

RG 44  
Vol. 255  
#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  
Orsborn: Commission counsel

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

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

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

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

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

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

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

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

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

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

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

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

Court Reporting: Margaret E. Graham, OCR, RPR

**MEDIA POOL COPY**

May 18, 1988

INDEX - VOLUME 65

The Honourable Judge F. Cacchione

Examination by Mr. Pugsley	11567
Examination by Mr. Saunders	11572
9:52	11582
10:15	11598
10:37	11615
10:59	11632
Examination by Mr. Ross	11642
11:49	11647
12:12	11662
Examination by Mr. Wildsmith	11664
Examination by Comm. Evans	11678
Examination by Chairman	11684
2:30	11685

Mr. Frank Edwards

Examination by Mr. MacDonald	11686
Examination by Chairman	11707
Examination by Mr. MacDonald (Cont'd)	11710
3:59	11722
4:15	11731
4:28	11738

1 MR. CHAIRMAN

2 Good Morning. Mr. Pugsley?

3 MR. PUGSLEY

4 Thank you, My Lord.

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

7 EXAMINATION BY MR. PUGSLEY

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

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

15 Q. This was not a normal case.

16 A. Certainly not.

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

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

20 Q. You identified passionately with his cause.

21 A. Certainly.

22 Q. Your conclusions with respect to John MacIntyre and William  
23 Urquhart were based on information you had obtained  
24 concerning their activities in the 1971 investigation and, as I  
25

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

DISCUSSION

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  
2       apparent than real?

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

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

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

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

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

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

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

15 A. That's correct, sir.

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

18 MR. PUGSLEY

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

20 MR. WILDSMITH

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

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

Q. So there may have been a descriptive term in front of the word "Indian".

A. It... You know, quite frankly, Mr. Wildsmith, and this is a sad reflection on me, but I have a tendency of using that word at times often and I'm not sure if it's my word or his word.

Q. You might have embellished it or it might have been...

A. You know, it could have been my saying that way.

Q. Okay.

A. It was an emotional issue, certainly.

Q. Either way, you received it as being a very racist remark.

A. No question.

Q. Which upset you considerably at the time.

A. Yes, sir.

Q. It wasn't a joke.

A. I didn't interpret it as a joke. At the time, neither did I view it as Judge Anderson looking out for my interests as a private practitioner.

Q. Yes, which is an explanation that's now been offered, and I'm wondering if there was anything in the context of the conversation where he was discussing your practice?

A. There was. I had spent approximately eight years plus with Nova Scotia Legal Aid, dealing with all kinds of clients, some of them who were very difficult clients. And I think it was known at the time that I wasn't pleased and that I wanted to

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

And that's why it showed as being January.

Q. Okay, but getting back to the comment itself. Was it made towards the end of that conversation then?

A. I would think it was towards the end of the conversation.

Q. The conversation pretty much ended at that point?

A. I think apart from just a few other words, yes.

Q. Okay. Yesterday when you testified the last words on the record on this issue, you said that you understood "his concern was that I not jam myself in a corner so as to shut doors behind me or ahead of me that lay in my career path."

A. Yes, sir.

Q. What did you mean to say "shut doors behind or ahead of you in your career"?

A. Don't make enemies in the Attorney General's Department that may prevent you from getting access to files. Don't have yourself viewed by members of the judiciary as being unpopular or going out on a limb or anything like that. Anything that would interfere with my career.

Q. Is it fair to say, then, that he was warning you that there might be repercussions as a result of your strong advocacy on behalf of Mr. Marshall?

A. That's what I got from it.

Q. Okay, you were...

A. Because, obviously, there was an Appeal Court decision there

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.

THE HONOURABLE JUDGE CACCHIONE, EXAM. BY COMM. EVANS

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

THE HONOURABLE JUDGE CACCHIONE, EXAM. BY COMM. EVANS

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 that 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.

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

MR. EDWARDS, EXAM. BY MR. MACDONALD

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

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.

MR. EDWARDS

7 Yes.

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?"

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.

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?

MR. EDWARDS

19 Yes.

COMMISSIONER EVANS

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

MR. EDWARDS

23 Yes.

COMMISSIONER EVANS

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

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

MR. EDWARDS, EXAM. BY MR. MACDONALD

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

5  
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

12  
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

MR. EDWARDS, EXAM. BY MR. MACDONALD

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

MR. EDWARDS, EXAM. BY MR. MACDONALD

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.

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

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

A. That's right.

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

A. Yes.

Q. And not discussing anything with the media.

A. Yes.

Q. Or with anyone else?

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

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

A. Yes.

Q. You called Wheaton, did you say?

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

Q. Why were you calling him?

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

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

to that.

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

A. Oh, yes. Yes.

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

A. Yes.

Q. And, in particular Section 617.

A. Yes.

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

A. Yes.

Q. You brought those to the attention of Wheaton?

A. Yes.

Q. For what purpose?

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

MR. EDWARDS, EXAM. BY MR. MacDONALD

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

COMMISSIONER EVANS

1 I agree with that.

2  
3 A. But that would not let Halifax off the hook.

CHAIRMAN

4  
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.

CHAIRMAN

9  
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.

MR. CHAIRMAN

21  
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.

MR. EDWARDS, EXAM. BY MR. MACDONALD

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.

12

13

14

15

16

17

18

19

20

21

22

23

24

25

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