

THE HONOURABLE JUDGE CACCHIONE

Thank you, My Lords.

THE WITNESS WITHDREW.MR. MACDONALD

My Lords, the next witness is Frank Edwards.

FRANK EDWARDS, duly called and sworn, testified as follows:

EXAMINATION BY MR. MACDONALD

Q. Your name is Frank Edwards?

A. That's correct.

Q. Mr. Edwards, you're the Crown Prosecutor for the County of Cape Breton, is that correct?

A. That is correct.

Q. How long have you held that position?

A. Since December 11, 1978.

Q. When did you graduate from law school?

A. 1974.

Q. Between then and '78, what did you do?

A. I was in private practice in Glace Bay.

Q. General type of practice?

A. It was, yes.

1 Q. In particular, did you do some criminal work?

2 A. Yes, about maybe a third of the practice was criminal practice.

3 Q. Was that as defence counsel?

4 A. It was, except for the occasional private prosecution, minor
5 assaults, that type of thing.

6 Q. Did you have occasion to deal with various Crown Prosecutors
7 in the County of Cape Breton?

8 A. Yes.

9 Q. Did you ever have occasion to deal with Donnie MacNeil?

10 A. Once, coincidentally, when I was doing a private prosecution
11 that he was defending.

12 Q. You never dealt with him as Crown Prosecutor?

13 A. No.

14 MR. CHAIRMAN

15 When you refer to the "County of Cape Breton", that does not
16 include all the Island of Cape Breton, or does it?

17 MR. EDWARDS

18 No, it doesn't. It's the, basically the industrial area
19 comprising the County of Cape Breton and the major, the larger
20 municipalities.

21 MR. CHAIRMAN

22 Sydney?

23 MR. EDWARDS

24 Sydney, North Sydney, Glace Bay, Sydney Mines, New
25 Waterford, Louisbourg.

1 BY MR. MACDONALD

2 Q. The prosecutor position that you took in 1978, you were
3 appointed as Crown Prosecutor, were you?

4 A. Yes.

5 Q. Did you succeed Mr. MacNeil?

6 A. My immediate predecessor would have been Stanley
7 Campbell, now a judge of the Provincial Court. However, on
8 the afternoon of his decease, Mr. MacNeil was appointed, but
9 he died that same day. So he never actually took office.

10 Q. Were you then appointed after that?

11 A. I was appointed after that.

12 Q. How many people are on your staff? And we're talking about
13 professional people.

14 A. There are five of us full-time; myself and four assistant
15 prosecutors. There is a permanent part-time position, who
16 looks after our Youth Court work in the Family Court. That's
17 the 12 to 15-year-olds. And we have four lawyers on
18 retainer who we call, you know, when one of us is sick or tied
19 up in another court, that type of thing.

20 Q. You yourself prosecute?

21 A. Oh, yes.

22 Q. Do you restrict your activities to particular courts?

23 A. The bulk of my practice would be at the Supreme Court level.
24 I do most of the trials that go before a jury. But I do, on
25 occasion, do some County Court work and some Provincial

1 Court work.

2 Q. What relationship exists between your office and the Halifax
3 office of the Attorney General?

4 A. Well, my immediate superior, I suppose, would be Martin
5 Herschorn, the Director of Prosecutions. We would be obliged
6 to go to Martin when we wished to appeal, either to the
7 County Court or to Supreme Court. Our authority is limited to
8 the ability to recommend appeals. We're also obliged to
9 follow general guidelines from Martin, and sometimes Gordon
10 Gale. I'm talking about matters of general policy, like with
11 respect to second convictions on breathalyser, spousal
12 assaults, that type of general policy directive governing those
13 types of prosecutions. But aside from that, the carriage of the
14 individual cases on a day-to-day basis is, well, we're fairly
15 autonomous in that regard. Withdrawal of charges, perhaps I
16 should mention. If we, for any reason, wish to reduce a
17 murder charge to manslaughter, we'd be obliged to get
18 authority from the Director of Prosecutions for that.

19 Q. As far as appeals are concerned, you do not argue the appeals
20 yourself. That's done out of Halifax, is that correct?

21 A. Supreme Court appeals.

22 Q. Supreme Court appeals.

23 A. We have, like Brian Williston, in our office, he argues most of
24 our County Court appeals locally in Sydney. But anything
25 that's coming to Halifax would be argued by one of the

1 departmental solicitors.

2 Q. Do you need approval from Mr. Herschorn before deciding to
3 appeal from a Provincial Court judge to the County Court?

4 A. Yes.

5 Q. So all decisions on appeal are made in Halifax.

6 A. Yes.

7 Q. Now you've talked about withdrawing charges. Do you, are
8 you required to discuss or receive approval from Halifax
9 before proceeding with charges? I understand the charges
10 are laid by the police, normally, aren't they?

11 A. Yes.

12 Q. And are discussions held between your office and the police
13 prior to a charge being laid?

14 A. In situations where the, I guess the best way to put it, in
15 nonstraightforward situations. Obviously, there's no need for
16 consultation on most breathalyser and routine things. But
17 any major prosecutions, there's generally consultation
18 between the prosecutor and the investigating officer.

19 Q. To get your advice as to the nature of the charge, what charge
20 should be laid, this sort of thing?

21 A. Yes.

22 Q. Now do you have any directions from Halifax that in certain
23 circumstances you must seek their advice as to what charge
24 should be laid?

25 A. No.

1 Q. If you're dealing with prominent people, for example, do you
2 have the complete autonomy, you and the police, to lay
3 whatever charge you like?

4 A. Yes.

5 Q. There's no directive out the A. G.'s office saying in particular
6 cases or dealing with particular people, no charge should be
7 laid unless the Attorney General's office approves it?

8 A. No.

9 Q. What if there's a disagreement between the police and your
10 office?

11 A. Well, as far as we are concerned, the prosecutors in Sydney,
12 that would be the end of it. If there's a disagreement
13 between one of the assistant prosecutors and the
14 investigating officer, then it'll normally be reviewed by me.
15 It'll be brought to my attention.

16 Q. What do you mean "it would be the end of it"? A policeman
17 says a charge...

18 A. Yes.

19 Q. Should be laid and you disagree.

20 A. What I meant was that would be final as far as we are
21 concerned. However, what happens is the R.C.M.P., their
22 manual specifies that if there is such a disagreement, then
23 they would refer it to their Halifax headquarters, who, in
24 turn, would take it up either with Gordon Gale or Martin
25 Herschorn and so we'd be back in it by that route. In other

1 words, I'd then be contacted by Herschorn or Gale and asked
2 to do a report on the nature of the disagreement and with
3 copies of any documentation that might be in our possession.

4 Q. With the caveat I don't want any names, has that ever
5 happened?

6 A. Oh, yes.

7 Q. So there's been a circumstance where the R.C.M.P. have
8 wanted to lay a charge, you have disagreed, and it's gone up
9 to your respective superiors.

10 A. Yes, that happens from time to time. It's rare and I can't
11 think of a specific case, but I know that I have sent in such
12 reports where there has been disagreement. But they were
13 not the high profile cases that you mentioned before. I can't
14 consider it, I can't think of any situation like that.

15 Q. What does "withdrawing a case" mean? You used that phrase,
16 "want to withdraw a case" or a charge?

17 A. Withdraw a charge.

18 Q. Charge, sorry.

19 A. Well, my understanding is that up until the entry of a plea by
20 an accused person, which is when issue is joined, so to speak,
21 it is within the prerogative of the Crown to withdraw any
22 charge that has been laid. The effect of the withdrawal would
23 be simply that that's the end of the charge. There would be
24 no finding of not guilty entered. After a plea is entered; i.e.
25 after issue is joined, the Crown then only has three options.

1 Either to proceed, or to offer no evidence, in which case a
2 finding of not guilty would be registered, or enter of stay of
3 proceedings. And that, by the way, is another circumstance
4 which would require a nod from Halifax, to enter a stay.

5 Q. Before you could enter a stay, that requires Halifax approval.

6 A. Yes.

7 Q. What's the effect of entering a stay of prosecution?

8 A. Entering a stay suspends the proceedings, I guess is the best
9 way to describe it, for a period of one year.

10 In other words, the charge is on the books for one year and
11 may be recommenced any time during that one-year period
12 by the Crown and the proceedings go from there. If it's not
13 recommenced within the one-year period, the charge would
14 lapse and it would have the net effect as if it had been
15 withdrawn originally.

16 Q. If you have a disagreement with the police, and you've
17 described that, do you make it clear to the police or do you
18 discuss with the police that the ultimate decision is theirs
19 whether to lay the charge, it's not yours?

20 A. Yes.

21 Q. When you said before "if there's disagreement, that's the end
22 of it", did you mean that that's it? The police cannot lay a
23 charge or what did you mean?

24 A. What I meant was that that's where it stopped as far as I was
25 concerned. There is no mechanism whereby I would be

1 obliged to then go to Halifax on my own initiative and say,
2 "Look, the police and I have this disagreement. I don't feel
3 there should be a charge. What do you think?"

4 Q. So then if there is a circumstance where the police wish to lay
5 a charge, you disagree, for whatever reason. You don't think
6 there's enough evidence or whatever.

7 A. Yes.

8 Q. If the police then proceed to lay the charge, you must decide
9 what course of action to take. Whether to withdraw, whether
10 to stay, or whether to proceed with the action.

11 A. Well, subject to the caveat about staying. Basically, the usual
12 decision is then I must decide whether to proceed or offer no
13 evidence once the charge is laid.

14 Q. Now is that your decision? Do you need approval of Halifax to
15 do that?

16 A. No.

17 MR. CHAIRMAN

18 While we're on that topic, Mr. Edwards, and this has been
19 coming up quite often during this Inquiry. That strikes me as
20 leaving a tremendous amount of authority and power in the hands
21 of the investigating officer, who is not trained in the law and may
22 not be in a position to decide the nature of the charge that should
23 be laid, if indeed he or she has gathered sufficient evidence to
24 sustain a charge. My concern is, how do you guard against the
25 police going on a fishing expedition and saying, "Well, we suspect

1 so and so but we really haven't got all the evidence. But if we
2 charge him and get some of these witnesses who we've been
3 interviewing in the witness box under oath, we may be able to
4 convict."

5 MR. MACDONALD

6 Or maybe he'll come in and plead guilty.

7 MR. CHAIRMAN

8 Or maybe he'll come in and plead guilty. How do you guard
9 against that, which seems to me to be a...

10 MR. EDWARDS

11 Well, My Lord, I guess the safeguard there is the fact that
12 the Crown has the carriage or the control immediately after the
13 charge is laid. And nothing can happen to that charge unless the
14 Crown does something with it. So that the charge is laid and then
15 I can withdraw it or seek a stay or whatever. I guess maybe if...
16 Maybe I could answer your question thus by considering the
17 alternative. The alternative would be not to allow the police to
18 lay a charge unless the Crown has first approved it. And if I'm
19 correct and that is the alternative, the danger with that is that
20 then that relegates too much power to the confines of my office.
21 In other words, I would then be able to order a police officer not
22 to lay a charge and that decision would never see the light of day.
23 At least now, if a police officer lays a charge, then I have to do it
24 out in public; i.e. say either we're going with it or I'm withdrawing
25 it. And, therefore, there's some accountability, I suppose, because

1 of the fact that it is, therefore, done in public.

2 MR. CHAIRMAN

3 The only danger I see in that is that a person has been
4 charged. Some of the damage to his or her reputation has been
5 done.

6 MR. EDWARDS

7 Yes.

8 MR. CHAIRMAN

9 I suspect it would be administratively impossible for the
10 police to be required to consult a Crown Prosecutor before laying,
11 say, charges in impaired driving and traffic violations and simple
12 break and entries. I have an uneasy feeling that there should be
13 more... Well, are we entitled to assume that, say, a conscientious
14 investigating officer dealing with investigating a serious, suspicion
15 of a serious crime, would come to a Crown Prosecutor before
16 laying the charge and saying, "Do you think this is the correct
17 charge? Is there more evidence I should be looking for before
18 laying the charge?"

19 MR. EDWARDS

20 I think in most cases there would be that expectation or that
21 confidence would be justified. However, you know, in the last few
22 months, there has been what I perceive to be a change of
23 emphasis in that regard by the R.C.M.P. and I find that, generally
24 speaking, there's not as much consultation now. They feel that in
25 more cases they'll make the judgement and I'm a little bit

1 concerned about that, about whether the charge should be laid. I
2 guess another point is that, that I meant to mention, is that like
3 the Criminal Code states that the Justice shall receive the
4 information. So, really, there'd have to be a statutory change if the
5 Crown were to have the authority to order the police officer not to
6 lay the charge. Under the terms of the Code, I think the ultimate
7 authority is with the police officer as far as the decision to charge
8 is concerned. I understand that there's a practice in New
9 Brunswick whereby the J.P.'s, as a matter of policy, I suppose, will
10 not accept an information unless the local Crown has initialled it.
11 But that, I can't think of any statutory basis for that type of
12 system and, personally, I think that would be probably not be as
13 good a system as the one we have.

14 COMMISSIONER EVANS

15 Isn't it a function of the police to investigate and if they feel
16 they have sufficient evidence, then they go to the J.P. and they lay
17 the information?

18 MR. EDWARDS

19 Yes.

20 COMMISSIONER EVANS

21 And that can be done without any okay from you.

22 MR. EDWARDS

23 Yes.

24 COMMISSIONER EVANS

25 All right. Then it comes to you. Your job is to prosecute.

11698 MR. EDWARDS, EXAM. BY MR. MacDONALD

1 MR. EDWARDS

2 yes.

3 COMMISSIONER EVANS

4 Or to withdraw, as you've said.

5 MR. EDWARDS

6 Yes.

7 COMMISSIONER EVANS

8 So that you have the control, once it gets into the courtroom
9 and in the light of day.

10 MR. EDWARDS

11 Yes.

12 COMMISSIONER EVANS

13 But prior to that, it could be done in a back room some place
14 between the police and the J.P.

15 2:52 p.m.

16 A. That's correct.

17 COMMISSIONER EVANS

18 But then you have control once it hits the, once it hits the
19 court.

20 A. Once the charge is laid and I think most police that we have
21 dealings with are cognizant of the fact that the control then
22 passes from the police to the Crown.

23 COMMISSIONER EVANS

24 But would it be fair to say that in a serious, very serious cases
25 like murder that sometimes you would be consulted before a

1 charge is laid to avoid what the Chairman says of blackening
2 somebody's character when there is no evidence to support
3 it?

4 A. Um-hmm. Oh, yes. You know the really serious cases like
5 murder, I can't think of an instance where a charge has been
6 laid without consultation. But sometimes, I suppose there
7 might be a tendency to minimize the impact of having a
8 charge of break and enter laid against you even in a very
9 serious offence. And...I like as much consultation as possible,
10 as long as we have the understanding that if there is a
11 disagreement and he wants to charge then he has that right.

12 COMMISSIONER EVANS

13 And responsibility.

14 A. And responsibility.

15 MR. MacDONALD

16 Q In practice, though, Mr. Edwards, if there is disagreement
17 between the police and your office as to whether a charge
18 should be laid, what happens? If you say, your office says no
19 charge should be laid, the police thought there should be,
20 what happens?

21 A. In most cases the police take the pragmatic approach, I
22 suppose, and take the attitude, "Well, what's the point in me
23 laying a charge if Frank Edwards is going to withdraw it."
24 And, you know, that's logical. I have no problem with that.
25 But I don't think that that subtracts from the importance of

1 the principle that the ultimate decision to lay the charge
2 should be with the police. I think that's sort of a safety valve.

3 Q. But the pragmatic approach that is, in fact, followed would
4 result in the charge not being laid.

5 A. It would, yes.

6 Q. And, therefore, it never does see the light, the public light so
7 to speak.

8 A. That's correct.

9 Q. Which is, as the Chairman has said, at times could be adverse
10 to the individual.

11 A. It's probably good that it works that way for that very
12 reason.

13 Q. Okay, let me deal with some of the other relationships you
14 had with the police. Do you get involved at all during the
15 investigation stage?

16 A. Yes. We're consulted for advice at the investigation stage.

17 Q. What type of advice would be sought?

18 A. One case that comes to mind, a person had confessed to a
19 murder and the investigation and was still going on as far as
20 some of the technical details but the main evidence was the
21 statement. So in the interview with the police officer it
22 became apparent that there might be some problem with the
23 admissibility of the statement. It was on the wording of the
24 right to counsel. So I suggested that it would probably be
25 prudent to go and take a second statement from the witness

1 and ensure that before the second statement was taken that
2 the accused person fully appreciated his right to counsel.
3 That's one example. Sometimes I'm consulted, I say "I", you
4 know, the Crown is consulted to determine whether the
5 evidence is sufficient and if it's not I might suggest, "Well,
6 why don't you go and get statements from A, B and C. See
7 what they have to say on the matter." And I make it as a
8 suggestion and consciously try to make the investigator
9 appreciate that I'm not trying to take over his investigation.
10 That it's up to him but, you know, it might be better if you do
11 this.

12 Q. All right. What is the system used at your office to get the
13 materials from the police into your possession? Materials
14 that they have gathered during an investigation.

15 A. Well most cases, that would be the, you know, the cases other
16 than murders or complex fraud cases, the, most police forces
17 will have a court officer and he will provide us with a copy of
18 the relevant material. Statements, Crown sheet, photographs,
19 that type of thing.

20 Q. Who makes the determination what's relevant?

21 A. Well in the first instance and in most routine cases that would
22 be by the court officer. But very often we will get a file and
23 say, "Well, you know, I note here that other statements
24 were taken. I'd like to have copies of those." So...

25 Q. Do you have access to the complete police file if you want to

1 get it?

2 A. Depending on the department. Like the Sydney Police
3 Department, for example, if I say to the court officer or the
4 investigator involved in the particular investigation that I
5 want to see the whole file, there's no difficulty with that. And
6 with the RCMP, I don't think there'd be a problem with that.
7 Although if there is a report containing investigators'
8 opinions, I don't know if that would be turned over to me
9 knowing that it would, in turn, be turned over to defence
10 counsel.

11 Q. Is it your practice to take whatever materials you receive
12 from the police and turn it over to defence counsel?

13 A. Yes.

14 Q. Totally?

15 A. Yeah. Subject to if there is a witness who is going to be
16 intimidated and I can't think of a case, single case, where I've
17 had to hold something back for that reason. I would turn
18 over pretty well everything.

19 Q. So that's been your experience and your practice...

20 A. Yes.

21 Q. To turn over the entire file you obtained from the police.

22 A. Yes.

23 Q. Do you wait for defence counsel to approach you?

24 A. Again, you know, there's quite a marked difference, I
25 suppose, in how the minor cases are handled and the major.

1 In the minor breathalyzer-type of case, normally there'd be
2 an approach by defence counsel. But in the major cases
3 where there is a lot of documentary evidence, very often the
4 initiative will be taken by us and just send it out to, a
5 complete copy out to defence counsel. But sometimes they'll
6 make the request before we've had a chance and we'll
7 comply.

8 Q. But if a request is not forthcoming you will, and let's talk
9 about major cases...

10 A. Yes.

11 Q. If we could. If a request is not forthcoming you will take the
12 initiative and get the file to them?

13 A. Yes.

14 Q. Have you ever had police complain to you that you shouldn't
15 be giving the complete file to defence counsel?

16 A. I wouldn't say complain. I guess there have been remarks
17 and expressions that, you know, "You're being a little too
18 generous." But it hasn't gone beyond that and I've never had
19 any difficulty in that regard.

20 Q. When do you give your file to the defence counsel and we're
21 talking serious cases now.

22 A. Yes.

23 Q. Do you do that before the preliminary inquiry?

24 A. Yes.

25 Q. And if other materials come to your attention after you have

1 given the file, what do you do with those?

2 A. Do a covering letter and say, "I now enclose the statement
3 dated such and such. Just obtained."

4 Q. Is it your practice to interview witnesses before trial? Before
5 the preliminary?

6 A. Yes. As often as I can. And in the major cases, that would be
7 pretty well always. Some witnesses I deliberately do not
8 interview. A witness, for example, if I'm calling a co-excused,
9 who has been charged in a separate information and I have a
10 reasonable expectation that that witness is going to be hostile
11 and perhaps subject to a Section 9(2) application, I will
12 usually not interview that witness beforehand because, well
13 for two reasons. Number one, the witness may try to suggest
14 in court that the Crown really put words in his mouth and,
15 two, because the application is going to be made to cross-
16 examine the witness. A lot of times it's helpful if you have a
17 little bit of a psychological edge, I suppose, and have the
18 witness not knowing exactly where you're going to be coming
19 from.

20 Q. As Crown Prosecutor, do you object if defence counsel
21 interview Crown witnesses prior to trial?

22 A. No.

23 Q. Do you consider that you have any right to object?

24 A. No.

25 Q. As, when you practiced as defence counsel, was it your

1 practice to interview the witnesses prior to the trial?

2 A. Yes.

3 Q. The system of use of Crown sheets, that's been in use for the,
4 by the RCMP for some time, I believe, has it?

5 A. Yes.

6 Q. And that was in use when you took over as Crown
7 Prosecutor?

8 A. Yes.

9 Q. Was there a similar system in use in the Sydney City Police
10 when you took over?

11 A. No.

12 Q. Is there now?

13 A. Yes.

14 Q. And who instituted that system? Or who requested such a
15 system?

16 A. I requested it to the then Chief John MacIntyre and he issued
17 the order to his men that they should do so and it has carried
18 on since.

19 Q. What degree of control, if any, is exercised over your
20 activities by Halifax? You've said Martin Herschorn, for
21 example, is your immediate superior.

22 A. Yes.

23 Q. What degree of control is exercised over you?

24 A. I guess the, aside from what I talked about before, the
25 guidelines and that type of thing, you're talking about on an

1 individual-case basis.

2 Q. Yeah.

3 A. From time to time the Attorney General will get a letter of
4 complaint from a dissatisfied citizen who may have been
5 involved in a case either as complainant or victim, whatever,
6 and I'll be asked to do a report to Halifax to explain what
7 happened in order that they can assess whether there is any
8 legitimacy to the complaint.

9 Q. So it's reactive-type of control as opposed to anything else.

10 A. Oh, yes. But as far as the calling of witnesses and, you know,
11 trial strategies and that type of thing there's virtually
12 autonomy at the local level. That's been my experience
13 anyway.

14 Q. Thank you. I want to move into the, your involvement in the
15 Marshall case, Mr. Edwards. You're the author of a document
16 that's fairly well known at this stage and we've been calling
17 them various things. Frank Edwards' notes, Volume 17 and so
18 on. You have the originals with you, do you?

19 A. Yes, I do.

20 Q. And I understand you would prefer to look at the originals as
21 opposed to relying on any typed version thereof.

22 A. I'm a little more comfortable with the originals if it's okay.

23 MR. MacDONALD

24 I can point out, My Lords, that copies of the originals are also
25 in Volume 17. I don't, subject to your direction whether we

1 have to file the actual copy of Mr. Edwards' notes.

2 COMMISSIONER EVANS

3 We need Volume 17 then, I take it.

4 MR. MacDONALD

5 You certainly do.

6 CHAIRMAN

7 Before we move into Volume 17, and simply because, so I
8 won't forget, when, I think it was Judge Matheson was
9 testifying and he was asked if he had any comments or
10 complaints with respect to the method, or the way that some
11 cases were handled by Crown Prosecutors, he indicated, it
12 may not have been Matheson, but I think it was. In his view
13 an appeal should be handled by the prosecutor who had the
14 carriage of the case at the trial rather than have a lawyer
15 from the Department of the Attorney General who's resident
16 in Halifax carrying the appeal. And I gather from your
17 testimony that that practice still prevails. That if you're
18 prosecuting a case and it's then appealed to the Court of
19 Appeal of Nova Scotia, you will not be counsel on the appeal.

20 A. That is correct, My Lord, yes.

21 CHAIRMAN

22 Would you be there? Would you be present?

23 A. No.

24 CHAIRMAN

25 Is there any...

1 A. I...

2 CHAIRMAN

3 Do you brief, do you have to come to Halifax to, or does the
4 counsel that's going to carry the appeal come down to see you
5 to, for a briefing?

6 A. No, there will be telephone briefings. For example, in the
7 Ebsary appeals which were handled by Dana Giovanetti, there
8 was quite a bit of conversation between us about points that
9 he queried in the transcript and that type of thing.

10 COMMISSIONER EVANS

11 Who prepares the notice of appeal?

12 CHAIRMAN

13 Yeah, who prepared the notice of appeal?

14 A. That would be prepared in Halifax.

15 CHAIRMAN

16 So they make the decision whether or not, say, well I guess in
17 most instances the appeal would be taken by the defence,
18 wouldn't it, counsel for the accused.

19 A. Well there are Crown appeals, too.

20 CHAIRMAN

21 Oh, I know there are Crown appeals. But I suspect that...

22 A. Yes. But...

23 CHAIRMAN

24 More comes from the accused.

25 A. More from the defence, yes, I'm sorry.

1 CHAIRMAN

2 Does that cause you any, in effect, the, counsel for the, Crown
3 counsel on an appeal, is almost in the same position as an
4 Appeal Court. He hasn't had the advantage of seeing the
5 witnesses...

6 A. That's correct.

7 CHAIRMAN

8 In the witness box. Does that cause you any concern? Or let
9 me put it this way. Do you share the views of Judge
10 Matheson?

11 A. No, I don't. Perhaps I should but it's been my experience that
12 the appeals have been very competently handled. You know,
13 the cases that I was involved in. And, you know, I don't say
14 that to put in a plug for our solicitors but I just honestly
15 haven't had any reason for concern in that regard. After all,
16 the appeals are usually on points of law.

17 CHAIRMAN

18 Yes, I'm just...I don't want to lead you into the Marshall
19 evidence but, for instance, the Assistant Crown Prosecutor in
20 the Marshall case was aware of the statements taken from
21 Ebsary and Jimmy MacNeil and others. If he didn't choose to
22 pass that information on to the, to counsel for the Crown on
23 the appeal, there would be no way that the Crown would
24 bring that to the attention of the Appeal Court, would there?

25 A. No, that's correct.

1 CHAIRMAN

2 Is that practice peculiar, to your knowledge, to Nova Scotia,
3 with respect to Crown appeals or the taking...

4 A. I honestly don't know, My Lord.

5 MR. MacDONALD

6 Q. Now, Mr. Edwards, I'll be referring to Volume 17 but it'll just
7 be for your benefit I'll give you dates and I think that's
8 probably the easiest. First of all, when did you, what is your
9 practice respecting making notes?

10 A. My usual practice, I guess I'm, compulsive is too strong a
11 word, but I normally take notes and, you know, not always as
12 extensive as in this case or rarely as extensive as in this case,
13 but I do try to take as many notes as I can.

14 Q. And the notes that you've made on this case, when did you
15 start making them?

16 A. February 21st.

17 Q. And I think you've said...

18 A. '82.

19 Q. You've already alluded to the fact that they're relatively
20 comprehensive. More comprehensive than your normal
21 practice? Is that correct?

22 A. Yes. They're more detailed because, well I was more involved
23 in, I suppose, in the investigational phase of this than I would
24 be normally and also on February 21st it was apparent to me
25 that what I had was a case of potentially great import and,

1 therefore, it was probably wise to start taking notes.

2 3:14 p.m.

3 Q. Do you need your notes to refresh your memory?

4 A. Yes, in some cases, I can't recall anything beyond what's in
5 the notes. And in others, as I suppose we'll see as we go
6 through, I do have independent recollection and I'll try to
7 make it clear when I'm going on one or the other.

8 Q. Okay, if I can leave that with you to try and tell us when
9 you're relying on your memory or whatever.

10 A. Yes.

11 Q. You didn't start to make them until February the 21st of
12 1982?

13 A. That's correct.

14 Q. The first entry, however, is dated February 3rd.

15 A. That's right.

16 Q. Was that your first involvement with this case?

17 A. Yes.

18 Q. When you made the note on February the 21st, were the
19 events of February 3rd familiar?

20 A. Oh, they were still very fresh in my mind because I had had,
21 as the notes show, recurring contact with the investigators
22 during the intervening period.

23 Q. Is this one of the days you can remember today, February
24 3rd?

25 A. Yes, I can, I have pretty good independent recollection of that

1 day.

2 Q. How did the meeting come to be arranged?

3 A. I received a phone call from John MacIntyre. I believe it was
4 earlier that morning, though it may have been the day before.
5 And he requested a time when I would be available to meet
6 with he and Inspector Scott to discuss... Now I don't
7 remember if he said "an important matter" or "a matter", but
8 anyway he made the request for the meeting.

9 Q. Do you know what time you met with him?

10 A. Yes, it was 1:30 p.m.

11 Q. At 1:30 p.m.

12 A. Yes.

13 Q. Do you keep a diary or Daytimer or anything like that for
14 your appointments?

15 A. Yes.

16 Q. Do you have your book for that particular time?

17 A. Yes.

18 Q. What, if any, entries show for February 3rd?

19 MR. MACDONALD

20 I should point out, My Lords, that this has not been
21 distributed to counsel because I've not seen it myself. But Mr.
22 Edwards has just advised me that he had it last week and the time
23 when he advised me he didn't have it with him.

24 BY MR. MACDONALD

25 Q. What's it say for February 3rd?

MR. EDWARDS, EXAM. BY MR. MACDONALD

1 A. February 3rd, I have a notation at 1:30 p.m., "Chief
2 MacIntyre," just those two words.

3 Q. Do you have any other appointments for that afternoon?

4 A. I have an appointment noted at 2:30 p.m. with Jim Carroll.

MR. MACDONALD

6 Okay, My Lords, I can advise Your Lordships rather than
7 take the time to do it, that Constable Carroll's diary was filed, if
8 you recall, his notebook and discloses that on that day at that
9 time, he was at the Crown Prosecutor's office. It does not say that
10 he was meeting with Frank Edwards. It just says "Crown
11 Prosecutor's office."

BY MR. MACDONALD

13 Q. How long did the meeting last with Chief MacIntyre and
14 Inspector Scott?

15 A. It's my recollection that it was a half hour to 45 minutes.

16 Q. The evidence that we've heard from Chief MacIntyre, and he
17 repeated this on several occasions, is that the meeting was
18 from two to two and a half hours. Inspector Scott said that
19 his initial response was he thought it was at least an hour.
20 But when he was told that Chief MacIntyre said it could be
21 two to two and a half hours, he said, "Well, could have been."
22 That's his response.

23 A. Yes.

24 Q. And that's found in the transcript at page 9206, My Lords.
25 And Chief MacIntyre's evidence at one spot, anyway, at page

1 6349. Now there's quite a difference between two and a half
2 hours and half an hour to 45 minutes.

3 A. Right.

4 Q. How confident are you in your recollection of the time?

5 A. That is my best recollection and I'm pretty confident that
6 that's accurate.

7 Q. Tell us as best you can what you remember about the
8 meeting.

9 A. Chief MacIntyre and Inspector Scott showed up at the
10 appointed time and we met in my office. At the time, I had,
11 my desk was against the wall so that if you were seated at
12 the desk, you'd be facing at the window. And in the middle of
13 the room, there was a six-foot table. We didn't have a
14 conference room at the time, so my office doubled as such.
15 Chief MacIntyre sat on one side of the table and Inspector
16 Scott on the other, and I sat at one end. I would have been
17 approximately two to three feet away from Chief MacIntyre
18 at the time and a little further away from Inspector Scott on
19 the other side of the table. Chief MacIntyre had a large file
20 with him. I'm aware that there's evidence of whether it was
21 a manila file or accordion file. I can't help you on that. All I
22 can recall is that it was a thick file, and by that, I mean two to
23 three inches thick, as I recall. And Chief MacIntyre had the
24 file opened on his lap as he sat near the table. He began by
25 telling us the purpose of the meeting and I believe one of the

1 first things he did was show a letter that he had gotten from
2 Stephen Aronson, Donald Marshall's lawyer.

3 Q. Yes.

4 A. And now I can't recall whether he handed the letter around
5 for us to read or not. I believe I did read it at that time. He
6 mentioned or did mention that he went on to outline then the
7 background of this particular case and said it related to
8 Donald Marshall who had been convicted for a judge and jury
9 back in 1971. That the main evidence against him was from
10 two teen-aged boys who were eyewitnesses. He indicated
11 that each of the boys had given two statements. And while
12 he was talking, I just reached over and pulled what I took to
13 be a statement out of the file. Now I don't recall whether it
14 was Chant's first statement or Pratico's. I believe it was
15 Chant's, and I began reading it. And John said, "No, that's not
16 the statement," or that's... My recollection is that that's the
17 bull statement, that was the gist of it, "Here, read this one."
18 So he took back the first statement and then gave me the
19 June 4th statement and so I started reading that. And John
20 went on with his outline of what had gone on. He did mention
21 that Chant and Pratico had been unknown to one another and
22 that they had given these incriminating statements against
23 Marshall. They said that Marshall had been accosted by...
24 Marshall.. I'm sorry. Yeah, the first statements, John did
25 outline that the first statements indicated that Marshall had

1 been, Marshall and Seale had been accosted by two
2 individuals. And then the second statements he outlined said
3 that Chant and Pratico had, in fact, seen Marshall stab Seale.
4 He said that a conviction was entered and that after the trial,
5 MacNeil had come forward. I believe he did give Jimmy
6 MacNeil's name, full name, and at that time, MacNeil stated
7 that Roy Ebsary had, in fact, done the stabbing. And that John
8 said that he then turned the matter over to the R.C.M.P. to
9 have them do a reinvestigation because he felt that it
10 wouldn't be proper for him to reinvestigate a case that
11 somebody had been convicted on as a result of his original
12 investigation. So he mentioned that the R.C.M.P. took
13 polygraph tests and, in MacNeil's case, the result of the tests
14 were inconclusive but that the polygraph showed that Ebsary
15 was truthful when he stated that he had not, in fact, stabbed
16 Seale. He mentioned, then went to the contents of the letter
17 and Mitchell Bayne, who, I guess, is Mitchell Bayne Sarson,
18 but at that time, and I believe the letter states it, that
19 Mitchell Bayne...

20 Q. Yeah, I think in front of you is Volume 34. One of those
21 volumes, Mr. Edwards, and there's listed on the binders which
22 ones... page 22 is a copy of Mr. Aronson's letter.

23 A. Yes. Yes, I see somebody has penned in "Sarson" after Bayne,
24 but I don't think that was on the original letter.

25 Q. And the third paragraph refers to the fact that it was October

1 of 1979 when he was living in Sydney.

2 A. Yes.

3 Q. And Ebsary admitted to him at that time about the stabbing.

4 A. Now John, at that time, indicated that there was a connection
5 between this Mitchell Bayne and Marshall and that the
6 connection was via Sarson's sister, who apparently was a
7 girlfriend of Donald Marshall. And I'm relatively certain that
8 it was during that first meeting that he told Inspector Scott
9 and I that during his escape from Dorchester or Springhill...

10 Q. "His escape" being Marshall's escape.

11 A. Marshall's escape, that Marshall had been found at Sarson's
12 sister's place in Pictou, I believe.

13 Q. What was Chief MacIntyre asking on that day or was he
14 asking anything?

15 A. The meeting, toward the end of the meeting, what he was
16 asking was that the R.C.M.P. look into the complaint and I
17 understood reinvestigate the matter.

18 Q. And that was the suggestion from Chief MacIntyre.

19 A. Oh, yes.

20 Q. Why were you involved?

21 A. I suppose that question is better put to John MacIntyre. I'm
22 not sure. I mean there's no reason that I know of why Chief
23 MacIntyre couldn't have gone directly to Inspector Scott and
24 said, "Look, I've got this matter and I'd like you fellows to
25 investigate it."

1 Q. Were you to be kept advised of the investigation as it went
2 forward?

3 A. My expectation, I don't recall any conversation on that point,
4 but I can tell you that my expectation was that the R.C.M.P.
5 would take it and do whatever they were going to do with it
6 and when they finished, they would come and let me know
7 what they had found and seek advice on where I should go
8 from there.

9 Q. Did you report any of this event to your superiors in Halifax?

10 A. No, I may have made a passing reference to it in a telephone
11 conversation with either Gordon Gale or Martin Herschorn.
12 I've no independent recollection of such a call but it wouldn't
13 surprise me if there had been, you know, if it had come up
14 incidentally when we were discussing other matters, for
15 example. But that's speculation.

16 Q. In any event, nothing on that particular day was of sufficient
17 import to you that you wanted to make notes right then of
18 what was happening.

19 A. No, that... You know, I have to say that, really, I was rather
20 skeptical about the whole thing and thought that perhaps
21 John was overreacting to this letter he had gotten from
22 Aronson. I mean to me at that time the fact that an
23 individual would have been wrongfully convicted for
24 something such as murder was almost inconceivable.

25 Q. In your notes you do make note of the fact that Chant and

1 Pratico were unknown to one and other.

2 A. Yes.

3 Q. Who, was that point emphasized in any way?

4 A. Now I don't, I can't tell you whether John MacIntyre offered
5 that or if I or Scott asked that and got that response.

6 Q. Thank you. Anything else you want to say about February
7 the 3rd?

8 A. No, that's all I can recall at that point.

9 Q. Now your next notes are dated February 16th. Those, as well,
10 were made on February 21st, were there?

11 A. Yes.

12 Q. What happened on February the 16th?

13 A. Well prior to February 16th I was aware that Harry Wheaton
14 and Jim Carroll were working on the case, I believe, as a
15 result of a telephone call from one or the other. At that time
16 Jim Carroll was involved in a major fraud case that I was
17 prosecuting so there was fairly regular contact. As a matter
18 of fact the meeting later that day, I expect, would have been
19 on that very file. So I think I learned through one of those
20 meetings, one of them mentioned that Inspector Scott had
21 assigned Wheaton and Carroll to the case. So when they
22 showed up on February 16th, I knew what they were there
23 for.

24 Q. Was it to tell you what they were doing?

25 A. Yes. They told me that had gone to Pictou and interviewed

1 Mitchell Bayne Sarson. I think that was the first time that I
2 learned that the Mitchell Bayne in the letter was actually last
3 name "Sarson" and I can't recall much of what they said about
4 him beyond what's in the notes. The fact that they were not
5 impressed by him. That, I believe they had checked with
6 Gene Cole, who is the Sergeant of the Pictou detachment, and
7 he had indicated to them that Sarson was in the local drug
8 culture and was a suspected trafficker. And that he was a
9 friend of Marshall's. It would have been, when I say "they"
10 told me, it would have been Harry Wheaton. Jim is not as
11 vocal as Harry. And Harry usually, in our meetings, did most
12 of the talking.

13 Q. Were you given a copy of the statement that had been taken
14 by Wheaton and Carroll from Sarson?

15 A. I don't think. Not at that time.

16 Q. Did they tell you that Sarson told them they had had related
17 Ebsary's story to Junior Marshall in prison?

18 A. Yes, I believe they did.

19 Q. Your note for that date, or did they tell you whether they
20 believed Sarson?

21 A. My best recall is that they were a little bit suspicious of
22 Sarson. That they didn't feel he was a reliable person.

23 Q. You have a note on February 16th where you say, "Chant and
24 Pratico had been cross-examined on previous statements."
25 Where does that note come from?

1 A. I recall that I asked Harry Wheaton, and when Harry told me
2 that he had a transcript of the trial I asked him whether the
3 two eyewitnesses, Chant and Pratico, had been cross-
4 examined. And he was of the view at that time, based on his
5 reading of the transcript, that they had.

6 Q. You, at this stage, had not read the transcript.

7 A. No.

8 Q. Were there any discussions between the three of you who
9 was to be kept aware of what was going on as they did their
10 investigation? Whether any information was to be given to
11 the Attorney General, their superiors, the media.

12 A. No, not at that point. There was no discussion. As indicated
13 in the notes they indicated that they were going to continue
14 on and they'd get back to me in a week or so. My
15 interpretation was that they'd update me at that time.

16 Q. You noted that they were going to see Chant that evening.
17 That is the evening of February 16th. When did you next
18 hear from Wheaton and Carroll?

19 A. I'm just looking for that reference in my notes.

20 Q. It's on number...

21 A. Oh yes, okay. Number four.

22 Q. Number four?

23 A. Yeah. We didn't touch, there were those four items indicated.
24 Like I know they told me that they had spoken to Ebsary's
25 wife and learned that Pratico had severe psychiatric

1 problems. And then the fourth that they were going to
2 interview Chant that evening.

3 Q. How long would you have met with them that time, do you
4 remember?

5 A. I'd only be guessing.

6 Q. When was the next time you heard from them?

7 CHAIRMAN

8 Do you want to take a short break?

9 3:35 p.m. - BREAK

10 3:59 p.m.

11 BY MR. MACDONALD

12 Q. Mr. Edwards, we had talked about your notes on February the
13 16th.

14 A. Yes.

15 Q. And then I asked you when you next heard from anyone with
16 respect to this case. When was it?

17 A. I called Sergeant Wheaton at 3:30 p.m. on February 21st. But
18 before I forget it, if I may, you asked me earlier about
19 whether at the February 16th meeting there had been any
20 discussion on limiting the amount of information that was
21 given out to the press and I'm going with my original notes
22 here and my notation of that was on the next page. I've got
23 no independent recollection of that discussion. However,
24 there's no doubt that in my mind that that note is accurate,
25 recounting the discussion there about the fact that Parker

1 Donham had been digging into the case and Billy Urquhart
2 had advised me of that and we agreed that the facts would
3 be, that were to be given out would be at a minimum. But I
4 merely confirm that the R.C.M.P. were investigating. So I'm
5 confident that that discussion did take place on February 16th
6 because of my notes. But I, you know, I don't have an
7 independent recollection of it occurring on February 16th,
8 1982.

9 Q. The typewritten copy of your notes on page one of Volume
10 17. Do you have Volume 17 there? On page one, you'll see
11 the notation for February 21st is set opposite that note about
12 "also discussed the fact".

13 A. Yes.

14 Q. Now are you telling me that, in fact, that discussion...

15 A. That conversation took place February 16th.

16 Q. Okay, so that's...

17 A. You see, the notes of February 21st don't begin until the
18 paragraph opposite "re Chief MacIntyre" in the margin. "This
19 a.m. (Sunday February 21st, '82)."

20 Q. Okay, so that's when...

21 A. So everything before that notation took place on February
22 16th.

23 MR. MACDONALD

24 So, My Lords, on page one of Volume 17 and on the top of
25 page two, that notation of February 21st.

BY MR. MACDONALD

1 Q. In fact, that's the date the notes were made. They're not
2 referring to something that took place on that day.

3 A. That's right.

4 Q. Okay, thank you. So there was a discussion about keeping
5 things close.

6 A. Yes.

7 Q. And not discussing anything with the media.

8 A. Yes.

9 Q. Or with anyone else?

10 A. Well, my mind was on media at that time. I don't think the
11 notion of discussing it with anyone else was addressed.

12 Q. Okay. Let's go then to your notes that actually reflect what
13 took place on February the 21st. That's opposite the notation
14 "Re Chief MacIntyre".

15 A. Yes.

16 Q. You called Wheaton, did you say?

17 A. Yes, I phoned, as the note indicates, I phoned him at home at
18 approximately 3:30 p.m.

19 Q. Why were you calling him?

20 A. It was mainly because of the conversation I had had at the
21 police station earlier that morning with Chief MacIntyre. I
22 had been down the police station. I'm not normally down
23 there, of course, on Sunday morning, but the case referred to
24 there was a first degree murder case and Chief MacIntyre had
25

1 requested myself and Inspector Scott to go down to the police
2 station and, or to go over the investigation with him to see if
3 there were any loose ends that could be tidied up. And it was
4 after our discussions on the Weatherbee case that the Chief
5 had taken me aside and asked me about the Marshall
6 investigation. What were they doing, what I knew about it.

7 Q. You made a note that said you "would like to be able to say
8 when it was all over that here are the results of an
9 independent investigation and that Chief MacIntyre had no
10 part in nor influence on it."

11 A. Yes.

12 Q. Was it your intention or your wish that Chief MacIntyre be
13 kept advised of what was happening as this investigation
14 went along?

15 A. No, quite the contrary. It was my notion that he had no part
16 in the investigation. That it was an independent R.C.M.P.
17 investigation and as of Sunday, February 21st, I guess I
18 recognized the possibility that Chief MacIntyre himself might
19 be subject to some investigation.

20 Q. You had realized that as of February 21st?

21 A. I say I may have. I'm saying that because I know that by
22 February 21st, they had talked to Chant, of course.

23 Q. Had they told you by February 21st of the meeting with
24 Chant and Chant had recanted the evidence he had given at
25 trial?

1 A. No. No, I didn't actually learn that until that afternoon.

2 Q. The afternoon of?

3 A. Of February 21st when I phoned Wheaton, I believe.

4 Q. Let me take you to your notes.

5 A. Yes.

6 Q. If you want to review your notes before answering this,
7 please do.

8 A. Yes.

9 Q. We're at February 21st, your discussion with Wheaton.

10 A. Yes. Go ahead.

11 Q. In that notation, you say "Harry said there had been new
12 developments."

13 A. Yes.

14 Q.

15 And that he and Scott had decided there would
16 be no further communication until report for
17 Attorney General was ready. At that time, they
18 would sit down with me and discuss it.

19 Now does that accurately reflect what was said by Wheaton to
20 you?

21 A. Yes.

22 Q. I take it from that that Wheaton is telling you he's not going
23 to discuss anything.

24 A. That's my understanding or that was my understanding at
25 that time.

Q. So given that, why do you say that something he told you that

1 afternoon alerted you to do something?

2 A. Because, as indicated in the meeting of February 16th, the last
3 thing they told me, or the last thing I listed there, was that
4 they were going to go and interview Chant that evening.

5 Q. Yes, and that's what I've asked you if you had known by the
6 21st...

7 A. Yeah.

8 Q. What took place.

9 A. So what I'm, the point I'm about to make is that when he
10 phoned or when I phoned him on the afternoon on the 21st
11 and he said that there were some new developments, what
12 went through my mind there was that something with Chant
13 had happened. I had no idea what but...

14 Q. That's a supposition on your part.

15 A. Yes, and that's as best I can recall what triggered the note-
16 taking, because it was after that call that I started making the
17 notes.

18 Q. Let me go back to the notation of what Wheaton told you,
19 though. Did you understand that the R.C.M.P. had been asked
20 to prepare some report for the Attorney General?

21 A. During that telephone conversation?

22 Q. Well, at any time. He told you "There will be no further
23 communication..."

24 A. Yes, okay.

25 Q. "...until the report for the Attorney General is ready."

1 A. Yes.

2 Q. When did that enter the picture or who told him to make a
3 report to the Attorney General?

4 A. I can't answer that. I didn't.

5 Q. You didn't.

6 A. No.

7 Q. Did you have any communication up to that time with anyone
8 from the Attorney General's office in Halifax that they were
9 involved, that they had asked Wheaton or Scott or the R.C.M.P.
10 to prepare a report for the Attorney General?

11 A. No. My interpretation of that is that the R.C.M.P. had decided
12 to take it to the Attorney General.

13 Q. Now would that also alert you that perhaps something is
14 going on here?

15 A. Of course.

16 Q. Whatever happened, it was on that day you decided that I'm
17 going to keep comprehensive notes of this.

18 A. Yes.

19 Q. At the end of your discussion with Wheaton on February 21st,
20 did you then conclude you wouldn't be hearing anything else
21 from him until the Attorney General received a report?

22 A. Yes, that was the understanding I took from the phone call.

23 Q. You must have been surprised then on February 23rd when
24 they came to update you on the investigation?

25 A. It was an about face but I was, my curiosity was sufficiently

1 peaked at that time that I wasn't going to remind them of
2 the...

3 Q. You were prepared to listen.

4 A. Yes, most interested in what they had to say.

5 Q. Was February 23rd the next time you met?

6 A. Yes.

7 Q. At that time, you were updated on the investigation, is that
8 correct?

9 A. That's correct.

10 Q. At that time, would you have been advised of the interview
11 they had with Mr. Chant?

12 A. Again, and just so the record is clear, I have no independent
13 recall of that meeting, as significant as it might have been, or
14 as it was. But I assume that I was advised of Chant recanting
15 at that time.

16 Q. Were you told that on February 22 a conversation had been
17 had with Mr. Ebsary on the phone in which he had, looked
18 like he probably admitted his guilt?

19 A. Yes.

20 Q. You were told that?

21 A. Yes, I believe I was. And I believe they had already been to
22 Dorchester to visit Donald Marshall, I think, on the 18th. And
23 I can remember speaking to them between the two visits to
24 Dorchester. So I assume that this was the occasion and that's
25 when they told me about the meeting with him having been

1 interrupted by the disturbance inside the penitentiary.

2 Q. In any event, you were advised on February 23rd that
3 Wheaton and Carroll believed Marshall to be innocent.

4 A. Yes.

5 Q. Was that a surprise to you?

6 A. Yes, you know, that's the first time they told me and I believe
7 it is. I remember the first time that I heard them say that,
8 that I don't know if surprised is the right word so much as,
9 what, it had quite an impact, I suppose is the best way.

10 Q. That particular note for February 23rd.

11 A. Yes.

12 Q. Is fairly cryptic for you.

13 A. Yes.

14 Q. In that your, you're usually much more verbal than that.

15 A. Yes.

16 Q. Is there any particular reason for that?

17 A. No, you know, again, 1982, when I was reviewing my Day-
18 timer the other day, it was a particularly busy year for me
19 and that's the only explanation. As I say, I'd tried to make as
20 many notes as I could and sometimes you're, or I find
21 sometimes I'm brief with my notes because you think, well,
22 I'll never forget this, sort of thing, and that may be the
23 explanation. I don't know. I'm speculating. Perhaps I
24 shouldn't.

25 Q. Do you know what time of the day you would have met with

1 Wheaton and Carroll?

2 A. No, I couldn't say that. It would have been during...

3 Q. Your Daytimer doesn't help you on that? February 23rd?

4 A. It just may. There's no notation for Wheaton/Carroll here.

5 Q. Okay. You did call Wheaton, though, at 11:00 p.m.

6 A. Yes.

7 Q. On that same day. And your note is intriguing. You said:

8 Suggested investigation not complete until Chief
9 MacIntyre questioned, though he should not be
10 privy to conduct of investigation until
11 department has had an opportunity to decide
upon it.

12 A. Yes.

13 4:15 p.m.

14 Q. Can you elaborate on that, please?

15 A. The best I can do for you on that is tell you that when the
16 realization came home to me that there was a good
17 probability at that stage that Marshall was, in fact, innocent,
18 that caused me to think and rethink about what I knew at
19 that stage and what the possible implications of it were and I
20 know that though I try to leave my job at the office when I go
21 home at 5 o'clock, that day I didn't and, you know, for me to
22 call Wheaton at home at 11 p.m. meant that I was, tells me
23 that that evening I was pretty wrapped up in the whole
24 process here. And as far as the specific information there is
25 concerned, I took the view at the time that if, in fact, Marshall

1 was innocent and if, in fact, the questioning of Chant had been
2 improper and I made no judgement on that at the time, and
3 that Pratico, the other eyewitness had, at the time, severe
4 psychiatric problems, then some very serious questions had
5 to be asked to the investigator.

6 Q. At this time had you seen Chant's statement that was given to
7 the RCMP in February 1982?

8 A. I believe I would have, yes.

9 Q. Had you also discussed with Wheaton and Carroll their
10 meeting with Chant?

11 A. Yes.

12 Q. Let me get you to look at Chant's statement and perhaps that
13 would help you. It's in Volume 34 at page 47. And that was
14 a statement was that taken on February the 16th of '82.

15 A. Yes.

16 Q. Have you seen that before?

17 A. Yes.

18 Q. If you want to just, have you had the opportunity recently to
19 review it?

20 A. Yes.

21 Q. I'll suggest to you that there's no mention in there about Chief
22 MacIntyre or no mention, I don't believe, no mention of
23 pressure...

24 A. No.

25 Q. Intimidation.

1 A. No, that's correct.

2 Q. Or anything of that nature.

3 A. That's right.

4 Q. Were you being told anything other than what is contained in
5 the statement of Wheaton and Carroll?

6 A. I believe I was, yes. And here I can't be categorical but I
7 believe at that time the fact that there may have been some
8 pressure applied, some inappropriate pressure applied by
9 Chief MacIntyre was mentioned to me by Staff Sergeant
10 Wheaton.

11 Q. In any event, you felt it sufficiently important to call
12 Wheaton at home at 11 o'clock to suggest that his
13 investigation could not be complete until Chief MacIntyre was
14 questioned.

15 A. That's right. I mean this was, if I may, this was a situation
16 that, you know, I found myself in without really anything to
17 consult for direction. And so I know I came to that conclusion
18 and I felt that it was important enough to phone him then.
19 Now no doubt it would have waited but... I could have phoned
20 him the next morning but I felt sufficiently strong about it
21 then, I suppose, to phone him then.

22 Q. Now let me just go to the balance of that statement. "Chief
23 MacIntyre should be questioned though he should not be
24 privy to conduct of the investigation until the Department has
25 had the opportunity to decide upon it." And I have some

1 difficulty understanding what that means. The opportunity to
2 decide upon what?

3 A. Decide what was going to transpire as a result of these
4 findings.

5 Q. Did you want the Department, and by the Department you
6 mean the Attorney General's Department, do you?

7 A. Oh yes, of course.

8 Q. Did you want the Department to decide whether Chief
9 MacIntyre should be questioned?

10 A. Oh no, no, no.

11 Q. I want to refer you to some evidence of Staff Sergeant
12 Wheaton...

13 A. Yes.

14 Q. And have you comment, please. And this is found on page
15 7589 and he was asked, "What did Mr. Edwards express to
16 you." This was his answer.

17
18 I don't recall Mr. Edwards' exact words but they
19 would something along the line as he has written
20 in his notes. That he felt he would like to contact
his Department in Halifax prior to the Chief being
questioned.

21 A. No. That is not my recollection and I can, I think I can be
22 very definite on that. What I'm referring to there is, you
23 know, what do we do now knowing that Donald Marshall is in
24 prison for a murder he didn't commit, or at least there's a
25 strong probability at that stage, in my view. That's the matter

1 that I felt was of sufficient import to take it out of my hands
2 and that I should really take it to Halifax. There was no
3 directive, of course, on anything like that. But as far as
4 whether or not the police should be questioned, that was not
5 something that I felt, either I or the investigator, had to go
6 any further with.

7 Q. You've also noted there your suggestion that Chief MacIntyre
8 should not be privy to the conduct of the investigation until
9 the Department had the opportunity to decide about it. And
10 you've explained that's until the Department had decided
11 what to do. Does that accurately reflect what you told Staff
12 Wheaton?

13 A. Yes.

14 Q. And let me just read you another portion of Staff Wheaton's
15 evidence and ask you if this is correct. And it's following
16 along on the same page.

17 A. Yes.

18 Q. Answer, "I take a little exception to the word 'question.' I
19 would have used the word 'appraise.' The Chief was the one
20 who came to Mr. Edwards and to Inspector Scott and it's the
21 same as I said with Mr. Aronson, I feel he should be..." and
22 here's the point. "It was my feeling, and I'm sure an
23 inspector, Inspector Scott and Mr. Edwards can speak for
24 themselves, but it was my feeling that the Chief should be
25 appraised at every level of the investigation." Was that ever

1 expressed to you by Wheaton?

2 A. I can't recall him ever...

3 Q. Did you express.

4 A. Expressing that.

5 Q. Did you express to him on more than one occasion your view
6 that the Chief should not be privy to the conduct of the
7 investigation?

8 A. Yes.

9 Q. Did he ever take issue with that with you?

10 A. No. As I recall Staff Wheaton really took no position on that
11 issue and my recall is that he was indicating that, well,
12 Inspector Scott felt the other way. That he should be
13 appraised.

14 Q. Okay. Any other recollection of February the 23rd other than
15 what's in those brief notes?

16 A. No, that's about it.

17 Q. Your next contact with this case was February 24th, 25th, I'm
18 sorry.

19 A. Yeah, 24th I was off. 25th, yes.

20 Q. And that was when you spoke with Gale and Herschorn.

21 A. Yes

22 Q. Was that, to your recollection, your first discussion with
23 them?

24 A. Yes. That's my recollection of the first discussion but I
25 believe that I would have at least mentioned it to them prior

1 to that.

2 Q. You note that Gale had already been briefed by Christen. Do
3 you know who Christen was, or did you know at the time?

4 A. Oh, yes. Yes.

5 Q. Now further on in your notes of February the 25th you say
6 that you told Wheaton sections that may be relevant in the
7 Criminal Code.

8 A. Yes.

9 Q. And, in particular Section 617.

10 A. Yes.

11 Q. Those are the provisions for pardon or reference, is that
12 correct?

13 A. Yes.

14 Q. You brought those to the attention of Wheaton?

15 A. Yes.

16 Q. For what purpose?

17 A. Well, during that period of time I was operating on the
18 premise that there was the strong probability that Marshall
19 was innocent and so I was looking for a mechanism to get him
20 out of jail and to get the conviction removed. And in the
21 course of that, of course, I would have gone to the Criminal
22 Code, I mean at that time I didn't know anything about any
23 reference but, of course, anybody would know about pardons
24 so I looked at pardons and then, I guess, just digging around
25 in the Code I found 617 and thought that after reading it that

1 it may be just what was required here.

2 Q. No doubt we'll discuss that Section a little later. You've got
3 another note at 2:45 on that day.

4 A. Yes.

5 Q. And that's a discussion with Cpl. Carroll?

6 A. Yes.

7 Q. And did he mention at that time having spoken Mr. Pratico.

8 A. Yes.

9 Q. And he mentions there that, "Pratico said he had been
10 pressured by the police to lie." Was that the first mention
11 that had had heard of police pressure?

12 A. No, I'm fairly confident that Staff Sergeant Wheaton had
13 mentioned police pressure in relation to Chant on February
14 23rd.

15 4:28 p.m.

16 A. No, I'm fairly confident that Staff Sergeant Wheaton had
17 mentioned police pressure in relation to Chant on February
18 23rd.

19 Q. Now right on the same day you got a call at 3:40, what's...

20 A. From Mr. Warren, the brother-in-law of Sandy Seale.

21 Q. Was there some indication at that time, or some, beginning to
22 be some mention in the media about this investigation and
23 the fact that Mr. Marshall may, indeed, be innocent?

24 A. No. My notes indicate there he had been hearing rumours, he
25 said. And he wouldn't say from where as I note there in

1 quotes. "He heard it around." And he was calling more or less
2 to find out what I knew, as I recall.

3 Q. Okay. Now you worked that night, too. In your next note
4 you're calling Wheaton at 9 o'clock.

5 A. Yes.

6 Q. Having just finished reading the transcript.

7 A. Yes.

8 Q. And you said, you told him it was now your opinion the
9 Crown never disclosed the first statements to the defence.

10 A. Yes.

11 Q. And that's from your reading of the transcript of the trial
12 evidence of who?

13 A. That was from reading the entire transcript. But, in
14 particular, the evidence of Chant and Pratico. I believe I had
15 read the entire transcript by that point.

16 Q. Were you aware, or was it your expectation that the practice
17 followed by the Crown in 1971 was the same practice that
18 you followed? That is, complete disclosure of everything.

19 A. Was it my expectation. I don't know that I had a view on it
20 one way or the other at that time, Mr. MacDonald, but I
21 suppose, you know, if I did think about it, yes, that would
22 have been my expectation. I couldn't, see, like I didn't start
23 practicing, of course, until 1975 and I just couldn't imagine,
24 and Crown in 1978, I couldn't imagine having that kind of
25 statement in my possession and not disclosing it.

1 Q. Did you have, have you ever had the opportunity to read the
2 evidence of, or did you hear the evidence of Simon Khattar
3 given to this Inquiry?

4 A. Yes, I think I sat in on all of Simon's.

5 Q. My recollection is that he testified that he would have
6 expected that there were statements knowing Chief
7 MacIntyre's practice of taking statements. That he would
8 have expected the Crown Prosecutor would have those
9 statements, but his practice was not to ask for them.

10 A. Yes, I recall him saying that, yes.

11 Q. Did that surprise you?

12 A. Yes.

13 COMMISSIONER EVANS

14 Would "shocked" be a better word?

15 A. Probably yeah, I think so.

16 MR. MacDONALD

17 Q. Did you, have you had the opportunity to read the
18 preliminary, evidence at the preliminary inquiry?

19 A. Had I at that point?

20 Q. No, have you.

21 A. Oh, yes.

22 Q. And if I suggest to you that, indeed, there was a statement in
23 there from Patricia Harriss that she did given written
24 statements to the police would you accept that? That is her
25 evidence.

1 A. Well if you say it is there, yes.

2 Q. So the defence were aware that there were written
3 statements. Maybe not that there was two, but they were
4 aware of written statements.

5 A. Um-hmm.

6 Q. But your practice would have been, as I understand it, and
7 that's what I'm leading to...

8 A. Yes.

9 Q. You would have taken the initiative and given those
10 statements to the defence.

11 A. Yes.

12 Q. And you would have given both statements from Chant and
13 both statements from Pratico...

14 A. Yes.

15 Q. To, and, in fact, both statements from Harriss.

16 A. Yes. I should say, you know, I, it may sound to date that, you
17 know, I'm saying, "Well, I would have done all this," but I'm
18 talking in the context of practice since I began practicing. I've
19 learned since that disclosure practices probably weren't the
20 same at that time so...

21 Q. Let me put this to you. Have you ever had a case, major case
22 now...

23 A. Yes.

24 Q. Where defence counsel haven't come to you and asked you,
25 "What have you got?"

1 A. If I haven't sent it to them initially, no, I haven't had such a
2 case.

3 Q. Would you agree or accept that there's got to be some burden
4 on the defence to take some initiative as well?

5 A. Generally speaking, yes. But I'd have to say that in the
6 context of the practice as I know it, I would find it surprising
7 that if no request was made and the Crown was in possession
8 of statements such as Chant one and Pratico one, that the
9 Crown wouldn't say, any Crown I know I think would say,
10 "Look, you should be aware of these."

11 Q. So you would say that the ultimate obligation rests with the
12 Crown to get it to the defence. Get all the information to the
13 defence.

14 A. Yes, but at the same time I have to qualify that and say that
15 that does not remove the duty from defence counsel to be
16 diligent and to do some active information gathering and
17 satisfy themselves that they've got it all because, I think
18 that's the only way that there's going to be assurance that
19 something of significance is not, say, inadvertently not
20 disclosed. It's a two-way process.

21 Q. All right. There's a couple of other notes in your, that you
22 made at 9 o'clock on that night.

23 A. Yes.

24 Q. That I just want to refer you to. You said:
25

1 It's also my feeling, though I didn't mention to
2 Wheaton, that Rosenblum and Khattar should be
3 specifically asked whether they were aware of
4 existence of first statements.

5 A. Yes.

6 Q. Why wouldn't you mention that to Wheaton?

7 A. Well, you see the next sentence, I'm a little confused by my
8 own notes there. Because the next sentence, "Harry
9 mentioned latter possibility though we didn't pursue it
10 further."

11 Q. Was it your wish and your understanding that at some time
12 Khattar and Rosenblum were asked if they were aware of the
13 existence of those first statements?

14 A. Yes. And I believe there's a later reference in the notes to
15 that fact because, of course, you know, part of my research at
16 the time involved learning the rules of fresh evidence
17 because I hadn't had a case, see 'cause I don't do appeal work.
18 So I hadn't had, up to that point in my career, a case where I
19 had had to go to the law on fresh evidence and, of course,
20 when you do go to the law, particularly Palmer, you see that
21 the knowledge of the defence at the time of the trial is crucial
22 on the question of admissibility of the fresh evidence.

23 Q. Okay. One last thing on February the 25th. You say,
24 "Wheaton doubtful of whether defence ever learned of
25 further investigation which probably was in progress while
the case was under appeal."

1 A. Yes.

2 Q. You're talking there about the November investigation by
3 Ebsary and, of Ebsary and MacNeil...

4 A. Yes.

5 Q. By Inspector Marshall.

6 A. Right.

7 Q. Should the defence have been advised of that?

8 A. Absolutely.

9 Q. And given the way your system works now, that the case is
10 under appeal and it's in Halifax, who should have advised
11 them?

12 A. That is a question that I've thought of many times in the last
13 few years and the short answer is Donald MacNeil.

14 Q. And would you like to explain why you make that statement
15 having, it's obviously one you've given serious thought to.

16 A. This was a criminal matter that took place in his jurisdiction.
17 He is the prosecuting officer for Cape Breton County. Was
18 responsible for criminal prosecutions in that county. He had
19 personally had carriage of the case and at the appeal stage,
20 although it was being handled by a solicitor in Halifax, it was
21 still information that he was personally aware of. And that,
22 no doubt, knew it would be of great interest, at least to the
23 defence. And I really don't think that he could have taken it
24 for granted that it would be disclosed in Halifax. I think he
25 was the one primarily responsible to get that information to

1 the defence.

2 CHAIRMAN

3 Who could have disclosed it in Halifax unless Mr.
4 MacNeil...yes, well Halifax would have known, wouldn't they.
5 They knew the...

6 A. Yes.

7 MR. MacDONALD

8 Halifax, well...

9 CHAIRMAN

10 Well, I'm not sure of that.

11 MR. MacDONALD

12 I guess one of the questions is whether they did get
13 Marshall's report, but assuming they did.

14 A. I'm operating on the premise, My Lord, that Halifax knew.
15 And I'm saying notwithstanding that fact I would put the
16 initial responsibility, or the basic responsibility to disclose on
17 the Chief Prosecutor in that county.

18 COMMISSIONER EVANS

19 Wouldn't there be a joint responsibility?

20 A. Yes.

21 COMMISSIONER EVANS

22 The Crown is indivisible.

23 A. Of course. Yes. But I guess I would say the initial
24 responsibility would be MacNeil's...

25

1 COMMISSIONER EVANS

2 I agree with that.

3 A. But that would not let Halifax off the hook.

4 CHAIRMAN

5 Would you say that if, on the assumption that the counsel for
6 the Crown appearing before the Court of Appeal on this
7 appeal, on the Marshall appeal...

8 A. Yes.

9 CHAIRMAN

10 Assuming that he was aware of the re-investigation by
11 Inspector Marshall, in your opinion, would it have been his,
12 apart from advising counsel for the accused, is responsibility
13 to advise the Court?

14 A. I have a little difficulty with that. I mean I'm aware of a
15 situation that I'm involved in where there is fresh evidence
16 that I'm aware of which is passed on to the defence.

17 A. which is passed on to the defence. Actually, the defence
18 became aware of it first and, surely, it is up to the defence to
19 decide whether or not he wishes to present that evidence as a
20 ground of appeal. That's my initial reaction.

21 MR. CHAIRMAN

22 So if we assume if, for instance, Donald MacNeil had advised
23 Mr. Rosenblum, then one would have expected Mr. Rosenblum to
24 take the appropriate procedure to bring this to the attention of
25 the Appeal Court.

1 MR. EDWARDS

2 Yes, particularly, I mean... Like there's fresh evidence and
3 there's fresh evidence and...

4 MR. CHAIRMAN

5 But fresh evidence...

6 MR. EDWARDS

7 This stuff here, I mean I can't imagine Moe Rosenblum
8 having that and not making it a ground of appeal.

9 MR. CHAIRMAN

10 Well, on that note, we will adjourn until 9:30.

11 4:42 p.m. INQUIRY ADJOURNED UNTIL 9:30 a.m. MAY 19.

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REPORTER'S CERTIFICATE

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



Margaret E. Graham

DATED THIS 18 day of May, 1988 at Dartmouth, Nova Scotia