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#9

ROYAL COMMISSION ON THE DONALD MARSHALL, JR., PROSECUTION

Volume 64

Held: May 17, 1988, in the World Trade and Convention Center, Halifax, Nova Scotia

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Court Reporting: Margaret E. Graham, OCR, RPR

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MR. CHAIRMAN

Mr. Orsborn.

MR. ORSBORN

The witness today will be His Honour Judge Felix Cacchione.

THE HONOURABLE JUDGE CACCHIONE, duly called and sworn testified as follows:

EXAMINATION BY MR. ORSBORN

Q. Your Honour, may we have your full name, please?

A. My name is Felix Antonio Cacchione.

Q. And where do you live, Your Honour?

A. I live at 1326 Birmingham Street in the City of Halifax, County of Halifax, Province of Nova Scotia.

Q. And do I understand that you are presently a Judge in the County Court in the Province of Nova Scotia?

A. Yes, I am a Judge of the County Court for District Number One.

Q. And when were you appointed to the bench?

A. I was appointed on June the 12th, 1986. I was sworn on June the 26th, 1986.

Q. What is your educational background?

A. I have a Bachelor of Arts degree from Loyola in Montreal, which is now Concordia University, majoring in political science with a minor in languages. I have a LL.B. degree from Dalhousie granted in 1974. I was admitted to the Nova

1 Scotia Bar in March of 1975.
2 Q. Following your admission to the Nova Scotia Bar and prior to
3 your appointment to the bench in 1986, did you practise
4 law?
5 A. I began my practise in 1975 on April 1 with Nova Scotia
6 Legal Aid. I worked with Nova Scotia Legal Aid until May of
7 1983 at which time I began my own practise. I was alone in
8 that practise until September of that year when I was joined
9 by Mr. Michael Lambert in the partnership of Lambert and
10 Cacchione.
11 Q. During the time that you were with Legal Aid did you
12 practise both criminal and civil law?
13 A. Actually initially from 1975 until October of 1976 I had a
14 combined practise dealing mostly in criminal and family
15 cases. In October of 1976... I should state I was hired to
16 work in the New Glasgow office, a rural office of Nova Scotia
17 Legal Aid. I worked there and covered the Truro office until
18 October of 1976 when I was transferred to Halifax to work
19 in their criminal division. I did exclusively criminal work
20 from October of 1976 through until my appointment.
21 Q. So, even when you were in private practise from 1983 until
22 1986, you were doing exclusively criminal work.
23 A. My practise was restricted to criminal law, yes, criminal
24 defence law.
25 Q. So, prior to your appointment to the bench you...from say

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

A. That's correct.

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

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

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

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

Q. Did you consider yourself a successful defence counsel?

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

COMMISSIONER EVANS

Did you eat regularly?

HIS HONOUR JUDGE CACCHIONE

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

COMMISSIONER EVANS

Then you were successful then.

HIS HONOUR JUDGE CACCHIONE

I also managed to get upset stomachs rather regularly.

MR. ORSBORN

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

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

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

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

1 told to them. There was a lack of definite instructions, i.e., "I
2 want to elect to Judge and jury and I want this type of
3 defence put forward." It was mostly, "I'm in your hands,
4 you can do what you want." I found getting instructions
5 very difficult. I found representing black accused difficult
6 in the sense of trying to convince the accused that, in fact,
7 they would be tried fairly and impartially. That is very
8 difficult I found at the time in particularly dealing with jury
9 cases where you would have a panel drawn of
10 approximately two hundred people from which you'd select
11 your jury, and maybe if you were lucky one or two out of
12 the two hundred summonsed were blacks. And then you'd
13 have to explain to the accuse, don't worry, that you will get
14 a fair trial, that the Court will make sure that you're tried
15 fairly and impartially. That is often easier said than done.
16 The appearances at times were difficult to try and
17 overcome. It, as I said the question is pretty broad, and...
18 Q. With respect to your comments about native accused and
19 difficulty getting instructions, was this because of any
20 language difficulties or cultural differences or are you able
21 to...
22 A. Not being an anthropologist I really can't answer because
23 of...whether it was because of cultural differences, but I did
24 feel that there was more of a sense of the matter had been
25 pre-determined and it was just a question of going through

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

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

A. Yes.

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

A. Yes, I did.

Q. ...while you were in practise?

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

1 understand the process. I had...I've always had difficulty in
2 urging someone to plead guilty if I felt that there was a
3 defence available to them, however, at times, much to my
4 chagrin, the plea of guilty would go in, and that made
5 practising very difficult.
6 Q. Do I gather from that that the presence of the native
7 worker...native court worker program had a positive effect
8 on your ability to get instructions?
9 A. I certainly felt that it did and I was saddened when the
10 program was withdrawn.
11 Q. Yes. You mentioned in dealing with black...
12 A. I should add, as well, that in many instances I dealt with the
13 Black United Front, and that was also of assistance to me as
14 counsel. It appeared, at least to me, that they were more
15 active in making sure that persons who were before the
16 Courts were properly represented, and obviously a more
17 vocal minority.
18 Q. You mentioned in dealing with black accused that there
19 would on occasion be a perception on the part of the black
20 accused in a jury trial that a jury with a small number of
21 blacks on it might be perceived to be something less than
22 impartial. Do I gather that this is simply...this was simply a
23 perception on the part of your client?
24 A. I felt that, with juries, justice would, in most, if not all
25 instances, lead to justice being done. There is that

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

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

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

1 community on that jury panel. You're not, as counsel, going
2 to go out and say to an accused person, "Listen, I think
3 you're going to get the shaft because you're black." You
4 know, you do have to believe in the system that we have.
5 Q. From the point of view of your experience as a defence
6 counsel with juries and the selection of juries, are there any
7 changes to the jury system that you might have wanted
8 while you were defence counsel that would go, at least some
9 way, to alleviating this concern?
10 A. Well, certainly the change from the property ownership
11 requirement which has now been done away with. It was a
12 great step forward. I would hope that there would be more
13 representation from minority groups on juries. But then,
14 again, and these are just perceptions, you would have to try
15 and put yourself in the place of a sole black juror amidst
16 eleven white jurors trying to decide an issue where one of
17 the accused is from a racial minority. I think that the
18 pressures, at least I would expect that the pressures would
19 be, if only self-imposed, would be very great.
20 Q. We've had some evidence before the Commission concerning
21 Crown disclosure policies during the time in which you were
22 defence counsel. Both Mr. Giffin and Chief Judge How have
23 testified that the policy of the Crown was to make full
24 disclosure to the defence. Chief Judge How said this would
25 be on request. Mr. Giffin said this was a positive obligation

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

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

Q. Perhaps if I might interrupt.

A. Certainly.

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

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

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

9:54 a.m.

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

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

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

is saying that it should exist or does exist.

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

A. Yes.

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

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

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

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

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

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

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

A. It was.

1 Q. To your knowledge, I think you've said the difficulties were
2 shared by the other Legal Aid counsel.
3 A. Not all of them. Some of the counsel, perhaps because of the
4 social relationships that they had outside the courtroom, were
5 able to access information more easily. I think if one looks at
6 criminal trial lawyers as a group you will find that they tend
7 to be loners and, as such, it makes it difficult to socialize with
8 others, other lawyers, particularly criminal trial lawyers on
9 the Crown side. I found, I never spent time with these people
10 socially and I think that made my job a bit more difficult.
11 Q. Were you aware that the policy, at least of the Department,
12 was to provide full disclosure?
13 A. There had been rumours that that was the policy. There'd
14 been rumours that there was a policy manual that espoused
15 full disclosure. I never experienced full disclosure. I can
16 assure you of that.
17 Q. Did you have occasion, then, to make any complaints to the
18 superiors in the Department, either formally or informally?
19 A. I, yes. I recall speaking with Mr. Herschorn on several
20 occasions. I recall speaking with Mr. John Wade on several
21 occasions. I recall speaking with Mr. David Thomas on many
22 occasions. And the reply would always be the same. "It's up
23 to the prosecutor to decide." It was a fairly wishy-washy
24 attitude. In the case I referred to concerning the statement of
25 the complainant I went to the immediate supervisor of the

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

1 and obtained an acquittal.
2 Q. I understand you were retained by Junior Marshall in 1983.
3 A. I was.
4 CHAIRMAN
5 Before you move into that area Mr. Orsborn, Judge Cacchione
6 are you in a position to give us the, based on your experience,
7 any evidence or comments as to categories of Crown
8 Prosecutors. My understanding is that some Crown
9 Prosecutors are full-time public servants in the, on the staff
10 of the Department of the Attorney General while others are
11 retained to prosecute while still remaining in private practice.
12 Is that...
13 A. That, My Lord, was not the case when I was practising. It
14 seems that it was only recently as a result of certain high-
15 profile cases that private counsel were retained to act as
16 prosecutors. In the years that I practised I can't recall a
17 situation, actually I recall someone from the, a judge of the
18 Probate Court who had been a former prosecutor and then
19 become a judge of the Probate Court acting as a prosecutor in
20 a situation that involved a police officer. But that was the
21 only instance that I recall of private counsel being retained.
22 CHAIRMAN
23 And with respect to Federal Crown Prosecutors is that the
24 same situation, that they're public servants?
25 A. I think that's a little different. I think that Federal Crown

1 Prosecutors outside the Halifax-Dartmouth area are generally
2 people in private practice who get a contract to do the Federal
3 prosecutions. Fisheries, sometimes the smaller narcotics
4 matters. Actually I'm trying, I'm scheduled to hear one
5 involving a fairly large narcotics matter that has private
6 counsel representing the Crown.
7 CHAIRMAN
8 Well, in your practice did you detect any, with respect to
9 disclosure, any difference in approach between, let's say in
10 the case of the Federal Crown, between those in private
11 practice and those who were retained full time?
12 A. There was a certain degree of difference and I think it was
13 just because of the private practitioner acting as Crown
14 counsel was not as comfortable in his role and would,
15 therefore, be more cautious in the type of disclosure. But I'm
16 sure that once a request was made and it was channelled
17 through to the head office that disclosure was forthcoming as
18 a result of that. I can honestly say that I never had
19 difficulties with Federal Crown Prosecutors. It wasn't a
20 matter of, "Well you can look at the file," which was often the
21 case with the Provincial Crown. "You can't take a photocopy
22 of the statement." Initially it was, "You can't even dictate the
23 statement on your own machine." That changed after a while
24 when you'd surreptitiously arrive with your dictating
25 machine and start dictating the statement. With the Federal

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

COMMISSIONER EVANS

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

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

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

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

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

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

1 Crowns with the statements that I've made. I do, however,
2 want to make the Commission aware that not all of the them
3 follow the policy that has been outlined before this
4 Commission and that is in that policy manual.
5 Q. You were aware of the manual.
6 A. Certainly. I recall being at a class at the Dalhousie Law School
7 speaking to a group of students with Mr. Herschorn and we
8 had a great discussion over the contents of that policy
9 manual. Mind you, I've not yet seen it. He had it in his
10 possession but I didn't see it, didn't read it.
11 Q. There was no distribution to the defence bar?
12 A. No, My Lord.
13 Q. So I take it that this operated on an old school tie attitude.
14 Some got disclosure, some didn't get disclosure.
15 A. I would say that that's a fair statement.
16 Q. And if the Crown was happy with the defence he revealed a
17 certain amount more or less depending upon the degree of
18 familiarity.
19 A. Yes.
20 Q. But when you got into that position, I believe you said that
21 you only found out about a statement once you arrived before
22 the Court. And he said, "Now I want to hold a voir dire on the
23 statement" of which you had no prior knowledge.
24 A. That's correct, My Lord.
25 Q. And did you get an adjournment of that trial?

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

Q. Slightly incriminating...

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

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

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

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

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

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

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

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

A. Yes.

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

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

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

A. Yes.

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

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

1 wheel gets the oil." If an accused felt that he was having
2 difficulty either in obtaining representation or a perception
3 that the process was being unfair to him or her, that Black
4 United Front would become involved and they would contact
5 counsel. They would contact me and ask questions and
6 perhaps make representations on behalf of the particular
7 accused person. So it seemed that they had a higher profile.
8 Q. And they had an advantage, too, I take it that they were more
9 articulate in English than the natives.
10 A. Yes. As, not speaking Micmac myself but understanding that
11 there is no word in Micmac for "guilty," I think emphasizes
12 the point that, the difficulties that counsel would have with
13 an accused saying "I'm guilty." I'm perhaps being blamed for
14 it. Obviously if you're being charged you're blamed for it.
15 But that and guilt are two different things.
16 Q. I have no final question to you. You say that you appeared on
17 a panel, I take it, with Mr. Herschorn.
18 A. It was a class discussion.
19 Q. And he indicated certain things that were really news to you.
20 A. I knew that the manual existed. I really wanted to read the
21 manual. I never was given the opportunity to read the
22 manual. Being told that full disclosure was a policy did not
23 stand in, or was not in keeping with what I had experienced
24 in practice.
25

1 10:14 a.m.

2 COMMISSIONER EVANS

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

6 THE HONOURABLE JUDGE CACCHIONE

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

13 COMMISSIONER EVANS

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

16 THE HONOURABLE JUDGE CACCHIONE

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

18 COMMISSIONER EVANS

19 Thank-you, very much.

20 THE HONOURABLE JUDGE CACCHIONE

21 Thank-you, My Lord.

22 MR. ORSBORN

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

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

1 said, "Fine, I am leaving," and so it was as a combination of
2 those factors that led me to, when requested by Stephen, to
3 agree to represent Donald. I felt that Junior and I had a
4 good rapport. I could in some ways understand where he
5 was coming from. He felt comfortable with me. I agreed to
6 take the file on. I left private practise, I'm sorry, I left Legal
7 Aid in May of 1983. I think I resigned effective April 30 or
8 somewhere in that area, and it was...I became his solicitor
9 once the decision from the Nova Scotia Court of Appeal was
10 handed down, which I believe was May the 13th.
11 Q. Yes. Following the handing down of that decision were you
12 briefed by Mr. Aronson on what his views were of what
13 needed to be done in the days ahead?
14 A. Stephen, as I recall, sent me....sent me a covering letter with
15 the file indicating that there had been an originating notice
16 issued, what materials were being forwarded to me and, yes,
17 we did have discussions concerning particularly the civil suit
18 and what the purpose of that was.
19 Q. What was the purpose of the civil suit?
20 A. It was, in essence, to protect Junior's rights should
21 everything else fail. It appeared to me that Stephen was
22 saying, and subsequently I agreed after spending some time
23 on the file and dealing with the system, that it would be a
24 long road to hoe. We didn't know whether or not Junior
25 would be able to make it through the whole civil suit. I had

1 never, as I have indicated, practised civil law before, was
2 unaware of the machinations that go on in a civil suit and
3 the interlocutory applications and the ex parte applications
4 and the motions that are made, of which I'm very familiar
5 now, and discoveries, et cetera, notices to produce. It was
6 felt that that would be difficult. It would be difficult to
7 establish the claim. It would also be more difficult on Junior
8 trying to proceed with the claim.
9 Q. You, in fact, did renew, I think, the...
10 A. Yes, we renewed it simply...
11 Q. ...statement and...
12 A. ...not to let it lapse, and to give us some more breathing
13 room and to see. But our purpose, quite frankly, after
14 having done a review of the law and malicious prosecutions
15 and looking that Municipal Act and the Police Act and all of
16 that was that we could proceed with the action. It would be
17 very difficult to establish, not only legally, but it would be
18 more difficult in terms of what it would take out of Junior to
19 go through that and to be faced with having the suit in
20 Sydney, which is where it was filed, and knowing that
21 obviously very competent, probably the most competent
22 counsel would be retained to defend the various parties and
23 that we would be in Court a lot on motions and having dealt
24 with Junior and knowing what his reaction was to Courts
25 and proceedings, we felt that it was...it would be very

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

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

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

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

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

1 They're...certainly both shared the same apprehensions. I
2 think Donald's were more pronounced, obviously because of
3 his experience.
4 Q. Did Mr. Aronson hand you over his files?
5 A. Yes, he did.
6 Q. Are you able in a general sense to indicate what those files
7 contained, and I'm thinking specifically of whether or not
8 they contained any...one or more RCMP reports, statements
9 of witnesses form 1971, the 1971 RCMP review?
10 A. I'm not sure if the 1971 RCMP review was there. I know
11 that there was a report from Staff Sergeant Wheaton in
12 which he outlined some of the deficiencies in the case in the
13 initial investigation. I recall seeing copies of Patricia Harriss'
14 first statement at eight o'clock in the evening and then the
15 other one at one, one-thirty in the following morning.
16 Maynard's Chant statement with the signatures, that report
17 was in. I think it was a 1982 report.
18 Q. Do you recall if there was more than one RCMP report?
19 A. I'd have to say that there was only one RCMP report. I
20 recall it being fairly thick. It was stapled together with the
21 statements attached to it.
22 Q. Did Mr. Aronson indicate to you any restrictions of any kind
23 on which this material could be...for the uses it could be put?
24 A. No, none whatsoever.
25 Q. When you took Mr. Marshall as your client, what were your

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

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

Q. He was less concerned with compensation.

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

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

A. Obtained nothing from the RCMP.

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

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

Q. What about the Correctional Services of Canada?

MR. CHAIRMAN

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

THE HONOURABLE JUDGE CACCHIONE

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

MR. CHAIRMAN

Were you aware of the Inspector Marshall report in 1972?

THE HONOURABLE JUDGE CACCHIONE

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

MR. CHAIRMAN

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

1 Inspector Marshall report.

2 THE HONOURABLE JUDGE CACCHIONE

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

7 COMMISSIONER EVANS

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

10 THE HONOURABLE JUDGE CACCHIONE

11 Yes.

12 COMMISSIONER EVANS

13 When he turned them over to you.

14 THE HONOURABLE JUDGE CACCHIONE

15 Yes.

16 COMMISSIONER EVANS

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

19 MR. ORSBORN

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

COMMISSIONER EVANS

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

MR. ORSBORN

In 1984 I believe.

COMMISSIONER EVANS

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

THE HONOURABLE JUDGE CACCHIONE

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

COMMISSIONER EVANS

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

THE HONOURABLE JUDGE CACCHIONE

Yes.

COMMISSIONER EVANS

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

THE HONOURABLE JUDGE CACCHIONE

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

1 Attorney General's authorization."

2 COMMISSIONER EVANS

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

6 THE HONOURABLE JUDGE CACCHIONE

7 I...

8 COMMISSIONER EVANS

9 On other cases.

10 THE HONOURABLE JUDGE CACCHIONE

11 Federal Crown, My Lord.

12 COMMISSIONER EVANS

13 Well, Federal Crown, yes.

14 THE HONOURABLE JUDGE CACCHIONE

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

18 COMMISSIONER EVANS

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

21 THE HONOURABLE JUDGE CACCHIONE

22 Yes.

23 COMMISSIONER EVANS

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

1 the Provincial Crown.

2 THE HONOURABLE JUDGE CACCHIONE

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

4 COMMISSIONER EVANS

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

8 THE HONOURABLE JUDGE CACCHIONE

9 That's correct, sir.

10 COMMISSIONER EVANS

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

13 THE HONOURABLE JUDGE CACCHIONE

14 That's correct.

15 COMMISSIONER EVANS

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

18 THE HONOURABLE JUDGE CACCHIONE

19 Yes.

20 COMMISSIONER EVANS

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

23 THE HONOURABLE JUDGE CACCHIONE

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

1 COMMISSIONER EVANS

2 It would go to the local Crown.

3 THE HONOURABLE JUDGE CACCHIONE

4 Yes, it would.

5 COMMISSIONER EVANS

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

9 THE HONOURABLE JUDGE CACCHIONE

10 I would say that that's accurate.

11 COMMISSIONER EVANS

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

16 THE HONOURABLE JUDGE CACCHIONE

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

19 MR. ORSBORN

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

THE HONOURABLE JUDGE CACCHIONE

May I find out what those reports were?

MR. ORSBORN

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

THE HONOURABLE JUDGE CACCHIONE

I don't have Volume 31.

MR. ORSBORN

Your Honour, at page 69.

COMMISSIONER EVANS

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

MR. ORSBORN

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

COMMISSIONER EVANS

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

MR. ORSBORN

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

MR. CHAIRMAN

What is it in, Volume 34?

MR. ORSBORN

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

THE HONOURABLE JUDGE CACCHIONE

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

MR. ORSBORN

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

THE HONOURABLE JUDGE CACCHIONE

I don't recall seeing that report.

10:45 a.m.

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

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

1 were '82 reports as I recall it.
2 Q. Well did Mr. Aronson indicate that he had any information
3 that he was not passing over to you?
4 A. No, he didn't. He didn't.
5 Q. We have correspondence on file. Just for the record it's
6 Volume 30, which indicates that you made some requests of
7 the Correctional Services of Canada for certain information?
8 A. Yes, it did.
9 Q. And am I correct that through exchange of correspondence
10 with them you did receive certain information from Mr.
11 Marshall's files?
12 A. We received a fair amount of material from Mr. Marshall's
13 file. The material that we wanted we didn't receive.
14 Q. What was that?
15 A. Any correspondence between the Attorney General's
16 Department, the Parole Board, the City of Sydney Police force
17 and the Parole Board. Anything that would indicate that
18 those two agencies, in particular, felt that Donald shouldn't be
19 released because he would be a threat to the community. Or
20 anything that would have restricted his parole eligibility,
21 apart from the fact that he wasn't admitting and showing
22 remorse for the offence, which in and of itself wouldn't have
23 made him eligible for parole because he had to admit his guilt
24 before they'd consider him for parole.
25 Q. Did you have any knowledge that such material existed?

1 A. I wasn't aware that there were particular letters but in
2 dealing with other criminal clients I was aware, and in
3 conversation with parole officers I was aware that those
4 requests were routinely made before a person was considered
5 for release, either on a T.L.A. or any sort of a temporary
6 release. So I would have expected that those would be on file.
7 Q. So your request, then, was based on your general knowledge
8 rather than knowledge...
9 A. Specifics, yes.
10 Q. Knowledge of specifics, thank you. What avenues did you
11 consider in terms of getting the type of inquiry that you were
12 looking for in Mr. Marshall's case?
13 A. Well, we requested that one be held. That was denied.
14 Q. Requested who?
15 A. Well we requested that the Attorney Generals, Mr. How, Mr.
16 Giffin, consider a public inquiry. That was denied. We
17 certainly felt that as a result of dealing with the file that
18 nothing would be done vis-à-vis Mr. Marshall by the
19 Attorney General's Department unless a significant amount of
20 public pressure was brought to bear. We were being
21 stonewalled, there's no question.
22 Q. You were just asking really at this point for almost a listing of
23 available options that you felt you had to conduct an inquiry.
24 A. Well the Public Inquiries Act, the good graces of the
25 government. The fact that there had been an acquittal from a

1 murder conviction. That somebody had spent ten years, ten
2 months in a federal institution.
3 Q. You did have some correspondence, I think, with the Federal
4 Government, as well?
5 A. Well there was also the International Covenant signed by
6 Canada which we brought to Mr. Chrétien's attention and, I
7 believe, Mr. MacGuigan's attention, that, dealing, not with the
8 issue of public inquiries but with compensation. And we
9 were advised that, they took out of context a certain portion
10 of that treaty and said, "Well, Donald was the author or his
11 own misfortune so we can't compensate him."
12 Q. Our file, our...
13 A. Those are my words.
14 Q. Our exhibits indicate some correspondence also with a House
15 of Commons standing committee on justice?
16 A. Yes, there was.
17 Q. So do I gather that there were a number of sort of options
18 that you were looking at for an inquiry?
19 A. Well we were trying to explore anything that would shed
20 some light on this. We were aware of the New Zealand
21 inquiry into Arthur Alan Thomas, or it's known as the Crewe
22 murders and we felt that only that type of an investigation
23 would achieve two purposes. One, to prevent the repetition of
24 this miscarriage and, two, to deal with the issue of
25 compensation. When, it was amazing actually, the number of

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

1 happened to him so why bother."
2 Q. Some of these matters you've touched on, I think we'll,
3 perhaps elaborate on as we go through the chronology.
4 Perhaps if I might touch on one matter before we, before I
5 suggest taking a break. I gather that you were with Junior
6 Marshall during the preliminary and one or more of the
7 Ebsary trials?
8 A. Yes, I was.
9 Q. They were held in Sydney?
10 A. That's correct.
11 Q. During your time in Sydney did you interview any of the
12 witnesses that had testified in 1971?
13 A. No.
14 Q. Did you interview either Mr. Rosenblum or Mr. Khattar?
15 A. The only contact I had with Mr. Rosenblum was, as I recall it,
16 is the opening of Mr. Ebsary's first trial when Mr. Rosenblum
17 came up, I recall this vividly. He came up to Donald and sort
18 of patted him on the back and it was, "How are you doing?"
19 you know, "Good to see you." da-da-da-da. And Donald just
20 sort of turned around and walked away and Mr. Rosenblum
21 came to me and said, "You know, if he told me the truth I
22 would have gotten him off." At which point I turned and
23 walked away. I spoke with a police officer by the name of
24 Mroz, who was on the force at the time and he indicated to
25 me that he had some information that would be very relevant

1 to what we were trying to do and, but that he couldn't discuss
2 it then because I think he was under subpoena as a witness
3 but really wanted to meet with us and indicated his support
4 for our position. Unfortunately, he died shortly thereafter.
5 Q. I was wondering why, if you were concerned about getting a
6 full inquiry, why you would not take the opportunity to talk
7 firsthand to a number of these people while you were in the
8 Sydney area.
9 A. It was my feeling that the RCMP had quite conclusively stated
10 in their report that the wrong person had been charged and
11 convicted. That there were some very serious allegations
12 about how the matter was investigated. That witnesses had,
13 at the December reference hearing had stated that they were
14 pressured into testifying to facts that were known to be
15 wrong. What more would one require. I didn't feel that my
16 going and speaking to a witness and then sending the
17 statement that I took from the witness to the Attorney
18 General's Department would have any more influence than a
19 report prepared by competent skilled investigators.
20 Q. I'd just ask you to turn for a moment to Volume 32 at page
21 210. There is about five pages there of what appear to be
22 typed notes. Volume 32 at page 210.
23 A. That's correct. That date should be...
24 Q. Are those your notes, Your Honour?
25 A. Yes, they are. This is a memo, as I recall it, and I stand to be

1 corrected, but as I recall this memo it was dictated upon my
2 return from the preliminary, Mr. Ebsary's preliminary which
3 I think was held in August. This is the 11th of August '83. It
4 reads '73 but it should be '83. I recall being...
5 Q. I'm just wondering, Your Honor, if it should read the 7th of
6 November because you do make reference in the body of the
7 memo, the first page, to a September 15th date and a
8 November 4th date.
9 A. Could be. Could be.
10 Q. That may be the...
11 COMMISSIONER EVANS
12 What's the right date?
13 A. It could be November, My Lord. It would have to be
14 November.
15 Q. And it would be '83.
16 A. '83, certainly. I recall dictating the memo. I recall being so
17 upset that I decided that I would have to start putting this
18 stuff down on paper in order to substantiate what I felt was
19 going on and what I had perceived as happening in Sydney.
20 And I recall doing it after a hearing involving Mr. Ebsary, be
21 it the preliminary or the trial. Obviously it must have the
22 trial and it must have been the second trial, I think, so...
23 Q. You say you were upset. And from reading the note I gather
24 that the focus of your concern was the way Mr. Marshall was
25 being used as a witness, is that correct?

A. Yes.

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

A. Yes.

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

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

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

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

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

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

1 disclose. Now I'm, I don't know the reason why. I recall one
2 incident at one of the Ebsary trials where he approached me
3 and said something about, "Do you know who released my
4 report to the CBC or a reporter?" And I just smiled and he
5 said, "You don't have to answer the question, I know the
6 answer now."
7 Q. Are you able to tell us then the basis for that statement in
8 your notes?
9 A. I can't, at this time, recall. Obviously I wouldn't have made it
10 up.
11 Q. I appreciate that. On page 214...
12 CHAIRMAN
13 I missed that. Where were you referring?
14 MR. ORSBORN
15 Volume 32, page 214.
16 CHAIRMAN
17 No, no. Before that. The last question.
18 MR. ORSBORN
19 Oh, page 212. The bottom paragraph on page 212. A
20 suggested report by Staff Wheaton about the laying of
21 charges.
22 CHAIRMAN
23 Before we go on to page 214, Judge Cacchione, the bottom of
24 page 211. You suggest that John MacIntyre had urged Oscar
25 Seale to lay a complaint against Edwards to the Bar Society.

1 Where did you get that information?
2 A. As I recall it, My Lord, I believe that that information came
3 from Mr. Edwards, Frank Edwards.
4 COMMISSIONER EVANS
5 One minor, I think, misprint on page 210, about ten lines
6 down. "To the best of my knowledge he has paid any conduct
7 money whatever." He has not been paid, I take it's what you
8 meant.
9 A. That's correct. And it, obviously that concerned me because it
10 wasn't in keeping with the Crown practice. If you have a
11 witness who's from out of town you pay him conduct money
12 or you arrange for his transportation. And it, my impression
13 at the time, and I still share it, is that they would have been
14 just as happy if he didn't show up as a witness.
15 MR. ORSBORN
16 Q. Was Mr. Marshall under subpoena?
17 A. He was under subpoena.
18 Q. He was?
19 A. As I recall that I think I had been served with the subpoena
20 or I had been given the subpoena. I had undertaken to have
21 him there.
22 Q. And was he a resident of Halifax at the time?
23 A. Yes, he was. He was living in Ogilvie Towers.
24 Q. To your knowledge was any conduct money requested?
25 A. I don't recall requesting conduct money.

1 Q. And do you know how his travelling expenses were, in fact,
2 paid?
3 A. I know that, I think our firm paid to get him up there on at
4 least one occasion. I know, at least I've been told that there's
5 some reference to receipts from our firm acknowledging
6 payment from the Attorney General's Department for some
7 conduct money. But that was a reimbursement as I recall it.
8 I mean I wouldn't have made the note if he'd been given
9 conduct money and a plane ticket to get to Sydney.
10 Q. You make some rather strong comments about Chief
11 MacIntyre on page 214 in the top six or seven lines of that
12 page.
13 A. That's right.
14 Q. With respect to your comments about, "Also known by his
15 men as being a rascist and particularly so towards Indians
16 and Blacks..." are you able to tell us the basis for that
17 statement?
18 A. If I'm not mistaken that may have been part of the
19 conversation that I had with Leo Mroz.
20 Q. Were any particulars provided or just a general comment?
21 A. No, it was a general comment but it, I wasn't a resident of
22 Sydney but it was quite evident from speaking with people
23 that I knew in Sydney that there really was no love lost
24 between the Blacks and the Indians. I mean just speaking
25 with Donald you got the feeling that...it's very consistent with,

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

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

A. No.

Q. You say later on on that page:

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

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

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

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

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

A. No, I didn't.

11:08 - BREAK

11:33 p.m.

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

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

1 Q. In August and September of 1983, you had an exchange of
2 correspondence with Mr. MacGuigan, who was then federal
3 Minister of Justice, in which you requested compensation
4 under the International Covenant on Civil and Political Rights.
5 For the record, that correspondence is found at Volume 30 at
6 pages 26 and following. Do I understand that your letter,
7 which is found on page 26 of Volume 30, was the first written
8 request that you had made to anybody for compensation?
9 A. I believe it was.
10 Q. Any reason you picked that forum first rather than the
11 province or elsewhere?
12 A. Well, it was the only legislation or treaty that, in fact, spelled
13 out that compensation should be paid. Canada was a signing
14 party to the agreement. Mr. Marshall had been incarcerated
15 in a federal institution, had been convicted under federal
16 legislation, and I was aware that the, obviously, the
17 prosecution was conducted by the provincial Attorney
18 General. However, in light of the International Treaty, it was
19 felt that that would be the forum to first approach.
20 Obviously, we didn't succeed then.
21 Q. Mr. MacGuigan replied to you at page 29 and following of that
22 volume, and would I be correct in saying that Mr. MacGuigan
23 said to you that because of Mr. Marshall's role in this matter,
24 he does not comply with the conditions in the covenant and,
25 therefore, cannot receive compensation?

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

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

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

1 hearing and the decision was handed down in the media, he
2 was convicted of what's been referred to as a "robbery", an
3 "attempted robbery", "rolling", "bumming money", whatever
4 you want. But the perception was there that he was up to no
5 good and he got what he deserved. And if he had, if he had
6 been charged and had been convicted of robbery in 1971, my
7 reading of the cases would indicate that he would have
8 served no more than a year. It's only in recent times that we
9 have bench-mark decisions on robbery cases saying that
10 three years is a starting point. And assuming that three years
11 is a starting point, then that's what he would have gotten in
12 '71, which I don't think he would have received that kind of a
13 sentence. He would have been paroled after a third of his
14 sentence. So it just, it was really very difficult to get over
15 that perception that here's a man who was, obviously, up to
16 no good and it clouded the issue that somebody died,
17 somebody went to jail as a result of that death who did not
18 cause the death.
19 Q. These comments of the Court of Appeal that you refer to,
20 were they, in your view, a hurdle for the matter of
21 compensation.
22 A. Certainly.
23 Q. And an inquiry, or one or the other?
24 A. Definitely with respect to compensation. I would think that
25 they would have had some bearing on an inquiry, but most

1 certainly with compensation. I recall being told by Mr.
2 Endres, well, you know, he was there to rob somebody and
3 the Appeal Court has said that that, you know, he was hiding
4 things from his lawyers. He wasn't truthful. There were
5 references made as to his credibility at the reference hearing
6 taken completely, I wouldn't say out of context, but without
7 an appreciation that this man had for ten years, ten months
8 been incarcerated, said that he hadn't committed the crime,
9 that nobody listened to him, had been convicted by a court
10 composed of white people, was now again before a court
11 composed of white people, had not been prepped for trial and,
12 in fact, had the feeling that he was, again, on trial. And
13 findings of credibility were made which caused me some
14 concern. It seemed that the focus was on his credibility and
15 what he was doing in the park on that evening, as opposed to
16 the fact that he had been charged and convicted on evidence
17 that had been obtained through pressure, that the evidence,
18 in fact, was false, that someone else had committed the
19 offence, and that the police had reinvestigated that and had
20 determined that somebody else had committed the offence.
21 None of that was dealt with.
22 Q. The comments that you refer to of Mr. Endres, were they in
23 the context of the compensation negotiations?
24 A. Yes, they were.
25 Q. In 1984?

1 A. Yes, they were.

2 MR. CHAIRMAN

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

10 HIS HONOURABLE JUDGE CACCHIONE

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

13 MR. CHAIRMAN

14 And then subsequently...

15 HIS HONOURABLE JUDGE CACCHIONE

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

1 saying, "I want to talk to your boss, I don't want to talk to you,"
2 and Coles kept replying that he was the one that was handling the
3 matter.
4 BY MR. ORSBORN
5 Q. Speaking then of that exchange of correspondence between
6 yourself and Mr. How, which is contained at Volume 32 and
7 page 262 and following, that starts off in September 21, 1983,
8 and you make what appears to be a formal request for an
9 inquiry.
10 A. Yes.
11 Q. Do I take it from what you've just said that this was not done
12 earlier because you were in the process of establishing your
13 practice and you wanted also to see if any initiative was
14 coming from...
15 A. Yes.
16 Q. Other parties?
17 A. That's correct.
18 Q. Also in this letter to Mr. How, there's no reference to
19 compensation. It focuses on the inquiry.
20 A. No, there wasn't. Initially, it was just an inquiry and we felt
21 that the federal government should deal with the
22 compensation issue because of that treaty. Obviously they
23 declined jurisdiction on that matter and then we approached
24 the provincial government with respect to that.
25 Q. I won't take you through each page but there is an exchange

1 between you and Mr. How, and some notes, I think, from Mr.
2 Coles saying you want to meet with Mr. How, you don't want
3 to meet with Mr. Coles, and one or other of them is away and
4 the thing goes on. Why did you not want to meet with Mr.
5 Coles?
6 A. Because Mr. Coles is the Deputy Attorney General. I felt that
7 because of the nature of this particular case, the profile
8 involved, that it was a matter that the Minister should handle.
9 This was not your ordinary appeal of a conviction or a
10 sentence appeal or any discussions with the department. This
11 was a matter dealing with the administration of justice in the
12 Province of Nova Scotia and who better to deal with it than
13 the person who is in charge and responsible.
14 Q. Was there anything to prevent you meeting with Mr. Coles to
15 at least start up the dialogue and get the lines of
16 communication going?
17 A. Well, obviously, from the first reply that we got, we didn't
18 assume that they were prepared to deal with us. I mean
19 denying even just a meeting with the Attorney General was a
20 forebearer of future dealings.
21 Q. Yes, I guess I go back to my question. Was there anything to
22 prevent you from meeting Mr. Coles? I understand from,
23 certainly from Mr. How's evidence, Judge How's evidence and
24 from Mr. Coles' note, which is found on page 272, that Mr.
25 Coles appears to be willing to meet you.

1 A. My understanding from my conversations with Stephen
2 Aronson were that Coles, Mr. Coles was directing the way
3 matters should be dealt with in terms of how the reference
4 hearing was to be conducted, what the Crown's position was
5 to be at the reference hearing. It was my feeling that he
6 would not be a good person to deal with, that the Attorney
7 General, who is and was his boss at the time, would be a
8 preferable person. Because I assumed in my mind that his
9 position might be somewhat different in that he was not a
10 career civil servant but, in fact, an elected member of the
11 legislature and a member of the Cabinet and that, politically,
12 it would be better for him to deal with it than a civil servant.
13 Q. Did you have any firsthand knowledge of the approach that
14 Mr. Coles might take with respect to a request for an inquiry?
15 A. In September of '83?
16 11:49 a.m.
17 Q. Yes, when this exchange was going on.
18 A. No, no, firsthand knowledge.
19 Q. Any firsthand...
20 A. Assumptions.
21 Q. Okay. Any firsthand knowledge of the approach that Mr.
22 Coles might take with respect to a request for
23 compensation?
24 A. None at that time, other than, as I've stated, the discussions
25 that I had with Stephen Aronson and what...you see Stephen

1 and Frank Edwards seemed to have had a good working
2 relationship and they were quite open and frank, at least
3 that's what I gathered from my conversations with Stephen.
4 But at some point I think the pressure was put on Mr.
5 Edwards and when I became involved initially, Frank, who
6 was a classmate of mine, and I had some discussions and
7 then it appeared that he just backed off completely and it
8 became very formal, our relationship. I wasn't able to get as
9 much information from him as Mr. Aronson had been able to
10 obtain. And it would...my understanding was that they were
11 both on the same wavelength in terms of what the Court of
12 Appeal should do and what should be presented to the
13 Court.
14 Q. What type of information were you seeking from Mr.
15 Edwards?
16 A. Well, just anything that he would have in terms of
17 background information, whether or not he had been told to
18 adopt a certain position, what he felt about the investigation
19 in 1971, what he knew about Donald C. MacNeil and his
20 approach to prosecuting cases, what he knew about
21 Detective MacIntyre and his approach. Things that would
22 have been of assistance.
23 Q. Is it fair to say though, Judge Cacchione, that as between Mr.
24 Aronson and Mr. Edwards they were at least counsel
25 involved in the same matter, whereas you would not have

had that relationship with Mr. Edwards?

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

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

A. No, never did meet Mr. How.

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

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

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

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

Q. I'll just stop you there.

A. All right.

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

A. Uh-hum.

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

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

Q. On the...

MR. CHAIRMAN

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

THE HONOURABLE JUDGE CACCHIONE

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

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

MR. ORSBORN

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

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

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

A. Yes.

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

A. No.

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

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

1 Pratico and Chant. I think there was a comment, I'm not
2 sure if it was Dr. Mian, as to Pratico's reliability as a witness.
3 The Chant statement with the attached page of signatures,
4 alleged signatures.
5 Q. Okay. Had you discussed with Mr. Marshall the possibility
6 of providing this kind of information to the media?
7 A. To the media.
8 Q. Yes.
9 A. Not in terms of "Donald, I will...do I have your permission to
10 provide this particular document to that particular reporter
11 or media person." The instructions that I had from Donald
12 were to seek a public inquiry and to make every effort to
13 obtain that public inquiry. I took it from that that there was
14 an implied consent to deal with the matter in that light.
15 Q. Did you place any restrictions on the use to which this
16 material could be put?
17 A. No, I'm sorry.
18 Q. Did you place any restrictions...
19 A. Did I?
20 Q. Did you say to Heather Matheson...
21 A. To Heather Matheson, yes, I did. I told her that I didn't
22 want the report quoted and that she would have to confirm
23 what was in the report through other sources, that she
24 couldn't just sort of, as has been done, take somebody's
25 notes, read them into the record, and say this is a reporting,

1 and she would have to confirm it. And, I understood that
2 she, in fact, did confirm it, and where that report went to
3 after and how Kirby Grant got it, I have no idea. I
4 understood that there was a furor over that.
5 Q. Yes, I think, in 1984. Did you provide any RCMP reports
6 from your files to any other member of the media or indeed
7 member of the public?
8 A. I don't believe that I did. I think they may have been
9 shown to...there was a committee that was established of
10 concerned citizens in Nova Scotia that may have seen the
11 report, but certainly copies weren't...
12 Q. Did you provide any reports to Michael Harris?
13 A. I think Michael Harris had the reports actually. I think he...I
14 know he was aware of them. He was in close contact with
15 Stephen Aronson. I can't recall providing Michael with the
16 reports.
17 Q. The documentation indicates that you, in fact, met with
18 Attorney General Giffin in November of 1983.
19 A. Yes.
20 Q. And, Mr. Giffin has testified, and I think the documents
21 reflect that the meeting was set up for a Wednesday the
22 23rd and then was accelerated to the 21st because he heard
23 in the media that you were...that there was supposed to be a
24 meeting. Do you have any knowledge of the media
25 becoming aware of a proposed meeting with Mr. Giffin?

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

Q. Do you remember meeting with Mr. Giffin?

A. I recall meeting with him.

1 Q. Around the 23rd of November.
2 A. Yes. In his office.
3 Q. Was anybody else present?
4 A. Michael Lambert, my partner was present, and Mr. Coles
5 was present, Gordon Coles.
6 Q. Do you remember if he took any notes of that discussion?
7 A. I recall Mr. Coles having a foolscap pad in his hand and
8 having a pen in his hand. Whether or not he wrote down
9 anything I'm not sure, but I know that the four of us met in
10 that office, Mr. Giffin behind his desk, Mr. Coles to his left as
11 he was facing us, and Mr. Lambert and I on a couch in that
12 office. And we talked about the Donald Marshall situation.
13 Q. Was...and I take it this was your first face-to-face discussion
14 with members of the department about the matter?
15 A. Yes, yes.
16 Q. Okay. And what issues were raised?
17 A. As I recall it we asked for a public inquiry into the
18 conviction of Donald Marshall and, as well, I believe we
19 raised the issue of compensation for the years that he had
20 been incarcerated. I really don't have specific recollection of
21 the details of that conversation. I recall that the meeting
22 was not very long. It may have been twenty to thirty
23 minutes at the most. But other than that I remember I
24 didn't take any notes, and I'm not sure if Mr. Lambert took
25 some notes.

1 Q. Who was piloting the discussion?
2 A. Well, I started by indicating why we were there, what we'd
3 like. I think Mr. Giffin made the comment that, well, the
4 Court of Appeal seems to think a bit differently than you do
5 on the issue of what happened that evening. And, I recall
6 saying that that's why there was a need for an inquiry that
7 would not be as limited in its focus. But the conversation, in
8 essence, came from our side. Mr. Coles may have asked one
9 or two or three questions, and I think that was the first
10 occasion when any miscarriage of justice is more apparent
11 than real came back at us in a face-to-face discussion.
12 Q. Was the matter of the civil proceeding raised?
13 A. Quite honestly, I can't recall if that was raised. I know that
14 it was subsequent to that it was obvious to us that the civil
15 proceeding was a bar to any sort of dealings on this matter.
16 The Premier had made statements. The regular...the matters
17 before the Court, the Ebsary matters before the Court were
18 not going to deal with this and there's the outstanding issue
19 of the civil suit against the City of Sydney. Now, what that
20 had to do with the Province of Nova Scotia was beyond me,
21 but it was clear to me that after hearing that on several
22 occasions that, in their minds at least, it was a bar to their
23 dealing with it and hence we wrote a letter saying, "We're
24 dropping the civil suit."
25 Q. And are you indicating that also the Ebsary matter being

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

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

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

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

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

1 MR. CHAIRMAN

2 Volume 30.

3 MR. ORSBORN

4 Volume 30, at page 34.

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

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

11 Q. Did you...

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

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

25 A. My understanding was that Staff Sergeant Wheaton had

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

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

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

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

A. That's my word.

12:10 p.m.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

1 General being aware of that? Which is what your sentence
2 says.
3 A. I have no personal knowledge of the Attorney General being
4 aware of that.
5 Q. Second paragraph on that same page, Your Honor, seven or
6 eight lines down. You say, "The provincial government asks
7 that Mr. Marshall barter away his civil claim against the
8 Sydney City Police with the possibility of compensation being
9 paid to him." Was that position put to you?
10 A. Well you don't have to spell things out, you know. When the
11 Premier says, "Well, the civil suit is still there." I think the
12 only inference you can draw from that is that that's an
13 impediment. You have to be aware that you're dealing with
14 politicians who can say things in many different ways but the
15 bottom line is the same. The civil suit is there.
16 Q. And in January of 1984 you, in fact, dropped the civil suit.
17 A. That's correct. We didn't want anything to stand in the way
18 of them dealing with what we were asking for. And at that
19 stage as I recall it, we were asking for a full public inquiry
20 and compensation.
21 Q. You spoke earlier of the exchange of correspondence you had
22 with the Department in early 1984 with the request for
23 information under the Freedom of Information Act and, again,
24 for the record, that's found in Volume 32 at 309 and
25 following. I won't ask you to turn to it but was there any

1 specific information you were looking for from the
2 Department of Attorney General?
3 A. Well I think that...
4 Q. Your letter is pretty broadly worded.
5 A. I'm sorry?
6 Q. I say your request is pretty broadly worded.
7 A. Sometimes when you don't know what you're looking for you
8 ask for everything and the kitchen sink.
9 Q. That was my question. Was there information that you
10 specifically knew existed that you were looking for?
11 A. The reports of Wheaton with respect to an investigation into
12 the Sydney Police, with the laying of charges, the procedures
13 to be adopted with respect to taking statements from
14 witnesses. What, if any, correspondence there was between
15 the Sydney City Police and the Attorney General's Department
16 with respect to Donald Marshall. Anything that would shed
17 some light on why that position was being taken by the
18 Department. It's, I view it now in light of an application,
19 what's referred to as a Wilson application, to contest the
20 validity of an authorization in a wiretap case. And you have,
21 the B.C. Court of Appeal saying that you have to establish a
22 prima facie case of fraud before you can get the information
23 in the packet and then you have other courts saying, no, that
24 you should have it as a matter of right because how are you
25 going to contest the validity if you don't know what's in the

1 affidavit. And it was one of those "just give us what you have
2 so that we can look at it" but we never did receive anything.
3 So we didn't know if those reports had been acted on. We
4 had a suspicion that those reports were available, that Staff
5 Wheaton had supplied them with reports.
6 Q. Okay, just in the chronology, then, I'll point out at page 319 of
7 Volume 32 that you again write Mr. Giffin, I take it, on
8 January 18th, 1984, asking for an inquiry and for comments
9 on compensation. And then two pages later is the letter of
10 January 23rd, '84 which you formally notify them that the
11 civil suit has been dropped.
12 A. Yes.
13 Q. Now in February of, or before I do. I would take it that you
14 discussed with Mr. Marshall the matter of dropping the civil
15 suit?
16 A. My recollection was, yes, that we did have a discussion with
17 respect to the civil suit. I, as I indicated this morning, had not
18 dealt with civil matters before. My partner at the time was
19 quite experienced with civil litigation and as a result of
20 discussions with my partner and with Donald we came to the
21 conclusion that the burden on him as a plaintiff in that civil
22 suit would be so onerous that it would be very difficult given
23 the client that we had, given the nature of the suit to be
24 brought, given the resources that we were to be confronted
25 with, that it would be very difficult. I said also this morning

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

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

A. Yes.

Q. And Mr. Mitchell.

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

Q. Did you initiate the formation of that group?

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

Q. And you...

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

Q. What did they do for you?

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

1 May decision. The government's approach to things. And we
2 hoped that, at least I hoped that that group would be in a
3 position to convince the government to hold an inquiry and to
4 deal fairly and honorably with Donald Marshall, Jr. in terms of
5 both the inquiry and compensation.
6 Q. To your knowledge did that group, in fact, meet with the
7 Premier or any member of government?
8 A. I'm not sure that they met or whether or not the letter was
9 sent. Well obviously the letter was sent. Well I'm not sure if
10 it was sent actually. It's there on file.
11 Q. Turning to page 324 there are some handwritten notes on
12 that page, can you identify those notes?
13 A. That's my handwriting.
14 Q. There's reference at the top to "D.M., Jr." and then what
15 appears to be "Father Comeau."
16 A. Yes. "Committee recommends public inquiry, strongly
17 recommends..."
18 Q. Are you able to tell us the context in which those notes were
19 made? Is this information coming to you from Father Comeau
20 or what?
21 A. This would have been a telephone call to me from Father
22 Comeau and outlining what they had concluded as a result of
23 our discussion. I can't recall when we had the meeting at the
24 hotel, the Lord Nelson.
25 Q. I just have one question on those notes and...

1 A. Obviously he did meet personally with the Premier. You see,
2 the thing was that Father Comeau, to my knowledge, was
3 quite involved in the Conservative party or had Conservative
4 party affiliations and that's why it was felt by others, not
5 myself, but by others in the group that he would be the
6 contact person.
7 Q. Okay. About a halfway down the page there's a note which
8 says, "Chief Justice sd. ..." I presume means "said" does it?
9 A. Yes.
10 Q. "P.I. (public inquiry) may be contempt of court."
11 A. Yes.
12 Q. Can you tell us anything at all about that comment?
13 A. Only that that was what Father Comeau told me. Now I'm not
14 sure if from that note whether or not the Premier told Father
15 Comeau that the Chief Justice had told him, I don't know.
16 Q. You don't know. Okay.
17 A. I'm not sure.
18 Q. Eight or ten lines from the bottom of the page there's a note
19 there, "Immediately after Ebsary's decision the government
20 will immediately move on public inquiry." Again, this is a
21 report from Father Comeau to you?
22 A. Yes.
23 Q. And from what you said earlier is this not what you were
24 looking for?
25 A. That's certainly what we were looking for was a public

1 inquiry. This is February 10th, 1984.
2 Q. Yes.
3 COMMISSIONER EVANS
4 He skipped over that.
5 MR. ORSBORN
6 Q. But in terms of a resolution at least of the issue of the inquiry,
7 would not this, assuming it were true, resolve it from your
8 point of view?
9 A. Assuming it was true.
10 Q. Yes.
11 A. I didn't assume that it was true.
12 Q. I see. I was about to move, My Lord, into a...
13 COMMISSIONER EVANS
14 Before you leave that, 325, on page 325...
15 MR. ORSBORN
16 Yeah, I think that's perhaps out-of-date order in the volume.
17 COMMISSIONER EVANS
18 Is that what you mean? I beg your pardon?
19 MR. ORSBORN
20 I believe that note is out-of-date order in the volume, My
21 Lord.
22 COMMISSIONER EVANS
23 Yeah, I'm not concerned about the date but it says, "Ron
24 Giffin, 1:59 p.m., will meet privately. No reporters." Then it gives
25 a date, "2 p.m. Third floor." And that's the meeting that was

1 subsequently advanced.
2 A. I'm not, Mr. Orsborn has referred to the meeting as taking
3 place on the 21st of November. If that's when it took place
4 then obviously it was advanced.
5 COMMISSIONER EVANS
6 All right. But that, it's clearly from the note that it was to be
7 a private meeting between you and Ron Giffin.
8 A. That's right.
9 COMMISSIONER EVANS
10 And it was changed because somehow or other there was a
11 leak and reporters and so forth were apprised of it?
12 A. My understanding, My Lord, was that the media knew that
13 there was to be a meeting. I also recall that there was no
14 indication where, when the meeting was to take place.
15 COMMISSIONER EVANS
16 No, I understood though, that your evidence earlier today
17 was that you did not feel there was anything wrong if the
18 reporters were available because it was going to be, even though
19 it was going to a private meeting. Am I right on that?
20 A. I don't recall saying that but certainly I agree with the
21 statement, that I didn't feel that there would be anything
22 wrong with them being present. Not during the meeting but
23 certainly after the meeting.
24 COMMISSIONER EVANS
25 Well, of course, of those scrums that appear after a meeting

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

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

COMMISSIONER EVANS

Yes. Some are factual, some otherwise.

A. Certainly.

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

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

A. Yes.

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

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

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

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

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

A. That was Donald's figure.

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

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?

2:21 p.m.

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

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

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

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

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

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

Q. This comment...

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.

2:30 p.m.

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

A. Yes.

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

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

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

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

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

A. No, subsequent to that.

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

A. Yes.

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

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

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

A. As I recall it, I did make the comment that what his standing was at that particular time. I'm not sure if I said, 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?

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

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

A. I must have.

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 you 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.
2 A. Yes.
3 Q. I'm interested in the comment attributed to you that you
4 would recommend that settlement. Is that accurate?
5 A. I'm not sure if I use the word "recommend". Recommend
6 implies that I would have agreed with the figure.
7 Q. Yes.
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

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

COMMISSIONER EVANS

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

HIS HONOURABLE JUDGE CACCHIONE

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

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

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

A. No, sir.

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

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

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

A. At that stage, I thought that we had reached the point where we were no longer adversaries. That we were, in fact, we had 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

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

BY MR. ORSBORN

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

A. Yes, it is.

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

A. That was your bottom line at that stage.

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

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

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

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 if they settle, they will take this and if they
22 > don't, it would be because of other pressures, not the adequacy of the offers.
23
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.

Q. And I just draw your attention to one paragraph on page 546. Was this prepared by you, this press release?

A. Yes, it was.

Q. Okay, page 546, the paragraph reading:

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

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

A. Yes, it was.

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

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

A. Yes.

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

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

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

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

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

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

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

A. No. No, they weren't.

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

A. I did.

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

A. I was attempting to establish in my own mind whether or not the reinvestigation in 1971 had been brought to the attention of the Attorney General's Department, whether or not a report had been submitted to that department, and whether or not that report had, in fact, been made available to Mr. Khattar and Mr. Rosenblum, who were representing Donald in his appeal. It was my understanding that Judge Anderson was in the Attorney General's Department at the time. I went to see 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

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

MR. ORSBORN

Thank you, My Lord.

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

EXAMINATION BY MS. DERRICK

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

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
government of Nova Scotia for the failure of its
20 system of justice.
21 A. One of the recurring themes that came out of my discussions
22 with Junior was that nobody ever acknowledged that
23 anything had gone wrong. It was always, he was the reason
24 he spent ten years plus in jail. Even when the conviction was
25 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.

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

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

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

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

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

A. That's the way I saw it.

4:03 p.m.

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

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....

A. That's correct.

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

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

Q. Did you consider contacting Amnesty International?

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

MR. CHAIRMAN

You're losing me now.

MS. DERRICK

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

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

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

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

A. I have no doubt, yes.

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

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

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

MS. DERRICK

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

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

REPORTER'S CERTIFICATE

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

Margaret E. Graham

DATED THIS 17th day of May 19 88 at Dartmouth, Nova Scotia