials, where in your correspondence you  
8 state that Mr. Marshall deserves a public apology from the  
9 government. I'm sorry, perhaps it's not in that letter. I  
10 thought I... I beg your pardon?

11 MR. CHAIRMAN

12 We've seen it.

13 MS. DERRICK

14 Q. Yes. And what I wanted to ask you, Judge Cacchione, is, was  
15 this important to Mr. Marshall? Thank you. It's on page 39.  
16 This is at Volume 30.

17 A. Yes, five or six lines from the bottom of that page.

18 Q.

19 He also deserves a public apology from the  
20 government of Nova Scotia for the failure of its  
21 system of justice.

22 A. One of the recurring themes that came out of my discussions  
23 with Junior was that nobody ever acknowledged that  
24 anything had gone wrong. It was always, he was the reason  
25 he spent ten years plus in jail. Even when the conviction was  
overturned, no one said, "We're sorry that this happened." I



1 think to this day, no one has ever apologized to him. And  
2 certainly I think that that would have gone a long way in  
3 making him feel as if he wasn't the entire cause of that  
4 miscarriage of justice.

5 Q. So was it your experience in dealing with him that he bore  
6 the burden of that criticism or that allegation throughout this  
7 entire process?

8 A. No doubt whatsoever.

9 Q. Now in your first attempts to advance the issue of a public  
10 inquiry and the issue of compensation, you dealt with the  
11 federal government. And if I'm to understand it, it was  
12 because Mr. Marshall had been incarcerated in a federal  
13 institution and because of the international covenant, is that  
14 correct?

15 A. Yes, that's correct.

16 Q. And the federal government was not prepared to act. Was it  
17 also your experience that in your requests for  
18 information from the federal government, you had trouble  
19 getting material that you wanted to start amassing a file?

20 A. The materials we received from the National Parole Board  
21 through the Privacy Commissioner dealt with what I felt were  
22 irrelevant matters to what we were pursuing. They were  
23 files kept by the Parole Board, some medical files. It had  
24 some bearing on what we were looking at but the important  
25 thing that we wanted was the communications between the

1 police force and the Parole Board, Attorney General's  
2 Department and the Parole Board, anything that would tend  
3 to establish that, there was an attitude that Mr. Marshall was  
4 a dangerous person. That he, in fact, had committed this  
5 vicious murder and should be kept behind bars. The reasons  
6 why he wasn't allowed certain releases on compassionate  
7 grounds. I believe, at one point, there was a question of a  
8 funeral that he wanted to attend and he wasn't allowed to go  
9 to it. My understanding of the working of that system was  
10 that a contact would be made with the local authorities with a  
11 view to determining whether the person should be allowed  
12 back in the community and on what basis. Those files were  
13 never released to us. I'm not even sure if you people have  
14 those files.

15 Q. And were you interested in this material because you viewed  
16 it as supporting any claim you might make with respect to the  
17 pain and suffering he had experienced?

18 A. Oh, most certainly.

19 Q. You eventually didn't pursue this, and the materials at the  
20 end of Volume 30 show an exchange of correspondence  
21 between you and the Privacy Commissioner and his office. It  
22 basically comes to an end. Am I correct in assuming that the  
23 reason for that was because the compensation negotiations  
24 were winding down and this material ceased to be of any real  
25 value to you?

- 1 A. I think that's accurate.
- 2 Q. You also approached the Federal Justice Standing Committee.  
3 Can you tell us what you hoped that they could do? You  
4 made a request to appear.
- 5 A. That they would, in fact, launch an inquiry into the, what we  
6 viewed as a miscarriage of justice. That was our main aim in  
7 contacting the Standing Committee on Justice, and hopefully,  
8 as a result of that, they might inquire or make  
9 recommendations with respect to compensation payments.
- 10 Q. And you wrote to the Standing Committee on March 1st,  
11 1984. This is in Volume 30 at page 23, in which you state  
12 "...it seems that the Provincial Government will not act on this  
13 matter." Was it true that at that point you were starting to  
14 despair of any action on the part of the Provincial  
15 Government?
- 16 A. Well, that was almost a year after I had taken over the file  
17 and there hadn't been considerable amount done to further  
18 the position that we had. We felt that we had to explore  
19 various avenues to bring some pressure to bear on the local  
20 authorities to deal with the issue. As I recall, that letter was  
21 some few days before the announcement of the Campbell  
22 Commission.
- 23 Q. And, in fact, this committee never did decide to meet with  
24 you.
- 25 A. No.

1 Q. It was a question of being actively considered, is that correct?

2 A. Yes.

3 Q. The materials also show that you applied for a pardon for Mr.  
4 Marshall and, specifically, the pardon application was with  
5 respect to the offence for which he was acquitted. Why were  
6 you applying for a pardon? Was this related to compensation  
7 in any way?

8 A. No, we were hoping that if ever his name was run through the  
9 CPIC computer that it would not come out as having been  
10 convicted of murder. So that, in fact, if he were to travel,  
11 there would be no record of conviction. It presented  
12 problems. We anticipated that because Junior had family in  
13 the northern U.S. states, that he would travel back and forth  
14 to Boston and that might present some difficulties. It really  
15 didn't have anything to do with compensation.

16 Q. So it was purely for the purpose of getting his record sealed.

17 A. Yes, yes.

18 Q. And they advised you, in fact, that you didn't need to do that  
19 because he had been acquitted?

20 A. I'd be interested to know if his name was run through the  
21 computer, whether or not that would come up.

22 Q. With respect to the meeting that was arranged with Mr.  
23 Giffin, although you say you may have mentioned the fact of  
24 the meeting to a member of the press, you didn't arrange for  
25 any press to be there at that meeting.

- 1 A. No, definitely not.
- 2 Q. Or to be waiting around outside.
- 3 A. Definitely. I don't recall stating the date or time of the  
4 meeting. Just that at long last we finally got a meeting with  
5 the Attorney General's Department. And I can't recall who I  
6 made the comment to. The press, at that stage, was obviously  
7 interested in the Marshall case and kept calling on a regular  
8 basis to find out what the status of the file was.
- 9 Q. So you were just being open about the status of it.
- 10 A. I didn't, I mean I may have been naive about political, or  
11 about civil negotiations, but I certainly wasn't stupid enough  
12 to say that we're going to bargain with this type of lighting  
13 and a scrum going on. I was asked the question, "Have you  
14 finally managed to arrange a meeting?" And I said, "Yes."
- 15 Q. And to use your own words, you weren't naive enough to put  
16 your position or your negotiations or your claim to any  
17 prejudice.
- 18 A. No.
- 19 Q. Now by November, 1983, I think you told my friend that  
20 there hadn't been an actual formal request to the Provincial  
21 government for compensation but, in fact, you had sent in  
22 September of 1983, Mr. How, the Attorney General, you had  
23 sent him a copy of Stephen Aronson's press release that had  
24 been released at the time of the...
- 25 A. Yes.

THE HONOURABLE JUDGE CACCHIONE, EXAM. BY MS. DERRICK

1 Q. The reference decision. And would I be correct in assuming  
2 that you were familiar with the fact that there had been a  
3 press conference in, I believe, it was May of 1983?

4 A. I was familiar with it. I expected that anyone who watched  
5 the six o'clock news would be familiar with it.

6 Q. So that was my next question. You assumed as well that the  
7 government would have been aware that..

8 A. Well, it was obvious. It was on the national news. This was  
9 one of the major cases of the day that a man who had spent  
10 almost eleven years was finally acquitted and there was a  
11 news conference... Or finally released, I'm sorry, and there  
12 was a news conference.

13 Q. So you felt that the issues that were of concern to Mr.  
14 Marshall were in the public forum, by virtue of that press  
15 conference.

16 A. That's the way I saw it.

17 4:03 p.m.

18 Q. And, in fact, just for the record, the press release, and I'm  
19 looking at page 268 of Volume 32 states "No decision has  
20 been made at this time as to whether to actually proceed in  
21 the Courts or whether to look to other avenues of seeking  
22 compensation," and goes on to refer later to the...the press  
23 release emphasizes a need for a public inquiry but says  
24 "Certainly all efforts should be made to see that he is given  
25 fair compensation under the circumstances."

1 A. Yes.

2 Q. Did you believe when you got started dealing with the  
3 provincial government or when you took over the file  
4 perhaps, did you believe that the provincial government  
5 might, in fact, approach you with an offer of compensation?

6 A. Well, I had hoped that there would be some overtures  
7 particularly in light of the fact that it was a different  
8 government that we were dealing with, a Conservative as  
9 opposed to a Liberal government. That certain public  
10 relations points could be scored. I had hoped that they  
11 would make some overtures.

12 Q. Was it your view right from the start that the provincial  
13 government could, in fact, have dealt with the issue of  
14 compensation without in any way impairing Mr. Ebsary's  
15 right to be presumed innocent?

16 A. I felt that there could have been a way of dealing with that.  
17 The issue of compensation did not necessarily have to  
18 involve the pointing of a finger at Mr. Ebsary as being the  
19 person who committed the offence. It could have dealt with  
20 the time spent in jail if an inquiry had necessitated looking  
21 at the other persons responsible. I'm sure that in-camera  
22 proceedings could have been scheduled. On the other hand,  
23 simply an assurance that these matters are before the Court,  
24 that we guarantee that there will be a full inquiry, that  
25 compensation will be examined at the conclusion of these



THE HONOURABLE JUDGE CACCHIONE, EXAM. BY MS. DERRICK

1 matters, would have gone a long way in allaying Junior's  
2 fears that the matter was simply going to be forgotten.

3 Q. Now, around this time in early 1984, and in the materials  
4 just for the reference, in Volume 38 at page 99 there is a  
5 Mail Star news report of Wednesday, March 7th, in which  
6 Mr. Edmund Morris is quoted concerning a telephone call  
7 from Junior Marshall with respect to employment. And in  
8 response to that being in the newspaper, Judge Cacchione, I  
9 believe, if I'm correct, you wrote a letter to Mr. Morris,  
10 which is found in Volume 33 at page 348.

11 A. I recall writing a letter to him. I recall being upset, very  
12 upset at the tone of ...

13 Q. The article itself refers to Mr. Morris calling at ten o'clock  
14 and, calling a place, I guess, where he was supposed to have  
15 gone for a job interview and finding him not there and then  
16 calling him at home and finding him still in bed, and your  
17 letter expresses a concern that this created an impression  
18 that the general public was dealing again with a lazy Indian.

19 A. Yes.

20 Q. Did you relate these remarks in the newspaper by Mr.  
21 Morris with respect to the government's treatment of Mr.  
22 Marshall?

23 A. Well, at this stage it seemed to me, at least I inferred, that  
24 that's the attitude that they were taking, that this is not  
25 really worth spending a whole lot of time, and that was

1 consistent with the feelings that I had, consistent with what  
2 I thought the government's position was.

3 Q. Do you feel that Mr. Marshall's race was a factor in the  
4 dealing with of his compensation and his general treatment  
5 by the provincial government?

6 A. I personally feel it was. I don't...to say because of this that  
7 was said to me or because that was written I can't point to  
8 anything in particular. It...I was speaking with someone  
9 just before we came in and one gets certain gut feelings  
10 about how people perceive things and that was the gut  
11 feeling that I had. I felt, and I said it on numerous  
12 occasions, that in my own mind my feeling was if Donald  
13 Marshall had been the son of a prominent south-end white  
14 Protestant person that the matter would never have been  
15 dealt with in the fashion that it was. But those are...they're  
16 nebulous, the opinions are not nebulous, but the basis for  
17 the opinion is nebulous. It's just a feeling of...I couldn't help  
18 but feel, to put it in the vernacular, that I was jerked  
19 around.

20 Q. By?

21 A. By the Attorney General's Department in dealing with Mr.  
22 Marshall.

23 Q. Now, I think you just said earlier that there was a lot of  
24 media attention to the post-reference period and were you  
25 receiving calls frequently from members of the media

1           wondering what was going on, asking you about the status  
2           of the matter?

3       A.    I wasn't only receiving calls, I'd come back to my office after  
4           being in court and have CBC reporters or ATV reporters  
5           sitting in my office waiting to ask me questions. Now, I  
6           initially chose not to return phone calls because I didn't  
7           want to deal with the matter on that level. It became clear  
8           to me that the government wouldn't respond to anything  
9           but public pressure and as a result of that I started  
10          returning phone calls. I granted interviews. People in  
11          Montreal set up a trust fund. People from Vancouver and  
12          Victoria would write in support. It seemed that it was a  
13          case that touched a lot of people in Canada and obviously if  
14          that support was going to be beneficial to Junior's position,  
15          then I would use it.

16       Q.    So, you utilized that interest and that support.

17       A.    Yes, I did.

18       Q.    For the benefit of advancing...

19       A.    Yes, I did.

20       Q.    ...Mr. Marshall's situation. Do you feel that that kind of  
21           pressure and that kind of support did eventually affect what  
22           happened? Do you feel it had any effect on the fact that the  
23           government paid compensation?

24       A.    I'm satisfied in my own mind that if there had not been the  
25           public pressure that was mounting that Justice Campbell's

1 Commission would have never been called. I'm satisfied in  
2 my own mind, as I said to Mr. Orsborn, that the reason that  
3 that Commission was called was to cool the sentiment that  
4 was building across this land. It wasn't only in Nova Scotia,  
5 and the amazing thing in Nova Scotia was that the people  
6 from all cross sections of our society here were supportive,  
7 that people of all political stripes were supportive, that...

8 Q. And that's where that committee arose from, is it?

9 A. Yes, there was...well, there was a committee...there was  
10 Reverend Hussey in Montreal who on his own established  
11 this trust fund because I believe he had spent some time in  
12 Nova Scotia and felt some links in Nova Scotia, had worked  
13 in penal institutions. There was a...the committee consisting  
14 of Father Comeau, Dean Charles, Mr. Mitchell and someone  
15 else, I can't recall, and there was also a committee of  
16 concerned citizens in Nova Scotia that included John Godfrey,  
17 Mrs. Rosen...

18 Q. Goldbloom. Dr. Goldbloom.

19 A. Mrs. Goldbloom, thank-you, Maxi Grant. These were  
20 prominent people in Nova Scotian society who were  
21 interested and felt that something had to be done and they  
22 were undertaking letter-writing campaigns and trying in  
23 their own way to put pressure on the government to deal  
24 with the issue.

25 Q. And this was in response to a lack of response, is that....

THE HONOURABLE JUDGE CACCHIONE, EXAM. BY MS. DERRICK

1 A. That's correct.

2 Q. ...what was happening? Now, through this period of time I  
3 believe you made some other efforts to get a remedy for Mr.  
4 Marshall. Did you contact or were you contacted by any  
5 prisoner's rights groups, for example?

6 A. I was contacted by a woman whose name is Clair Culhane,  
7 who is a prison rights activist. She in conjunction with, I  
8 believe it's David Feinstein in Montreal were more than  
9 helpful in assisting. She was prepared to come to the  
10 Campbell Commission hearings to give evidence as to the  
11 effects of incarceration on what's referred to as "lifers."  
12 Very supportive, a woman who has worked for a long time.  
13 She's almost seventy years right now and has worked in  
14 institutions, has been barred, as she likes to say, from every  
15 major penal institution in Canada for her human rights  
16 activities. She certainly was supportive.

17 Q. Did you consider contacting Amnesty International?

18 A. We did consider that. I'm not sure if... I can't recall  
19 contacting them. I know we did consider it and it was  
20 bandied about.

21 MR. CHAIRMAN

22 You're losing me now.

23 MS. DERRICK

24 I think it's frankly quite clear and I was nearly finished this  
25 line of questioning. I'm merely attempting to demonstrate the

THE HONOURABLE JUDGE CACCHIONE, EXAM. BY MS. DERRICK

1 effort to which Judge Cacchione went. Some...

2 MR. CHAIRMAN

3 We've accepted that. We accept his evidence on that point.

4 MS. DERRICK

5 Well, I think that....

6 MR. CHAIRMAN

7 We're aware of it.

8 MS. DERRICK

9 ...what I was trying to bring out by asking these questions was to  
10 show the additional degree to which he went.

11 MR. CHAIRMAN

12 Amnesty International, I believe, is concerned with people  
13 who are incarcerated, moreso than people who have been  
14 released.

15 THE HONOURABLE JUDGE CACCHIONE

16 They are concerned with people who are incarcerated. I  
17 think their mandate is slightly broader than that. I don't recall  
18 contacting Amnesty International. I do recall discussions with the  
19 prisoner's rights groups.

20 MS. DERRICK

21 Q. Judge Cacchione, I want to ask you some questions now that  
22 more specifically deal with compensation and also with the  
23 Campbell Commission.

24

25

1 4:16 p.m.

2 Q. (Cont'd.) I think you've given evidence already to my friend  
3 that you weren't aware, that there was correspondence from  
4 Justice Campbell to you concerning what he was prepared to  
5 entertain in terms of submissions with respect to the ambit of  
6 the inquiry.

7 A. Yes.

8 Q. And I take, your evidence was as well that you didn't know  
9 that subsequent to that there was correspondence and  
10 discussions between Justice Campbell and Mr. Coles of the  
11 Attorney General's Department persuasively seeking to  
12 narrow that ambit.

13 A. I was never made aware of that correspondence until I  
14 reviewed the documents contained in the volumes that are  
15 before me prior to testifying here today. It, after reviewing  
16 those documents, confirmed in my own mind the suspicions  
17 that I had at the time. That we would have been faced with  
18 procedural wrangling in the Supreme Court of Nova Scotia of  
19 an extended duration.

20 Q. And you, in fact, received a letter from Justice Campbell and  
21 it's in Volume 33 at page 418 and I'm actually referring to  
22 page 419, where he says, "My letter of March 23rd was not a  
23 decision that evidence of the police investigation or original  
24 trial could be submitted." Do you remember what your  
25 reaction was when you saw that?



- 1 A. The same as I'm just stated that...
- 2 Q. That came as a surprise to you, then.
- 3 A. Well I, I wouldn't say surprise. I anticipated it simply  
4 because I wasn't convinced that the dealings were being  
5 conducted in a frank and open manner. That there was a  
6 hidden agenda, if you want. I have no doubts that Justice  
7 Campbell, in his own mind, felt that that was a proper course  
8 for the inquiry to take. That is, to examine the events prior to  
9 the incarceration. When that letter arrived it confirmed that,  
10 well, he's being restricted, or we're going to have a procedural  
11 wrangle over that issue.
- 12 Q. Now in the, once the negotiations got going and actual figures  
13 started to be discussed you proposed a global award of  
14 \$550,000 and Mr. Coles responded, or perhaps Mr. Endres  
15 actually responded, this is in Volume 33 at page 467, and I  
16 think you've already given evidence that he basically  
17 criticized aspects of your letter but didn't come back with any  
18 kind of counteroffer. Had you expected that there would be a  
19 counteroffer to the \$550,000 proposal?
- 20 A. I can't say what I expected. I guess I had hoped they would  
21 come back and say, "Yes, that's agreeable and we'll deal with  
22 the matter." I'm not sure if I expected them to come back  
23 with a counteroffer.
- 24 Q. To what use, if any, was the actuarial report ever put?
- 25 A. It was submitted to the government. I refer to the

1 government, I mean the Attorney General's Department to  
2 show them that Mr. Marshall had lost income and to provide a  
3 basis for that lost income and then we were faced obviously  
4 with the questions of whether or not, in fact, he would have  
5 earned that money what he would have spent accommodating  
6 himself and, et cetera. But that was the purpose. We  
7 couldn't, I knew enough at least to know that I couldn't just  
8 say, "Well, he lost \$400,000 in salary or anticipated wages"  
9 without having some statistical basis for that.

10 Q. You felt you needed something to substantiate your claim on  
11 that basis.

12 A. Yes. And that report, interestingly, we were never billed for  
13 it until the compensation award was made public at which  
14 point I think we paid something close to \$1000 for the report.

15 Q. So that was, was that part of the disbursements that...

16 A. Yes.

17 Q. You mentioned earlier?

18 A. Yes.

19 Q. I just want to refer you to Volume 33 at page 484. These are  
20 Mr. Endres' notes with respect to a telephone conversation  
21 that he had with you and I just want to ask you whether they  
22 refresh your memory at all. He says July 18th, '84, "Spoke  
23 with Felix. Told him that we cannot go that far." And I'm  
24 assuming he's referring to the 300 to the 325,000 plus Steve  
25 Aronson's fees.

1 A. Yes.

2 Q. And then he says, "That we have a limit." Do you recall that  
3 being said to you in that conversation or at any time by the  
4 Attorney General's Department? "We have a limit."

5 A. I recall the comment that they had a limit. In reviewing  
6 these documents I was shocked to see that he says, "I was  
7 authorized to offer an additional 10,000 for 270." When, in  
8 fact, there are other documents here that shows that he was  
9 authorized to offer more than that.

10 Q. That's right. In fact, the previous page, 483. So obviously  
11 you weren't aware of that until you saw these documents.

12 A. No.

13 Q. Is that correct?

14 A. Not at all.

15 Q. Now when you went into this compensation negotiations, you  
16 went in without very much information and you didn't have  
17 Staff Sergeant Wheaton's report which is the 1983 report.

18 A. All I had was what was on file from Mr. Aronson's office and  
19 that, I believe, was the 1982 report. Now I've looked at that  
20 in the materials. It seems familiar. I can't state positively  
21 that that is the report that I had. I know that I was given no  
22 other reports and in 1983 I was representing Mr. Marshall.  
23 And if a report was prepared, then I certainly didn't receive  
24 it.

25 Q. Have you since seen a report by Staff Sergeant Wheaton

1 dated May 30, 1983?

2 A. I don't believe I have.

3 Q. Which is found in Volume 20 at page 8.

4 A. The only materials that I have reviewed are Volumes 30, 32  
5 and 33, I believe. Yes, 30, 32 and 33. Page 8?

6 Q. Yes. There's correspondence further to this on page 26 which  
7 shows that this report went to the Attorney General's  
8 Department with some other attachments. But this is Staff  
9 Sergeant Wheaton's report with respect to queries about good  
10 policing practices and his comments with respect to the same.  
11 Have you ever seen that report?

12 A. No. I never have. I think this may have been one of the ones  
13 that there's a letter that Mr. Orsborn referred to. I believe it  
14 was to Mr. MacGuigan. I'm not sure. I've never seen this  
15 report.

16 Q. There's a letter where you refer to having some knowledge  
17 about a report.

18 A. Yes.

19 Q. And you, I think you mentioned in your direct evidence about  
20 understanding there had been eight recommendations, is that  
21 what you're referring to?

22 A. I believe that this is what I was referring to. Now how I  
23 came to know about this is beyond me at this stage.

24 Q. When you went into the negotiations for the compensation  
25 issue, did you have some expectations that compensation

1           might be paid long before it was?

2       A. That's hard to answer. I guess I expected that they would  
3       accept, the Attorney General's Department would accept that  
4       there was a miscarriage of justice, that he was innocent of the  
5       murder, that he did suffer time in jail and would compensate  
6       him for that. Whether I expected it to occur immediately  
7       upon request, I don't think I did.

8       Q. But you didn't immediately think that there would be any  
9       basic argument around those issues, is that what you're  
10      saying?

11     A. I'd hoped that there wouldn't be any argument.

12     Q. In your view were these compensation negotiations anything  
13     other than a hard-driven bargain?

14     A. I'm sorry?

15     Q. I was asking you whether, Judge Cacchione, in your view,  
16     these compensation negotiations were anything other than a  
17     hard-driven bargain.

18     A. My opinion at this stage?

19     Q. Yes.

20     A. No. That's exactly what it was.

21     Q. And did you feel that at the time Mr. Marshall was,  
22     effectively, being pushed to the wall?

23     A. I not only felt, I knew that Mr. Marshall was pushed to the  
24     wall. He was against the wall. The thing that is difficult to  
25     verbalize is exactly the type of person that I was dealing

1 with. His state at that particular time. It's very easy to say  
2 now that, to this Commission, that he was psychologically a  
3 broken man. But to actually see that on a regular basis, to see  
4 a grown man cry and weep and become angry, and have no  
5 control was a motivating factor to deal with this issue.

6 Q. And it's your view that it's that condition which contributed  
7 to Mr. Marshall's settling when he did.

8 A. I have no doubt, yes.

9 Q. In the final analysis what view do you have of the fairness  
10 and the adequacy of the compensation that was awarded?  
11 Not speaking now about the process but the actual award.

12 A. I still, in my own mind, feel that the award was low. That the  
13 figure we proposed, the 550,000 inclusive, would have been a  
14 fair award. When you take into consideration that he was  
15 granted \$270,000 all told, out of that approximately \$100,000  
16 came out for legal fees and disbursements. That left him with  
17 \$170,000 invested at the current rates would have provided  
18 him with \$17,000 a year which is almost minimal return for  
19 having spent the best part of his life, that is, his youth in a  
20 Federal institution in maximum security being exposed to  
21 people who are contained in those facilities, in my opinion,  
22 certainly didn't come close to compensating him. I must add  
23 though, that I don't think that anything would compensate  
24 him. I don't think that you can return those 11 years to that  
25 person. And that's the sadness of this situation.

1 Q. But given that, in your view, you would have been more  
2 satisfied had there been an easier acceptance of the global  
3 award that you proposed.

4 A. Yes. I would have, I felt, in my own mind, ideally, a million  
5 dollars as was given to Arthur Alan Thomas. Realistically, I  
6 felt that \$550,000 was an acceptable figure. It certainly  
7 doesn't make me feel good to think that I was a party to that  
8 negotiation that resulted in that settlement.

9 Q. When you said to Mr. Orsborn that you took into account the  
10 cost to the provincial government of the inquiry, are you, in  
11 effect, saying that you regarded this as a potential selling  
12 point? In other words, you won't be able to spend all this  
13 money so you might as well be considering taking that into  
14 account?

15 A. I viewed it as that. Certainly.

16 Q. So it wasn't that if there had been no inquiry you'd have been  
17 prepared to settle for less, it was simply a way of making any  
18 proposal more powerful.

19 A. It's easier to sell, I think, to the electorate. I viewed it as  
20 that.

21 Q. Judge Cacchione, would you not have been assisted had there  
22 been some statutory scheme for compensation for the  
23 wrongfully convicted in place at the time you were dealing  
24 with this?

25 A. I think it's, I think it should be in place. There should be

1 some sort of a scheme. One of the concerns that I had was the  
2 Federal Government's reluctance to deal with the issue of  
3 compensation. They indicated that this is a provincial matter,  
4 it should be dealt with by the province. When the settlement  
5 was arrived at, shortly thereafter it comes to our attention,  
6 through the media, that the Federal Government has  
7 contributed \$135,000-odd to that settlement and I thought  
8 that that was a bit unfair. That that money perhaps should  
9 have been sent to Donald Marshall.

10 Q. Judge Cacchione, you have referred to Judge Anderson's  
11 remarks to you. I believe in his testimony he explained his  
12 remarks by saying that he had been concerned that you  
13 should not become too embroiled, I think he may have been  
14 referring emotionally, with a person's whose reputation was  
15 questionable. I just want to ask you whether that, in your  
16 experience as a criminal lawyer, whether those are valid  
17 considerations with respect to representing a client?

18 A. I'm satisfied in my own mind knowing Robert Anderson now,  
19 after having spent two years, approximately two years in the  
20 same office as him, that, in fact, he was concerned about me,  
21 the lawyer, having come out of Legal Aid, having just started  
22 a practice. I can't share his views that it depends on the  
23 nature of your client as to the degree of representation that  
24 you give that person. On that we differ. But I certainly accept  
25 that his concern was that I not jam myself in a corner so as to



1 shut doors behind me or ahead of me that lay in my career  
2 path.

3 MS. DERRICK

4 Thank you, Judge Cacchione, and thank you for your efforts  
5 on behalf of Junior Marshall. Those are my questions.

6 4:31 p.m. - ADJOURNED TO 18 May 1988 - 9:30 a.m.

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## REPORTER'S CERTIFICATE

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

  
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Margaret E. Graham

DATED THIS 17<sup>th</sup> day of May 19 88 at Dartmouth, Nova Scotia