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#3

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

Volume 67

Held: May 24, 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

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Messrs. Bruce H. Wildsmith and Graydon Nicholas: Counsel for
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1 MAY 24, 1988 - 9:31 a.m.

2 MR. CHAIRMAN

3 Mr. MacDonald.

4 MR. MacDONALD

5 Thank-you, My Lords.

6 MR. FRANK EDWARDS, recall and still sworn, testified as follows:

7 EXAMINATION BY MR. MacDONALD [Cont'd.]

8 Q. Mr. Edwards, I believe you had a couple of directions or
9 explanations, further explanations of matters you dealt with
10 last week, is that correct?

11 A. Yes. I noted what appears to be a typographical error in the
12 transcript, and maybe a significant one. Page 11779, line
13 23, it's in part of your question, picking up "...you phoned
14 Wheaton and he confirmed or he did know about these
15 earlier statements." That should be "he did not know."

16 Q. Okay. Thank-you.

17 A. And the other point I just wanted to touch on because,
18 again, my fault, I guess, I left it hanging. Page 11801, line
19 16, this is where we were discussing the...what I've termed
20 the "hold in abeyance issue".

21 Q. Yes.

22 A. And you ended your question there on line 16 by asking
23 "Why do they have to wait around for four years?" referring
24 to the Sydney Police to be questioned on that, and so then
25 there was a little confusion after that, but I was interpreting

1 you as wanting to give me an opinion on why Mr. Gale felt
2 that way, and, of course, that was a misinterpretation. But I
3 just wanted to say on that that, of course, neither Gale nor I
4 nor anyone involved had any idea at that time that this was
5 going to take four years. That there was going to be three
6 Ebsary trials or whatever. It was a much shorter period of
7 time that we had in mind.

8 Q. But surely it doesn't take, you don't have to wait around to
9 do an investigation. You may argue that you shouldn't bring
10 charges or perhaps shouldn't, but to do the investigation
11 while the facts are still relatively fresh. Why would you
12 wait around at all?

13 A. No, well, that's...like I make that point later in the page that
14 my own view was that there was no need to wait around.
15 But I think it, you know, it's important to note that as of
16 June the 9th when 617(c) was agreed to that that, in effect,
17 opened the whole matter of the investigation up again, you
18 know, by agreeing to an inquiry format Gale had agreed, I
19 take it, to the investigation of the city police.

20 Q. I see. Okay.

21 A. Yeah.

22 Q. The discussions you had with Mr. Gale at the time the
23 decision was being made whether to do it subsection (c) or
24 (b).

25 A. Yes.

1 Q. At that time you were discussing that if you went under (c)
2 it would be a wide open full scale inquiry, is that correct?

3 A. That's the...that's my recollection, yes.

4 Q. And Mr. Gale was certainly agreeable to that.

5 A. Yes.

6 Q. Okay.

7 A. Yes.

8 Q. Now, that certainly adds explanation. Do you want to get
9 Volume 31, please?

10 A. I should...just referent to that June meeting with Mr.
11 Rutherford, I outlined the reasons why (c) was preferred,
12 you know, I gave two reasons. And, of course, and I believe
13 Mr. Rutherford's evidence bears this out, one of our
14 preoccupations at that meeting in considering whether to go
15 (b) or (c), one of our preoccupations was that under (b)
16 there was the possibility of a new trial being ordered and
17 that...that was always at the back of my mind, I know at
18 least, right through.

19 Q. The back of your mind as being an undesirable possibility.

20 A. A very undesirable possibility, yes.

21 Q. In volume thirty...I'm sorry, did you have any other...

22 A. No, that was it, thank-you.

23 Q. Volume 31, at page 52.

24 A. Yes.

25 Q. Those are notes of, I understand, prepared by Stephen

1 Aronson.

2 A. Yes.

3 Q. And they're dated May the 11th of 1982.

4 A. Yes.

5 Q. In those notes though there is a reference to you where he
6 has spoken to you and then there is the suggestion of an
7 appeal, Section 617, and that says, "Free and unconditional
8 pardon." Were you...did you ever give any serious thought
9 to the possibility of having a free and unconditional pardon?

10 A. Yes. I think either my April memo to Gordon Gale or the
11 following one, May I believe, I think I dealt with that issue.
12 I know I gave very serious consideration to recommending a
13 pardon but, ah, for the reasons outlined in that memo I
14 thought that it would be best, in everyone's interest, and
15 especially the interest of Mr. Marshall, that the new
16 evidence be aired publicly, whereas a pardon would have
17 been an executive or political decision and I don't think it
18 would have done that much for Mr. Marshall, of course.
19 That's what I thought at that time. In view of what
20 happened subsequently, you know, if I had to address that
21 issue now I might take a different course. But at the time
22 my rationale was that better to have the evidence tested
23 and aired publicly.

24 Q. Let me take you back to page 26 on that same volume.

25 A. Yes.

1 Q. Now, 26 is just a covering letter from yourself to Mr. Gale
2 and you're outlining...you're explaining the numbers.

3 A. Yes.

4 Q. That are contained in your letter which is found on page 29
5 of the same volume.

6 A. Yes.

7 Q. Now, I take it you were asked either to update your earlier
8 memo of April 22nd or you just elected to because some
9 new evidence and developments had come to light, is that
10 correct?

11 A. Yes. I don't recall whether I was asked or whether I just
12 did that on my own initiative.

13 Q. Okay. If we can just flip through some of the items in your
14 letter which is found on page 29.

15 A. Yes.

16 Q. In that letter, we won't take the time to go through it, but in
17 that you do explain why you didn't think a pardon would be
18 the appropriate way to proceed.

19 A. Right.

20 Q. That the evidence would be subject to scrutiny and so on.

21 A. Yes.

22 Q. Let me take you to paragraph numbered 8, that's on page
23 30.

24 A. Yes.

25 Q. You say that "Judging by public reaction to date, the most

1 serious question remaining would relate to the apparently
2 perjured testimony given in the November '71 trial."

3 A. Yes.

4 Q. That was a question, a real question in the community at
5 that time, wasn't it?

6 A. Yes.

7 Q. And continued to be.

8 A. Yes.

9 Q. And at a later date you were asked to give your opinion to
10 the...to your superiors whether perjury charges should, in
11 fact, be laid.

12 A. That's correct.

13 Q. And we'll come to that, I guess, chronologically as we get to
14 it. Number 10.

15 A. Yes.

16 Q. You say, "More significant than the inconsistencies in
17 Pratico's stories is the fact that apparently he had a
18 reputation at the time for being a liar. It is hard to believe
19 the police did not know this by the time he was put forward
20 as a credible witness." Now, where did you get the
21 information that Pratico had a reputation as being a liar?

22 A. From Jim Carroll and Harry Wheaton.

23 Q. Your only sources of information, I take it, except for your
24 interview with Patricia Harriss, was from the RCMP who
25 were passing along information to you.

1 A. And my interview with Donna Ebsary.

2 Q. Oh, I'm sorry, yes, and Donna Ebsary. Okay. On paragraph
3 11 or in paragraph 11 you refer to Patricia Harriss and note
4 that on April 16th you obtained a copy of her first
5 statement which we've been referring to.

6 A. Yes.

7 Q. That statement, I suggest to you, would lend even more
8 weight to your earlier suggestion that the best and most
9 desirable result of a reference to the Court would be an
10 acquittal on the basis of a miscarriage of justice. Would you
11 agree with that?

12 A. That's a fair statement, yes.

13 Q. Thank-you. On page 31 in paragraph 12.

14 A. Yes.

15 Q. You're referring to the O'Reilley statements again.

16 A. Yes.

17 Q. Did Sergeant Wheaton tell you that he had contacted the
18 O'Reilley girl in Calgary?

19 A. That's my recollection, yes.

20 Q. Do you...

21 A. I understand from evidence that...I heard it somewhere that
22 he had, in fact, talked to her father and the father was the
23 intermediary.

24 Q. Yes. He, in fact, never was in contact with...

25 A. No.

- 1 Q. ...the O'Reilley girl.
- 2 A. No. But at the time it was my understanding, and again, you
3 know, I don't want to say that Staff Sergeant Wheaton was
4 misleading me, you know. I think he just said, "Well, look
5 O'Reilley says this or that," you know.
- 6 Q. I'm not suggesting that he was misleading you at all.
- 7 A. No.
- 8 Q. I'm putting to you though that given the evidence or the
9 potential evidence of the O'Reilley girl...
- 10 A. Yes.
- 11 Q. That a complete and a thorough investigation by Staff
12 Wheaton would have included a discussion with that girl by
13 him.
- 14 A. That's fair.
- 15 Q. In the final sentence in paragraph 12 you again speculate or
16 tell your superiors.
- 17 A. Yes. That's what I expected.
- 18 Q. That you expect the city police would say. That is pure
19 speculation on your part.
- 20 A. Yes, yes.
- 21 Q. Thank-you. Now, paragraph 13, you say, "From the
22 foregoing it is clear that any consideration of perjury
23 charges necessarily involves an examination of police
24 conduct in the investigation before you could decide if
25 these...the stories from these youngsters is correct, you

1 would have to carry out a complete investigation of the
2 police."

3 A. That was my view, yes.

4 Q. But you consider, your next sentence, "That examination will
5 likely make it equally clear that perjury charges are not
6 appropriate."

7 A. Yes.

8 Q. Now, why did you include in advance or speculate that that
9 would be the result of an investigation?

10 A. Just knowing what I knew at that point. You know, let's
11 take them one at a time. Patricia Harriss. Given the manner
12 in which her statement was obtained and given her age. By
13 the manner, I mean the length of time and parent possibly
14 not present during the questioning, I didn't feel that there
15 would be any basis for suggesting there be an intent to
16 mislead on her part...

17 Q. But let me...

18 A. ...because of that.

19 Q. Let me just take you to another point in time and get you
20 comments.

21 A. Sure.

22 Q. I'm talking about the time they're on the witness stand.

23 A. Yes.

24 Q. And at the trial under oath.

25 A. Yes.

- 1 Q. My understanding of perjury and the definition of perjury.
- 2 A. Yes.
- 3 Q. Is someone who under oath lies or tells an untruth with the
- 4 intention of misleading...
- 5 A. Yes.
- 6 Q. ...the person who is hearing that statement. Is that a fair...
- 7 A. That's fair, right.
- 8 Q. Now, Patricia Harriss, take her on the witness stand.
- 9 A. Yes.
- 10 Q. Said that she saw Donald Marshall and one other person.
- 11 A. Uh-hum.
- 12 Q. Who...I don't know if she said it could be Seale or whatever.
- 13 She said it was one other person.
- 14 A. Yes.
- 15 Q. Now, that's not the truth according to her.
- 16 A. That's correct.
- 17 Q. And would you not say that she said that at trial with the
- 18 intention of misleading the jury?
- 19 A. I would have trouble impugning that intent to her and I...
- 20 Q. Why would she have said it?
- 21 A. Well, I think that is the relevance, ah, what I was starting to
- 22 answer by saying that the circumstances of the taking of her
- 23 statement, the one which was consistent with that
- 24 testimony. Once she had made that statement then she
- 25 would feel obliged, and again I may be speculating, but I

1 think it's common sense that in those circumstances that
2 most witnesses and in particular a youthful witness would
3 feel bound to stay with that statement, you know, and
4 possibly there were discussions between her and the police
5 or the prosecutor prior to that. Again, that's speculating.
6 But she...

7 Q I...

8 A. ...didn't have a lot of choice, I suppose, but to testify as she
9 did at the time. That was my feeling.

10 Q And let me accept that for the purposes of our discussion.

11 A. Yes.

12 Q But surely that doesn't get you around the fact that when
13 she gave the evidence under oath.

14 A. Yes.

15 Q It was a lie.

16 A. Yes.

17 Q That she intended the jury to believe it.

18 A. Yes.

19 Q To believe her evidence.

20 A. Correct.

21 Q Now, how do you get around, at least, a prima facie finding
22 of perjury?

23 A. I suppose, you know, if you wanted to be very technical
24 about it and I feel that's what you'd have to be really to
25 push perjury there. I...I acknowledge what you're saying is

1 technically correct, but I just couldn't see any Crown
2 recommending perjury in those circumstances.

3 Q. And I'm not being critical of you at all, Mr. Edwards, and we
4 come to your...we'll come to your opinion later on, perhaps
5 we can deal with it in more detail. What I'm interested in is
6 taking the next step.

7 A. Yes.

8 Q. And asking if you ever gave consideration to charges of
9 counseling perjury? Before you can do that, I suppose, you
10 must have had the perjury committed.

11 A. Yes.

12 Q. Okay. We'll come to that later.

13 A. My "yes" was not...

14 Q. I understand.

15 A. ..."yes" that I considered counseling perjury.

16 Q. No, I understand that. On page 33, paragraph 21, were you
17 at this stage, this is in May, I believe we have most, if not
18 all, of the evidence that is going to be acquired by Staff
19 Wheaton and Jim Carroll.

20 A. Yes.

21 Q. And at this stage you make the point "And in this unusual
22 case, perhaps more than in any other, it is vitally important
23 that justice be seen to be done," and that was a real
24 consideration to you at that time.

25

1 9:52 a.m.

2 A. That was, yeah, a basic premise on which I was proceeding.

3 Q. And you were still of the view when you wrote this letter, I
4 assume, since there's no reference to your earlier one on this
5 point...

6 A. Yes.

7 Q. That the best result to be obtained from the Appeal Court
8 would be an acquittal on the basis that there had been a
9 miscarriage of justice.

10 A. Yes.

11 Q. Thank you. Now let's go to page 63, please. That is a letter
12 from the Honourable Jean Chrétien to the Attorney General
13 which is enclosing the original reference. You received a copy
14 of this letter, didn't you?

15 A. I did, yes.

16 Q. At this stage it's known that the reference is, in fact, going
17 under sub-section (b) of Section 617.

18 A. Correct.

19 Q. And you would know at that time that the carriage of the
20 matter has now shifted and Donald Marshall's lawyer has to
21 present the evidence himself.

22 A. That is correct, yes.

23 Q. And in those circumstances following your practice...

24 A. Yes.

25 Q. It would be your intention that Steve Aronson should have

1 access and been provided copies with of all the
2 documentation that you had.

3 A. Right.

4 Q And that is the same intention, is it not, that is expressed by
5 Mr. Chrétien in the final paragraph of his letter.

6 A. It appears to be, yes.

7 Q You, in fact, did that. You turned over to Mr. Aronson all of
8 the documents you had.

9 A. Yes.

10 Q And he would need those in order to properly present the
11 evidence to the Appeal Court on behalf of his client, is that
12 not so?

13 A. I suppose the argument could be made that he wouldn't
14 require Staff Wheaton's report, you know, that all he would
15 require would be the statements. But I took the view that,
16 you know, having been in his position just a couple of weeks
17 before that I'd sure want to have it.

18 Q. Sure. Okay.

19 A. And so I gave it to him and I was also concerned with Mr.
20 Aronson and Mr. Marshall having some assurance that we
21 were being straight with them and that they were getting
22 everything that we had.

23 Q. In any event, you felt perfectly correct and proper in giving
24 all of the information to Mr. Aronson.

25 A. That's correct.

1 Q. Did you put any...

2 A. And, you know, as far as this letter is concerned I don't know
3 if I even took cognizance of that last paragraph because, as
4 you know, a couple of years later when this flared up and I
5 was justifying my turning over the report, I made no
6 reference to this letter. I wish I had thought of it at the time.

7 Q. Did you put any restrictions on Aronson as to the use he could
8 make of the documents turned over to him?

9 A. The only restriction I put on him, and I didn't have a clear
10 recollection of this in '84 when I was accounting, but the only,
11 the only recollection I had was that I had asked him not to
12 make it public because it was rather sensitive in nature.
13 Beyond that, I made no restriction and I believe Mr. Aronson,
14 in his evidence, confirmed that there was that kind of a
15 restriction put on.

16 Q. By not making it public you mean don't circulate...

17 A. Don't circulate the...

18 Q. In general.

19 A. The report to the press.

20 Q. I'm going to...

21 A. Or the political candidates.

22 Q. On page 68, and this is, again, taken from Mr. Aronson's
23 records, that he was meeting with you in June. What was the
24 role played by each of you after the reference came down?
25 Who was to do what?

1 A. You're referring to the contents of page 68?

2 Q. I'm just pointing out 68 that you met with Mr. Aronson...

3 A. Yes.

4 Q. On June 23rd to discuss the case.

5 A. Yes.

6 Q. What I'm trying to ascertain is what role each of you played
7 once the reference was actually forwarded.

8 A. After the reference was ordered under 617(b) I had to shift
9 gears completely, I guess it's fair to say, and recognize that
10 the carriage of the thing was with Mr. Aronson. And I can
11 recall a bit of a discussion we had on that matter around that
12 time. And I want to preface this by saying that Steve and I
13 got along very well and relations were always cordial. But in
14 one of our initial discussions, if not the first one, I suppose I
15 was making suggestions about, you know, what he might do.
16 And I don't recall exactly what I was saying but I do recall
17 him telling me in a polite way that he would decide how the
18 thing was going to be handled from here. And I said, "Okay,
19 fair enough." So I hope that's focussing on your question
20 because from that point I was more or less in the role of a
21 respondent and I was more in a reactive role than active.

22 Q. Were you going to be an adversary?

23 A. As you probably read in my brief on fresh evidence, I felt
24 that I was really on the tightrope on that one. I was, it's not
25 often that I wish I was representing the other side but that's

1 where I was on that one but I recognized or I felt that there
2 was a role for me to play in, I suppose in an adversarial
3 sense, in that I thought that there should be some cross-
4 examination of the witnesses who might be called. But I
5 never, at any time, ever felt that the end result should be any
6 different that the ordering of an acquittal.

7 Q. Look at page 69, it's a letter of July 2nd from Mr. Aronson to
8 yourself. He's referring to the fact that he has now reviewed
9 the materials you forwarded to him and he's looking for
10 additional information. Some of the initial statements
11 apparently were not given to him.

12 A. Yes.

13 Q. That's, I assume, because you didn't have them, is that
14 correct? You didn't withhold anything from him intentionally,
15 did you?

16 A. Oh I certainly didn't withhold it intentionally. Now I may
17 have had those statements and, I don't know whether they
18 didn't get photocopied but certainly, or maybe I didn't have
19 them at all, I don't recall.

20 Q. Anything he did request...

21 A. But anything he wanted at any time through this, and I think
22 he'd verify that, he got it without hesitation.

23 Q. Look at page 70.

24 A. Yes.

25 Q. He asks a couple of questions and I'd like to know if you can

MR. EDWARDS, EXAM. BY MR. MACDONALD

1 give us the answers. The first is, "Another point comes to
2 mind is whether or not George MacNeil and Sandy MacNeil
3 have been located." Do you know if, in fact, they were ever
4 located and interviewed?

5 A. I don't recall, Mr. MacDonald.

6 Q. And he also says, "Finally, has Pratico ever been asked how
7 he became involved with the Sydney City Police in the first
8 place? Was he picked and, if so, why?" Do you know if that
9 was ever determined?

10 A. I can recall some conversation by Staff Wheaton, I believe
11 regarding a Poirier chap, as having been the link between
12 John MacIntyre and John Pratico. I'm pretty vague on that.

13 Q. Did you, yourself, ever talk with Pratico?

14 A. No.

15 Q. Have you ever talked with Dr. Mian?

16 A. No.

17 Q. Now your first court appearance, I think, was on July the 9th
18 of 1972 or '82. That's on page 77 of that document. There
19 are some notes. And also if you want to turn up Volume 29
20 at page 35 there are further notes.

MR. PUGSLEY

22 Volume 29, what page?

MR. MacDONALD

24 35.

25 A. Yes, the...

1 Q. My understanding is the notes that are on page, in Volume 31
2 at page 77 I believe were made by Mr. Herschorn. And I
3 think the ones on page 35, Volume 29, those are yours, is that
4 correct?

5 A. Yes. I have the original of those in Volume 29 here.

6 Q. Now do you recall that appearance?

7 A. The three appearances, there was two in July and one in
8 October, they, I suppose because of the passage of time, have
9 become kind of blurred together. And I can remember some
10 parts of them but it's more of an impression that stays with
11 me on those appearances.

12 Q. Were the two appearances in July before Chief Justice
13 MacKeigan?

14 A. Yes.

15 Q. And what was the purpose of those appearances?

16 A. Well as the note, you're saying July 9th, I have July 8th.
17 Perhaps I wrote down the wrong date.

18 Q. Okay, yeah. Your notes say July 8th, I guess...

19 A. Yes.

20 Q. Mr. Herschorn's are 9th. So it may be just you spoke to him
21 the day after that's all.

22 A. Yes.

23 Q. July 8th was the actual appearance.

24 A. If July 8th was a Thursday then I guess that would resolve it.
25 But the reason for that initial court appearance, I guess, was

1 just to get, as I indicate in my first note there, direction on
2 how to proceed to get the fresh evidence before the Court.
3 And there was some discussion about whether the formal
4 reference document would serve as a notice of appeal and I
5 believe it was decided it would.

6 Q. Mr. Herschorn's notes start out by saying, "Let down.
7 MacKeigan cautious in his approach."

8 A. Yes.

9 Q. Was there any feeling by you, or were you disappointed what
10 took place on the 8th?

11 A. I'd say yes, and that's why I preface the, my remarks by
12 saying like those three appearances left me with the
13 impression, or even the letdown is not unfair, that in my view
14 the Court was taking a very restrictive view of the proceeding
15 before it and it was becoming apparent, if it, you know, I can't
16 say that the feeling gelled on July the 8th but certainly by the
17 time the October hearing was over it was apparent to me that
18 there was no way the scope of evidence that I had anticipated
19 was going to go before the Court.

20 Q. What was your sense of what the Court, how the Court was
21 viewing this whole thing?

22 A. Again this, I find this difficult because I don't recall the
23 specific conversations but my sense was, and I can say
24 without hesitation, was that the Court seemed to be viewing
25 this more as an ordinary appeal than as what I considered to

1 be a very unusual situation. And, see, the wording of the
2 reference under 617(b) on the face of it, you know, as if it
3 were an appeal by Donald Marshall, Jr. seems to justify that.
4 That narrow approach. And I use narrow, not in pejorative
5 way, but descriptive, whereas my understanding of the
6 (Gorecki?) case, and that was the one that I was using, you
7 know, to sort of frame my thoughts but I believe Gorecki,
8 Number 2 states quite clearly that the Court has quite a bit of
9 discretion in, as I read Gorecki, Number 2, can open it up if it
10 wishes. That it's not bound to consider a reference under
11 617(b) in the very restrictive confines of an ordinary appeal.

12 Q. Let me just refer again to Mr. Herschorn's note. It says, you
13 are to return July 29th, for you and Mr. Aronson, to file
14 affidavits from proposed witnesses as to what their evidence
15 would be. And that was the procedure that Mr. Justice
16 MacKeigan, or Chief Justice MacKeigan wanted to hear, first of
17 all, what the evidence would be in order to decide whether to
18 let those people give evidence, is that correct?

19 A. Right.

20 Q. Then, "M.K." I don't know who M.K. means. Oh, MacKeigan.

21 A. "Surprised..."

22 Q. "Surprised re your suggesting..."

23 A. Yes.

24 Q. "That police witnesses be called to put the whole thing in
25 perspective."

1 A. Yes.

2 Q. You were suggesting, I take it, that the evidence from the
3 police has to be called and you found the Chief Justice was
4 surprised at that.

5 A. Yes. I mean my view was that if, really how could you assess
6 the evidence of Chant and Harriss, in particular, without
7 getting into the police evidence. Rightly or wrongly that was
8 the view I took and the Chief Justice, I don't recall that
9 particular occasion, but I can recall him, it would have been in
10 October when we were before the full Bench when the issue
11 was raised again. I can recall the Chief Justice saying to one
12 of his colleagues, I believe it was Mr. Justice Hart, on his right,
13 you know, "That's a can of worms, we don't have to get into
14 that." A remark like that in response and it was after that, of
15 course, that they reserved on the filing of the affidavits or
16 calling further evidence.

17 Q. Your opinion from the beginning was that the police evidence
18 had to be called, you had to hear the police as well as Chant
19 and Harriss in order to determine where the truth lie, is that
20 correct?

21 A. Yes.

22 Q. It goes on to say that you're going to meet with MacIntyre,
23 Monday, July the 12th to indicate he is to complete some
24 affidavits.

25 A. Yes.

1 Q. In your notes, Mr. Edwards, you say that you undertook to
2 insure that witnesses were advised of Section 5 of the
3 Evidence Act.

4 A. Yes.

5 Q. Which witnesses are you referring to there? All witnesses?

6 A. All witnesses, yes.

7 Q. And Section 5 is the section that provides what?

8 A. Well the guard against self-incrimination, I suppose, is the
9 best way to put it. That was at the suggestion of the Chief
10 Justice and I believe that was straightened out when we got
11 to actually hear the evidence in December because, of course,
12 the Charter of Rights automatically provides that protection so
13 Section 5 is really redundant.

14 Q. The way it was left on July 8th, then, was "Get some affidavits
15 and come back later in July."

16 A. Yes.

17 Q. And at that time some direction will be given to you.

18 A. Right.

19 Q. Okay. Let me take you back to your handwritten notes then
20 of your diary, so-called, in Volume 17, My Lords, at page 12.

21 A. Which notes are these?

22 Q. These are your notes of July the 12th, a meeting at your
23 office?

24 A. Yes, okay.

25 Q. How did that, you told Mr. Herschorn you were going to be

MR. EDWARDS, EXAM. BY MR. MACDONALD

1 meeting with Chief MacIntyre, that you'd compare affidavits
2 and you, in fact, met with MacIntyre, Whalley, Wheaton and
3 Mr. Urquhart...

4 A. Mr. Urquhart came in late that's why he's not mentioned in
5 the list at the top there.

6 Q. But he was there at some time.

7 A. Oh, yes.

8 Q. What was the purpose of that meeting?

9 A. Again, you know, I don't have any notes of the call that I
10 would have made, I assume to John MacIntyre to set the
11 meeting up. But my best recollection is that the purpose was
12 to advise him of what had transpired or advise the police of
13 what had transpired in Court on July the 8th.

14 I believe that I was aware prior to that court appearance
15 that affidavits were a likelihood. Now, that was probably
16 just speculation on my part on where this thing was to go.
17 So, one of the primary motives for the meeting would have
18 been to take information for the affidavits.

19 10:15 a.m.

20 Q. Why was...

21 A. And...but I guess the unspoken reason for the meeting was
22 that I really wanted to probe John MacIntyre and Bill
23 Urquhart on just what had taken place in 1971.

24 Q. Why was Staff Wheaton there?

25 A. Well, Staff Wheaton and Scott had had discussions with John

MR. EDWARDS, EXAM. BY MR. MACDONALD

1 MacIntyre, and you recall the earlier reference to the
2 meeting between Scott and MacIntyre, where Wheaton had
3 said that Scott hadn't had sufficient details to pin him down.

4 Q. Yes.

5 A. I didn't want to be in the same position so that, you know,
6 like I was anticipating quite an intense meeting, and so that
7 I wanted Wheaton there because, although he had briefed
8 me in detail, you know, some points that I hadn't anticipated
9 might come up and I'd like to have him there for
10 informational purposes.

11 Q. Why was Mr. Whalley there?

12 A. Now, that you would have to ask John MacIntyre. It was
13 John...it was John MacIntyre who invited Whalley.

14 Q. Okay.

15 A. I don't believe I did.

16 Q. When were your notes made of this meeting?

17 A. The notes were made during and immediately after the
18 meeting. You know, if you read them, they are very
19 disjointed, and the reason being is that I was trying to
20 conduct this meeting and make notes at the same time and
21 it wasn't a very useful exercise as far as note taking is
22 concerned.

23 Q. How long was the meeting?

24 A. I have no specific recollection. I mean it was long. It was
25 two or three hours I would say, maybe longer.

MR. EDWARDS, EXAM. BY MR. MACDONALD

1 Q. Can you comment on the mood of the meeting, the attitude
2 of the various people?

3 A. When the meeting began, I suppose that everybody was a
4 little tentative and guarded, but as the meeting went on and
5 I don't recall at specifically which point, but I recall that I
6 was pressing Chief MacIntyre on either the Chant or the
7 Harriss statements I think, and he got upset, and you asked
8 me earlier had I ever seen him bang his fist on the table,
9 well, that was one of the two occasions when he banged his
10 fist on the table and said, "What's going on here? What is
11 this?" which was obviously a reaction to being, I'd have to
12 admit, interrogated, because I was pushing him pretty hard.

13 Q. What were you pressing him about?

14 A. There again, now, I know I pressed him on the Chant one,
15 but I believe where the upset took place was on the Harriss
16 because I was pressing him on the propriety of keeping a
17 witness of that age at the police station until twenty after
18 one in the morning from eight o'clock in the evening.

19 Q. What was his response?

20 A. Well, he said that he wasn't there the whole time, he
21 didn't...he didn't know how long she had been there and I'm
22 a little vague on the specific reaction, but that was the gist
23 of it, and that her mother...I think he said her mother was
24 there part of the time at least. That there was no banging
25 on the desk as far as he was concerned.

MR. EDWARDS, EXAM. BY MR. MACDONALD

1 Q. Was Staff Wheaton present through the entire meeting?

2 A. I think he was.

3 Q. At any time were you threatened by Chief MacIntyre?

4 A. I heard Staff Wheaton's evidence on that point. No, that's
5 not my recollection. It was an intense meeting but Mr.
6 Whalley and Mr. MacIntyre didn't get me up against a wall
7 and stand over me, I believe that was the gist of it.

8 Q. Would you say that the Chief or Mr. Whalley or both became
9 aggressive towards you?

10 A. Well, Mr. Whalley definitely not. Mr. MacIntyre, I suppose,
11 you know, the slamming the fist and the raised tone could
12 be interpreted as aggressive, but no more than that.

13 Q. Let me read you what Staff Wheaton said at page 7806 of
14 the transcript and ask for your comment. He had said or
15 testified that the meeting was both morning and afternoon.

16 A. He may be right on that, I couldn't say.

17 Q. He was asked, "Were you present for the entire sessions
18 both morning and afternoon?" and here's his answer,

19
20 A. I left toward the end of the afternoon sessions to
21 go the washroom and when I came back Mr.
22 Whalley and the Chief were standing over Mr.
23 Edwards and there was finger pointing going on
and so on, and this was right at the end of the
meeting.

24 Q. Standing over Mr. Edwards. Was Mr. Edwards
25 seated?

1 A. He was seated, yes, sir.

2 Q. I see, any shouting?

3 A. Voices were loud. I wouldn't say shouting but
4 aggressive.

5
6 Did that scene occur?

7 A. No. No.

8 Q. At any time were you seated with Mr. MacIntyre and Mr.
9 Whalley standing over you in an aggressive manner?

10 A. No.

11 Q. Thank-you. We go back to your notes taken on that day
12 then and ask you various questions. Under the...you have
13 "Re Chant," do you have that? It's about...close to the
14 beginning.

15 A. Yes, I have it. And then it begins, "Says he did not."

16 Q. Yes.

17 A. Yes. Okay.

18 Q. Now, your second notation under that title is "No threats or
19 questions by anyone to Chant during the meeting." I assume
20 you mean...

21 A. No, sorry.

22 Q. ...other than somebody. Somebody must have been
23 questioning him.

24 A. Yes.

25 Q. Were you...

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1 A. That's what I say. The...this note taking was a, you know, a
2 lot of it was done during the meeting and I was trying to
3 keep a handle on questioning those present and getting the
4 notes, so.

5 Q. Were you told who did the questioning?

6 A. Yes, John MacIntyre did the questioning.

7 Q. You go on to say, "Says he didn't mention Pratico's earlier
8 statement on June the 4th." What does that refer to?

9 A. Well, as I recall the statement from Pratico had been taken
10 or Pratico's second statement had been taken earlier that
11 day.

12 Q. That's correct.

13 A. Which was a Sunday, I believe. And, so I asked John
14 MacIntyre whether he had said to Chant, "Look, I've got a
15 statement from this other fellow," whether it was Pratico or
16 an unnamed person, and "He says he saw it and, therefore,
17 you must have seen it." And John said that he hadn't
18 mentioned Pratico's statement, earlier statement to Chant.

19 Q. Did he deny making any reference to the fact that he...they
20 had this statement from another eyewitness who had seen
21 the murder?

22 A. That is my understanding, yes.

23 Q. Thank-you. Your next point is "Between May 30th and June
24 4th absolutely no conversation between the Chief and
25 Chant."

1 A. Right.

2 Q. And did you consider that to be important? Was that...who
3 was raising that, you or...

4 A. I raised that, yes, because...I mean I was trying to zero in on
5 what caused Chant to change from his first statement to his
6 second statement. So, I think, you know, it would be
7 reasonable to assume that if there was conversations in that
8 period of time, they may have had some bearing on the
9 change.

10 Q. Did the same thing apply to Pratico?

11 A. The same would apply, yes, I don't know if I asked that
12 same question, but if I didn't I should have, I guess.

13 Q. You then note, "When did he take Chant down to tracks?
14 Can't recall exactly when that was." Did you have
15 information that..."he" is referring to Chief MacIntyre, is it?

16 A. Yes.

17 Q. Did you have information that Chief MacIntyre had taken
18 Chant down to the tracks?

19 A. Yes, I believe I had gotten that from Staff Wheaton
20 somewhere along the line.

21 Q. Okay. Over on, at least on our next page, but this is under
22 the title "J.F. MacIntyre," to assists you in finding it. It's
23 Patricia Harriss.

24 A. Oh, yes, okay. Yes. Yeah, on the original note there is a
25 paragraph there and then a bracket "with J.F. MacIntyre" out

MR. EDWARDS, EXAM. BY MR. MACDONALD

1 in the margin.

2 Q. Okay. You, under the note for J.F.MacIntyre it says, "Can't
3 recall whether he spoke to O'Reilley previously."

4 MR. PUGSLEY

5 Harriss., Patricia Harriss?

6 MR. MacDONALD

7 No, it says, "Can't recall whether he spoke to O'Reilley
8 previously."

9 MR. PUGSLEY

10 I beg your pardon, sorry.

11 MR. EDWARDS

12 A. Yes. Yes, and...

13 Q. Previously to what?

14 A. Previous to taking the statement from Harriss on June 18th.
15 And, that's where I have difficulty with some of these notes
16 because that is not the sense I was left with at the end of
17 the meeting, because I believe in the affidavit I made a
18 reference contrary to that. So, I can't...I can't really explain
19 that.

20 Q. All right. Now, under the...under "Mr. Urquhart," and I take
21 it these are notes of comments from him, are they?

22 A. Yes.

23 Q. He doesn't recall the interview with Harriss.

24 A. Right.

25 Q. "Nor did he recall O'Reilley."

MR. EDWARDS, EXAM. BY MR. MACDONALD

1 A. Right.

2 Q. "But he says there is no banging desk and hollering." Now, if
3 he didn't recall it how could he say there was none of that
4 occurred?

5 A. I don't know.

6 Q. Okay. Under "Pratico," "Wouldn't say he was totally reliable
7 but placed credence where his story was corroborated by
8 other witnesses, Chant and Harriss."

9 A. Yes.

10 Q. Whose comment was that?

11 A. John MacIntyre. That may not be a word-for-word
12 comment. That may be my impression of the sense of what
13 he said.

14 Q. But you couldn't go with Pratico alone, you'd have to have
15 corroboration.

16 A. Yes, that's fair.

17 Q. Now, Mr. Urquhart with respect to just below that point is
18 saying "He has no independent recollection of interview."
19 That's the interview with Pratico. Correct?

20 A. Yes.

21 Q. Did you question him on that or press him why he could
22 remember an interview with Pratico, I'm sorry with Chant,
23 but he couldn't remember an interview with Pratico the
24 same day?

25 A. No. You know, I just want to make an interjection at this

MR. EDWARDS, EXAM. BY MR. MACDONALD

1 point. This was less than an ideal situation to do any cross-
2 examination, you know, if you can recall John MacIntyre's
3 testimony before this inquiry, I think it's fair to say that he
4 was a very difficult witness to cross-examine here, under
5 oath, and you know, before the inquiry. In that meeting
6 with Urquhart and Whalley present there...it was not, well, I
7 shouldn't say it was not possible, but I didn't feel that I was
8 able to do an effective cross, and really that wasn't, I
9 suppose, my primary objective, although I was trying to do
10 as much of one as I could.

11 Q. Your primary objective was to get information for affidavits.

12 A. Yes.

13 Q. At this stage, recognizing now that Aronson has conduct of
14 the appeal or of the reference.

15 A. Yes.

16 Q. Had you been told by Aronson that he had no intention of
17 calling evidence from the police?

18 A. I may have been, Mr. MacDonald, that was certainly my
19 understanding. Now whether I was told that by Aronson or
20 if I just assumed that he wasn't going to, I can't say.

21 Q. You did after this meeting with the...with Urquhart and
22 MacIntyre, did prepare affidavits for their review.

23 A. I did, yes.

24 Q. And the understanding was you would draft them, they
25 would be reviewed by MacIntyre and Urquhart with their

- 1 solicitor.
- 2 A. Yes.
- 3 Q. Any changes they wanted would be made by you.
- 4 A. Yes.
- 5 Q. Did you receive any instructions for preparation of those
6 affidavits other than during the meeting of July 12th?
- 7 A. There may have been a telephone conversation with John
8 MacIntyre. I don't...I don't think so. I believe I prepared
9 the affidavits based on what I had learned in the meeting.
- 10 Q. All right. Now, the next notes I have, Mr. Edwards, are July
11 21st.
- 12 A. Yes.
- 13 Q. And they record a conversation you had with Gordon Coles
14 who had told you he was getting feedback from somebody.
- 15 A. Right.
- 16 Q. That the Crown was being less...that the Crown was not
17 being impartial.
- 18 A. Right.
- 19 Q. And you learned that that was Mr. Whalley.
- 20 A. Yes.
- 21 Q. Do you recall that conversation with Gale?
- 22 A. Coles.
- 23 Q. Coles, sorry.
- 24 A. Yes. Yes.
- 25 Q. What was being said? What...were you being chastised in

1 some way?

2 A. Beyond what's said in the notes there I have no specific
3 recollection, although I do recall that information. The tone
4 of the meeting, he was quite cordial, I mean, he didn't really
5 come on heavy at that meeting. But I suppose, you know, it
6 might be interpreted as a gentle chastisement.

7 Q. Did you consider you were being...

8 A. That...sorry.

9 Q. Did you consider you were displaying a lack of impartiality
10 in this matter?

11 A. No, although I have to acknowledge that I had very definite
12 opinions about the matter at that time and I...I guess I was
13 just not able to understand at that point, given the
14 knowledge we had at that time, that anyone could seriously
15 believe that Donald Marshall had committed the murder

16 Q. Had you been meeting people who you thought did seriously
17 believe that?

18 A. Well, that was the sense I took from this July 21st phone
19 call, you know, and when they said I wasn't being impartial
20 and that I had pre-judged the situation. That's what I took
21 him to mean that, you know, I shouldn't...or to take the
22 position that Donald Marshall was innocent at this stage was
23 premature.

24 Q. During your meeting on July the 12th with those various
25 people, were there any comments made to you which would

MR. EDWARDS, EXAM. BY MR. MACDONALD

1 indicate anyone present at that meeting believed still that
2 Donald Marshall had killed Sandy Seale?

3 A. That was the general sense that I had from John MacIntyre,
4 and again I don't know if there is any specific reference in the
5 notes, but that was my impression of him. With Mr. Whalley I
6 remember quite specifically because, well, quite frankly, I
7 was astounded when at the end of the meeting, having gone
8 through this in some detail, as he was leaving he looked at me
9 and he kind of chuckled and he said, "Take that to court and
10 you'll be laughed right out of the courtroom."

11 10:37 a.m.

12 Q. Take what to court?

13 A. The Marshall case and the position that he was innocent.

14 Q. Back in your notes of July 21st...

15 A. Yes.

16 Q. You note that, "Coles says, 'They were concerned you were not
17 calling enough witnesses. McGee was one of the names
18 mentioned.'"

19 A. Yes.

20 Q. "You told him you had prepared affidavits for Urquhart,
21 MacIntyre and McGee." When did you meet McGee to get
22 instructions from him?

23 A. I don't believe I had a specific meeting with him. Mr. McGee
24 is a fellow who is very well-known to me and who I would
25 run into two or three times a week in the courthouse and

MR. EDWARDS, EXAM. BY MR. MACDONALD

1 although I can't specifically recall, I believe that, you know,
2 when I was over in court and met Mr. McGee I had a quick
3 conversation with him in the corridor asking him his
4 recollection and would he be prepared to give an affidavit.

5 Q. It was your intention at all times to have an affidavit from
6 him for submission to the Court.

7 A. Oh, I think I had already prepared it by the time I got this
8 call on July 21st.

9 Q. How was it left between you and Mr. Coles?

10 A. I don't recall the specific parting shot but, that's, I'm sorry,
11 that's a poor choice of words...

COMMISSIONER EVANS

12 It may be accurate.

13 A. No, not on this occasion at all. It was, you know, that whole
14 conversation was very calm and just left that we'll try to keep
15 some balance in this whole thing.
16

CHAIRMAN

17 Mr. Edwards, did you propose calling witnesses bearing in
18 mind that Aronson had the carriage of the case?
19

20 A. Yes, I was intending to call the police witnesses in response to
21 what I anticipated the, Chant and Harriss in particular, were
22 going to say.

CHAIRMAN

23 This is part of the adversarial process for testing the
24 strength of the evidence of the various witnesses, I presume.
25

MR. EDWARDS, EXAM. BY MR. MACDONALD

1 A. Yes.

2 MR. MacDONALD

3 Q. Your next notes are July the 22nd at which time Whalley,
4 MacIntyre and Urquhart came to your office with the
5 affidavits you had drafted and there were suggested changes
6 to be made?

7 A. Yes.

8 Q. Do you recall what the initial paragraph referring to John
9 Pratico and the lack of knowledge of the police concerning
10 him would have said?

11 A. Yes. I think I can remember pretty accurately, unfortunately
12 I didn't keep the draft. But it was a paragraph to the effect
13 that John MacIntyre, and I believe in Urquhart's also, had no
14 knowledge at the time of the trial and preliminary that John
15 Pratico had any type of mental problem.

16 Q. And they wished to have that paragraph deleted?

17 A. Yes.

18 Q. And on the basis as you've recorded that possibly Pratico's
19 mother would have told Chief MacIntyre that her son was on
20 pills.

21 A. Yes, I can recall Chief MacIntyre making that statement.

22 Q. Was that the only reason that perhaps they knew he was
23 taking pills but didn't know he had spent time in the Nova
24 Scotia Hospital? "I didn't know he had mental problems."

25 A. Yes. I think on the, at the July 12th meeting he had said

MR. EDWARDS, EXAM. BY MR. MACDONALD

1 specifically that he didn't know that Pratico was in the Nova
2 Scotia Hospital.

3 Q. Now would, the changes that you were asked to make, were
4 you satisfied that you had prepared affidavits based on
5 instructions received from MacIntyre and Urquhart that
6 accurately and truthfully reflected their knowledge?

7 A. Yes. I was satisfied that their affidavits accurately gave the
8 account that they had given me. You know, in fairness, I
9 would have to say that I was a little uneasy, particularly with
10 that bit about Pratico. But they were saying that this was the
11 truth of the matter and I felt that they were entitled to put
12 that position forward. I mean I contrast that, it would be
13 improper and I wouldn't put something in an affidavit that I
14 knew to be a lie. I certainly didn't do that. I don't think I
15 did.

16 Q. Were you satisfied that Sergeant, that Chief MacIntyre and
17 Urquhart had full opportunity to make any changes they
18 wanted in those affidavits before they were sworn?

19 A. Oh there's absolutely no question because they had the
20 affidavits for a few days. And read them over with Mr.
21 Whalley.

22 Q. Okay, you then go on to note on that same date that you left
23 them alone in your office to read Aronson's affidavit.

24 A. Yes.

25 Q. Aronson's affidavits. I assume those are the affidavits...

MR. EDWARDS, EXAM. BY MR. MACDONALD

1 A. Yes.

2 Q. That Aronson had, was proposing to introduce.

3 A. Yes.

4 Q. And then you make comment about the, when you returned
5 the Chief was reading the RCMP report that was in your office.

6 A. Yes.

7 Q. Is that something that would have just been open and
8 available for someone to read if they wanted to?

9 A. Possibly it was because I think I had a lot of the material
10 spread out on the conference table I mentioned the other day.

11 Q. And then you say you assured them you would do everything
12 possible to have their side of the story presented.

13 A. Yes.

14 Q. And their side of the story, I take it, was what was in the
15 affidavit?

16 A. What was in the affidavit, yes.

17 Q. At any time did you discuss with Chief MacIntyre or Sergeant
18 Urquhart how Chant and Pratico, these two people that were
19 unconnected, unrelated, didn't know each other, how they
20 ever both came up with the same lie?

21 A. I don't think I ever had the opportunity to press him on that,
22 you know, unless I said, "Well you had the opportunity during
23 the July 12th meeting," but it was hard to keep that meeting
24 on track.

25 Q. So at no time have you actually discussed that particular

MR. EDWARDS, EXAM. BY MR. MACDONALD

1 point with them.

2 A. I don't believe so, no.

3 Q. I want to take you to the affidavits of Mr. MacIntyre and
4 Urquhart.

5 A. Yes.

6 Q. They're found in Volume 39. And on page 79...

7 A. Yes.

8 Q. In paragraphs 10, 11, 12 and 13, they're going on talking
9 about John Pratico. Would you have wanted to know and
10 been interested to know that prior to taking the second
11 statement from John Pratico Chief MacIntyre had actually
12 taken him down to the Park and they were together in the
13 Park?

14 A. Yes, that would have been useful information to have.

15 Q. Would you consider that to be important information?

16 A. Yes.

17 Q. That was never told to you?

18 A. I don't recall it being told, but in fairness I have to say that
19 my notes of the July 12th meeting may not have picked that
20 up. It may have been mentioned to me, I don't think it was,
21 but it may have been. I can't rule it out.

22 Q. On page 80, paragraph 14, it's a statement by Chief MacIntyre
23 that he believed, or suspected that both Chant and Pratico had
24 previously obtained their first statements from Donald
25 Marshall. Was that told to you as well during the July 12th

MR. EDWARDS, EXAM. BY MR. MACDONALD

1 meeting?

2 A. I believe so. I seem to recall Chief MacIntyre saying, "Well
3 you know they both talked to Marshall before they gave
4 those first statements."

5 Q. Why was it not proposed by you that Gushue would be called
6 at the reference?

7 A. Why was it not proposed by me?

8 Q. Yes. That you were proposing to call Harriss but not Gushue.

9 A. It was Mr. Aronson who was proposing to call Harriss.

10 Q. From your point of view, from a rebuttal, if you will...

11 A. Yes.

12 Q. Why would you not propose calling Gushue?

13 A. Again, it's a little difficult to remember some of these specific
14 points six years after the event but I recall that Gushue was
15 both hostile and had a vague recollection and may have had a
16 bit of a drinking problem.

17 Q. Did you meet with him?

18 A. No. That was information that I would have gotten from Staff
19 Wheaton.

20 Q. Let me take you to Mr. Urquhart's affidavit which is on page
21 96 of that volume. I want to refer to page 97.

22 A. Right.

23 Q. Paragraph 7. This is a statement in the affidavit. And these
24 affidavits, I take it, are intended to be put before the Court...

25 A. Yes.

MR. EDWARDS, EXAM. BY MR. MACDONALD

1 Q. With the intention of the Court knowing what the evidence of
2 these witnesses would be.

3 A. Yes.

4 Q. Paragraph 7, "That at no time did anyone in my presence, or
5 to the best of my knowledge, make any threats or promises or
6 offer any inducements to Mr. Pratico." Now Mr. Urquhart had
7 told you he had no independent recollection of that meeting
8 at all.

9 A. Right.

10 Q. Wouldn't you agree with me that the essence of what
11 paragraph 7 is saying would lead one to conclude that he does
12 recall what happened. And that there were no threats made.

13 A. Yes. That's fair.

14 Q. But that's not a fair representation of what Mr. Urquhart had
15 told you.

16 A. Well perhaps not, but at the same time he had told me he had
17 no recollection but he was also, I believe, suggesting, and I
18 think I'm correct on this, that if it had happened he'd
19 remember. And that he had accompanied John MacIntyre on
20 many occasions and never saw the type of conduct that
21 MacIntyre was being accused of. Now perhaps I overstated
22 his position there and that's a fair criticism.

23 Q. But he swore the affidavit.

24 A. Yes. I mean I was going on, not only the written notes but
25 my impression and doing my best to reflect the positions that

MR. EDWARDS, EXAM. BY MR. MACDONALD

1 they had given me in the affidavits. And recognizing that it
2 was going to be reviewed them and by Mr. Whalley. So if
3 there were any misconceptions that they'd be thereby
4 removed.

5 Q. Now look at paragraph 9, that is a statement by Mr. Urquhart
6 that he was present and took a second written statement
7 from Patricia Harriss on June the 18th.

8 A. Yes.

9 Q. Let me show you the original of that statement. That's Exhibit
10 56.

11 A. Apparently taken by Sergeant MacIntyre.

12 Q. If you look at page 106 of Volume 39 you will see the, 105-
13 106 it's the typewritten part.

14 A. Yes.

15 Q. And let me read you from the evidence of Mr. Urquhart at
16 page 9597 and 9598. You said this is the, the question, "This
17 is the later statement of Patricia Harriss and do you see your
18 name on page 66?" And he says, "Yes, it's typed in the right-
19 hand corner." And that would be similar to that page I've
20 showed you, 106.

21 A. Yes.

22 Q. Question, "Yes, and again, correct me if I'm wrong, but you've
23 already told us that you weren't there." Answer is, "That's
24 right." And he confirmed on the same page that he wasn't
25 even there when that second statement was taken.

MR. EDWARDS, EXAM. BY MR. MACDONALD

1 A. Um-hmm.

2 Q. From Patricia Harriss.

3 A. Yes.

4 Q. You were never told that.

5 A. That he wasn't there?

6 Q. Yeah. In fact, you were told that he was there. And Mr.
7 Urquhart...

8 A. Yes.

9 Q. Swore an affidavit saying that he was there.

10 A. That's my recollection, yes. And that's obviously what the
11 affidavit says.

12 Q. Where would the original of these police files have been, do
13 you know?

14 A. I guess by that time the RCMP had them.

15 Q. I take it then, paragraph 11 of that affidavit, on page 97
16 obviously can't be correct either. Where he says that, "No one
17 made any threats or promises to Patricia Harriss."

18 A. If we now accept that he wasn't there.

19 Q. Well, if we accept his own evidence...

20 A. Yes.

21 Q. When he says he wasn't there.

22 A. Right. On that basis, paragraph 11 can't be right.

23 Q. Now did you consider this evidence to be of importance to
24 present the police side of things that you wanted to do? That,
25 look, there wasn't any inducements, there was no threats...

1 A. Yes.

2 Q. And we have two of these policemen saying that.

3 A. Right.

4 Q. One of whom says he has no independent recollection. He told
5 you, no independent recollection of the Pratico statement
6 taking at all...

7 A. Right.

8 Q. And he wasn't even there at the Harriss.

9 A. Right.

10 Q. Let's go to the October court appearance and I think, do you
11 have Exhibit 17 there, Mr. Edwards?

12 A. I have the original. Yes, I do.

13 Q. No, 17. You may. You've probably got the original. I just, for
14 the benefit of their Lordships, on page 74 of Volume 17.

15 10:56 a.m. - BREAK

11:23 a.m.

16 Q. I just want to go back on a couple of points, Mr. Edwards,
17 before we press on. In Volume 31 at page 29, that's your
18 letter of the...started April 22nd, finished May 3rd.

19 A. What was that page reference?

20 Q. 29.

21 A. Yes.

22 Q. Is there any way...

23 COMMISSIONER EVANS

24 What volume are we in?

25

1 MR. MacDONALD

2 That's 31, My Lord. Page 29.

3 Q. It notes that you started that letter on April the 22nd and
4 concluded it on May the 3rd. Is there any way that you
5 could tell me what parts may have been written on various
6 dates?

7 A. I'm sorry, Mr. MacDonald, I don't think I can.

8 Q. Particularly could you...any way of telling when paragraph
9 11 was written?

10 A. May I just take a moment to read it?

11 Q. Yes.

12 A. Perhaps that will make the painting dry. What you want to
13 know, of course, are, I assume, is whether I can say whether
14 that was written before or after April 26th.

15 Q. That's what I'd like to know, if you can...if you could tell us.

16 A. I couldn't say, quite possibly before, but...

17 Q. But you can't.

18 A. I can't say definitively, no.

19 Q. That's fine. And one other point, when you met on July 12th
20 at your offices with MacIntyre and Urquhart, Whalley and
21 Wheaton...

22 A. Yes.

23 Q. You told us that you had the sense from Chief MacIntyre
24 that he was still of the view that Marshall had committed
25 the murder and, in fact, Mr. Whalley was telling you you'd

1 be laughed out of court if you went with the evidence you
2 had.

3 A. Yes.

4 Q. At that time would they have been aware of the statement
5 that Donald Marshall had given in Dorchester about the
6 rolling or the robbing having been in progress?

7 A. I don't believe there is a reference to it in the July 12th
8 notes.

9 Q. There isn't. But you were aware of it.

10 A. I was aware of it, and...

11 Q. Were you telling them everything that you knew?

12 A. That was my intention and I'd be surprised if I didn't
13 mention it to them at that time, but I, again...

14 Q. In fact, your notes do say the Chief read the RCMP report on
15 that day.

16 A. No, that was the next day, wasn't it?

17 Q. Oh, was it, okay, I'm sorry.

18 A. Yeah.

19 Q. It was the (21st?). You're right. At any time did Chief
20 MacIntyre say to you or anybody else say to you, "If we'd
21 had only known that there was a robbery attempt going on
22 in May of 1971 we'd have approached this thing entirely
23 different."

24 A. No.

25 Q. Now we need your help to try and get some dates. On

1 Volume 29, these are your handwritten...some of your
2 handwritten notes. It's a thinner volume.

3 A. What volume?

4 Q. 29.

5 A. Oh, yes.

6 Q. And you have your original notes there so you may be able
7 to help us better.

8 A. Okay.

9 Q. But you'll need 29 to look at.

10 A. Yes.

11 Q. Starting on page 35.

12 A. Yes.

13 Q. In fact, before we do that, why don't you turn to page 34
14 and that answers a question I had posed to you earlier. It's
15 a telephone message from Mr. Wheaton to yourself.

16 A. Oh yes, right.

17 Q. In response to the question how did Pratico come to the
18 attention of the police.

19 A. Yes.

20 Q. And the reference is to Raymond Poirier.

21 A. Yes. I knew Poirier rang a bell, but I had forgotten about
22 that telephone message.

23 Q. Now starting on 35, that's no problem. That's dated July 8.

24 A. Yes.

25 Q. The next on page 36 is dated July the 22nd.

1 A. Yes.

2 Q. After that though, the next few pages, can you assist me and
3 tell me when they may have been prepared? From there up
4 until October the 5th.

5 A. They, I believe, and I can't...I can't be definite on it, but I
6 believe they were written prior to the October 5th
7 appearance, like those, 1, 2, 3 under "Preliminary remarks."

8 Q. Yes.

9 A. They...

10 Q. That's on page 37, My Lords.

11 A. Those comments reflect pretty well the position set out in
12 my brief on fresh evidence, which was forwarded to the
13 Court prior to October 5th. So I think I was just making
14 handwritten cues on that. But it's possible that they may
15 have been made when I was preparing the brief on fresh
16 evidence. I can't say. I stuck them in there because they
17 seemed to pertain to the October 5th... They weren't with
18 the rest of the notes when I gathered up the file.

19 Q. Could they be notes that you made for yourself to use when
20 you were addressing the Court in October?

21 A. Could have been, yes.

22 Q. You don't have any notes of your July 29th appearance
23 before the Court. Was there anything that you can recall of
24 significance that occurred at that time?

25 A. No, as I say, the three appearances, but in particular the two

- 1 July appearances are blurred together in my memory.
- 2 Q. Okay. Take those notes then, the preliminary remarks.
- 3 A. Right.
- 4 Q. Which are...our copy is contained on page 37.
- 5 A. Yes.
- 6 Q. Of that Volume 29.
- 7 A. Yes.
- 8 Q. The first one says, "There is a substantial argument..."
- 9 A. Agreement.
- 10 Q. Agreement, okay. Okay. Now, the second, "The Crown's
- 11 basic position is that if Chant, Pratico and Harriss are heard
- 12 then police should also be heard."
- 13 A. Right.
- 14 Q. And you continued to adopt that position throughout.
- 15 A. Oh, yes.
- 16 Q. Third, "That Court will get a distorted view unless the
- 17 appellant is submitted to cross-examination on his affidavit
- 18 or unless the Crown is permitted..." now what's after that?
- 19 A. There's nothing after that in that sentence, you know, it's
- 20 the Crown's view of...the Crown's view that certain actions of
- 21 "A" which has been...doesn't follow. But I can tell you with
- 22 some certainty that the sense I was trying to convey there,
- 23 "Submitted to cross-exam. on his affidavit or unless the
- 24 Crown is permitted," I believe what goes in there, "to
- 25 introduce the statement taken at Dorchester on March the

1 9th, '82."

2 Q And then your next point, "The Crown's view..." You read
3 that first, will you?

4 A. Okay. "The Crown's view that certain actions of 'A' not only
5 precipitated events of May 28, but also the course of the
6 subsequent investigation in defence (refer to MacNeil's
7 affidavit.)"

8 Q Now, at this stage were you still of the view that the Court
9 was going to be looking at this very broadly or were you
10 now of the view that the Court was taking a very narrow
11 look at this and treating it just like an appeal from a
12 conviction?

13 A. The most accurate description of my thinking on it at the
14 time was that the flag went up in July that the Court was
15 going to be taking a narrow view of it, but that I felt the
16 broad view was still alive in October and so I guess the
17 answer is, yes, I thought that though there might be some
18 resistance that there was still a shot at opening the thing up
19 a bit in October.

20 COMMISSIONER POITRAS

21 What does the "A" stand for again, please?

22 MR. MacDONALD

23 Appellant, I would think, My Lord.

24 MR. EDWARDS

25 Yes.

COMMISSIONER POITRAS

1
2 Thank you.

MR. MacDONALD

3
4 Q Now, the next page we have is also entitled "Preliminary
5 remarks," is that...

6 A I don't have that one or at least I don't have it in sequence
7 here, but if I can just...

8 Q Can you read the bottom line there?

9 A ...take a second.

10 Q The bottom, under, opposite "Police Evidence" what that
11 says?

12 A "Police evidence respecting knowledge of Pratico's mental
13 state." Very clear, isn't it?

14 11:36 a.m.

15 Q I guess the "respecting" gave me problems. Look at the next
16 page, 39, Mr. Edwards.

17 A Yes.

18 Q That is, comments I take it, on the brief of the appellant.

19 A Yes.

20 Q But at the bottom it says, "He does not mention whether or
21 not he will seek leave to call the appellant."

22 A Right.

23 Q Were you of the view that Aronson was going to call Marshall
24 as a witness?

25 A I was until I got his brief which was, if I remember it

1 correctly, silent on the point. And so I was, I noted my
2 concern there.

3 Q. If the issue, if the issue is whether, who, whether Marshall
4 killed Seale...

5 A. Yes.

6 Q. Or stabbed Seale, if that's the only issue and you have the
7 evidence of Chant and Pratico and Harriss and so on, why
8 would you ever call Marshall?

9 A. Well there again, if you're taking the, well no, I was going to
10 say even, if you're taking the narrow view of the reference,
11 that it is an appeal and nothing more, then you're correct.
12 There'd be no point in calling him or hearing from him. But
13 even if it is a narrow appeal, the disposition or, you know,
14 maybe I'm mistaken on this, the disposition, ie. whether he
15 be acquitted on the basis of a miscarriage or on the basis that
16 the conviction is no longer supported by the evidence seems
17 to me that whether or not a robbery was taking place bears
18 directly on which of those two options should be taken by the
19 Court. That was my feeling on it.

20 Q. Okay.

21 A. The narrow issue or the main issue of deciding whether or not
22 he, in fact, inflicted the fatal stab wound, of course, could be
23 determined without his evidence.

24 Q. Let's jump ahead to page 42 which are your notes, I believe,
25 taken on October 5th when you were actually before the

1 Appeal Division.

2 A. Yes.

3 Q. And this is the application for leave to call new evidence, isn't
4 that correct?

5 A. Yes.

6 Q. You told us earlier today that in your recollection the two
7 Julys and the October hearing sort of blended together now
8 and you just have a sense of what was going on.

9 A. Um-hmm.

10 Q. What was the sense that you had after that October meeting?

11 A. Well I guess the bottom line for me there was that the
12 prospects of my ever getting the police evidence before the
13 Court were remote. That was my feeling after October 5th.
14 That I think I referred to it earlier this morning that I recall
15 Mr. Justice MacKeigan making the aside on the Bench that,
16 you know, there was no point in opening that up and I
17 believe you have Martin Herschorn's note where I reported to
18 him that at one point and I forget which hearing, the Chief
19 Justice had indicated surprise that I even wanted to get into
20 that.

21 Q. That was in July.

22 A. Yeah.

23 Q. Now if you don't have the police evidence being called...

24 A. Right.

25 Q. Wouldn't that indicate to you that there is going to be a very

1 narrow look at this issue?

2 A. Yes.

3 Q. And the only look at it is who stabbed Seale, or did Marshall
4 stab Seale.

5 A. Yes.

6 Q. And is that the sense you had when you left the court in
7 October?

8 A. Yes.

9 Q. Your first notation on October 5th says, "Made clear that
10 affidavits were not evidence." What does that mean?

11 A. That's referring to a comment by the Chief Justice near the
12 beginning of the hearing. I believe Mr. Aronson was making
13 his submission at the time and part of that was implying, if
14 not stating directly, I don't remember the exact words, that
15 the affidavits were evidence and the Chief Justice sort of
16 stopped him and said, "No, the affidavits are not evidence."

17 Q. What do you take that to mean?

18 COMMISSIONER EVANS

19 What affidavits are you referring to?

20 A. Mr. Aronson had submitted a bound volume of affidavits in a
21 booklet like this, the gray cover, and it included all the
22 affidavits of Chant, Pratico, Harriss...

23 COMMISSIONER EVANS

24 But not the police...

25 A. Khattar. No. Although I took that to mean, I had submitted

1 the police affidavits and I took that admonition to mean not
2 only his affidavits but mine, too.

3 COMMISSIONER EVANS

4 No affidavits.

5 A. That's right. No affidavits at all.

6 MR. MacDONALD

7 Q. My Lord, Volume 39 contains all of the affidavits that were
8 filed with the Court on the hearing of the application for fresh
9 evidence. And they do include, we have compiled that
10 document. It does include the police affidavits and the other
11 affidavits prepared by Mr. Edwards, but also all of the
12 evidence prepared by Mr. Aronson.

13 What do you take that to mean or what did you take it to
14 mean? "These affidavits are not evidence."

15 A. That they had no independent standing of their own in the
16 absence of viva voce evidence.

17 Q. And I take it from that or can I take it from that that the
18 Court then would not be referring at any time to those
19 affidavits as evidence in support of any finding they wanted
20 to make in the ultimate reference.

21 A. Yes, except, of course, insofar as the affidavits are adopted by
22 the witnesses testifying...

23 Q. During the course of...

24 A. During the course of the fresh evidence.

25 Q. Very good. Thank you.

MR. EDWARDS, EXAM. BY MR. MACDONALD

1 COMMISSIONER POITRAS

2 But would they be admissible in the court reference as being
3 part of a court records?

4 A. Insofar as they'd be adopted, that's my understanding. For
5 example, when we got to the reference on December 1st and
6 2nd, I believe Patricia Harriss was cross-examined on parts of
7 her affidavit and I believe she adopted parts of the affidavit.
8 Well those parts that she would adopt would be evidence.
9 That's my impression, My Lord.

10 COMMISSIONER EVANS

11 The entire affidavit would not be evidence then.

12 A. No, no. Unless she adopted the whole thing and I don't
13 believe she did. I think she adopted a few parts of it.

14 MR. MacDONALD

15 My Lord, that would be similar, of course, to any
16 interlocutory application leading to a trial. The trial judge would
17 not be referring to those affidavits as part of the record of the
18 trial. At least I would hope he wouldn't.

19 COMMISSIONER POITRAS

20 No, but what I understand here is that though they would
21 not necessarily be, though they would not be admissible, and
22 nonetheless parts of them would be subject to confirmation. And
23 in that event those parts would then be admissible.

24 COMMISSIONER EVANS

25 Sure.

MR. EDWARDS, EXAM. BY MR. MACDONALD

1 MR. MacDONALD

2 And I believe that's what Mr. Edwards has said.

3 MR. EDWARDS

4 Yes.

5 COMMISSIONER POITRAS

6 So, what then, is the virtue of having an affidavit in the first
7 place?

8 MR. MacDONALD

9 Well if you go back, Mr. Edwards, perhaps I shouldn't be
10 doing this, but My Lord for convenience, if you go back to July 9th
11 or 8th notes, the request from the Chief Justice was to file
12 affidavits of what evidence would be called by the various
13 witnesses.

14 CHAIRMAN

15 Would be called.

16 MR. EDWARDS

17 Yes.

18 MR. MacDONALD

19 And that was my understanding of what Mr. Edwards told
20 us.

21 MR. EDWARDS

22 Yes.

23 CHAIRMAN

24 This was simply for the purpose of giving the Court of
25 Appeal an indication of what the deponents in these affidavits

MR. EDWARDS, EXAM. BY MR. MACDONALD

1 would say, or were likely to say in the event they were called to
2 testify at the rehearing, is that right?

MR. EDWARDS

3
4 Yes. And perhaps the best way to sum it up is that my
5 understanding was that the affidavits, except insofar as they were
6 subsequently adopted, would be restricted to this hearing, ie.
7 restricted to use in deciding what fresh evidence would be called.
8 But beyond that, they had no independent standing.

CHAIRMAN

9
10 And if it was subsequently decided that, by the Court of
11 Appeal, that they did not want to hear from John Jones, then, and
12 he wasn't called, then the affidavit did not form part of the record
13 from the point of view of the final determination of the reference,
14 is that correct?

MR. EDWARDS

15
16 Right.

CHAIRMAN

17
18 And there were situations such as that? There were
19 affidavits filed on the July application...

MR. EDWARDS

20
21 Yes.

CHAIRMAN

22
23 By deponents who were not subsequently called.

MR. EDWARDS

24
25 The police witnesses...

1 CHAIRMAN

2 The police witnesses, in particular.

3 MR. EDWARDS

4 Being a case in point.

5 MR. MacDONALD

6 Q. Look again, at page 42, or your notes of the October 5, '82.

7 There is a listing there of the various witnesses Aronson
8 would like to have called at the reference.

9 A. Yes.

10 Q. And on the next page, My Lords, are the list of the witnesses
11 that the Appeal Division said could be called at the reference.

12 COMMISSIONER EVANS

13 Before you leave, page 42. I don't have the benefit of that
14 Cape Breton shorthand but under "Aronson - Began..."

15 MR. EDWARDS

16 "Began by listing affidavits filed. Moved that all evidence
17 put in as evidence...." That should have been, "That all affidavits
18 put in as evidence..." It seems to be out of sequence with the
19 Chief Justice's comment.

20 MR. MacDONALD

21 Q. And down at the bottom of that page as well, Mr. Edwards, it
22 says, does it not, "Moving for receipt of affidavits in this
23 application."

24 A. Yes.

25 Q. And if you go to the second page on that as well, you'll see the

1 last line on page 43, My Lord, "Reserved on application to receive
2 affidavits."

3 A. Right.

4 Q. Also, "Reserved on application to hear evidence of other
5 witnesses."

6 A. Right.

7 Q. Is that correct, Mr. Edwards?

8 A. Yes.

9 Q. There was an oral decision from the Court saying which
10 witnesses they were prepared to hear? Is that correct?

11 A. Yes. Which I believe was subsequently incorporated in an
12 Order.

13 Q. Yes. And, in fact, there's a written decision from the, a
14 written Order, you're right.

15 A. Yes.

16 Q. To your knowledge, has the Court ever handed down a
17 decision on those reserved points?

18 11:50 p.m.

19 A. Well, the matter came up again at the end of the reference or
20 the end of the hearing on December 2nd and there, as I recall,
21 at that stage, I said, and I'm paraphrasing, that in my view
22 there was no point in calling the police at that stage. I believe
23 Mr. Aronson agreed with that. I asked that the affidavits of
24 Chief MacIntyre and Bill Urquhart be admitted, or those
25 portions of those affidavits which had any bearing on the

MR. EDWARDS, EXAM. BY MR. MACDONALD

1 evidence of Chant and Harriss be admitted. Aronson quite
2 properly, of course, said, "Well, no, that's not going to happen
3 unless I have the opportunity to cross-examine." And so I
4 think there was a ruling then that, in that case, none of it was
5 coming in. The transcript may...

6 Q. The transcript...

7 A. May differ, but I think that's the gist of it.

MR. MACDONALD

9 In Volume 3, My Lords, is the transcript of the reference
10 evidence. And on page 233, the court denied the application or
11 the request by Mr. Edwards to file the affidavits of MacIntyre,
12 Urquhart and Magee. Mr. Aronson took objection to their being
13 filed and the court said, "We shall not admit the affidavit."

BY MR. MACDONALD

14 Q. There was no reference, I don't think, to the affidavits of, for
15 example, Mary Ebsary and some of the others that...

16 A. No, I don't believe Mr. Aronson ever brought that back to the
17 fore again. I think the only additional reference then was to
18 Pratico. He mentioned calling Pratico, but then he said, but
19 if..." I think he said if I agreed, that as a fact that Pratico,
20 because of his delicate mental condition, was not capable of
21 testifying in '71, that he file, now I'd have to read the
22 transcript, but I believe he was going to file Pratico's affidavit
23 and Dr. Mian's by agreement. No doubt that the transcript
24 would sort that out.
25

1 Q. When you left the court then on October 5th, what was your
2 view as to whether or not you'd be able to call the police
3 evidence?

4 A. Just before I get to that, yeah, that reference about John
5 Pratico, that's between Line 20 and Line 30 on page 231.

6 Q. Of Volume 3.

7 A. Yeah. He said:

8
9 I should still like to have some clarification on
10 the evidence relating to John Pratico, My Lord.
11 If it's taken, I'm quite prepared with my friend
12 to agree that he's not a credible witness, if that's
13 acceptable to the court. If it's not, I would
14 suggest that something be done either by way of
15 admitting certain of the affidavits which support
16 the opinion with respect to his credibility or that
17 he himself be called as a witness if that's not
18 sufficient.

19 And I think from there, we agreed that we could do it by
20 agreement rather than calling.

21 Q. Okay. When you left the court on October 5th, what was your
22 view as to whether you'd be able to call the police evidence?

23 A. My feeling was that the possibility that I would be able to call
24 the police evidence after October 5th was remote and would
25 hinge in great measure on the way the evidence came out at
the hearing on December 1st and 2nd. But I didn't think the
prospects of getting that evidence before the court was very
good or were very good.

1 Q. Next I have notes of yours of October 21st, 1982 and those
2 are on page 44 of Exhibit 29. Do you have those?

3 A. Yes, or I have the copy. I can't put my fingers on the
4 originals but...

5 Q. That's your writing, though, is it?

6 A. Oh, yes.

7 Q. You called Gene Coles in Pictou?

8 A. I don't recall ever talking to Gene Coles on that. I believe that
9 that is a note of intention to call.

10 Q. But you don't believe you ever did.

11 A. I don't think I ever did.

12 Q. Who had told you that he had been involved in 1974 or
13 thereabouts in looking at this file?

14 A. I can't recall. It might have been John MacIntyre. It might
15 have been Jim Carroll.

16 Q. Then you make note...

17 A. It may have been Harry Wheaton. I really don't know.

18 Q. And you make notes about Patricia Harriss and Maynard
19 Chant. You're going to look for their criminal record.

20 A. Yes.

21 Q. And then you say, "Did Dave Ratchford give a statement?
22 What about Gary Green?"

23 A. Yes.

24 Q. Where were you getting the information about Ratchford and
25 Green?

- 1 A. Again, I can't identify the source. In that whole sequence
2 about Harriss, Chant, and Ratchford, the only thing I can say is
3 that I know that it was John MacIntyre that brought to my
4 attention that Patricia Harriss had a prior record.
- 5 Q. Why were you interested in October in Coles and Ratchford?
6 Now the evidence we've heard is that those were two, or
7 possibly two separate incidents.
- 8 A. Yes.
- 9 Q. Were you interested at that time in the fact that there may
10 have been other opportunities for an investigation of the
11 Marshall case to have been carried out?
- 12 A. I was interested, of course, but I don't... I don't even recall
13 making those notes.
- 14 Q. Okay.
- 15 A. But it is my handwriting.
- 16 Q. Let's go ahead then to the reference itself, the reference
17 hearing. That was on December 6th, was it?
- 18 A. December 1st and 2nd.
- 19 Q. December 1st and 2nd, sorry. What was your reaction to the
20 panel that was convened for that hearing?
- 21 A. I had no reaction at the time. Justice Morrison was no longer
22 there. He was having health problems at the time and Justice
23 Pace was now in his stead.
- 24 Q. Were you aware that Justice Pace had been Attorney General
25 of Nova Scotia in November of 1971?

1 A. No. No.

2 Q. In December of 1971?

3 A. I had been aware that Justice Pace had been an Attorney
4 General and I believe that he served as Attorney General two
5 different times. But the short answer is it never occurred to
6 me that he might have been the Attorney General in office at
7 the time of the original Marshall prosecution. You know, I
8 think I should tell you that when I had my stint teaching in
9 Newfoundland, I referred to before, that was during the
10 1970-71 term. So I didn't even, I wasn't a resident of Cape
11 Breton at the time so I knew nothing about the Marshall case
12 until February 3rd, '82.

13 Q. If you had been aware of the fact that Mr. Justice Pace had
14 been Attorney General of this province in November and
15 December, 1971 at the time of the trial and at the time of the
16 reinvestigation by the R.C.M.P.

17 A. Yes.

18 Q. In December.

19 A. Right.

20 Q. Would you have taken any issue with his sitting on that
21 panel?

22 A. Yes.

23 Q. Why would you do that?

24 A. I would have argued that there was a perceived bias or the
25 possibility of a perceived bias by Mr. Justice Pace and that it

1 would not be appropriate for him to sit on that panel. You
2 know, even if, and I think the likelihood is that he knew
3 nothing about the case. The fact of the matter is that he, as
4 Attorney General at the time, was responsible for the original
5 prosecution of Donald Marshall. So...

6 Q. And notwithstanding that he may not have had any
7 knowledge, you still would have objected.

8 A. That's right. You know, assuming, even assuming he didn't
9 have any knowledge, I don't think he should have been there.

10 Q. Was there any member of the court more active in the
11 interplay as this reference went on than others?

12 A. The hearing per se was conducted by the chief justice. So he
13 was the one who was making the rulings and generally being
14 the chairman, if I can put it that way. So he was the one who
15 was most active. There wasn't any appreciable activity by
16 any of the others during December 1st and 2nd. Now, of
17 course, that, you know, I expect you'll ask me the same thing
18 when we get to the argument in February and it was a
19 different situation then.

20 Q. Okay. Prior to the hearing, what did you see your role to be?
21 You're there on behalf of the Crown. At this stage, are you
22 into an adversarial position?

23 A. Prior to the hearing?

24 Q. Just before you go in there.

25 A. Yes, okay. I see myself in an adversarial position but, again,

1 it was in a limited way and it was to subject, to try to test the
2 evidence of the witnesses who were going to be called. To
3 that extent, at that stage, well, at any stage right up to the
4 present, there was never any intention on my part to be
5 adversarial to the extent of pushing for a new trial or pushing
6 for the affirmation of the original conviction.

7 Q. Prior to the reference, did you speak with any of the
8 witnesses? Patricia Harriss?

9 A. Other than...

10 Q. Other than the statement you had taken, or the interview you
11 had with her in your office back in April or wherever it was?

12 A. No.

13 Q. Jimmy MacNeil?

14 A. No. None of them.

15 Q. Chant?

16 A. None of them.

17 Q. Donald Marshall?

18 A. [No audible response.]

19 Q. Now isn't that a bit of a departure from what you said you
20 would normally do? That even as defence counsel, if you put
21 yourself in that position here...

22 A. Yes.

23 Q. That you would go and interview the witnesses?

24 A. No, what I was meaning to convey there is that I would be
25 interviewing the witnesses that I intended to present. You

1 know, as a Crown, I guess it's split 50/50 about, you know,
2 when I interview defence witnesses. Some of the so-called
3 defence witness will have been interviewed by the police
4 beforehand, some not. For example, alibi witnesses, in the
5 come lately alibi situation; i.e., one that's not disclosed right at
6 first. Rarely will I interview those.

7 Q. Now we have a situation here where you have several people
8 taking the witness stand and admitting that they had lied at
9 the trial of Donald Marshall.

10 A. Right.

11 Q. You had Chant, you had Harriss, and you had Marshall
12 himself.

13 A. Yes.

14 Q. Was the court interested in why they had lied?

15 A. Oh, no, quite the contrary. I think the... Well, probably the
16 cross-examination of Patricia Harriss is most illustrative of
17 the point that... I don't have the page reference at my
18 fingertips, but when I was attempting to cross-examine her, I
19 believe on the O'Reilly statement, the Chief Justice said
20 something like, "Look, she told one story then. She's telling
21 another one now. She's admitting she lied. We don't have to
22 go beyond that."

23 Q. And was that the sense you had as well with the other
24 witnesses that the court wasn't concerned why they lied at
25 the earlier trial?

MR. EDWARDS, EXAM. BY MR. MACDONALD

1 A. That was my impression, although I can't provide specific
2 references like I could with Patricia Harriss. I think that
3 reference is somewhere around 166 of the transcript. And
4 you see at page 166 at about Line 12, the Chief Justice says:

5
6 You now propose to go far afield which would
7 involve opening these proceedings on matters
8 that are not before us. So I don't know how you
9 can be permitted to carry on this.

10 You know, there are a couple of other references, I think, like
11 that in there.

MR. MACDONALD

12 Reference to page 166, My Lords, for the record, would be
13 found at page 169 in Volume 3. 166 is the transcript page
14 number.

BY MR. MACDONALD

15 Q. Let's get to Donald Marshall and his evidence at the reference.

16 A. Right.

17 Q. How would you describe his demeanour on the witness stand?

18 A. Subdued in parts and defiant in other parts.

19 Q. We see reference throughout the transcript of "Speak up, Mr.
20 Marshall," and...

21 A. Yes, that would be the subdued. Not, he's not a witness who
22 speaks as loudly and clearly as you'd wish, if you were
23 scripting it.

24 Q. Have you had experience in your time in the courts dealing
25

1 with other natives?

2 A. Yes.

3 Q. Other than Mr. Marshall?

4 A. Yes.

5 Q. And would you say that, normally, they are witnesses who
6 are very quite and subdued on the witness stand?

7 A. Yes, I believe Judge Matheson used the word "reticent" when
8 he was asked a similar question and I think that's pretty
9 accurate.

10 Q. That's been your experience as well?

11 A. In most cases. Now there have been some native witnesses
12 who are extremely articulate, but most that I've dealt with
13 have been reticent, subdued.

14 Q. And you talked about him being... What was the other word
15 you said at times he was?

16 A. Defiant.

17 Q. Defiant?

18 A. Yes. They had to be ordered...

19 Q. Let me take you to a place where he was defiant...

20 A. Yes.

21 Q. In the transcript. And that's in Volume 3 at page 64. Perhaps
22 if Their Lordships could have that volume, it would be useful.
23 It would be page 59 of the transcript, Mr. Edwards.

24 A. 59?

25 Q. Yes. I guess starting at the bottom of page 58. Yeah, starting

1 at the bottom of page 63 of the transcript... Or the exhibit.

2 A. Right.

3 Q. And you're talking to Mr. Marshall to get him to define what
4 "to roll somebody" means and then you asked him this
5 question: "Right. Now, had you ever rolled anyone prior to
6 that night?" and he says, "I can't answer that." And that
7 goes on...

8 A. Yes.

9 12:10 p.m

10 Q. Pretty well for a page or so.

11 A. Yes, I remember that exchange.

12 Q. Until the Court required Mr. Marshall to answer that
13 question. Now, you've had a lot of experience prosecuting
14 people. Isn't that an improper question, to ask someone
15 have they ever committed a crime?

16 A. Yes. Generally speaking that would be improper and maybe
17 even always. All I can tell you is, if you wish, I can explain
18 my rationale at that time.

19 Q. Okay. I'll certainly...

20 A. Yeah.

21 Q. ...allow you to do that. You go ahead, and but I'll come back
22 to the question itself.

23 A. No, it...

24 Q. Yeah. I suggest to you that it's always improper, it's totally
25 wrong to ask someone and you're not permitted to ask

MR. EDWARDS, EXAM. BY MR. MACDONALD

1 someone if they have committed a crime. And you're
2 permitted to ask them have they ever been convicted, and
3 that's because of the provisions of the Evidence Act.

4 A. Yes, you'd put the specific conviction and date and
5 disposition to them.

6 Q. Yes. And that's strictly to test credibility.

7 A. That's right.

8 Q. But if you ask somebody, "Have you ever committed a
9 murder?" they don't have to answer that question, do they?

10 A. No.

11 Q. And if you ask someone, "Have you ever rolled anyone?"
12 surely they don't have to answer that question.

13 A. Okay.

14 Q. No objection from Mr. Aronson's counsel.

15 A. From Mr. Marshall's counsel.

16 Q. Sorry, Mr. Marshall's counsel.

17 COMMISSIONER POITRAS

18 Yes, there is. Page 63.

19 MR. EDWARDS

20 Yes, he objected.

21 Q. I'm sorry.

22 A. Yes, I think we had a little discussion on that.

23 COMMISSIONER POITRAS

24 Line 18, page 63.

25

MR. EDWARDS, EXAM. BY MR. MACDONALD

1 MR. EDWARDS

2 I'm sorry, what was the page?

3 MR. MacDONALD

4 Yeah, well, he's even asked there, My Lord, if he's familiar
5 with what the term means. The question has not been
6 asked yet, has it?

7 COMMISSIONER POITRAS

8 Yes.

9 MR. MacDONALD

10 Q. Okay, then I'm sorry. Yes, you're quite correct, on page...line
11 about 12. Yes. I'm sorry. I apologize to Mr. Aronson. He
12 did, in fact, object.

13 A. Yes.

14 MR. CHAIRMAN

15 And the Court ruled that it was a relevant question.

16 MR. MacDONALD

17 And the Court directed that it be answered. On page 65.

18 A. Uh-hum.

19 COMMISSIONER POITRAS

20 And page 63, line 24 or so.

21 Q. Now let me get back to your role in there, Mr. Edwards.

22 A. Yes.

23 Q. Your role is to, is what, to...

24 A. Test the evidence.

25 Q. To test the evidence of each of the witnesses.

1 A. Right.

2 Q. I don't mean this in any unfair sense, but did you see it in
3 your role to be fair to Mr. Marshall?

4 A. Yes.

5 Q. And would you think you're being fair to him by putting
6 that line of questions?

7 A. In retrospect I can say, no, I wasn't being fair to him, but I
8 wasn't intentionally unfair, put it that way.

9 Q. You wanted to explain the reason for asking the question
10 and I said I'd give you the opportunity to answer that.

11 A. Uh-hum.

12 Q. Please do.

13 A. No, what I was doing there was laying the groundwork for
14 my application to cross-examine him on the statement. And,
15 of course, he had said in the March 9th statement that he
16 had rolled people in the Park before. And so the whole
17 rationale for cross-examining a witness on a prior written
18 statement, as I understand it, is to test credibility. So I was
19 asking him questions that I knew were covered in the
20 written statement. Now, I accept the criticism that I went
21 too far with it in that regard, and had I to do it over I
22 wouldn't but...

23 Q. Wasn't the purpose, the real purpose, of trying to get that
24 statement in, that's Marshall statement given to Wheaton
25 and Carroll at the penitentiary...

1 A. Yes.

2 Q. Was to try and prove that Donald Marshall on the night of
3 May 28th, 1971, was embarking on a criminal act? He was
4 trying to commit a robbery.

5 A. Uh-hum. The primary reason for introducing the statement
6 was to find out or to help find out exactly what had gone on
7 there that night. I took the position that this...this is an
8 important point. If you don't mind I'd like to try to explain
9 it as fully as I can. But just going back before...before the
10 hearing, where there was...there had been an indication by
11 Mr. Aronson that he might not call Donald Marshall or his
12 brief had been silent on the point. My brief respecting fresh
13 evidence was that if he were called I should be permitted to
14 cross-examine him on that statement. If he were not called
15 I should be given the opportunity to introduce the
16 statement the same way as I'd be looking for leave to
17 introduce the police evidence. My rationale for that was
18 that here we had a very unequivocal statement by the
19 witness which, to me, made the events of the fateful night
20 more plausible. That statement was believed by Staff
21 Wheaton and I believed it when I read it, notwithstanding
22 the possible inducement that can be argued was present.
23 My feeling was that the statement is there, it has to be dealt
24 with, you can't...it should not be ignored. Now, I would have
25 thought that when I made the application to cross on that

1 statement that the very forceful, or the most compelling
2 argument against it, and look I, you know, I don't mean to
3 be critical of Steve Aronson because I have the highest
4 respect for him. But I would have thought that he would
5 have argued vigorously that look, at that point Marshall
6 would have said anything to get out of jail and that that
7 would be the inducement argument, and you know, when
8 the thing came up I did acknowledge that there was an
9 inducement argument. But that argument wasn't proper.
10 Mr. Aronson did make a submission against it. I forget the
11 gist of it. But it wasn't done an inducement argument, it
12 was just...the reference to an inducement was just tacked on
13 the last sentence of his submission.

14 Q. Let me put...

15 A. So, you know, I guess the bottom line of what I'm saying
16 there is that I felt that it would be wrong just to pretend
17 that that statement did not exist. It had to be dealt with.

18 Q. Let me put this to you, Mr. Edwards, again as an experienced
19 prosecutor.

20 A. Right.

21 Q. If Donald Marshall were charged with robbery...

22 A. Yes.

23 Q. At that time. And you were attempting to have that
24 statement introduced....

25 A. Yes.

1 Q. Knowing, and I could quote you from your evidence the
2 other day...

3 A. Yes.

4 Q. ...about...

5 A. I remember it.

6 Q. Would you agree with me you never would have got that
7 statement before the court?

8 A. No, I don't think anyone can be that categorical on it
9 because as I understand the law on confessions, not only
10 must there be an inducement, but it must be proven that
11 the statement was given as a result of the inducement, and
12 here we had like two meetings, like Donald Marshall had
13 February 18th and then March 9th to consider that, to
14 consult with counsel. It was an established fact that he had
15 counsel at the time. But yet he gave the statement on March
16 the 9th. So although the prospects of getting that statement
17 on a trial would be iffy, it wouldn't be a dead issue. I think
18 that possibly it could have been argued, but that's...that
19 wasn't the tack I took at the time, but to answer your
20 question, no.

21 Q. All right. Would you not, though, think at least it important
22 for the members of the Court looking at that statement to be
23 aware of the circumstances under which it was taken?

24 A. Yes.

25 Q. That there may well have been inducement.

1 A. Yes.

2 Q. That Marshall had been told by Sarson about Ebsary's story
3 about the robbery.

4 A. Yes.

5 Q. Prior to meeting with these fellows.

6 A. Right.

7 Q. Don't you think all of that would have been important
8 information for the Court to know?

9 A. Yes.

10 Q. Rather than just have the statement itself.

11 A. Right. And...

12 Q. And you...some of it was brought out, I...the transcript
13 speaks for itself. There was circumstances under which it
14 was given was brought out in the examination of Mr....

15 A. It was brought out...

16 Q. ...Marshall.

17 A. ...then, you know, I think perhaps it could have...we could
18 have had a voir dire on the admissibility of the thing.
19 Unfortunately, and I accept responsibility for this, I guess I
20 was still partially in the inquiry mode rather than the
21 appeal mode and I argued that, look, he's not in jeopardy
22 here. This thing was...this reference was precipitated by his
23 action and, in effect, he's coming here now and he just wants
24 to tell part of the story. Let's put it all on the table.

25 Q. I guess that's what's...

1 COMMISSIONER EVANS

2 Would you have been as forceful if the Court hadn't agreed
3 with you?

4 MR. EDWARDS

5 I'm sorry, at the time I made the argument I...like I
6 wouldn't have known that the Court was going to allow me to do
7 the...

8 COMMISSIONER EVANS

9 Well, I thought...

10 MR. EDWARDS

11 Maybe I misunderstood you.

12 COMMISSIONER EVANS

13 In the middle of page 64.

14 MR. EDWARDS

15 Okay.

16 COMMISSIONER EVANS

17 There had been...on 63 there was the objection by Aronson
18 and then there was the...

19 MR. MacDONALD

20 For your benefit that's page 58 of your...we've got about a
21 four or five page difference in the two things.

22 MR. EDWARDS

23 Oh, I see, okay. Right.

24 COMMISSIONER EVANS

25 Then you went after him again and said...

MR. EDWARDS, EXAM. BY MR. MACDONALD

1 MR. EDWARDS

2 Yes.

3 COMMISSIONER EVANS

4 Had you ever rolled anyone prior to that night?
5 (and he said) I can't answer it, (and then I take
6 it that is the Court,) You were asked a question
7 by, (I take it that should be) By Mr. Edwards,
8 You haven't answered it. I did, I have no
9 answer. (and then) Mr. Marshall, (that's the
10 Court).

9 MR. EDWARDS

10 Yes.

11 COMMISSIONER EVANS

12 "And I don't think, I don't know how to answer it."

13 MR. EDWARDS

14 Right.

15 COMMISSIONER EVANS

16 And then you came into the picture again. Would it not
17 have been necessary before you introduced or attempted to
18 introduce that statement to establish whether it was voluntary or
19 not?

20 MR. EDWARDS

21 Certainly on a trial, a trial situation, and that's...that's what I
22 say. I was probably guilty there of still regarding this thing as an
23 appeal but also an inquiry and because, no doubt, you've read my
24 argument there that he's not in jeopardy here and anything he
25

1 says is protected anyway. So...

2 COMMISSIONER EVANS

3 He wasn't going to be hurt.

4 MR. EDWARDS

5 Pardon me?

6 COMMISSIONER EVANS

7 Your view was he was not going to be hurt by the answers
8 that he gave.

9 MR. EDWARDS

10 In the crim...in the sense of criminal liability. Obviously, you
11 know, it was potentially very damaging to him unless he could
12 give a good explanation as to why that statement had been made.

13 COMMISSIONER EVANS

14 But then again down at the bottom of page 64, "Prior to the
15 night of May 28th had you ever rolled anyone before?" and then
16 he again says, "It's nobody's business," so it wasn't just that night
17 you were asking him about. You were also asking him about any
18 prior occurrences in the Park.

19 MR. EDWARDS

20 Yes, and as I say, I...

21 COMMISSIONER EVANS

22 Again, was...

23 MR. EDWARDS

24 Well, I was...I was laying the groundwork for the cross on
25 the statement and those references had been contained in the

MR. EDWARDS, EXAM. BY MR. MACDONALD

1 statement. Now, the criticism, I think, is valid, that I went too far.

COMMISSIONER EVANS

2
3 Then on 65, The Court, "You have been asked now, Mr.
4 Marshall, you have been asked a question now, you must answer
5 it." And then, "I might have, I might...I may have not."

MR. EDWARDS

6
7 Yes.

COMMISSIONER EVANS

8
9 So it was the Court pushing a bit for the answer, as well.

MR. EDWARDS

10
11 Yes, although...

COMMISSIONER EVANS

12
13 They wouldn't know what your motive was. Your motive
14 was, you say, to lay the groundwork for the cross-examination.

MR. EDWARDS

15
16 For the cross, yeah.

COMMISSIONER EVANS

17
18 Unless, the Court wouldn't be anticipating that, which is
19 quite a jump for them to make.

MR. EDWARDS

20
21 Well, I...

COMMISSIONER EVANS

22
23 You, at least, knew where you were going.

MR. EDWARDS

24
25 Now, again I don't want to duck responsibility for it. I

1 mean, I...

2 COMMISSIONER EVANS

3 No, I appreciate that.

4 MR. EDWARDS

5 I pushed it.

6 COMMISSIONER EVANS

7 So did they.

8 MR. MacDONALD

9 Q And, I invite you, I'm sure you've read this recently, Mr.
10 Edwards, and you're fairly familiar with the transcript, this
11 Court wasn't told that before Marshall made that statement
12 he was...he had two RCMP officers tell him, "Now look, you
13 can tell us whatever you like and you may never see us
14 again."

15 A. No.

16 Q Some...similar with... I'm trying to remember what you told
17 us the last day.

18 A. Yeah. Yeah, that's the drift.

19 Q "But if you tell us what we want to hear we'll get you out of
20 here."

21 A. Yeah.

22 Q They were never told that.

23 A. Well, no...

24 MR OUTHOUSE

25 Well, My Lords, as I recall, it's been some time ago, my