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#1

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

Volume 65

Held: May 18, 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
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Mr. Clayton Ruby, Ms. Marlys Edwardh, and Ms. A. Derrick:
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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
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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

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THE HONOURABLE JUDGE CACCHIONE, EXAM. BY MR. PUGSLEY
MAY 18, 1988 - 9:30 a.m.

MR. CHAIRMAN

Good Morning. Mr. Pugsley?

MR. PUGSLEY

Thank you, My Lord.

THE HONOURABLE JUDGE CACCHIONE, still sworn, testified as follows:

EXAMINATION BY MR. PUGSLEY

Q. Your Honour, I'm appearing on behalf of John MacIntyre. The services and support you provided for Mr. Marshall extended, I suggest, far beyond the normal services that a lawyer renders to a client?

A. They are the services that I tried to render to most of my clients. It was an unusual case and I would agree that they were beyond the normal counsel services.

Q. This was not a normal case.

A. Certainly not.

Q. You provided counselling, emotional support, you were his confidant, and perhaps more important, you were his friend.

A. That's... I felt I was his friend, yes.

Q. You identified passionately with his cause.

A. Certainly.

Q. Your conclusions with respect to John MacIntyre and William Urquhart were based on information you had obtained concerning their activities in the 1971 investigation and, as I

1 understand it, your knowledge of their activities in the 1971
2 investigation were confined to talking to Donald Marshall,
3 talking to Stephen Aronson, and reading, perhaps, two or
4 three reports of Harry Wheaton.

5 A. That's correct.

6 Q. And those reports of Harry Wheaton, my friend, Mr. Orsborn,
7 referred them to you yesterday, referred you to two of them,
8 or I guess perhaps all three, and I'd like to address your
9 attention, if I may for a moment, to the first report that is
10 found in Volume 34 at page 9.

11 A. Yes, I have that.

12 Q. This report, Your Honour, is dated February 25th, 1982. In
13 fact, we know from evidence that has been given previously
14 that it must have been written after March 1st, because there
15 are certain statements that are annexed to it that are dated, I
16 think, March 1st and perhaps one a little bit later than March
17 1. So they contain conclusions in the body of the report that
18 were gleaned by Staff Wheaton after February 25th. The
19 report is approximately eleven pages long. It goes from page
20 9 in the upper right-hand corner to page 19. And then
21 annexed to it on page 20 and 21, there are a list of
22 statements.

23 A. Yes.

24 Q. And attached to that list, there are the statements
25 themselves. And I take it that what you had passed to you in

1 Mr. Aronson's file was not only the report but the two pages
2 containing the list of statements and the statements
3 themselves.

4 A. I, as I indicated yesterday, Mr. Pugsley, I assume that this is
5 the report I have. I only had one report that was in Mr.
6 Aronson's file which was forwarded to me. It seems familiar.
7 I know I didn't have an '83 report or anything subsequent to
8 that, but I did have, I recall particularly seeing the two
9 statements of Patricia Harriss.

10 Q. Yes.

11 A. With respect to an 8 p.m. interrogation and a 1:30, or timed at
12 1:30 the following morning. As I recall the file which I had,
13 the...

14 Q. Sorry, if I could just interrupt you for one moment.

15 A. Certainly.

16 Q. You do recall seeing both of those statements, do you?

17 A. I recall seeing the statements, not the typed version as is
18 contained in this report. I recall seeing handwritten
19 statement, the first identifying several parties, one of whom
20 seemed to match the description of Mr. Ebsary.

21 Q. That was the eight o'clock statement.

22 A. That was the eight o'clock statement and it ended mid-way
23 through the page and then there was another statement
24 which identified Marshall and Mr. Seale being the only ones
25 in the Park.

1 Q. In fact, the only statement of Patricia Harriss that is annexed
2 to this report that I'm directing you to is the statement taken
3 at 12:10 or 12:20 a.m., which is found as Attachment number
4 7. The eight o'clock statement is not attached to this report.
5 I'm not quarrelling with your recollection at all, but just as a
6 matter of information.

7 A. Yes. It's very vivid in my memory. They were handwritten
8 statements.

9 Q. But you saw them both. Right, okay. I think one way we can
10 check and just verify what, in fact, you did receive is by
11 checking the information that was given to Heather Matheson,
12 because she has testified on discovery. And annexed to her
13 discovery or during the course of that civil proceeding, her
14 solicitor provided us with a copy of the R.C.M.P. report that
15 she had. And the report that she had was the one, I take it,
16 given to her by you.

17 A. Yes.

18 Q. Now in this... The only reason for bringing your attention to
19 this, sir, is in the statements of Patricia Harriss and John
20 Pratico, taken by the reinvestigators in 1982, which are found
21 at page 50 of this volume; Pratico at page 50 and Patricia
22 Harriss at page 54, certainly the indication is in that
23 statement of Pratico that MacIntyre is the villain. And
24 although Patricia Harriss is not able to identify the individuals
25 in the police who upset her, she certainly talks about police

1 pressure in this statement on page 54. You may read this, if
2 you want, but for the purpose of my questioning, Your
3 Honour, it's not really necessary to do so.

4 A. Yes.

5 Q. All I'm saying is that the Wheaton report is a pejorative about
6 MacIntyre. The statements annexed to the report are
7 pejorative about MacIntyre. The information you got from
8 Stephen Aronson and from Donald Marshall certainly, again,
9 painted MacIntyre as the villain.

10 A. I don't think there's any question about that.

11 Q. Yes, right. You did not attend the reference. You did not hear
12 the witnesses give their evidence.

13 A. No, I did not.

14 Q. You did not interview personally any of the people who gave
15 evidence at the preliminary in 1971 or at the trial.

16 A. No, I did not.

17 Q. Except for Marshall.

18 A. That's right.

19 Q. You did not interview any of the people from whom
20 MacIntyre took statements in 1971.

21 A. No, I did not.

22 Q. You did not interview MacIntyre or Urquhart..

23 A. No, sir.

24 MR. PUGSLEY

25 Thank you, Your Honour.

1 MR. MURRAY

2 Mr. Pugsley has covered any questions I would have on
3 behalf of William Urquhart.

4 MR. BARRETT

5 No questions on behalf of the Estate of Donald C. MacNeil.

6 MR. CHAIRMAN

7 Mr. Saunders?

8 MR. SAUNDERS

9 Thank you, My Lord.

10 EXAMINATION BY MR. SAUNDERS

11 Q. Your Honour, I'm Jamie Saunders. I'm acting on behalf of the
12 Attorney General and his Department.

13 A. I'm well aware of that.

14 Q. How well, Judge Cacchione, do you know Frank Edwards?

15 A. Frank and I were classmates in law school. We graduated the
16 same year, 1974, and we were in the same section, the first
17 "C" section of, in law school. Our relationship was quite
18 cordial in law school. I believe we played hockey together on
19 a few occasions. I don't know him as a friend, but certainly
20 quite amicable relationships.

21 Q. Thank you. During your term at Nova Scotia Legal Aid, you
22 said that you practiced for a time in Truro?

23 A. Yes, I did.

24 Q. And also in New Glasgow?

25 A. I was based in New Glasgow and I lived in New Glasgow. My

1 primary obligation was the New Glasgow office. As a result of
2 certain events in Truro, I was asked to cover that office as
3 well and, initially, I would go there one or two days a week
4 and towards the end of my stay, I was there regularly. I was
5 there more often than I was in New Glasgow.

6 Q. Over what years were you in New Glasgow, sir?

7 A. I went to New Glasgow... I joined Legal Aid April 1st, '75. I
8 believe I went to New Glasgow in May of that year and I left
9 and moved to Halifax in October of 1976.

10 Q. And during the time that you were in New Glasgow, you did
11 some cases in Truro, am I correct?

12 A. Oh, yes. Yes, I did. Mostly, I think I did two jury trials in
13 Truro. Most of my appearances were either before Provincial
14 Court Judge Archibald or Judge McLellan, who was the County
15 Court Judge there at the time.

16 Q. So is it fair to say that the appearances that you did make in
17 New Glasgow and in Truro were in the mid seventies?

18 A. Yes.

19 Q. Did you ever appear in court, sir, as counsel for the accused in
20 Cape Breton County?

21 A. Never in Cape Breton County.

22 Q. I take it, then, that you have never acted as defence counsel
23 in cases where Mr. Edwards was the Crown Prosecutor.

24 A. No.

25 Q. You attended with your client, Donald Marshall, Junior, at the

1 Roy Ebsary preliminary hearing?

2 A. Yes, I did.

3 Q. When was it, sir, that you first gave notice to Mr. Edwards,
4 the Crown Prosecutor, that you were acting on behalf of
5 Junior Marshall?

6 A. Gave notice, formal notice?

7 Q. When would he have had any notice that you were acting for
8 Junior Marshall?

9 A. I have no idea. Probably when he saw me there on the
10 occasion of Ebsary's preliminary.

11 Q. And that would have been in August of 1983?

12 A. I think it was, yes.

13 Q. When were you formally retained by Junior Marshall to take
14 on his case?

15 A. May of 197... May of 1983.

16 Q. And you executed a contingency agreement, as I understand
17 it?

18 A. I did.

19 Q. With Junior Marshall?

20 A. I did.

21 Q. Was that filed, sir, with the court?

22 A. No, it wasn't.

23 Q. So the first notice by your evidence that Mr. Edwards would
24 have had to your involvement on behalf of Mr. Marshall was
25 likely in August of '83 when you attended in Sydney.

1 A. I can't recall whether or not we had any telephone
2 conversation before attending at the Ebsary preliminary. I
3 would have to say that it would be when I first showed up in
4 person. I'm not quite clear on whether or not I did call them
5 and say that I'm coming up with him or anything to that
6 effect.

7 Q. Thank you. Did you always consider Mr. Edwards' dealings
8 with you to be courteous and professional?

9 A. I did.

10 Q. Who was acting on behalf of the accused, Ebsary?

11 A. At the preliminary hearing?

12 Q. Yes.

13 A. I believe it was Mr. Wintermans.

14 Q. And he's a lawyer with Nova Scotia Legal Aid...

15 A. Yes.

16 Q. In Sydney.

17 A. And we worked together in Halifax.

18 Q. You and he have?

19 A. We had, yes.

20 Q. And was Alan Nicholson or Nickerson counsel...

21 A. He was not representing him, I did not see him at the
22 preliminary.

23 Q. Yes.

24 A. I believe Mr. Nicholson's involvement occurred after an
25 incident involving Mr. Wintermans at the courthouse.

1 Q. Thank you.

2 A. I believe that's when the file was passed over.

3 Q. When Mr. Nicholson eventually took over...

4 A. After the trial.

5 Q. The case.

6 A. Yes.

7 Q. On behalf of Mr. Ebsary.

8 A. Yes.

9 Q. All right. Did you consider that you were there with your
10 client, Mr. Marshall, to maintain a watching brief during the
11 proceedings?

12 A. I was there to supervise the proceedings, certainly, and to
13 give moral assistance to Mr. Marshall.

14 Q. When you say "to supervise the proceedings", what do you
15 mean, Your Honour?

16 A. Well, just to insure that the case was being presented.

17 Q. Yes.

18 A. As far as I knew what the evidence was and to see that Mr.
19 Marshall was not taken advantage of.

20 Q. And Mr. Marshall was there as a material witness to a murder
21 charge against Roy Ebsary.

22 A. That's correct.

23 Q. All right.

24 A. He was the witness in terms of an eyewitness. There was,
25 circumstantial evidence was available.

1 Q. Yes. Now you attended the first preliminary inquiry against
2 Roy Ebsary.

3 A. That's right.

4 Q. Did you meet in Mr. Edwards' office during those proceedings,
5 Your Honour?

6 A. I don't recall if we met in his office. I recall meeting in his
7 office which is located in a house that's been converted next
8 to the courthouse. I'm not sure if it was at the time of the
9 preliminary. I don't think it was at the time of the
10 preliminary. I think it may have been at the time of the trial,
11 one of the trials.

12 Q. Thank you. Did you offer any criticism to Mr. Edwards of his
13 handling of the preliminary inquiry in August of '83?

14 A. No, I didn't have any contact with Mr. Edwards after the
15 preliminary.

16 Q. Thank you. You attended the first trial in September of
17 1983?

18 A. I did.

19 Q. And that was before, as I recollect, Mr. Justice Clarke, as he
20 then was, with jury?

21 A. I can't remember who the presiding justice was.

22 Q. The second trial against Mr. Ebsary was in November of
23 1983?

24 A. Yes, that one, I have definite recall of attending.

25 Q. Do you recall that it was before Mr. Justice Rogers with jury?

1 A. That's right.

2 Q. And it was after the second trial that you met again with Mr.
3 Edwards and recorded the noon hour meeting you and he had
4 in his office in your memorandum dated November 7, 1983?

5 A. I believe it was, yes.

6 Q. Now the memorandum, Your Honour, that you prepared, is
7 that something that you dictated upon your return to Halifax?

8 A. I can't recall, Mr. Saunders. It most likely would have been
9 upon my return.

10 Q. During your noon hour meeting with Mr. Edwards, during the
11 conduct of the second trial, did you offer any criticism of his
12 handling of the case?

13 A. I don't believe that I did.

14 Q. Thank you. Was it that time, Your Honour, that you and
15 Junior Marshall went together and you went to the reserve
16 and he said to you that he wished to meet with his mother
17 and you and he...

18 A. No.

19 Q. Went to visit her and he disappeared?

20 A. No, that was the evening before Mr. Ebsary's preliminary
21 inquiry.

22 Q. In August.

23 A. Yes.

24 Q. All right. And he just left.

25 A. That's right.

1 Q. And you didn't know where he had gone.

2 A. That's right.

3 Q. Did you have concerns that he was going to bolt?

4 A. I had, I didn't have concerns that he was going to bolt. I had
5 concerns of what condition he'd be in when he came back.

6 Q. Did you feel confident that he would attend the preliminary
7 the next day?

8 A. I was hoping that he would attend. He had told me that he
9 would be there. I had no reason to disbelieve him. In fact, he
10 did attend. He wasn't in very good condition, but he did
11 attend.

12 Q. Are you saying you had no concern as to whether he would
13 attend the next day?

14 A. I had some concerns. My concerns were more as to what
15 condition he would be in when he attended than his
16 attendance, per se. There's always this lingering doubt of
17 maybe he won't show.

18 Q. Sure, and you had some of that yourself?

19 A. At that stage, some, not a high percentage.

20 Q. As I recall from your memorandum, Your Honour, Mr.
21 Edwards expressed to you his own concern that Mr. Marshall
22 might bolt.

23 A. This was in November, yes.

24 Q. And you recorded that in your memorandum.

25 A. Yes.

1 Q. And he offered that as the reason why he had not told Junior
2 Marshall directly that he was going to make application under
3 Section 9 to the Evidence Act.

4 A. That's what is recorded in my memorandum.

5 Q. Yes. But he, in any event, explained to you that he was...

6 A. Yes.

7 Q. Intending to make that application.

8 A. Yes.

9 Q. And stated to you his reason for not telling Junior.

10 A. That's right.

11 Q. All right. You said last day that you did not expect the
12 Attorney General's Department to pay your transportation
13 costs in having to attend with your client in Sydney.

14 A. That's correct.

15 Q. But you certainly did expect the Crown to pay Junior
16 Marshall's expenses in attending all of these proceedings as a
17 material witness.

18 A. He was the Crown's key witness. I expected that they would
19 pay his conduct.

20 Q. I'd like you to turn to your memorandum, Your Honour.
21 Volume 32 in the red book at page 210.

22 A. I have that.

23 Q. And we're now agreed that this is a memorandum dated the
24 7th of November, 1983?

25 A. That's correct.

1 Q. And you begin by identifying the three occasions on which
2 Junior Marshall had to attend as a witness in Sydney.

3 A. Yes.

4 Q. And then about six lines from the top, you say, "At no time
5 has the Crown made any arrangements for Donald's
6 transportation to and from Sydney."

7 A. Yes.

8 Q. "To the best of my knowledge, he has not paid (I assume "he
9 has not been paid")...

10 A. That's right.

11 Q. "Any conduct money whatsoever."

12 A. That's right.

13 Q. And then you say in the next sentence, "It is almost as if the
14 Crown did not want him to appear." And you talk about that
15 attitude; that is, that the Crown appeared not to want him
16 around, to have prevailed throughout the other proceedings.

17 A. Yes.

18 Q. And then you go further and you state that it was your
19 opinion at the time that there was an attempt, I assume by
20 the Crown, "to assassinate Mr. Marshall's character", as you
21 put it.

22 A. That's right.

23 Q. Is that correct?

24 A. Yes.

25 Q. Isn't it a fact, Judge Cacchione, that the Crown paid Junior

1 Marshall his expenses to attend the proceedings in August of
2 1983, September of 1983, and November of 1983?

3 A. I have no knowledge of them paying his expenses.

4 Q. Would it surprise you if the evidence is later in the week that
5 the County of Cape Breton paid Donald Marshall, Junior, the
6 expenses for his attendances in August and September and
7 November of 1983?

8 A. When did they pay the expenses?

9 Q. When they were occurred... when they occurred.
10 9:52 a.m.

11 A. That wasn't my understanding, Mr. Saunders.

12 Q. Did Junior Marshall tell you that he had not been paid by
13 the County of Cape Breton for his expenses in August and
14 September?

15 A. I don't recall him being paid expenses to travel to Sydney.

16 Q. Your conclusion, Your Honour, that it's almost as if the Crown
17 did not want him to appear and that that attitude prevailed
18 throughout the proceedings, I suggest, is based on your
19 assumption that the Crown did not pay his expenses, is that
20 correct?

21 A. That, yes, it would be based on that.

22 Q. And, am I correct in suggesting that if your premises are
23 shown to be incorrect that your conclusion is erroneous?

24 A. Certainly.

25 Q. Thank you. Was there not a duty upon the Crown

1 Prosecutor to adduce all material and relevant evidence,
2 whether favourable or unfavourable, to the Crown in the
3 Ebsary murder trial?

4 A. Yes, that certainly is a duty on all prosecutors.

5 Q. Would it have been favourable to the accused, Roy Ebsary,
6 for the Court to know that Junior Marshall was in the Park
7 intent on rolling or robbing someone?

8 A. It was evidence that was available to the Crown and...

9 Q. Would it have assisted the accused, Roy Ebsary?

10 A. It would have assisted the accused, Roy Ebsary. It would...

11 Q. Thank you.

12 A. ...not assisted the accused, Roy Ebsary, for the Crown to lead
13 evidence as to the knives that were found in Mr Ebsary's
14 basement, which contained blood and fibre samples, which
15 matches those of Mr. Seale and Mr. Marshall. That evidence
16 wasn't led. The fibre expert was not called.

17 Q. But it would have assisted the accused for it to be known in
18 court that Junior Marshall was in the Park for an unlawful
19 purpose?

20 A. It would have assisted...certainly it would have assisted Mr.
21 Ebsary.

22 Q. Thank you. Thank you. You say in your memorandum,
23 Judge Cacchione, that you asked Mr. Edwards to tell you
24 what his recommendation was to the Attorney General with
25 respect to laying perjury charges against the material

1 witnesses in 1971. Do you recall that discussion with Mr.
2 Edwards?

3 A. Could you... You say it's in the memorandum.

4 Q. Yes. And I'll find it for you in just a moment.

5 MR. CHAIRMAN

6 Page 4.

7 THE HONOURABLE JUDGE CACCHIONE

8 Page 4.

9 MR. SAUNDERS

10 Thank you, My lord.

11 Q. Towards the bottom of the page, Judge Cacchione, the second
12 paragraph starting, "Edwards in conversation at the noon
13 break..."

14 A. Yes.

15 Q. You asked Mr. Edwards what his recommendation was to the
16 Attorney General regarding the laying of such charges
17 against those witnesses.

18 A. I would have asked him, yes.

19 Q. Yes. Why did you consider it your business to hear from a
20 Crown Prosecutor whether he intended to have charges laid
21 against witnesses?

22 A. Because my understanding of the relationship between Mr.
23 Edwards and Mr. Aronson was that it was a frank and open
24 relationship concerning what had occurred in 1971 and that
25 Mr. Edwards was quite sympathetic to the position adopted

1 by Mr. Aronson and I felt that I would have the same frank
2 and open response from him as Mr. Aronson had had.

3 Q. About all matters, Your Honour?

4 A. Pretty well. This was a continuation of what I see...of what I
5 saw as a miscarriage of justice.

6 Q. Would you have considered it to be fair and appropriate for
7 the Crown Prosecutor in Cape Breton to disclose to outside
8 counsel whether he intended to charge witnesses?

9 A. I would have hoped that our relationship was such that he
10 would have been forthright with me.

11 Q. And include in that forthrightness whether or not he
12 intended to have other witnesses charged with...

13 A. I was getting the impression that he was being pressured
14 from the...we had had a...I remember calling him at his
15 home, I had his unlisted number.

16 Q. Yes.

17 A. I can't recall if it was prior to the preliminary or prior to
18 one of the many trials. And we seemed to have a fairly
19 frank discussion on various issues and then, as I recall it, it
20 seemed that he wasn't as open with me. If you...if you're
21 asking if it was any of my business it wasn't any of my
22 business.

23 Q. Okay. And this discussion that you had with Mr. Edwards on
24 the telephone when you called his home, can you place that
25 for me in terms of August to November?

1 A. I can't. I would think it was probably prior to preliminary.

2 Q. And then you said last day that there seemed to be a turn in
3 that and the dealings between the two of you seemed to get
4 more formal.

5 A. Yes. Yes.

6 Q. When did that occur?

7 A. I would think September to November, probably closer to
8 November. I can't pinpoint it but I definitely felt that there
9 was a move away from that relationship.

10 Q. Was it a formal meeting that you and he had at the noon
11 break during the November trial of Ebsary or was that a
12 more friendly discussion between the two of you?

13 A. We were in his office. We were in...not in his office, but
14 there is a conference room.

15 Q. Yes.

16 A. That's where we had the meeting.

17 Q. Sharing lunch.

18 A. I don't think we shared lunch, no.

19 Q. And was it a friendly meeting and discussion between the
20 two of you?

21 A. Seemed to be friendly. We weren't at each other throats.

22 Q. Did you put to him, "Look, Mr. Edwards, I want to find out
23 who is directing this case? Is it you or is it the
24 Department?"

25 A. No, I didn't put that to him.

1 Q. Well, how did it come about that he denied that he was
2 under any direction whatsoever from the Attorney General
3 regarding how to prosecute Ebsary? What led to that
4 comment or statement in your memorandum?

5 A. It must have been part of the discussion. I can only rely on
6 what's...what's on that page or in that memorandum. As to
7 the exact contents of the conversation, I didn't keep notes of
8 the conversation. Obviously if you start in a meeting, start
9 taking notes people will not...will not be as frank and open
10 with you.

11 Q. But is this a memorandum that you dictated upon your
12 return.

13 A. Fairly soon, yes.

14 Q. Yes.

15 A. Oh, yes.

16 Q. Yes. When the ideas were still fresh in your mind?

17 A. I'm not...yes, they were fresh in my mind, there's not
18 question.

19 Q. So you have recorded that Mr. Edwards denied that he was
20 under any direction whatsoever from the Attorney General
21 in the prosecution of the Ebsary case.

22 A. Uh-hum.

23 Q. And you can't tell me how that comment came about?

24 A. I can't. It may have been as a result of conversation. I may
25 have asked him, and I have a tendency of asking point-

1 blank questions.

2 Q. Yes.

3 A. "Is somebody telling you how to do this?"

4 Q. Yes. In any event, Mr. Edwards made it clear to you that it
5 was his case.

6 A. Yes.

7 Q. Thank you. You say at page 212, Your Honour, last page or
8 last paragraph, bottom of the page beginning, "Wheaton is
9 an experienced..."

10 A. Uh-hum.

11 Q. "...and very competent police officer..."

12 A. Uh-hum.

13 Q. "...who apparently has written a report to the RCMP."

14 A. Yes.

15 Q. Am I right in saying that you have never seen this report
16 allegedly prepared by Wheaton?

17 A. That's correct.

18 Q. Are you aware of the existence of a Wheaton report
19 anywhere in which he makes recommendations regarding
20 the laying of charges and outlines seven or eight major
21 procedural irregularities in the questioning of witnesses?

22 A. There was, I was referred to a report yesterday that seemed
23 to indicate, perhaps not in point form that these are the
24 irregularities, but I think that there was comments as to the
25 witnesses and what was done with the witnesses and how

1 they were questioned.

2 Q. So you're having these discussions with Mr. Edwards in
3 1983 and I'm not aware of any evidence that there was ever
4 a report by Wheaton in 1983 suggesting charges against
5 anyone.

6 A. Well, you would have more knowledge on what's in the
7 Attorney General's file than I would because I didn't get to
8 see any of the Attorney General's file.

9 Q. Or the Commission's record here before these proceedings.

10 A. That's correct, that's correct, sir.

11 Q. What was your source...

12 A. Even though there were requests made.

13 Q. What was your source, Judge Cacchione, of information
14 which caused you to make that statement in your
15 memorandum?

16 A. I can't recall what the source was. I just...I don't know if I
17 had conversation with Staff Wheaton. I don't know if I had
18 conversation with someone involved in the RCMP. I really
19 don't know, Mr.Saunders.

20 Q. Thank you.

21 A. I can assure you that there would have been some basis for
22 making that statement in the memorandum.

23 Q. Might it be that your source was wrong?

24 A. Possible, but given what was happening at the time I chose
25 to believe my source moreso than what I was not getting

1 from the other side.

2 Q. You say, sir, at the middle of page 214 of your
3 memorandum, about seven lines from the top,

4 He, [that being John MacIntyre], ...has attempted
5 to have a complaint laid against Frank Edwards
6 by Seale, [that would be Oscar Seale], ...with the
7 Barristers' Society and has, in fact, had him lay a
8 complaint with the Attorney General regarding
the conduct of the Crown in not vigorously
opposing the reference hearing.

9 A. Yes, sir.

10 Q. What was the source of that information, sir?

11 A. I can't recall what the source was. I...if I did I would give
12 you the answer.

13 Q. I'm not aware of any evidence, Judge Cacchione, of Mr. Oscar
14 Seale making a complaint with anyone regarding Mr.
15 Edwards' conduct at the reference.

16 A. Perhaps you should ask Mr. Coles that.

17 Q. Well, Mr. Edwards will be here to speak to it later in the
18 week.

19 A. Well, Mr. Edwards can speak to it.

20 Q. And Mr. Coles will be another day.

21 A. Certainly.

22 Q. I'm asking you, sir, what your source of information was for
23 that comment?

24 A. I can't recall what my source of information was, Mr.
25

1 Saunders.

2 Q. Do you have any evidence, sir, before this Commission that,
3 in fact, such a complaint was laid by Oscar Seale either with
4 the Barristers' Society or the Attorney General's office with
5 respect to Mr. Edwards' conduct at the reference?

6 A. I have no evidence, I can't call a witness to testify to that.

7 Q. Would it surprise you, Judge Cacchione, to learn that Mr.
8 Seale was very complimentary to Mr. Edwards about his
9 conduct at the reference?

10 A. Yes.

11 Q. It would surprise you?

12 A. Yes, sir.

13 Q. Thank you. Is it correct, sir, that your expenses and Mr.
14 Marshall's expenses for attending the last trial in November
15 of 1983 were paid by the Crown with a cheque to your
16 office, the firm of Lambert and Cacchione?

17 A. There was a cheque to my office, I'm not sure if my
18 expenses were paid in that or not. I'm not sure if that...I
19 recall there were...there was a flight, cost of a flight, cost of
20 accommodations.

21 Q. Yes.

22 A. I'm not sure if that was inclusive of both accounts.

23 Q. You said last day, Judge Cacchione, that in your experience
24 as defence counsel you often had difficulty in convincing
25 your clients of the fairness of the system that they are going

1 up against in Court.

2 A. Yes, sir.

3 Q. You also said that you, as counsel before that Court and
4 within that system, had to believe in the system.

5 A. That's correct, sir.

6 Q. And that notwithstanding the illustration that you gave of a
7 black accused going before a white Judge or a Court
8 composed of twelve white jury members you would try
9 your best to instill that concept of independence and
10 fairness in the mind of your client accused.

11 A. I would certainly try.

12 Q. Yes. And would you agree with me, Judge Cacchione, that an
13 essential foundation of the belief that you and I share in
14 that system to which we have both given about fourteen
15 years in our career depends on trust between Crown and
16 defence and the Judge?

17 A. I don't understand your question. I certainly...there has to
18 be a belief that the system will work.

19 Q. Does there also have to be a belief that, Your Honour, that
20 statements made by one counsel to another, commitments
21 given, undertakings given, will be respected and adhered
22 to?

23 A. Certainly.

24 Q. And does it go hand-in-hand with that, Judge Cacchione,
25 that if one finds that commitments given have been

1 breached or not followed that it tends to sour future
2 relationships between those parties?

3 A. That would be normal, yes.

4 Q. Yes. And may even cloud future dealings between the
5 parties with an air of suspicion or cynicism?

6 A. Yes.

7 Q. Thank you. You spoke yesterday, Your Honour, of disclosure
8 by both Federal Crown and Provincial Crown and you said
9 that in your experience the thoroughness of disclosure or
10 the promptness with which it was given depended upon two
11 things, either the relationship defence counsel has with
12 Crown or the geographical location of the proceedings. Do I
13 have it correctly?

14 A. That's what I said.

15 Q. And you were in defence practise for ten years before your
16 elevation to the bench, sir.

17 A. I was in practise...

18 Q. Eleven years.

19 A. ...eleven years, yes.

20 Q. Yes. I'd like to explore with you the illustrations that you
21 gave yesterday. The first one you said was that in your
22 experience you would sometimes seek production of
23 statements and the answer you would get was that you
24 couldn't have the statement if you intended to use the
25 statement for the purposes of cross-examination.

1 A. That's right.

2 Q. Had you ever taken a statement with that arrangement in
3 place, Your Honour, and then attempted to use the statement
4 in cross-examination of a witness, notwithstanding the prior
5 agreement?

6 A. Prior agreement not to use the statement.

7 Q. Yes.

8 A. In cross-examination. I don't believe that I ever did, sir.

9 Q. Why...

10 A. A statement given by a witness is the first recorded
11 recollection of that witness's testimony.

12 Q. And I would think experienced defence counsel like yourself
13 would want to make the very best use of that kind of first-
14 hand recollection.

15 A. Certainly.

16 Q. And would you ever agree to take a statement from a Crown
17 on the undertaking that you wouldn't use it for the purposes
18 of cross-examination?

19 A. I don't think that I would want my hands tied in that
20 fashion.

21 Q. No, I wouldn't think. The second illustration you gave, Your
22 Honour, was that you would sometimes see an investigator
23 going around with a file that you described I would say
24 about three inches thick and...

25 A. That's right.

1 Q. ...that you were stuck with something far less than that.

2 A. That's right.

3 Q. Yeah. Did you intend to leave the impression with the
4 Commission that you, as defence counsel, have the right to
5 see a police investigator's entire file?

6 A. I have, I felt, as defence counsel the right to see evidence
7 that may exonerate my client. In the situation that I
8 referred to there were a series of photographs that directly
9 pointed the finger at another person committing the offence.

10 Q. Yes, sir.

11 A. I was not allowed to view that particular file. Counsel who
12 took the file over from me, in fact, not only viewed the file
13 but was able to tender into evidence those photographs
14 which resulted in a discharge of the accused at preliminary.

15 Q. I'm happy to hear that. But I just didn't want to have it left,
16 and I didn't think you were leaving the suggestion with the
17 Commission that defence counsel has the right to see a police
18 investigator's entire file.

19 A. Well, if there is something in the file that will point the
20 finger either towards the accused or away from the accused
21 then I think in the interests of fairness his counsel should
22 have access to that information, because it becomes a very
23 subjective thing if you don't have that policy in place as to...

24 Q. Right. I have no quarrel with you.

25 A. ...what the accused gets to see or doesn't get to see.

1 Q. And when one encounters a Crown Prosecutor who declines
2 to disclose that kind of information of which you spoke, I
3 suggest to you that defence counsel has the right to apply to
4 the Judge for disclosure by the Crown of that evidence, sir?

5 A. Has the right under what authority?

6 Q. Well, there is the case of Patterson v. The Queen, Supreme
7 Court of Canada, which talks about disclosure of statements.

8 A. To statements.

9 Q. To defence counsel.

10 A. Statements.

11 Q. Yes.

12 A. We're talking about police files now.

13 Q. No, I'm talking about evidence in the Crown file, whether it's
14 police files or photographs or statements or whatever.
15 Yesterday you spoke in generalities about having the
16 opportunity to see the entire file and now I wish to explore
17 with you the concept of defence counsel applying to the
18 court for access.

19 A. Yes.

20 Q. To information. Is it not a fair statement, Judge, that if
21 defence counsel feels grieved or in an unequal position that
22 the defence can apply to the Court and have the Court
23 decide whether the Crown is obliged to disclose information?

24 A. That would be correct.

25 Q. Thank you. I didn't think you were saying yesterday in the

1 case on the Federal side if, for example, you had been
2 defending a major drug prosecution, that one of my friends
3 for the Department of Justice may have been prosecuting,
4 that you would have been shown the entire investigator's
5 file in your position as defence counsel.

6 A. I've seen on the Federal side flow charts that have been
7 prepared by the investigators indicating the outline of the
8 case, which doesn't obviously form part of the Crown sheet
9 or any information. It's for internal use. I've seen those
10 documents.

11 Q. Yes.

12 A. I would add to what I said yesterday, and I still maintain
13 the position I took yesterday, I would add, however, that in
14 some instances the fault lies not with the prosecutor but
15 with the investigating officer who decides on his own that
16 he will not release certain information to the Crown, and
17 that has occurred where, as recently as a few weeks ago, at
18 the conclusion of a prosecution and the tendering of defence
19 evidence, the Crown is made aware of a rather incriminating
20 statement of which it had no knowledge, and obviously
21 neither did the defence at that stage.

22 Q. Yes.

23 A. So there is...there is that extra factor.

24 Q. And in that example that you have given, Judge Cacchione, I
25 suggest that it's up to the Court to then decide whether that

1 evidence ought to be before it and given to counsel...

2 A. Oh, certainly.

3 Q. ...for the accused. Correct?

4 A. The admission of that evidence is within the Court's
5 purview.

6 Q. Thank you. You said yesterday on the ability of defence
7 counsel to have a look at such things as Crown statements.

8 A. Yes.

9 Q. In the file. Did you detect over the eleven years that you
10 were in practise, sir, an evolution in the process so that
11 things were gradually coming to your attention or being
12 given to you when ten years earlier they were not?

13 A. I wouldn't say an evolution, an evolution that may have had
14 the rollercoaster course.

15 Q. Yes. And would the roller coaster that you describe
16 sometimes depend on the personalities of defence counsel
17 and Crown?

18 A. There is no question.

19 10:15 a.m.

20 Q. Whether we like it or not, personalities clash...

21 A. That's the unfortunate thing.

22 Q. One is apt to get less?

23 A. Certainly.

24 Q. All right.

25 A. Certainly.

1 Q. The incident that you described of going into an office and
2 seeking to transcribe with your recorder what it was that was
3 in the file, was there an opportunity for you to do that
4 privately; that is, in an office so that others wouldn't overhear
5 what you were dictating?

6 A. I did it on many occasions.

7 Q. Yes, so you were...

8 A. Either with the presence of the Crown there or in a room off
9 to the side.

10 Q. You were permitted to do that, sir?

11 A. On certain occasions, yes.

12 Q. And on occasions in acting for accused in other parts of the
13 province, were you able to go and look at the Crown file and
14 see the Crown sheet and see the statements of witnesses in
15 the Crown file?

16 A. Yes.

17 Q. And if they had the facilities with which to provide you with
18 photocopies, did you get the photocopies, if asked?

19 A. Again, depending on the individual Crown Prosecutor. Certain
20 Crown Prosecutors would provide photocopies of the
21 statements, perhaps the Crown sheet. There is an unwritten
22 rule, which I agree with, that the Crown sheet cannot be used
23 for purposes of cross-examination, the Crown sheet being the
24 police officer's synopsis of the evidence.

25 Q. Yes, sir.

1 A. And there's a good basis for that. There is no rule, however,
2 that says that you cannot use a statement given to the police
3 by a witness for purposes of contradicting that witness.

4 Q. I've never heard of such a principle, either, and I, like you,
5 would be surprised if any defence counsel would accept a
6 statement on that basis.

7 A. Obviously would be doing a disservice to his client.

8 Q. I should think.

9 A. If he or she accepted that premise.

10 Q. Right. Were you able to get material from Crown file,
11 including such things as statements when you practiced
12 defence work in Truro and New Glasgow and those areas?

13 A. Truro, Mr. Kaulback was the prosecutor there at the time that
14 I was there and his approach was you can see whatever is in
15 the file. The prosecutor in Pictou County was somewhat
16 different. He would let you see what he felt that you should
17 see. That, as I understand it, continues to today's date, with
18 the requirement of applications to court so that materials be
19 made available to the defence.

20 Q. But there is that ability, Your Honour, you'll agree, that if
21 defence counsel feels that he needs material and hasn't
22 received it, he goes to the judge and makes application for it.

23 A. Certainly.

24 Q. Thank you. The third illustration and the final illustration
25 you gave yesterday was the one most alarming to me, and as

1 I recollect, you said that you were in a preliminary hearing,
2 I'm sorry, a pre-trial conference before a different judge than
3 took the trial.

4 A. Yes.

5 Q. And at the pre-trial conference, you put it to the Crown in an
6 all-encompassing way, and correct me if I'm misstating this,
7 that you wanted to have from the Crown all oral or written
8 communications by the accused which the Crown might use?

9 A. That's correct.

10 Q. That was before a different pre-trial judge than the one who
11 conducted the trial.

12 A. Yes, it was.

13 Q. What was the charge, sir?

14 A. Attempted murder.

15 Q. And in that case, did I understand you to say that it was only
16 at the end of the proceedings that Crown counsel sought to
17 introduce a statement made by the accused, that would be
18 your client.

19 A. That's right, oral statement.

20 Q. To the effect, "I hope the bitch dies."

21 A. I think that was the gist of the statement, yeah.

22 Q. Yeah, and as you said to Mr. Justice Evans, a fairly damning
23 statement by the accused in those proceedings.

24 A. I would think so, on a charge of attempted murder.

25 Q. I should think you would have felt outraged.

1 A. I was.

2 Q. Ambushed.

3 A. I guess you could say that I felt ambushed.

4 Q. Betrayed.

5 A. I wouldn't say betrayed.

6 Q. Did you make complaint to the trial judge, sir?

7 A. I, yes, I indicated that we were not aware that this statement
8 was in the Crown's possession and that there had been
9 discussion at the pre-trial with regards to statements the
10 Crown might tender.

11 Q. So you made that known to the trial judge in open court
12 during the proceedings?

13 A. That was my understanding, in the absence of the jury.

14 Q. Of course. But can I hear it from you that you did make it
15 known to the trial judge in court that you felt...

16 A. My recollection is...

17 Q. Ambushed.

18 A. I think that there were, in fact, two accused, two counsel, and
19 I recall making the comment that we're not aware of this and
20 the matter being recessed for some time so that we would be
21 appraised and be given copies of the notes taken by the
22 investigating officer.

23 Q. Did you make the application vigorously, sir?

24 A. Knowing my temperament, I probably was vigorous.

25 Q. And you clearly outlined to the trial judge that that was

1 something entirely different than you had been led to believe
2 during the pre-trial conference and your dealings with the
3 Crown, correct?

4 A. That we were unaware that the statement existed.

5 Q. Yes, and did I also understand you to say yesterday that
6 there had been so many errors, in your respectful view,
7 during the conduct of the trial that you thought you could
8 have it overturned on appeal in any event?

9 A. Yes, and that's what happened.

10 Q. Quite apart from this incident with the Crown?

11 A. There was that incident with the Crown. There was also a
12 case that had been argued in the Supreme Court of Canada
13 that was, that had been argued. We were awaiting a decision,
14 a case of Ancio v. The Queen.

15 Q. Yes.

16 A. That changed the intent required on an attempt murder
17 charge. So we felt fairly confident on that issue as well.

18 Q. In your factum, Judge Cacchione, with the Court of Appeal, did
19 you urge upon the Court of Appeal that you had been misled
20 by the Crown?

21 A. I don't believe I did, no.

22 Q. Why not?

23 A. Because if you're relying on a Supreme Court of Canada
24 decision that changes the law that assures you a new trial,
25 why bring that matter up?

1 Q Did you make complaints...

2 A. This was one of those situations, excuse me for interrupting,
3 Mr. Saunders, but this was one of those situations, as I
4 understood it, where it quite possibly was a case where the
5 investigator did not advise the Crown until the conclusion of
6 the trial, or the conclusion of certain evidence of the existence
7 of that statement. I would speculate on that. But for a Crown
8 to give an undertaking that there are no statements that
9 they're aware of and then to stand up mid-trial and say "We
10 have a statement we'd like to introduce," would lead to two
11 conclusions. One that they weren't frank at the pre-trial; or
12 two, that, in fact, they were taken by surprise as well.

13 Q Well, I want to know from you, Judge Cacchione, whether you
14 thought you were misled by the Crown Prosecutor in the
15 conduct of that case?

16 A. I felt misled, yes.

17 Q And did you put that in your factum to the Court of Appeal or
18 not?

19 A. I don't believe I did.

20 Q And now are you saying you're not sure whether it was a
21 deliberate act on the part of the Crown in knowing of that
22 information and withholding it from you, or whether the
23 Crown didn't know himself or herself, not being told by the
24 investigator?

25 A. I have no idea. I have said it could be one of those situations.

1 Q. Did you ever pursue it with the prosecutor?

2 A. No, it certainly affected our relationship.

3 Q. I would think. Did you ever complain to, for example, Mr.
4 Herschorn, Director of Prosecutions in the A. G.'s Department?

5 A. I don't believe I ever complained formally.

6 Q. Did you ever consider laying a complaint with the trial judge?

7 A. No.

8 Q. Did you ever consider laying a complaint with the Discipline
9 Committee of the Barrister's Society?

10 A. No.

11 Q. Or the Administration of Justice Commission within the
12 Barrister's Society?

13 A. No, I did not.

14 Q. Is there an association of defence counsel within the Halifax
15 area, Judge Cacchione?

16 A. Not to my knowledge, Mr. Saunders. There was at some point
17 an attempt to establish a criminal trial lawyer's association,
18 but that never really got underway.

19 Q. Isn't it a fact, Your Honour, that you never complained to
20 Martin Herschorn or Gordon Gale at the Attorney General's
21 Department about lack of disclosure by Crown?

22 A. I... No, that's not a fair statement. I did complain to Mr.
23 Herschorn in his office. I've never laid a formal complaint,
24 written a letter indicating this is the situation as I saw it. I
25 certainly have had many conversations with Mr. Herschorn.

1 My personal feelings were that he would not do anything
2 anyway, so why bother?

3 Q. Have you ever met with Gordon Gale?

4 A. I don't think I've ever met with Gordon Gale.

5 Q. This incident that you've described in the second degree
6 murder charge, you never complained about that to anyone
7 within the Attorney General's Department?

8 A. I'm sorry, the...

9 Q. The statement coming out at the end of the trial allegedly
10 from the mouth of your client...

11 A. The attempted murder?

12 Q. Yes.

13 A. No, I didn't.

14 Q. Volume 32, Your Honour, page 262, which is a letter from
15 yourself to the Attorney General of the day.

16 A. Yes.

17 Q. Is that the first written communication between yourself and
18 the Department notifying them of your retention by Donald
19 Marshall, Junior?

20 A. I believe it is, sir.

21 Q. And you ask for the opportunity to discuss with the Attorney
22 General the possibility of a public inquiry and its timing?

23 A. Yes.

24 Q. And I suggest that that letter was acknowledged promptly by
25 the Attorney General with his letter back to you of September

1 27th?

2 A. Yes, it was.

3 Q. And in that letter, Mr. How makes it clear to you that he has
4 passed over your request to his deputy?

5 A. That's correct.

6 Q. And then, as I recall, you respond to that letter again and
7 provide the Attorney General with a press release, and that's
8 found at page 264, that is your letter at page 264?

9 A. Yes, that's correct.

10 Q. Then you hadn't heard anything for about three weeks and
11 you sent a reminder to the Attorney General by letter dated
12 October 17th, which is at page 269.

13 A. Yes, that's correct.

14 Q. And two days later, you get a letter from the Attorney
15 General apologizing and saying that he had thought that the
16 matter was being tended to. He has checked with his deputy,
17 who didn't have the opportunity to meet with you and he's
18 asked that that be done immediately?

19 A. Yes.

20 Q. And then, as I recall, Mr. Coles did contact you on October the
21 24th, and you'll see at page 272 his memorandum of the
22 discussion between the two of you? You'll see in the second
23 paragraph his confirmation of the telephone call?

24 A. Yes.

25 Q. And it's a fair comment, I suggest, sir, that you made it clear

1 to Mr. Coles that you would prefer to deal personally and
2 directly with the Attorney General.

3 A. That was the gist of the letters that I had sent to the Attorney
4 General.

5 Q. Yes, and he told you that if you did not want to meet with
6 him, that he would so inform the Attorney General?

7 A. Yes, I don't see why he had to inform him. The Attorney
8 General had my letter saying I didn't want to meet with Mr.
9 Coles.

10 Q. But this is a discussion that you and he had again on October
11 the 24th where he was stating his preparedness to meet with
12 you and wondering if you would. You told him that you
13 would prefer to meet again directly with the Attorney
14 General and he said he would pass it on.

15 A. That's correct.

16 Q. And is it correct that within about ten days, Attorney General
17 How was elevated to the bench and Mr. Giffin took on the
18 portfolio.

19 A. I can't recall. I believe it was in November some time that
20 Mr. Giffin became the Attorney General.

21 Q. Yes. I'll get you to turn to page 325 of the same volume, sir.

22 A. I have that.

23 Q. And this is in your handwriting and is your note dated
24 November 15, 1983?

25 A. Yes, I've identified that.

1 Q. Yes, and so certainly as of that date, at the very latest, Mr.
2 Giffin was Attorney General and you were seeking to meet
3 with him.

4 A. Yes.

5 Q. Who called whom, sir? Did you contact Mr. Giffin and ask to
6 meet with him?

7 A. I can't recall, sir, and the note is really not clear as to whether
8 or not it was a call to or from.

9 Q. Am I right in saying that the intent of the meeting was that it
10 would be a one-on-one session, you and he meeting privately
11 to talk privately?

12 A. Yes.

13 Q. And you state in your note, "Will meet privately. No
14 reporters."

15 A. That's right.

16 Q. And the time of the meeting was set for Wednesday,
17 November 23 at two o'clock.

18 A. Yes.

19 Q. Was that in your office or a different office on the second
20 floor of that building?

21 A. I don't recall where the meeting was to take place.

22 Q. All right.

23 A. I don't think it would have been on the second floor because,
24 at that point, the second floor was being occupied by a
25 Commission on, I'm not sure if it was on higher education or

1 there was a commission, the Coffin Commission was occupying
2 those premises, and it was only in April or May that the
3 Campbell Commission took over that space. So I would
4 imagine it would have been either my office or, more likely,
5 Mr. Giffin's office.

6 Q. Did Mr. Giffin make it clear to you that he wanted the meeting
7 to be private, just between the two of you?

8 A. Yes.

9 Q. Did he make it clear to you that he did not want it known to
10 reporters?

11 A. He said he didn't... Well, according to the note, "No reporters."

12 Q. Yes.

13 A. No reporters present.

14 Q. Did you take from that that he didn't want it known that you
15 and he were meeting on November 23, 1983 at two o'clock in
16 the afternoon?

17 A. I took it from that that he didn't want reporters around at our
18 meeting.

19 Q. And did you conclude that were the reporters to be aware of
20 a meeting on November 23 at two o'clock, they were more
21 than likely to be around?

22 A. Yes, certainly. I mean if they know the date and place,
23 they're be there. I don't believe that there's, Mr. Giffin said in
24 his evidence, as I recall it, that he heard on the radio
25 something about there would be a meeting and, therefore,

1 called me and changed the date and time of the meeting.

2 Q. Yes, he did say that.

3 A. And I can't recall speaking to a reporter. I would imagine if it
4 was on the news that I did speak to a reporter. I don't recall
5 saying that a meeting would take place at such and such a
6 place and at such and...

7 Q. May you well have disclosed to reporters the date and time of
8 a meeting?

9 A. I would doubt it very much, in light of that note on the file,
10 that no reporters be present.

11 Q. Is it possible, sir, that you did indicate in some way the date,
12 time, and place of the meeting?

13 A. I don't think it is, Mr. Saunders.

14 Q. How else would Mr. Giffin have heard on a radio broadcast
15 that he was meeting with you on Wednesday, November...

16 A. That's the extent of what he...

17 Q. 23rd at two o'clock?

18 A. Probably heard, that he was meeting with me. I don't believe
19 that there's any indication as to time and place of the
20 meeting.

21 Q. His evidence is that he heard on the radio where and when he
22 was meeting with you.

23 A. Well, I don't know what his evidence was. My recollection,
24 from what I've read in the paper, obviously, was that he,
25 someone had told him that they had heard on the radio that

1 there was a meeting scheduled. I'm not sure if he want to the
2 extent of saying date and time and place. I can assure you,
3 Mr. Saunders, that more than likely, as I said yesterday, lots
4 of reporters were calling and asking lots of questions.

5 Q. And for a time, you were trying to avoid them.

6 A. [Nods "Yes".]

7 Q. Not replying to telephone calls.

8 A. Uh-huh.

9 Q. And not wanting them around your office.

10 A. Yeah, but I think that if we finally reached the stage where
11 the Attorney General was prepared to meet with us...

12 Q. And you had.

13 A. I wouldn't jeopardize it by saying, "Listen, guys, be at his
14 office at two o'clock on the 23rd of November." Because that
15 certainly would undermine everything.

16 Q. I would think.

17 A. And that's the basis why I'm saying that I don't think that I
18 made it known to the reporters as to where and when the
19 meeting was to take place.

20 Q. Is it possible, sir, that you did?

21 A. Anything is possible. I doubt very much, though, Mr.
22 Saunders, that I would have made date and time and place
23 known to the media.

24 Q. In any event, Judge Cacchione, I take it that the Attorney
25 General made it clear to you that he did not want anyone to

1 know of your meeting with him.

2 A. He said, "No reporters present." At least that's what the note
3 says.

4 Q. Did he call you on Monday, November 21st and say, "If you
5 want to meet with me, be here in five minutes."

6 A. Something to that effect, yeah.

7 Q. And then you and Mr. Lambert went to his office?

8 A. That's correct.

9 Q. And met with him and his deputy.

10 A. That's correct.

11 Q. Instead of a one-on-one meeting, it had become a four-person
12 discussion.

13 A. That's correct.

14 Q. Did Mr. Giffin, as Attorney General, seem upset when he
15 called?

16 A. Certainly one could take it from his comment that, "Get here
17 now if you want to meet," that he would have been upset.

18 Q. Did you know that the reason for his being upset was that he
19 had heard that it was out on the street that you and he were
20 meeting on the 23rd?

21 A. No, sir.

22 Q. Did he tell you that?

23 A. Ummm...

24 Q. Did he say anything at all to you about that?

25 A. Not that it was on the street. That he had heard through the

1 media.

2 Q. Yes.

3 A. That there was a meeting planned.

4 Q. He told you that.

5 A. I believe he did, sir.

6 Q. All right, and did you take that...

7 A. And that's as a result of that that we went over to his office.

8 Q. Exactly. One led to the other.

9 A. Yes, sir.

10 Q. All right. At page 281, Judge Cacchione, you have a note that
11 I would like you to explain to me. Is this in your
12 handwriting?

13 A. Yes, it is.

14 Q. Dated November 23, 1983, and could you just read it to me,
15 please? The photocopy I have is...

16 A. It says,

17 Mike Harris re conversation with Mark
18 MacGuigan. MacGuigan (1) recommends
19 investigation into city police; (2) will pay
Aronson's bill if no one else pays.

20 Q. So do I take it that this is a note that you made to confirm a
21 conversation you had with Michael Harris where he relayed
22 to you information that he obtained from the then Federal
23 Minister of Justice Mark MacGuigan?

24 A. That's accurate.

25 Q. Did Mr. Harris call you?

1 A. I would think so. I'm not sure. I can't recall meeting with
2 him. I would imagine it was a telephone call.

3 Q. Was Mr. Harris providing you with information as to the
4 federal position on this?

5 A. I think that was the only contact we had. He had been in
6 Ottawa and had met with Mr. MacGuigan.

7 Q. And it was your clear understanding that Mr. MacGuigan
8 undertook to pay Steve Aronson's account, if no one else
9 would.

10 A. That's what the note says.

11 Q. All right. Was there a partnership agreement executed
12 between or among Michael Harris and Mr. Aronson and Junior
13 Marshall?

14 A. Yes, there was, and I filed it as registered agent.

15 Q. You were the registered agent of that partnership?

16 A. That's correct.

17 Q. Does it still survive, to your knowledge?

18 A. I'm not sure if it's been renewed or not, sir.

19 10:37 a.m.

20 A. That was done in order to protect Junior's interests so that if
21 anything came out of this he would at least have some
22 interest in it.

23 Q. Distribution monetarily of any book and movie rights, am I
24 correct?

25 A. Yes, that's correct.

1 Q. Thank-you.

2 A. And that was common knowledge that it had been filed and
3 was there. Junior Isiah and Associates was the name of the
4 company.

5 Q. Yes. Mr. Giffin, made it clear to you, did he not, that he was
6 against a public inquiry into the circumstances of Mr.
7 Marshall's arrest and incarceration while the Ebsary
8 proceedings were still ongoing?

9 A. Yes.

10 Q. And you said last day that you understood the reason
11 behind that statement by the Minister.

12 A. Yes, I did say that.

13 Q. I take it that you would agree that one would have to be
14 awfully careful that whatever kind of inquiry there was into
15 the circumstances of Mr. Marshall's arrest and incarceration
16 would not trespass on the rights of an accused like Ebsary?

17 A. I agreed to that yesterday.

18 Q. Thank-you. And did you ever think, sir, that the
19 proceedings involving Mr. Ebsary would last three and a half
20 years and continue through September of 1986?

21 A. I didn't think that we would be faced with three trials on
22 the same issue.

23 Q. Now, in January of 1984 you requested information under
24 the Freedom of Information Act from the Department of the
25 Attorney General.

1 A. Yes.

2 Q. And your request was turned down by both the then deputy
3 an the then Attorney General of the day.

4 A. Yes, the deputy, as I recall it, the deputy denied the request.
5 There was an appeal procedure to the Minister.

6 Q. Yes.

7 A. Whom I understood would do a review of the request and
8 the materials.

9 Q. Yes.

10 A. And that was denied.

11 Q. And then they indicated in a communication to you that you
12 had a further and final right of appeal to the House of
13 Assembly.

14 A. Yes, that was what they indicated to me.

15 Q. Yes.

16 A. As I understood it no one had ever done that before.

17 Q. Yes.

18 A. As I've read in the materials, I guess, the Attorney General
19 didn't even both reviewing the materials. He just had
20 somebody write a letter.

21 Q. Yes.

22 A. And say, "Deny him the request."

23 Q. Yes. Now, I take it that that is really the extent of your
24 dealings with the Department in the month of January of
25 1984 and there then followed the meeting by the committee

1 of concerned citizens with the Premier of Nova Scotia,
2 correct?

3 A. There is a letter on file here in February sometime...

4 Q. Yes.

5 A. ...that Father Comeau and those other people met with the
6 Premier, yes.

7 Q. And, I'll ask you to turn to that now, please, Your Honour.

8 A. Yes.

9 Q. It's at page 326 of the same book.

10 A. I have that.

11 Q. And this is a letter from Father Leger Comeau to the
12 Premier dated February 15, '84, in which he thanks the
13 Premier for the opportunity to meet with the members of
14 the committee on Friday last.

15 A. Yes.

16 Q. And, I draw your attention to the second paragraph of the
17 letter. It is correct, is it not, that Junior Marshall was
18 invited to attend the meeting, as well, with the Premier?

19 A. No.

20 Q. That is not correct. You'll see the last sentence, "Mr.
21 Marshall had decided not to attend himself."

22 A. Yes, but it says, "My request for the meeting followed a
23 lengthy discussion amongst our group. On our invitation Mr.
24 Cacchione attended part of our meeting."

25 Q. Yes.

1 A. "Mr. Cacchione had been asked by Marshall to speak on his
2 behalf at the meeting."

3 Q. Yes.

4 A. "Mr. Marshall had decided not to attend himself."

5 Q. Yes.

6 A. That referred to the meeting between myself and Father
7 Leger, Dean Charles, Mr. Mitchell and Mr. Shaw.

8 Q. All right.

9 A. I don't believe that Mr. Marshall was ever invited to meet
10 with the Premier.

11 Q. Were you part of the group that met with the Premier?

12 A. No, sir.

13 Q. All right. Did you seek to be part of that committee meeting
14 with the Premier?

15 A. No, sir, I felt that it probably would be better that I not be
16 there.

17 Q. Yes. It was then on March the 5th of 1984 that the Premier
18 announced the establishment of the Campbell Commission.

19 A. Yes, sir.

20 Q. And, on the next day you received a letter from Attorney
21 General Giffin advising you of that, a letter dated March 6th,
22 1984.

23 A. Yes, sir.

24 Q. And then as I recall your evidence yesterday, after Justice
25 Campbell had some communications with you and other

1 solicitors for the Department, he indicated that he had
2 engaged Mr. MacIntosh as counsel for the Commission, and
3 that he himself would be out of the country between March
4 28th and May the 10th.

5 A. Yes, sir.

6 Q. But he did before departure recommend that the
7 government make an interim payment to Junior Marshall to
8 the extent of \$25,000.

9 A. I believe it was before his departure. The monies, I think,
10 came in certainly before May.

11 Q. Yes. Let's just turn to Volume 33, page 386. Do you have
12 that, Your Honour?

13 A. I do.

14 Q. Yes. And this is a statement made by the Attorney General
15 in the legislature.

16 A. April 3, yes.

17 Q. April 3, '84, in which he indicates the government's
18 acceptance of that interim recommendation.

19 A. Yes.

20 Q. And the payment was made to Junior Marshall, \$25,000.

21 A. That's correct.

22 Q. April 13, '84.

23 A. That's correct.

24 Q. And then upon the return of Justice Campbell to Prince
25 Edward Island from his vacation out of the country I guess

1 the next step was the meeting among many of you on May
2 16th, '84, and your notes and Mr. Endres' notes confirm the
3 extent of the discussions at that meeting.

4 A. That's correct.

5 Q. All right. And this, I suggest, was a meeting convened by
6 Commission counsel, Mr. MacIntosh.

7 A. Yes, it was.

8 Q. And, you had asked him to prepare an agenda of that
9 meeting and he had.

10 A. I didn't ask him to prepare anything.

11 Q. Are you clear on that, Your Honour?

12 A. I don't recall that, I recall receiving an agenda. I don't think
13 I made a request for the agenda. Okay, I do, April 11th.

14 Q. Yes, do you have that letter?

15 A. Yes. That I think came as a result of our discussions,
16 telephone discussions, MacIntosh and I.

17 Q. Yes. The April 11 letter of which you speak is at page 396.

18 A. Yes, it is.

19 Q. And in the third paragraph you say...

20 A. "If possible, would appreciate a written agenda

21 Q. ...you'd appreciate a written agenda?

22 A. Yeah.

23 Q. Yeah.

24 A. Yeah.

25 Q. So, you solicited that from Mr. MacIntosh and he prepared

1 it.

2 A. I think as a result of our conversation. We were talking
3 about what's going to be discussed.

4 Q. Yes.

5 A. And I figured we might as well have it on paper.

6 Q. Yes. So, you asked him to do an agenda and he did.

7 A. Yeah.

8 Q. And the meeting was convened to review the points of the
9 agenda, is that right?

10 A. Yes.

11 Q. And at that meeting you wondered out loud why so much
12 time and expense be taken with an inquiry and why not
13 negotiate the matter if it could be done between the parties.

14 A. Given what I had heard at the meeting, yes.

15 Q. Yes. And, they said "Why don't you make a proposal to us?"
16 That is Mr. Coles or Mr. Endres or both said, "Well, why don't
17 you make a proposal for our consideration."

18 A. Probably happened as a result of my saying that why bother
19 spending all this money on the inquiry, let's negotiate this.

20 Q. Yes. And that's when you and Mr. Endres entered upon
21 your discussions one on one to try and negotiate on behalf of
22 Junior Marshall.

23 A. Yeah, it was as a result of the position taken by Mr. Coles
24 that the inquiry could not look at the circumstances prior to
25 incarceration. That it was felt that we should negotiate the

1 matter, had...it appeared at least that Mr. MacIntosh, and
2 I'm not sure if he was speaking for the Commission or not,
3 but it appeared that he seemed to agree that the scope
4 should be broader than that outlined in the order-in-council.
5 Mr. Coles' position was that it shouldn't be, and it was clear
6 to me at that point that we would get into wranglings over
7 exactly how much scope that commission did have.

8 Q. And from that day forward you and Mr. Endres embarked
9 on your negotiations of the settlement.

10 A. Yes.

11 Q. And from May 16 until August 7 when it was finally
12 resolved you and he had, I take it, several meetings and
13 communications.

14 A. Telephone conversations and meetings.

15 Q. And arrived at the final settlement.

16 A. Yes.

17 Q. It was effected and confirmed on the 7th of August of 1984.

18 A. I...there was a...yes. My letter of the 7th.

19 Q. Yes.

20 A. Page 49.

21 Q. And that's the confirmation that you sent of the settlement.

22 A. Yes. And that...that was a confirmation of the settlement. I
23 think it was sometime in September that the releases were
24 signed.

25 Q. Yes. Now, you said last day, Judge Cacchione, that you

1 thought the government had established the Campbell
2 Commission as a way to take the pressure off.

3 A. Yes.

4 Q. In fact, sir, you were the one who was seeking an inquiry
5 and compensation on behalf of your client, Junior Marshall.

6 A. I was seeing a public inquiry.

7 Q. And you were also seeking compensation.

8 A. Yes. Yes, sir.

9 Q. And you were also seeking reimbursement of legal costs.

10 A. Yes, sir.

11 Q. Those were the three things that you were seeking on behalf
12 of your client.

13 A. That's correct.

14 Q. Did you seriously expect the government of Nova Scotia to
15 issue a blank cheque to your client?

16 A. No, sir.

17 Q. All right. So, that there had to be some process put in place
18 to determine what was a reasonable figure of compensation.

19 A. I would agree with that.

20 Q. And that process might be by way of formal Royal
21 Commission such as Justice Campbell's or it might be by way
22 of negotiation between counsel for the parties.

23 A. Yes.

24 Q. All right. You said that you recognized that a figure of \$5-
25 million as put forth by Junior Marshall was not reasonable.

1 A. Yes, sir.

2 Q. You said that you recognized that a figure of \$1-million
3 based on the New Zealand precedent might not be
4 reasonable because, as I heard you, there had been evidence
5 in that case where the gentleman had lost property or
6 money as result of his incarceration.

7 A. Fairly large farm actually. Yes.

8 Q. Yes. And so you recognized that that figure was not
9 appropriate or reasonable.

10 A. Yes.

11 Q. And so then you presented the government with a figure of
12 what you thought was reasonable, that being \$550,000.

13 A. Yes, sir.

14 Q. Now, you said that you were not aware of the
15 communications between Mr. Coles and Mr. MacIntosh as
16 Commission counsel.

17 A. No, sir.

18 Q. I take it that you did not copy Mr. Coles with your
19 correspondence with Mr. MacIntosh either.

20 A. No, sir. I...just to go back a few questions, Mr. Saunders. I
21 still maintain that the reason Campbell Commission was
22 called was to, in fact, take the heat off the government. Yes,
23 I did request a public inquiry. The inquiry that was called
24 under the auspices of that order-in-council was so restricted
25 that it did not come into what I saw as being a full public

1 inquiry. The inquiry that I envisaged certainly was in the
2 format that is presently underway.

3 Q. An inquiry into the circumstances leading to the arrest and
4 conviction.

5 A. That's correct.

6 Q. Whereas Mr....

7 A. And then a determination from there of the compensation
8 issue.

9 Q. Mr. Justice Campbell's Commission was to determine the
10 issue of compensation.

11 A. Yes, as a result of...

12 Q. Marked from the period of incarceration.

13 A. That's right.

14 Q. Yeah.

15 A. You accept as a given that he spent ten years, ten months in
16 a federal institution.

17 Q. Yes.

18 A. And then work your way forward.

19 Q. Yes. And did not Mr. Justice Campbell say in a letter to you
20 that he might entertain representations by interested
21 counsel as to the scope of his inquiry.

22 A. Oh, certainly, certainly he did.

23 Q. Right. And you just never got to that stage, I suggest,
24 because you and Reinhold Endres were negotiating this
25 arrangement on behalf of Junior Marshall.

1 A. Because we knew that it was going to take at least, you
2 know, a year or two years of legal...

3 Q. Yes.

4 A. ...wranglings before we could determine the issue of the
5 scope of that inquiry. And, because during that period I
6 didn't know if Mr. Marshall would survive. That was the
7 basis for entering into those negotiations, sir.

8 Q. Now, Mr. Justice Campbell had the authority under the
9 Public Inquiries Act to subpoena witnesses to appear before
10 him.

11 A. Yes, he did.

12 Q. Yes. And wasn't it a fact, Judge Cacchione, that you first
13 took the position that Junior Marshall would lead evidence
14 on compensation.

15 A. Yes.

16 Q. That was the first position you took.

17 A. Yes.

18 Q. And then you changed that position and sought the evidence
19 to be led by counsel for the Commission.

20 A. That's right.

21 Q. With an opportunity for you to lead other or additional
22 evidence.

23 A. Yes.

24 Q. As you saw fit.

25 A. Yes.

1 Q. And Mr. Coles sided with your position that it ought to be on
2 the shoulders of Commission counsel to lead the evidence
3 and if you thought something additional should be put, you
4 could do so.

5 A. That's correct.

6 Q. All right. In preparing for giving evidence at this inquiry,
7 Judge Cacchione, did you have regard to Mr. Coles' letter of
8 May 8, 1984, which is in Volume 33, page 407?

9 A. I...yes, I read this before testifying.

10 Q. Yes, sir, and at page 4...this is a letter from Mr. Coles to Mr.
11 MacIntosh outlining Coles' views on the procedure that
12 might be put in place during such an inquiry of
13 compensation.

14 A. Yes.

15 Q. And at page 3 of his letter, which is at page 409 of the book,
16 is it not correct that Mr. Coles suggest that Junior Marshall's
17 parents be given an opportunity to testify at the hearing
18 with respect to their son's compensation?

19 A. Yes, sir.

20 Q. And, does it also appear at the bottom of page 409, Mr.
21 Coles' suggestion that there be evidence led of Mr. Marshall's
22 incarceration during the eleven years and job opportunities
23 lost and then at the top of page 410 that Mr. Marshall may
24 wish to present testimony by his parents and others, "Who
25 might be able to attest to any potential talents and skills

1 which he manifested, et cetera."

2 A. Yes, sir. He also states in that letter, "In my opinion the
3 purpose of the scope of this inquiry is limited to the matter
4 of compensation."

5 Q. Yes, he doesn't. And he made that clear to you at the
6 meeting on May 16th.

7 A. Yes.

8 Q. All right. Now.

9 A. But that was May 16th. This letter was May the 8th.

10 Q. Yes. And you were having communications with
11 Commission counsel yourself, Mr. MacIntosh, right?

12 A. That's right.

13 Q. Right. You said yesterday, Judge, that you felt yourself
14 inexperienced in negotiating civil proceedings.

15 A. Yes.

16 Q. Did you ever consider having your partner, Mr. Lambert,
17 take on this task of negotiating with Mr. Endres?

18 A. Mr. Lambert was assisting me. I never asked him to take the
19 matter of the negotiations...

20 Q. Did you ever consider it?

21 A. I don't think we did.

22 Q. Did you ever consider asking senior counsel in the city to
23 take on this task on your behalf of negotiating Junior
24 Marshall's compensation with the government?

25 A. No, sir, I didn't. I can tell you that during the course of my

1 handling the Marshall file I was contacted by one counsel in
2 the Province of Nova Scotia who offered some assistance.

3 Q. Yes. But...

4 A. That was it.

5 Q. ...I'm asking you whether you ...

6 A. No, I didn't. I didn't seek out...

7 Q. The assistance of someone else.

8 A. No, sir.

9 Q. All right. At page 481, Your Honour, if I could get you to
10 turn to that.

11 A. Yes, sir.

12 Q. And this is a note made, as the evidence will later show, by
13 Mr. Endres of a discussion between the two of you on July
14 11th. And did you and he meet at places other than your
15 office or his to hammer out this negotiation?

16 A. Mr. Endres? I don't recall meeting at any other location, sir.

17 Q. All right. Mr. Endres notes "Was hoping that Ottawa would
18 pay Aronson's account, but they haven't come through,
19 wants to know if we would..."

20 A. Yes.

21 Q. "...work on Ottawa."

22 A. Uh-hum.

23 Q. Did you disclose to Mr. Endres that you were disappointed in
24 the fact that the Federal government was not coming
25 through in the payment of Mr. Aronson's account?

1 A. Yes, sir.

2 Q. And did you ask whether the Province of Nova Scotia would
3 seek to recover that?

4 A. I asked if he...if they would work on Ottawa to pay Mr.
5 Aronson's account.

6 Q. Why did you disclose to Mr. Endres your disappointment
7 that the Federal government was not looking after Mr.
8 Aronson's account?

9 A. Naive I guess.

10 Q. I'd get you to turn to page 483, I'm sorry, page 482, which is
11 a note, I believe, in your handwriting dated 11 July 84.

12 A. Yes.

13 Q. And is this a note that you made following your telephone
14 discussion with Reinhold Endres?

15 A. I would think it was a note that was made probably as the
16 conversation was going on.

17 Q. And you said that you were looking for Aronson's account of
18 \$80,000 and...

19 A. Yes.

20 Q. ...a net of between \$300-320,000 to Donald Marshall Junior.

21 A. Donald Marshall, yes.

22 Q. Yeah. Why did you indicate to Mr. Endres that you were
23 prepared to take a range, a net range of between \$300 and
24 \$320,000 for Junior Marshall? Why didn't you just say to
25 him the bottom line as far as Junior Marshall is concerned is

1 \$320,000 net?

2 A. I don't know, sir. Probably because those figures would
3 have been...to give them a range within which to work. I'm
4 not sure why I didn't just say three hundred and twenty or
5 four hundred thousand and Junior would cover Mr.
6 Aronson's fees.

7 Q. At page 344 of the book, Your Honour, you have a letter
8 from the Attorney General to yourself dated March 6th,
9 1984.

10 10:59 a.m.

11 A. Yes, sir.

12 Q. And on the last page of that letter, which is at page 346, Mr.
13 Giffin reviews with you the opportunity that Junior Marshall
14 might avail of himself in taking a plumber's apprentice
15 training program.

16 A. Yes.

17 Q. Whereby he would be given credit of the seventeen
18 hundred and ten hours that he had earned in the institution.

19 A. That's correct.

20 Q. Towards the eight thousand dollars...eight thousand credit
21 hours required to complete the journeyman course.

22 A. That's correct.

23 Q. Did Junior Marshall ever avail himself of this opportunity
24 expressed by Mr. Giffin?

25 A. No, sir.

1 Q. No.

2 A. No, sir, not to my knowledge he didn't.

3 Q. At page 397, it's a letter from Mr. Nantes to yourself dated
4 April 11, 1984, as a follow-up to Mr. Giffin's, offering to
5 meet and wondering if Mr. Marshall intended to take it on.

6 A. Yes, sir.

7 Q. And I take it in your absence, I believe on vacation, your
8 partner, Mr. Lambert, wrote to Junior Marshall a letter of
9 April 13, 1984, at page 400. Mr. Lambert supplies the
10 \$25,000 interim payment and also includes a copy of Mr.
11 Nantes' letter.

12 A. That's correct, yes.

13 Q. Wondering if Mr. Marshall was interested.

14 A. Yes.

15 Q. Thank you. And can I get you to turn to page 402, and are
16 these notes of you, Judge Cacchione, taken following a
17 meeting that you had with Mr. Nantes where this
18 opportunity was discussed?

19 A. It's not my handwriting, sir.

20 Q. Can you identify it for me?

21 A. It resembles Mr. Lambert's handwriting, but I can't say that
22 it is.

23 Q. Do you know...

24 A. It's certainly not my handwriting.

25 Q. Do you know whether or not Mr. Lambert met with Minister

1 Nantes and a Peter Cross or Gross on April 27th to discuss
2 this opportunity for Junior Marshall?

3 A. I don't recall that. It's quite likely that they did meet.

4 Q. Thank you. Is it right to say that you never knew what the
5 Government of Nova Scotia was prepared to offer Junior
6 Marshall?

7 A. In what respect, sir?

8 Q. In respect to compensation. That you never received an
9 indication of a figure from the government that they were
10 prepared to pay?

11 A. No, because they asked us to supply them with a figure.

12 Q. Yes. They asked you and the first figure you gave them was
13 \$550,000 and it came...

14 A. That's right...

15 Q. ...down from...

16 A. All inclusive.

17 Q. And it came down from there.

18 A. That's right.

19 Q. All right. And you disclosed to Mr. Endres that you were
20 disappointed with the fact that Ottawa had not come
21 through in the payment of Mr. Aronson's account.

22 A. Yes, sir.

23 Q. And you disclosed to Mr. Endres that Junior Marshall was
24 under considerable pressure and strain.

25 A. Yes, sir.

1 Q. Was he under financial pressure, quite apart from his
2 indebtedness to Mr. Aronson, and his ongoing indebtedness
3 to you, were there other outstanding bills that Mr. Marshall
4 had incurred?

5 A. Are we talking prior to the \$25,000 interim payment or...

6 Q. No, subsequent to that.

7 A. Subsequent to that. I wasn't aware of what his credits and
8 debits were. He would indicate to me that he needed
9 money.

10 Q. Did you know of any outstanding accounts of a major
11 proportion, something in excess of a thousand dollars?

12 A. Other than Mr. Aronson's \$79,000 bill and my account, no.

13 Q. I'd get you to turn to page 482, please, Your Honour, the
14 bottom right-hand corner there's a note it starts "Martha
15 Reeve..."

16 A. Yes.

17 Q. You spoke of her last day. And, midway down, "Shortfall is
18 what's being offered." Is that your note?

19 A. That's my handwriting.

20 Q. What's meant by the comment "Shortfall is what's being
21 offered?"

22 A. I don't know, Mr. Saunders.

23 Q. What's meant by the comment "Noel Doucette, bill not to be
24 paid?"

25 A. I have no idea, sir.

1 Q. Are you aware of any indebtedness between Junior Marshall
2 and Mr. Doucette or any organizations represented by Mr.
3 Doucette?

4 A. He may have...there are some...he was having some
5 difficulty, I think, I'm not sure what the indebtedness was.
6 I remember him being upset at the native community even
7 wanting money from him or something to that effect. I
8 don't know what it was for. I have no idea, sir.

9 Q. Thank you.

10 A. I don't even know who Martha Reeve is.

11 Q. You do not know who she is.

12 A. No, sir.

13 Q. All right.

14 A. I can't...I can't put a face to it or an occupation.

15 Q. Did you consider, Judge Cacchione, that your trump card in
16 negotiating with Mr. Endres on behalf of the Department
17 was to proceed with and pursue a public inquiry into the
18 circumstances of Donald Marshall's wrongful arrest and
19 conviction?

20 A. My trump card in the issue of compensation?

21 Q. In the issue of your negotiations with the Crown, that is, that
22 the belief that you were intent on pursuing a public inquiry
23 to have the circumstances disclosed. Did you consider that
24 to be a strong part of your case?

25 A. I didn't...I didn't view it as any strength or weakness in our

1 case.

2 Q. You did not.

3 A. I just...I was concerned that we have a public inquiry.

4 Q. You did not consider whether it was strong in your
5 negotiating approach to things.

6 A. I've never played bridge.

7 Q. You complained that Mr. Endres did not show enough
8 compassion in his approach to the negotiations with you.

9 A. That is my feeling, sir.

10 Q. But you've said that you didn't expect the government to
11 issue a blank cheque to your client.

12 A. No, obviously not.

13 Q. You say that the government knew that your client was
14 anxious to settle.

15 A. My government...the government knew that my client was
16 in dire straits.

17 Q. And you had told them that.

18 A. Yes, sir.

19 Q. You said that your plan was to seek more compensation for
20 your client on account of the cost saving that there would be
21 in not having to convene a public inquiry.

22 A. Yes.

23 Q. You said that Mr. Endres...

24 A. As a selling factor.

25 Q. You said that Mr. Endres would put to you the unlawfulness

1 of Mr. Marshall's being in the Park that night as a factor and
2 the statement that had been given to Wheaton in Dorchester
3 in March of 1982, and you telling Endres, "Well, that's not
4 evidence anyway because it wouldn't be admissible."

5 A. Yes.

6 Q. Isn't it correct, Judge Cacchione, that there was also the eye-
7 witness testimony of Jimmy MacNeil with respect to what
8 happened in the Park that night, quite apart from what
9 Junior Marshall said?

10 A. Yes, yeah, there was his evidence.

11 Q. You said that Mr. Endres was a shrewd and hard bargainer.

12 A. Yes, sir.

13 Q. Your partner, Mr. Lambert, had more experience than you in
14 civil litigation.

15 A. Yes, sir. I would indicate, for the record, that Mr. Lambert,
16 who spent ten years plus at Nova Scotia Legal Aid, dealt
17 primarily with family matters there.

18 Q. Yes.

19 A. And joined me in practise in September of 1983.

20 Q. Thank you. You said that you were being faced with the
21 conclusion of the Nova Scotia Court of Appeal, the last four
22 or five pages of the decision, in your negotiations.

23 A. Yes, sir.

24 Q. And that the comments that any miscarriage of justice was
25 more apparent than real was thrust at you.

- 1 A. Yes, sir.
- 2 Q. Yeah. That is, that the negotiator on the side of the Crown
- 3 used that as a factor in his dealings with you and gave it
- 4 some considerable weight.
- 5 A. It certainly formed part of his approach.
- 6 Q. You, I take it, Judge Cacchione, gave it no weight
- 7 whatsoever.
- 8 A. I gave it no weight whatsoever because I didn't believe in
- 9 that finding, sir.
- 10 Q. You never attended the evidence at the reference.
- 11 A. No, sir.
- 12 Q. Did you ever read the proceedings of testimony given?
- 13 A. I read some of the proceedings. I also read the proceedings
- 14 in 1971. The file that had been handed over to me by Mr.
- 15 Aronson.
- 16 Q. Did you read some of the proceedings before negotiating
- 17 with Mr. Endres?
- 18 A. I believe I had, yes, sir.
- 19 Q. How much of the proceedings?
- 20 A. Evidence of Harriss. I recall reading part of the evidence of
- 21 Mr. Marshall.
- 22 Q. Only part?
- 23 A. Obviously, he wasn't a good witness. I acknowledge that.
- 24 Q. Why did you only read a part?
- 25 A. I didn't feel it was necessary to go any further.

1 Q. You say you felt jerked around by the Department of the
2 Attorney General in negotiations?

3 A. Yes, sir.

4 Q. Yet you and your client executed releases with the
5 Department.

6 A. Yes, sir, that's what they required if they were going to pay
7 us \$270,000.

8 Q. In your memorandum prepared on November 7th, 1983,
9 Judge Cacchione of your discussions that day or soon before
10 with Frank Edwards, you strongly asserted that there was
11 character assassination of Junior Marshall by Mr. Edwards.

12 A. There was an attempt, I think the wording is.

13 Q. I take it it's obvious from that that you felt Mr. Edwards was
14 using and abusing your client.

15 A. I have difficulty with "using and abusing".

16 Q. Did you think he was using Donald Marshall, Jr.?

17 A. You don't use a witness. He was calling him as a witness.

18 Q. Did you think he was being unfair to Donald Marshall?

19 A. I felt that he...yes. I felt that he could have been fairer to
20 Donald Marshall.

21 Q. In preparing for yesterday's and today's evidence did you
22 have regard to page 566 of Volume 33?

23 A. Yes, sir, I've read that.

24 Q. Yes. And this is a letter from Mr. Edwards to Mr. Nicholson
25 and Nicholson was then acting on behalf of Roy Ebsary.

1 A. Yes.

2 Q. In the third trial.

3 A. That's correct.

4 Q. And will you agree with me, Judge Cacchione, that Mr.
5 Nicholson on behalf of his client, Mr. Ebsary, was accusing
6 Frank Edwards of being unfair in his treatment of Ebsary
7 and he asked, as you'll see at page 568, this is Mr.
8 Nicholson's letter to the then Attorney General dated
9 September 27, 1985, confirming Mr. Edwards' report that he
10 had no intention of prosecuting Junior Marshall for perjury,
11 "Because Donald Marshall has suffered enough".

12 A. Yes, sir.

13 Q. And Mr. Nicholson was asking the Attorney General to have
14 Mr. Edwards removed from the Ebsary case, is that correct?
15 You'll see in the last sentence of page 568 Mr. Nicholson's
16 suggestion, "That you refer this matter to someone not so
17 closely associated with the case."

18 A. Yes, I see that.

19 Q. So in 1983 you felt that Mr. Edwards was dealing unfairly
20 with your client and two years later Mr. Nicholson felt that
21 Mr. Edwards was treating Mr. Marshall too fairly. That he
22 was too closely associated with him and that he ought to
23 prosecute Junior Marshall for perjury, correct?

24 A. That's what those letters state, sir.

25 Q. Having regard to that correspondence, Judge Cacchione, does

1 it cause you to reflect that criticisms of Crown Prosecutors
2 and Crown actions may well depend on where you sit?

3 A. Obviously.

4 MR. SAUNDERS

5 Thank you, those are my questions.

6 MR. CHAIRMAN

7 We'll take a short break.

8 BREAK - 11:12 to 11:26 a.m.

9 MR. CHAIRMAN

10 Mr. Bissell.

11 MR. BISSELL

12 Yes, My Lords, I have no questions from the RCMP or the
13 Correctional Services.

14 MR. CHAIRMAN

15 Where is Mr. Wildsmith? He's gone on a frolic of his own.
16 Oh wait now, you go ahead first, don't you? I'm sorry, Mr. Ross.
17 Things have been moved around, everybody is...I'm not used to
18 trying...people going left and then going right.

19 EXAMINATION BY MR. ROSS

20 Q. For the record, Your Honour, my name is Anthony Ross and I
21 think we've met from time to time.

22 A. I think we have, Mr. Ross.

23 Q. I propose, Your Honour, to explore four areas with you. I'm
24 going to review one or two of the comments that you ...one
25 or two of the responses that you gave to Mr. Saunders and I

1 propose then to very quickly touch on the matter of
2 disclosure, following which I will very quickly touch on your
3 relationship with Jack Stewart, following I will touch on
4 something to do with Junior Marshall and Sandy Seale, and
5 then later I've got some other questions. Now, with
6 respect...

7 A. I am due to preside over a trial in Yarmouth tomorrow, Mr.
8 Ross.

9 Q. Well, in the spirit of comradery that exists between us I will
10 adjourn your trial until another date.

11 A. Thank you, very much, sir.

12 Q. Judge Cacchione...

13 MR. CHAIRMAN

14 It's the first example we've seen of a mutual admiration
15 society between the Bench and Bar in Nova Scotia, but carry
16 on.

17 MR. ROSS

18 Exclude Newfoundlanders, if it pleases, My Lord.

19 Q. Judge Cacchione, you spoke quite critically of the system
20 with respect to disclosure and Mr. Saunders questioned you
21 as to whether or not certain methods could not be referred
22 to the trial Judge in order to seek the disclosure.

23 A. Yes.

24 Q. Now, as a recent practitioner, now a member...now a
25 member of the Bench, wouldn't you agree that a system

1 ought to be put in place similar to the situation in civil
2 procedure where both sides are...sorry, where the Crown
3 with an obligation to disclose should be required to file some
4 form of list of what information is available and what
5 information it does not intend to disclose?

6 A. That certainly would go to a fuller system of disclosure. I
7 don't know if I'm prepared to go as far as adopting the Civil
8 Procedure Rules in terms of discovery or that type of a
9 situation. I...it used to be that on the back of an indictment
10 all witnesses were listed and at the conclusion of my career
11 as a practitioner that no longer seemed to be the case. I
12 don't know what you can draw from that. Certainly I would
13 feel that a better system of disclosure should be in place.

14 Q. Would you agree with me that although the problems with
15 disclosure might result from problems...from difficulties
16 between the Crown Prosecutor and the defence counsel, the
17 person that it real affects is the accused?

18 A. Oh, there's no question about that. Personality should not
19 have a role to play in that process.

20 Q. Sure. As a matter of fact it's really a situation in which a
21 Crown Prosecutor can really penalize an accused for poor
22 choice of counsel as far as the prosecutor is concerned.

23 A. That possibility exists.

24 Q. And, following up on your experience as far as providing
25 material is concerned, am I correct that, (a) from time to

1 time you found the Crown quite unwilling to give you access
2 to information, and (b) from time to time when such
3 information is given rather than make it easy for you and
4 give you a photocopy you are put through a very strange
5 process of having to dictate maybe a substantial file and
6 tape the rest for transcription purposes?

7 A. There were occasions where access was difficult. I agree
8 with you that there shouldn't be a need to have to dictate
9 and then subsequently transcribe evidence which is in the
10 Crown file which is what I had to do in the last case that I
11 handled, the first-degree murder trial.

12 Q. I share your concern. And further, is it fair to say that in
13 every one of these prosecutor's offices that you've been to
14 there's been a photocopy machine?

15 A. I think that's standard office equipment.

16 Q. Sure. So there's no real difficulty in just allowing you to
17 either photocopy the material yourself or photocopying it
18 and providing it to you.

19 A. Correct.

20 Q. But to a large extent that was not done.

21 A. As I stated, it depended on the particular prosecutor. It
22 wasn't a general approach or a similar approach with all
23 prosecutors. With some the matter, the file was simply
24 handed to you. With others the file was not handed to you.
25 Your client's statement was given, maybe a witness or key

1 witnesses were provided. In some cases that wasn't done at
2 all. So it varied from prosecutor to prosecutor.

3 Unfortunately it appears that it becomes a question of clash
4 of personalities.

5 Q. Thank you, Your Honour. Now as far as, sir, as your
6 relationship with Jack Stewart is concerned.

7 A. Yes, sir.

8 Q. Could you tell me when you first met Jack Stewart?

9 A. I would...I can't recall the exact date. I would think that I
10 met Jack Stewart early on in my career, because Jack has
11 been involved in the correctional services side of the
12 criminal justice system for quite a long time. With reference
13 to Mr. Marshall, I would have met him shortly after, to deal
14 with this particular file, shortly after my retainer.

15 Q. And at the time when you met Jack Stewart is it fair to say
16 that he also demonstrated a certain friendly relationship
17 with Junior Marshall?

18 A. Yes, sir. Jack Stewart, as I understood it, was the person
19 who had undertaken to be the link for Junior's return to
20 society, to assist him in the transition from a lifer to a
21 member of society.

22 Q. And in your discussions with Jack Stewart did he ever
23 indicate to you that a number of different statements had
24 been given by Junior Marshall as to what happened in May
25 of 1971?

1 A. No, sir. We never discussed the legalities or the evidentiary
2 basis for the file. It was simply dealing with Junior's
3 reinstatement into society.

4 Q. I take it...

5 A. How best to achieve that.

6 Q. And I take it then you didn't ...you didn't have any...you
7 didn't have cause to really look back into any records which
8 might have been compiled while Junior Marshall was
9 incarcerated.

10 A. I did not receive any records from Jack Stewart that were in
11 the possession of the Correctional Services, Correctional
12 Services Canada. As I said, we dealt with how best to help
13 Junior cope when he came out.

14 11:49 a.m.

15 Q. I see. And I take it in this regard, Junior himself, he did
16 discuss any treatment which was meted out to him at the
17 hands of the different officers with whom he had contact
18 while in the penitentiary?

19 A. There was no discussion of, "A particular guard did this" or "A
20 particular guard did that." We obviously discussed what it
21 was like to be incarcerated for almost 11 years. We certainly
22 discussed the fact that his wrist was broken during a floor
23 hockey game and no one looked after it until seven, or several
24 years later. I believe it was seven years later that it was X-
25 rayed and finally confirmed that it had been broken. But, no,

1 there was no, "Guard X did this" or "Guard Y did that."

2 Q. Sure.

3 MR. BISSELL

4 My Lord...

5 MR. ROSS

6 I'm not getting, that's, I'm not heading in that, that's not the
7 area in which I'm trying to head.

8 CHAIRMAN

9 Mr., then where, that's what I was just going to inquire as to
10 where you're heading.

11 MR. ROSS

12 Well that's why I'm cutting you off at this point, My Lord.

13 CHAIRMAN

14 Well you're not cutting me off.

15 MR. ROSS

16 Interrupting, sorry.

17 COMMISSIONER EVANS

18 Advising.

19 CHAIRMAN

20 I'm having difficulty associating this line of questioning with
21 the interests of the two parties who were granted standing who
22 are represented by you, namely Oscar Seale and the Black United
23 Front.

24 MR. ROSS

25 I appreciate that, My Lord. But I'm very conscious of the

1 fact that you'd have that concern. And what I am trying to
2 understand is I do not want to start going through Volume 35
3 with Judge Cacchione if he did not know anything about the
4 information in there.

5 JUDGE CACCIONE

6 I reviewed Volumes 30, 32 and 33, I believe, are the
7 volumes that I was given.

8 MR. ROSS

9 Q. There are volumes, Judge Cacchione, in which there are
10 statements given by Marshall, different accounts of what
11 happened in May of 1971. Did you have access to that
12 information?

13 A. As I've indicated, sir, the volumes that I was asked to review
14 prior to testifying are Volumes 30, 33 and, 30, 32 and 33, in
15 which there is no reference to any statements given by
16 Donald Marshall.

17 Q. Sure. I thank you. Well when you were acting for Donald
18 Marshall and before reviewing material for the purpose of
19 testifying here, did you at that time have opportunity to
20 review statements that were given by Donald Marshall as to
21 what occurred in May of 1971? Different accounts.

22 A. I think I may have. They may have formed part of the
23 original, Staff Sergeant Wheaton's report.

24 Q. I see. Those are the only ones. For instance, you did not see
25 any reports compiled at Springhill Institution or any other

1 Federal institutions.

2 A. With respect to the offence?

3 Q. With respect to Marshall's account of what happened back in
4 1971.

5 A. I reviewed notes which were provided to me, or his records
6 from Correctional Services, which we obtained from the
7 privacy commissioner. There, I believe, were notes in there
8 made to parole officers denying guilt, et cetera. I do not
9 recall seeing any statements as to occurrences in the Park or
10 what transpired that evening.

11 Q. I see. Thank you. And as far as your discussions with Junior
12 Marshall is concerned, did he ever discuss Sandy Seale with
13 you?

14 A. Not any thorough discussions. He did discuss the fact that he
15 had no reason to have any animosity towards Sandy Seale.
16 That he knew him casually. That he didn't kill him. That
17 Sandy was a superb athlete. That it was a chance meeting in
18 the Park.

19 Q. And after the chance meeting in the Park did he go on to
20 discuss a robbery theory?

21 A. Sir, Donald Marshall never indicated to me that he was in the
22 Park to rob anyone. The words that were used were "rolling
23 someone." And you can infer from that whatever you may.
24 Rolling can be, as I understand it, anything from accosting
25 someone and standing in front of them and saying, "Give me

1 money," which is sort of a panhandling situation to carry it to
2 its extreme, in fact, using physical violence to physically roll
3 someone and take monies.

4 Q. And in that regard, did Marshall indicate to you that he and
5 Sandy Seale were, in fact, in the process of rolling anybody?

6 A. He said that their object was to get some money. Now I, quite
7 frankly, don't believe that there was any, if we can use the
8 word "conspiracy" or "criminal intent" between the two of
9 them to agree that they would, in fact, do this.

10 Q. I see. Did Donald Marshall indicate to you how long he had
11 spent with Sandy Seale that night?

12 A. A very short period of time, sir.

13 Q. An extremely short period.

14 A. I would think we're talking in the range of minutes to a half
15 hour at the most.

16 Q. I see. And did he indicate to you whether or not he had any
17 friendly relationship with Sandy Seale prior to this incident?

18 A. The comment that I remember him making was "Why would
19 I kill somebody that I thought was a friend"? That was the
20 comment that sticks in my mind.

21 Q. And I take it that you were with Donald Marshall when he
22 gave testimony in the Ebsary trials?

23 A. Yes.

24 Q. I take it you will recall his evidence in the last of the Ebsary
25 trials in which he absolutely recanted from the robbery

1 1971 and it really took him until 1982 to come up with a
2 robbery theory?

3 A. He maintained throughout that he hadn't killed Sandy Seale.

4 Q. I have no argument with that. But as far as the robbery
5 theory is concerned, that the robbery theory first came when
6 he was with Staff Wheaton, when he gave a statement to
7 Wheaton.

8 A. I didn't draw any conclusions from that. I didn't explore that
9 area.

10 Q. But you would agree with me that on the surface it does
11 appear as though it requires explanation.

12 A. Yes, sir.

13 Q. There's one other area that I want to touch with, touch on
14 with you, Your Honour, and that is the circumstances
15 surrounding the statement which was made by Judge
16 Anderson. Can you recall specifically, have you got a clear
17 recollection of the occasion?

18 A. Yes, sir.

19 Q. And I take it that you were sufficiently disturbed that you
20 mentioned it to Harris.

21 A. Yes, sir.

22 Q. And I take, sir, that you were sufficiently disturbed that you
23 mentioned it to other people.

24 A. I mentioned it to Michael Harris. I certainly mentioned it to
25 my wife.

1 Q. What about other lawyers?

2 A. Yes, sir, I may have mentioned it to other lawyers.

3 Q. And this statement was in late 1983 or early 1984.

4 A. Somewhere in that area, yes.

5 Q. Did you discuss it with Mr. Lambert?

6 A. Yes, sir.

7 Q. And I must ask you, sir, was this consistent or inconsistent
8 with the view which you had, which you had formed of Judge
9 Anderson over the years practicing before him, at that time?

10 A. Are you asking me whether it was consistent, whether I held
11 a view that Judge Anderson was racist prior to his making
12 that statement to me and that statement confirmed the view?

13 Q. Yes.

14 A. I had not formed an opinion as to Judge Anderson being a
15 racist prior to the statement being made to me.

16 Q. I see.

17 A. As a result of the statement being made, as a result of what I
18 took from what was happening, it kept falling in line with
19 what I believed was part of the reason for this miscarriage of
20 justice. I've also indicated, Mr. Ross, that I, as a result of
21 working with Judge Anderson, and discussing this matter
22 quite candidly with him, am now of the opinion that he is not
23 a racist.

24 Q. Absolutely. I understand that, Your Honour, and I propose to
25 just go through so other steps before getting to that. Your

1 appointment was in June of 1986.

2 A. That's correct.

3 Q And is it fair to say, then, that from the time of this statement
4 until June 1986 you did, you were concerned as to whether or
5 not Judge Anderson was racist.

6 A. The statement was always in the back of my mind, certainly.

7 Q And I take it you'd agree with me that it was not a
8 descriptive statement. It was not, for instance, somebody
9 saying, "Okay fine, get Tony Ross to move his car." And they
10 say, "Well look, I don't know him." They say, "Well, you just
11 go up. He's in the Marshall Inquiry and he's the black guy."
12 It was not a situation like that, was it. Not a matter of
13 description. It was derogatory, wasn't it.

14 A. That statement was, "Don't put your balls in a vice for an
15 Indian."

16 Q Yes.

17 A. I don't see what you mean by, I can't follow the analogy that
18 you're drawing.

19 Q Okay, fine. Well, I'll ask you, did you classify that as a
20 compliment or an accolade or something as far as...

21 A. I stated yesterday, Mr. Ross, that I considered the comment at
22 the time to be a racist comment when it was made. I
23 considered it to be, have been made by a racist.

24 Q Well, that raises two questions. Let's deal with the comment
25 itself.

1 A. Yes.

2 Q. Is it your view that somebody, other than a racist, would
3 make a comment like that under the circumstances which
4 existed at that time?

5 A. I can see anybody making that kind of a comment.

6 Q. I see. So had you gone to the Director of Human Rights to ask
7 something about an Indian you ...

8 A. I've heard people refer to me as the Wop judge, Judge
9 Wopner, you know, it's, I mean that, that I can interpret as
10 being a racist comment because it reflects on my ethnic origin
11 if I choose to view it as that. We, obviously, have
12 experienced racism in our lives and I would assume that you
13 have experienced more of it than I have. But it's something
14 that is very hard to conclude whether or not somebody who
15 makes a joke involving someone of Indian origin or Pakistani
16 origin is, in fact, a racist who views all people who are
17 Pakistani in a lower class or subservient to others who are
18 white or black.

19 Q. I see. Would you agree with me that it is not the kind of
20 utterance by a person in power which could be embraced by
21 this society?

22 A. I would agree with you, sir, that if that comment were made
23 in public by anyone it should not be embraced by a member
24 of society. I don't regret ever having made that comment
25 public. I can indicate to you that the comment was made in

1 the confines of the judge's chambers on a question where we
2 were speaking to each other just as counsel seeking
3 information from a person who happened to be a judge but in
4 whose eyes, in my eyes, was viewed as a lawyer at the time
5 that the, what I was looking for was done. The comment was
6 made to me and I took from it that it was racist. I
7 subsequently took from that that he was saying, "Don't get
8 jammed up."

9 Q. I see.

10 A. You know, he was looking out for my interests. Now it's
11 unfortunate that the comment was made, there's no question.

12 Q. We've also heard statements, as a matter of fact, Staff
13 Sergeant Harry Wheaton indicated that at one point
14 MacIntyre had suggested to him that, you know, "Those
15 brown-skinned boys stick together." Would you say, then,
16 that for the same reasoning that this does not demonstrate a
17 racial attitude with MacIntyre?

18 A. They both demonstrate racial attitudes. But to say that
19 someone who makes that kind of a comment will proceed and
20 govern their lives or their professional lives in accordance
21 with that comment, I think is an assumption.

22 Q. Oh absolutely, and isn't it then, doesn't it then follow that
23 what you might have learned over the two years of working
24 with Judge Anderson has nothing to do with whether or not
25 he's a racist but just that he might very well not be an evil or

1 sinister man? Whether or not he's a racist.

2 A. I have never heard...

3 MR. SAUNDERS

4 My Lords, I'm afraid I object at this point to that question
5 by Mr. Ross. You know, it's his cross-examination, he's pursued it.
6 Other counsel have pursued it but to continue to explore with this
7 witness the dealings that he's had with County Court Judge
8 Anderson over the last two years and what those dealings have
9 meant, interpretations cast upon them by His Honour I say goes
10 too far.

11 CHAIRMAN

12 I don't quarrel with that. There's been fairly extensive
13 cross-examination of this witness, Judge Cacchione, on that
14 statement. And now we are getting, you're getting into the
15 speculative area, Mr. Ross...

16 MR. ROSS

17 Very good, sir.

18 CHAIRMAN

19 Up to this point I hadn't interrupted you but you were, the
20 line of relevancy was beginning to get awfully thin.

21 MR. ROSS

22 If it pleases Your Honor I think what you're try-, is it fair to
23 say, then, what we're talking about is something might be very
24 well be a matter of degree and it might be a matter of
25 perspective?

1 CHAIRMAN

2 Well we have the perspective from Judge Cacchione's point
3 of view and I guess that's all we can hope to receive from him.

4 MR. ROSS

5 Well if it pleases Your Honour, I'd just like to point out that
6 the last statement made by my friend, Mr. Saunders, to the Judge
7 was really speaking about criticism. He was speaking that the
8 criticism depends on where he sat. And I'm saying that as far as
9 the Bench and the Bar and the accused is there's a substantial
10 amount of difference in sitting places.

11 CHAIRMAN

12 Well that may very well be a matter for argument, Mr. Ross,
13 but it is not a matter that forms appropriate cross-examination of
14 this witness. He has given us, on at least three occasions in the
15 past two days, his views of that gentleman.

16 MR. ROSS

17 I appreciate that.

18 CHAIRMAN

19 And that's as far as the rule of relevancy permits.

20 MR. ROSS

21 Well I don't want to be argumentative, My Lord...

22 CHAIRMAN

23 Well then, don't be.

24 MR. ROSS

25 And I don't want to be ridiculed either, however, I would

1 point out that this witness who is a laywitness for the purpose of
2 this Inquiry, made the broad statement that the man is not a
3 racist.

4 CHAIRMAN

5 That's right.

6 MR. ROSS

7 And I would like to, in the interest of one of the clients that
8 I represent, to just explore that to understand the basis.

9 CHAIRMAN

10 What I'm saying to you is that you have been allowed a
11 great deal of latitude in exploring that and this witness has given
12 his opinions and his rationale and you are now, seem to be
13 embarking upon an area which he, himself, says that he can't
14 respond to.

15 MR. ROSS

16 Well I didn't hear that as a response if it pleases...

17 CHAIRMAN

18 Well I interpreted it as what he's saying.

19 MR. ROSS

20 Sure. Well then, if I could just ask one or two more
21 questions along the, a different line. On the same topic however.

22 Q. Your Honor, as far as your suspicion back in late 1983 and
23 early 1984 is concerned, did you come to any position as to
24 whether or not the racism that you suspected was restricted
25 just to Indians or to other members of minority groups?

1 A. No, sir, I just related it to the comment about Indians.

2 Q. I see. And as a practicing lawyer with Legal Aid did you,
3 from time to time, develop any close relationships with some
4 of the black accused that you represented?

5 A. Yes, sir.

6 Q. And did they, from time to time, express concern about the,
7 express fear or concern about the legal system and the chance
8 of a fair trial?

9 A. Yes, sir.

10 Q. Now when you were answering questions put to you by Mr.
11 Orsborn, I think it, for all intents and purposes, was directed
12 to jury trials.

13 A. Yes, sir.

14 Q. This concern that your clients appeared to have had, did it
15 also apply to trials with judge alone?

16 A. As I recall it, Mr. Ross, the concern was expressed with
17 respect to jury trials. I...I can't recall any clients of an ethnic
18 minority stating, "I don't want to go before Judge X because
19 he's a racist or he doesn't like people who live in this area." I
20 mean the comments may have been made, however, I don't
21 recall them. I'd like to add that one of the aspects of this
22 matter that you cannot appreciate until you've sat and
23 obviously we're getting back to a question of perspective
24 here, but you can't appreciate it until you've been there and
25 sat as a trial judge, is the, what has to be an ability which is

1 worked on consistently by a trial judge, particularly a judge
2 sitting alone, to remove from his or her mind evidence which
3 is not admissible or irrelevant and you, I take it from my own
4 experiences of having sat through a voir dire to determine
5 admissibility of a statement for hours and hearing evidence of
6 how the accused said this and the accused said that and at the
7 conclusion, based on either the freeness and voluntariness
8 aspect or a Section 10(b) Charter violation, you exclude the
9 statement and your mind, your professional mind has to say,
10 "I cannot consider this evidence. It cannot form part of my
11 decision." And that is something that you work on daily and
12 try to do. So that if you have a judge who has a particular
13 view I would hope, a particular view concerning a minority, I
14 would hope that that particular judge would be able to
15 remove that view and not have it form part of his or her
16 decision-making process.

17 12:12 p.m.

18 A. Now I can appreciate, sir, that it's difficult to accept that. I
19 can also appreciate, sir, that, at least the judges that I've come
20 into contact with, have, in fact, removed themselves from
21 cases where they are unable to be objective and impartial.

22 Q. Thank you, Your Honour. Looking at the statement, and look
23 at it in the proper perspective at this time, would you go as
24 far as saying that any perception of racism is, however, more
25

1 apparent than real?

2 A. The perception is there. The perception is real. That
3 somebody who makes that comment is a racist. That's the
4 perception. The conclusion that I draw from my discussions
5 with that particular judge are that he is not a racist.

6 Q. If Your Honour pleases, I thank you very kindly for telling us
7 that. In my view, it's very, very helpful to the Commission. I
8 think is very helpful to the public, in general. I'm almost
9 urged to accept it at face value, but at the same time, as far as
10 the accused is concerned, members of minority races as
11 accused, how do you think it can be handled when these
12 people are winding up before a judge who made such an
13 utterance?

14 A. I think that it can be handled in one of two ways. One, the
15 accused or his counsel ask that the judge remove himself
16 from the case because of a perceived bias. Or, two, that, in
17 fact, the judge, on his own motion, does that. And I would
18 indicate that as a result of that comment, Judge Anderson's
19 comment having been made public, that in fact on one
20 occasion that I am aware of, Judge Anderson did ask the
21 accused, who was a native woman who was being, I believe,
22 tried or sentenced in his court, whether or not she had any
23 difficulties with his hearing the matter. And, as I recall, there
24 were none and he proceeded to dispose of the matter.
25

1 Q I see. Finally, would you agree with me that the statement
2 and the fact that it was made flies in the face of the other
3 statement that justice must not be done, it must be manifestly
4 seen to be done.

5 A. It flies in the face of it. The appearances of justice can be, as
6 I've just indicated, dealt with in one of those two fashions.

7 MR. ROSS

8 Thank you very kindly, Your Honour.

9 MR. WILDSMITH

10 Yes, Your Honour?

11 COMMISSIONER EVANS

12 I was saying the last cross-examination kind of cut the
13 wheels out from under any cross-examination that you might
14 have, or a good part of it.

15 MR. WILDSMITH

16 Well, it certainly covered the same area, but I do want to go
17 back and touch a couple of the things.

18 EXAMINATION BY MR. WILDSMITH

19 Q Judge Cacchione, I'm Bruce Wildsmith and I'm here for the
20 Union of Nova Scotia Indians, and I only have a couple of
21 areas to explore with you. I get the impression from listening
22 to your testimony about the negotiations with the Province
23 over the issue of compensation that, in your view, the
24 Province played hard ball on that issue?
25

1 A. Yes, sir.

2 Q. And did not display a sense of sympathy or responsiveness to
3 the position of Mr. Marshall?

4 A. They certainly did not.

5 Q. I wonder if you could help us as to whether anybody that you
6 came into contact with in your work on behalf of Mr. Marshall
7 did demonstrate any sympathy or responsiveness? And here
8 I'm only referring to people who are part of the
9 administration of justice.

10 A. Including the Bar Society?

11 Q. That's the first I heard the Bar Society was involved.

12 A. Well, I'm referring, I'm sorry, members of the Bar Society.

13 Q. Well, people that had something to do with acting as part of
14 the administration of justice in resolving Mr. Marshall's
15 problems.

16 A. My impression is that no one came to Mr. Marshall's
17 assistance.

18 Q. So, to put it another way, everywhere that you turned, you
19 felt as though you met unresponsive reaction.

20 A. I felt that we always had to explain the situation of any
21 miscarriage of justice is more apparent than real. This guy
22 was out in the park to rob somebody, and you had to get over
23 that and try to have people see what the situation actually
24 was. And so we were confronted with that continuously. And
25

1 once it appeared that you got over that hurdle and sort of
2 dealt with certain issues that reflected adversely on the
3 apparent miscarriage of justice comment, then people would
4 listen.

5 Q. What I'm trying to get at are the various factors that, in your
6 view, led to the system being unresponsive. One of them was
7 the Appeal Court's comments, I take it.

8 A. Yes.

9 Q. You've already mentioned something about Mr. Marshall's
10 race being a factor.

11 A. I felt that it was, sir.

12 Q. And that if he was a prominent Nova Scotian, white, he would
13 have been treated differently.

14 A. I would think, and I do think that the matter would have
15 been handled differently.

16 Q. Is there anything else that you can point to besides those two
17 factors that led to the system being unresponsive?

18 A. Obviously Mr. Marshall's prior involvement with the criminal
19 justice system, as has been commented on here, the various
20 statements that were given by Mr. Marshall throughout the
21 various trials.

22 Q. Were these issues that were raised with you in your dealings
23 with various officials?

24 A. They were raised in conversation. He said one thing one day,
25

1 he said another thing the next day.

2 Q. And is that relevant to the issue of compensation?

3 A. I didn't think it was relevant to the issue of compensation. As
4 I viewed it, the man spent almost eleven years in jail for a
5 murder that he did not commit. He was incarcerated
6 wrongfully. He should have been compensated without any
7 great to-do.

8 Q. Okay. Let me move on to another area. I take it from the
9 comments that you've made so far that you think that racism
10 is an element in our society.

11 A. Mr. Wildsmith, I would not be truthful with you if I were to
12 say, and I would be blind, if I were to say that there is no
13 racism in our society. And it's very difficult to quantify that.
14 You can ask people, "Are you a racist?" And they will say,
15 "No, I'm not a racist." You can look at people's attitudes,
16 people's discussions. You can look at other factors to
17 determine racism.

18 Q. If that racism is present in our society, in general, is it a fair
19 conclusion to think that it's also present in the criminal justice
20 system?

21 A. Well, the criminal justice system, sir, is made up of members
22 of our society.

23 Q. So you can't divorce those two concepts.

24 A. Well, I tried to answer that with Mr. Ross, and my hope is
25

1 that members of the criminal justice system from prosecutors,
2 defence counsel, through to judges, because they are
3 professionals, would be able to, in a professional manner, say
4 I have these certain feelings towards that particular racial
5 minority, therefore I will not sit on this case or I am able to
6 remove those preconceived notions that I may have with
7 respect to a minority and deal with the matter objectively
8 and fairly and impartially. That's my hope. And I can only
9 accept that that is what is being done.

10 Q. To put this a different way then. You recognize that there is a
11 danger of racism being a factor in the criminal justice system
12 that we ought to safeguard against.

13 A. I recognize that it is a danger. My question is, how do you
14 safeguard against it? You know, we get back to the question,
15 are you going to ask everybody who is nominated for the
16 bench, "Are you a racist?" And are you going to expect that
17 the person is going to say, "Yes, I'm a racist," or "No, I'm not a
18 racist." And are you going to accept that as a truthful
19 answer? Now I don't consider myself to be a racist. I come
20 from an ethnic minority. Mind you, my skin colour conforms
21 with that of the majority of our North American society. So,
22 therefore, I don't feel racism in the same way as perhaps Mr.
23 Ross does or Mr. Marshall does. But I can assure you, sir, that
24 I have been the subject of comments with respect to my
25

1 ethnic origin. Whether or not I became a judge because I was
2 a mafioso. Whether or not, you know, the Italian in me would
3 lead me to favour Italian defendants. Those are all questions
4 and issues that have been raised with me. I can only do my
5 best and say that that is not a factor.

6 Q. Probably quite legitimate concerns but you're not meaning to
7 suggest that members of the black community or the Indian
8 community are not in a worse position than members of the
9 Italian community.

10 A. I didn't say that.

11 Q. No, but you're not meaning to suggest that in any way.

12 A. No, sir. No, sir.

13 Q. One of the comments that your attention was drawn to by Mr.
14 Orsborn. You don't have to turn to it now, but for the record,
15 it's in Volume 32 at page 214. As part of your notes, there's a
16 reference to Chief MacIntyre. Mr. Orsborn drew your
17 attention to the fact that your notes say "he" meaning Chief
18 MacIntyre, is also known by his men as being a racist and
19 particularly so towards Indians and blacks. And you
20 indicated to us that you thought the basis of that was from
21 Leo Mroz.

22 A. That's correct, sir.

23 Q. Could you tell us the context in which that remark was made
24 by Constable Mroz?
25

1 A. The only conversation that I had with Constable Mroz was
2 outside the courtroom in Sydney in the courthouse building.
3 It was during a recess in the Ebsary preliminary hearing and
4 we stood there. I had a cigarette and we discussed the matter
5 and he indicated that there were lots of things that he could
6 tell me that I would interested in and then stated the
7 comment that's contained in that memorandum.

8 Q. So he thought you would be interested in this because...

9 A. Well, obviously if he made the comment to me, he must have
10 felt that I would have been interested or that it was relevant
11 to what I was doing.

12 Q. And what you were doing was acting on behalf of Mr.
13 Marshall.

14 A. That's correct, sir.

15 Q. And so was the context that this might have had something to
16 do with the events that surrounded Mr. Marshall?

17 MR. PUGSLEY

18 I don't think the witness should speculate on that.

19 MR. WILDSMITH

20 Well, I'm wondering about the context in which Constable
21 Mroz would have made this remark and why he volunteered it to
22 Judge Cacchione at the time, and whether his impression on the
23 receiving end was that Chief MacIntyre racial views had
24 something to do with the events that surrounded Mr. Marshall.
25

1 MR. CHAIRMAN

2 How would he know? I'm curious as to how he would know.

3 MR. WILDSMITH

4 Well, as to the context of why things were being said.

5 THE HONOURABLE JUDGE CACCHIONE

6 How did I know the comment was made, sir?

7 MR. CHAIRMAN

8 No, no, but how would you know that that reflected the...

9 THE HONOURABLE JUDGE CACCHIONE

10 I haven't answered the question as to whether I knew it
11 reflected Mr. MacIntyre's opinion or beliefs. I know that the
12 comment was made to me.

13 BY MR. WILDSMITH

14 Q. My question was, why did Constable Mroz draw your
15 attention to that? Was it something to do with your work on
16 behalf of Mr. Marshall?

17 A. Well, he knew that I was representing Mr. Marshall and Mr.
18 Mroz, as I understood it, or at least his wife had some time in
19 the past taken Junior under her wing, I think she may have
20 been one of his schoolteachers and he may have gone there
21 after school or whatever. He obviously felt that it was a
22 comment that, or information that I would feel relevant or
23 important.

24 Q. Because it came...

25

1 A. And I don't know why he made it to me. I didn't say, "Is John
2 MacIntyre a racist?" I didn't ask him that question. It was
3 volunteered.

4 Q. Okay. Did you do anything to seek confirmation one way or
5 the other of the truth of that statement?

6 A. No, sir, I didn't.

7 Q. So you have no other source of information to either buttress
8 or refute.

9 A. Only comments that were made to me by other members of
10 the Marshall family and native community.

11 Q. Okay, not from other police officers, for example?

12 A. No, sir.

13 Q. Okay. Now getting back around to Judge Anderson's remarks,
14 I want to be sure that we have the statement correct as to
15 what Judge Anderson said. When Mr. Orsborn asked you the
16 question, he didn't put the words to you, but I did hear you
17 this morning use those words. The statement that you made
18 this morning, is that absolutely 100% correct?

19 A. "Felix, don't put your balls in a vice over an Indian." Could
20 have been, "Felix, don't put your fuckin' balls in a vice over an
21 Indian." Or, "Felix, don't put your balls in a vice over a fuckin'
22 Indian."

23 Q. Yes. It was the latter way that I had understood it.

24 A. It may have been that way, sir.
25

1 Q. So there may have been a descriptive term in front of the
2 word "Indian".

3 A. It... You know, quite frankly, Mr. Wildsmith, and this is a sad
4 reflection on me, but I have a tendency of using that word at
5 times often and I'm not sure if it's my word or his word.

6 Q. You might have embellished it or it might have been...

7 A. You know, it could have been my saying that way.

8 Q. Okay.

9 A. It was an emotional issue, certainly.

10 Q. Either way, you received it as being a very racist remark.

11 A. No question.

12 Q. Which upset you considerably at the time.

13 A. Yes, sir.

14 Q. It wasn't a joke.

15 A. I didn't interpret it as a joke. At the time, neither did I view
16 it as Judge Anderson looking out for my interests as a private
17 practitioner.

18 Q. Yes, which is an explanation that's now been offered, and I'm
19 wondering if there was anything in the context of the
20 conversation where he was discussing your practice?

21 A. There was. I had spent approximately eight years plus with
22 Nova Scotia Legal Aid, dealing with all kinds of clients, some
23 of them who were very difficult clients. And I think it was
24 known at the time that I wasn't pleased and that I wanted to
25

1 get out of Legal Aid. So there may have been conversation
2 about my practice and how it was going.

3 Q. Can you recall whether there was or was not conversation
4 about your practice?

5 A. Most likely there was, sir. The encounter, if one wants to call
6 it that, was not my knocking on the door, going in, and saying,
7 "Were you at the Attorney General's Department in 1971?
8 Did you receive this information? Did you pass that
9 information on?" It was a sit down, he was having lunch, as I
10 recall it, and sort of talking generalities and then getting to
11 the issue and then finishing the conversation with more sort
12 of generalities and then leaving. And then walking across the
13 street and going to the legislative library to determine when,
14 in fact, he had been appointed to the Bench. I, at that time, I
15 didn't understand how they recorded appointments to the
16 bench because his was recorded as being January of 1972.
17 And he had told me during our conversation that he was not
18 in the department at the time of this appeal. And I thought
19 that's pretty strange because he told me was on the Bench. I
20 now realize that once you are called from Ottawa, that you
21 cease and desist from any further involvement in the practice
22 of law. That is, you don't do a thing. So I was called on June
23 the 11th and it wasn't until the 26th. Now I understand he
24 was called in December some time and sworn in January.
25

1 And that's why it showed as being January.

2 Q. Okay, but getting back to the comment itself. Was it made
3 towards the end of that conversation then?

4 A. I would think it was towards the end of the conversation.

5 Q. The conversation pretty much ended at that point?

6 A. I think apart from just a few other words, yes.

7 Q. Okay. Yesterday when you testified the last words on the
8 record on this issue, you said that you understood "his
9 concern was that I not jam myself in a corner so as to shut
10 doors behind me or ahead of me that lay in my career path."

11 A. Yes, sir.

12 Q. What did you mean to say "shut doors behind or ahead of you
13 in your career"?

14 A. Don't make enemies in the Attorney General's Department
15 that may prevent you from getting access to files. Don't have
16 yourself viewed by members of the judiciary as being
17 unpopular or going out on a limb or anything like that.
18 Anything that would interfere with my career.

19 Q. Is it fair to say, then, that he was warning you that there
20 might be repercussions as a result of your strong advocacy on
21 behalf of Mr. Marshall?

22 A. That's what I got from it.

23 Q. Okay, you were...

24 A. Because, obviously, there was an Appeal Court decision there
25

1 and I was publicly stating that that was wrong and, obviously,
2 the same has been said and is in the headlines this morning.
3 So it doesn't make for a very popular view.
4

5 Q. Certainly. But I think what he was saying to you is that the
6 nature of our political society is such that you might be facing
7 repercussions in your career.

8 A. That's fair to say.

9 Q. Okay. And just one other last thing about that comment itself.
10 I take it that the way, whatever the exact words were, he
11 wasn't singling Junior out and saying, you know, "Don't get
12 your balls in a vice over Junior." It was over Indians in
13 general.

14 A. It was over "an Indian". He didn't refer to Junior Marshall. It
15 was "an Indian" and I took it...

16 Q. He identified...

17 A. At that time as being an Indian community or the Indian
18 community as a whole.

19 Q. Indians in general.

20 A. That was my understanding. That was my interpretation, I
21 should say, at the time.

22 MR. WILDSMITH

23 Okay. One last question that I have, My Lords. You may
24 have already ruled on, but I simply wanted to inquire as to the
25 basis today of Judge Cacchione feeling that Judge Anderson is not

1 a racist. Whether there is something in particular he cares to
2 point to, or whether it's just a general observation.

3 MR. CHAIRMAN

4 He's given it to us about three times.

5 MR. WILDSMITH

6 Yes, nothing specific, and that's what I wanted to know,
7 whether there was anything specific.

8 MR. SAUNDERS

9 My Lord, I'd object to anything specific or general. Judge
10 Anderson is not on trial in these proceedings.

11 MR. CHAIRMAN

12 No.

13 MR. SAUNDERS

14 The scope of this inquiry does not include what Judge
15 Anderson or any other judge has been doing over the last two
16 years, I submit with respect, and it's not for my friend to get into
17 that.

18 THE HONOURABLE JUDGE CACCHIONE

19 There are some particular discussions and events which
20 have occurred which have led me to form that conclusion.

21 MR. CHAIRMAN

22 That's fine. I guess that's the question you intended to ask.
23 Any other questions, Mr. Wildsmith?
24
25

MR. WILDSMITH

1 No, My Lords. That's it.

2 MR. CHAIRMAN

3 We will adjourn until two.

4 THE HONOURABLE JUDGE CACCHIONE

5 My Lords, do I have to return at two? Is there a re-direct
6 or rebuttal? I am available.

7 MR. CHAIRMAN

8 Yes.

9 THE HONOURABLE JUDGE CACCHIONE

10 Thank you.

11 12:38 p.m. COURT RECESSED UNTIL 2:15 p.m.MR. CHAIRMAN

12 Mr. Orsborn, do you have any question on re-direct?

13 MR. ORSBORN

14 No, My Lord.

15 COMMISSIONER EVANS

16 Judge Cacchione, I have a few questions which I would like
17 to direct to you, in view of your rather lengthy experience in
18 criminal law.

19 EXAMINATION BY COMMISSIONER EVANS

20 Q. Dealing with disclosure, do you expect, as a very minimum,
21 will provide the names of witnesses expected to be called to
22 testify and either a copy of their written statements, and in
23 the absence of a written statement, would you expect that
24 you would get a summary of what the Crown anticipates such
25 witness, the evidence of such witness?

1 A. At a minimum, My Lord, I would expect that.

2 Q. And I suppose that you would also recognize that there are
3 circumstances in which the Crown may feel justified in
4 withholding the name and address of a particular witness.

5 A. I have no difficulties with that, My Lord. I would indicate
6 that in one particular prosecution, which I defended on a
7 narcotics matter, there was a degree of concern, certainly a
8 valid concern, as to the safety and security of a, at that point,
9 unknown, at least to the defence, informant witness who, in
10 fact, could tie the various pieces of evidence together. And it
11 was on the basis of an undertaking from myself to Crown
12 counsel that that would not be disclosed and the identity
13 would not be known that the information was made available
14 to me. And I think that there has to be certainly a certain
15 amount of respect for the undertakings of counsel and,
16 obviously, one basis is on prior performance. If you divulge
17 something in confidence and it reaches the hands of the
18 accused or his associates and some harm is done to a witness,
19 then obviously that confidence is breached. But, certainly, I
20 would expect, pursuant to the code of conduct established by
21 the Bar Society, which is really the only code of ethics that
22 barristers have to govern themselves by, that disclosure
23 would be made, that all evidence, both exculpatory and
24 incriminating, would be made known. I think, in the long run,
25 it tends to save the court time.

1 Q. Well, I'm a great believer in the disclosure, of course, both as
2 a defence lawyer and subsequently as a judge for 25 years.
3 But you do agree that there are circumstances in which the
4 Crown should be entitled to exercise its discretion.

5 A. Certainly.

6 Q. When security of the individual is concerned.

7 A. Certainly, My Lord, I have no difficulties with that.

8 Q. Now I'd like to deal with the property in a witness. When Mr.
9 Khattar testified, my recollection of his evidence was that he
10 considered it would be a breach of legal ethics, serious or
11 otherwise, for a defence counsel to interview a witness whom
12 it was anticipated might be called as a witness for the Crown,
13 like in this case, Chant, Pratico, and Harriss. Do you have any
14 observation on that?

15 A. My understanding, My Lord, and what I governed myself in
16 my years of practice was that there is no property in
17 witnesses. That, in fact, if defence counsel is to properly
18 represent his client, then he should, as a matter of practice,
19 speak to each and every witness that he is aware of. He
20 should, in fact, conduct his or her own investigation with
21 respect to the circumstances of the offence. I think one is
22 doing his client a disservice by merely accepting what has
23 been provided as being the be all and end all of the case.
24 There is no property in defence witnesses. Mind you, the
25 argument could be raised and, no doubt, has often been raised

1 by the Crown, well, "We, as Crown Prosecutors, don't know
2 what the accused, who the accused witnesses are." But the,
3 it's the Crown that's bringing the charge. It's the Crown that
4 has to establish the charge. Certainly there are rules of
5 evidence with respect to alibi evidence or what use can be
6 made if it's not disclosed at a convenient time. If it's brought
7 up at the last instance. Then comments can be made either to
8 the jury or the judge can direct his mind to that.

9 Q. So that had you been defending Mr. Marshall back in 1973, I
10 guess. You wouldn't have been called to the Bar then?

11 A. In 1971, I was beginning...

12 Q. The circumstances have changed very much from '71 to '73
13 when you started to practice?

14 A. I began my practice, My Lord. I graduated in 1974. I began
15 practicing in '75. I made a point of attempting to do my own
16 research. In fact, it's well known that many private
17 practitioners, perhaps not so much so here, but certainly in
18 larger jurisdictions, make use of their own investigators to
19 interview witnesses. I think it's an obligation on counsel to,
20 in fact, speak to the witness before the witness testifies.
21 Again, a question of perspective. Mr. Saunders brought that
22 up this morning. From the police officer's perspective when
23 he's taking a statement, he'd like a certain set of facts. The
24 defence counsel may want other facts that can only be
25 brought forth by an examination of the witness.

THE HONOURABLE JUDGE CACCHIONE, EXAM. BY COMM. EVANS

1 Q. Yes, I think probably in some areas where they're better paid
2 than where I practiced and where you practiced, they did
3 hire investigators. I didn't have that luxury. Following the
4 conviction of Mr. Marshall and prior to his appeal, the Crown
5 and the police were aware that James MacNeil, I think it was
6 James MacNeil, had...

7 A. Yes.

8 Q. Stated that Ebsary was the killer, and that both MacNeil and
9 Ebsary had been interviewed by the police and subjected to a
10 polygraph test. Now in that circumstance, would you have
11 expected the Crown to disclose such information to you?

12 A. I certainly would have expected that evidence to be disclosed
13 to defence counsel. I would think that that evidence would
14 fall under the fresh evidence rules, be admissible at the
15 appeal. If not admissible at the appeal, certainly evidence
16 which should be in the possession of defence counsel at a
17 retrial. It obviously, that simple piece of evidence cast a
18 considerable doubt, and I would state, a reasonable doubt on
19 the Crown's case in the first instance. And a nondisclosure of
20 that evidence, in my opinion, is one of the factors that led to
21 Mr. Marshall spending almost eleven years in jail. I can't see
22 why that wasn't made known to Mr. Rosenblum or Mr.
23 Khattar at the time.

24 Q. And then you would have made the application to the court
25 for the admission...

1 A. Of fresh evidence.

2 Q. Of fresh evidence.

3 A. Yes, My Lord.

4 Q. would you also have interviewed Ebsary and MacNeil and the
5 Ebsary family and made the same application, if the evidence
6 were worthwhile, as it turned out to be?

7 A. I would think that based on MacNeil's evidence that defence
8 counsel's obligation was then to interview persons close to
9 MacNeil and to Ebsary. Obviously, I would think an interview
10 of those persons would have brought out the character and
11 prior conduct of Mr. Ebsary, together with his fascination for
12 knives.

13 Q. Dealing now with the judgement of the Court of Appeal on the
14 reference, in view of the fact that Junior Marshall was never
15 charged and, therefore... Or convicted of a robbery, is it your
16 opinion that the introduction of the robbery or rolling matter
17 in the Court of Appeal judgement had an adverse effect on
18 your compensation negotiations with the Department of the
19 Attorney General?

20 A. I believe that it was a factor taken into consideration by the
21 Department in our negotiations. I also believe that it was a
22 large factor in the approach and attitude that was taken
23 towards Mr. Marshall. That the public perception was, in fact,
24 tainted by that evidence and the comments that stemmed
25 from that evidence. If, it appeared to me that there was a

THE HONOURABLE JUDGE CACCHIONE, EXAM. BY COMM. EVANS

1 trial and a conviction entered on that particular charge that
2 hadn't been laid by the comments that were made. Certainly,
3 I have no difficulty in viewing the comments on his
4 credibility. I can see where a court or a panel of judges could
5 make those findings because of the experiences that I had
6 with Mr. Marshall. But I fail to see how it could go beyond
7 citing the question of his credibility and then indicating that
8 he was in the process of doing this or, in fact, had committed
9 another criminal offence. That has yet to be established. I
10 doubt it ever will be established. He has never been charged.
11 He has never been charged with the offence of perjury and,
12 yet, a reading of that judgement and the public perception
13 arising from that judgement was that he was not only an
14 acquitted murderer, but he was a perjurer and he was, as
15 well, a robber.

COMMISSIONER EVANS

17 Thank you, Judge Cacchione. I have no further questions.

MR. CHAIRMAN

19 I just have one.

EXAMINATION BY THE CHAIRMAN

23 Q. I think you indicated yesterday, Judge Cacchione, that when
24 the settlement had finally been agreed between you and
25 counsel, or solicitors for the Attorney General, that there was

1 a caveat that tat settlement had to be approved by Mr. Justice
2 Campbell. Is that...

3 A. I wouldn't say that it was a caveat. That he would be asked
4 to look at the settlement. I didn't perceive Mr. Justice
5 Campbell as having any real say in that particular issue. I
6 think that he dropped out of the picture once the negotiations
7 took place and that, subsequently, he was in fact endorsing an
8 agreement or a settlement that had been reached by counsel.
9 2:30 p.m.

10 Q. What then would be the purpose of asking him to endorse it?

11 A. It's what the government wanted.

12 Q. Supposing he had concluded that the settlement was
13 inadequate. Would it have been open to him to come back
14 and say so?

15 A. I would imagine that it would have been open to him to say
16 so. I doubt that he would have come back and said it's
17 inadequate, having the given that counsel had participated in
18 negotiations. But I think that was open, yes.

19 Q. Were there any discussions between you and Mr. Justice
20 Campbell after the settlement had been concluded and before
21 he had filed his approval?

22 A. I don't recall any discussions after that. Simply that the
23 matter was embodied in the documentation and forwarded.

24 MR. CHAIRMAN

25 Thank you very much.