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#17

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

Volume 71

Held: May 31, 1988, in the World Trade and Convention
Center, Halifax, Nova Scotia

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

Counsel: Messrs. George MacDonald, Q.C., Wylie Spicer, and David
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Mr. Donald C. Murray: Counsel for Mr. William Urquhart

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and Counsel for the Correctional Services of Canada

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

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

Messrs. S. Bruce Outhouse, Q.C. and Thomas M. Macdonald: Counsel
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Messrs. Bruce H. Wildsmith and Graydon Nicholas: Counsel for
the Union of Nova Scotia Indians

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

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

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MS. McCONKEY, EXAM BY MS. DERRICK

1 MAY 31, 9:30 a.m.

2 MR. CHAIRMAN

3 Ms. Derrick.

4 MS. McCONKEY, recalled and still sworn, testified as follows:

5 EXAMINATION BY MS. DERRICK

6
7 Q Miss McConkey, my name is Anne Derrick and I represent
8 Junior Marshall. Now, I believe you said yesterday that a
9 claim of innocence does not rule out a favourable release
10 decision.

11 A. Yes, that's right.

12 Q That's the parole policy.

13 A. Yes.

14 Q That's correct? So, in other words, is it correct to say that a
15 claim of innocence does not act as an absolute bar to a
16 person being released?

17 A. That's right.

18 Q My question to you then is what does it do, because a
19 reasonable inference from the policy is that a claim of
20 innocence sets the release decision back and acts as an
21 obstacle.

22 A. I would not agree with that. Certainly it was not...it was not
23 the case with Mr. Marshall.

24 Q The policy states, however, that it does not rule out a
25 favourable decision.

1 A. Uh-hum.

2 Q. That's couched in rather negative terms as opposed to
3 positive ones.

4 A. I suppose it...I suppose you're right. It is couched in
5 negative terms. However, that does not change the fact that
6 in Mr. Marshall's case he was granted day parole as soon as
7 he became eligible.

8 Q. I'm going to get to the specifics of Mr. Marshall. What I
9 wanted to know is are there any stat...is there any statistical
10 information that you're aware of concerning release, and
11 obviously holding constant previous records and the offence
12 involved, for those cases where prisoners have maintained a
13 claim of innocence versus those cases where prisoners have
14 admitted to the offence?

15 A. Not any statistics that I'm aware of. Certainly I have, over
16 the years that I was involved, worked with a number of
17 individuals who claimed innocence and a number who did
18 not, and I would agree that probably for those individuals
19 convicted of serious offences who were maintaining their
20 innocence, that claim of innocence may well have slowed
21 down their release.

22 Q. And without any proper statistical analysis, you can't really
23 know with any degree of certainty the actual effect that
24 making a claim of innocence has?

25 MR. PRINGLE

MS. McCONKEY, EXAM BY MS. DERRICK

1 Well, My Lord, with respect I wonder how this relates
2 directly to my friend's client. We certainly have no objection and
3 we put the witness forward to talk about the policy and
4 specifically as it relates to Mr. Marshall and his experiences and so
5 on. But I really doubt whether it's relevant to get into a general
6 examination of the system in the country.

MR. CHAIRMAN

8 Well, I'm assuming what Miss Derrick is leading up to is to
9 enquire as to whether there was any departure from the normal
10 policy as it related to her client, and in that regard I would
11 suggest it is relevant.

MS. DERRICK

13 Q. Did you hear my question?

14 A. Would you mind repeating it?

15 Q. I just wondered whether you would agree with me...I
16 wondered whether you would agree with me that without a
17 statistical analysis of the actual effect of making a claim of
18 innocence whether one can know with any degree of
19 certainty the effect that such a claim has on release?

20 A. I don't think one could know either way.

21 Q. What you've said is your impressions from working with
22 lifers and from dealing with people with serious offences is
23 that a claim of innocence may, in fact, slow the process
24 down.

25 A. In some cases.

1 Q. In some cases. And that is, in fact, consistent with saying
2 that it's not a bar but that it may indeed be an obstacle.

3 A. It may.

4 Q. Now you've said that an admission of guilt is not a
5 requirement for release but that it's an indirect factor, is
6 that what you said yesterday in your evidence?

7 A. I don't think that's quite the way I expressed it. I think the
8 way I expressed it was that it's not a direct factor in
9 considering whether an individual is going to be released or
10 not. But it may be an indirect factor in some of the
11 considerations that the board members make in ascertaining
12 whether or not an individual represents a risk.

13 Q. And so an admission of guilt is desirable as a way of a
14 prisoner dealing with defects in his personality or
15 inadequacies that may have resulted in the offence, is that...

16 A. It's not the admission of guilt that's desirable. It's a
17 recognition of the factors that may have led to the offence
18 that's desirable.

19 Q. Does remorse figure into this?

20 A. Yes.

21 Q. So is remorse for the offence seen as a positive and well-
22 adjusted response?

23 A. In some cases, depending upon the offence.

24 Q. And I'm talking about a serious offence like murder.

25 A. Yes, it probably would be.

MS. McCONKEY, EXAM BY MS. DERRICK

1 Q. And is it therefore believed that a remorseful person will
2 reintegrate into society better than a person who is not
3 remorseful?

4 A. All other factors being equal, yes.

5 Q. Yes. I'm just speaking about this one aspect.

6 A. But certainly, you know, remorse is not a major factor. The
7 major factor is the appreciation of the negative factors that
8 led to the offence and whether or not the individual has
9 dealt with them in such a way so as not to represent a risk.

10 Q. But is it fair to say that remorse may be considered as part
11 of that appreciation?

12 A. Yes.

13 Q. Do you accept that this is, in fact, a very primitive penal
14 theory that there should be repentance and expiation?

15 MR. PRINGLE

16 I object, My Lord, with respect.

17 MS. DERRICK

18 Well.

19 MR. PRINGLE

20 Are you giving...my friend seems to be giving evidence.
21 Couching the question and the term of the answers and the
22 question or at least the answer she'd like.

23 MR. CHAIRMAN

24 Keep the questions in line with the interest of your client,
25 Miss Derrick, and that's not an appropriate question.

MS. McCONKEY, EXAM BY MS. DERRICK

1 MS. DERRICK

2 Thank-you, My Lord. I am attempting to show that the issue
3 of remorse is connected with...

4 MR. CHAIRMAN

5 Whether it's a primitive theory or not, that certainly...it is
6 not...that's not the way to elicit it and there may be some very
7 interesting arguments. I've seen a large number of pre-sentence
8 reports and I can only recall one where the convicted person
9 wasn't remorseful.

10 MS. DERRICK

11 But I take your ruling, My Lord, is that you're not
12 interested...

13 MR. CHAIRMAN

14 Yes.

15 MS. DERRICK

16 ...in evidence relating...

17 MR. CHAIRMAN

18 My ruling is that it is not relevant at this point.

19 MS. DERRICK

20 Q. Miss McConkey, it's accurate to say, is it not, that the parole
21 board policy considers that risk to society is the most
22 important factor in deciding about release?

23 A. Yes, that is accurate.

24 Q. Is that correct? And, it's important that the prisoner show a
25 good understanding of the offence in terms of its gravity

1 and its effect?

2 A. In the case of serious offences, yes.

3 Q. Yes. And, I think you can assume from my questions that
4 that's what I'm dealing with. I'm dealing with an offence
5 like murder. So, in the parole process, is it important for a
6 convicted murderer to demonstrate an appreciation for the
7 factors that led to the offence in order to be a good risk for
8 parole and not a bad risk to society? Is that a fair way to
9 put it?

10 A. Probably, yes.

11 Q. So, the board is, in effect, saying to a prisoner "You're
12 claimed innocence is not a factor to be considered," I think
13 that's what the policy says, but it's important that you have
14 an understanding of the offence and, as well, the board
15 accepts the integrity of the verdict, is that correct?

16 A. Certainly the first part and the last part of that are correct.
17 In terms of it's important that you have a good
18 understanding of the offence, I think a better way to
19 express that is that it's important that you have a good
20 understanding of the problem areas of your personality at
21 the time of the offence.

22 Q. That may have led to the offence.

23 A. That may have led to the offence, yes, without dealing with
24 the guilt or innocence issue.

25 Q. But my question is how can those three aspects of the

MS. McCONKEY, EXAM BY MS. DERRICK

1 process stand together? How is it possible to reconcile
2 claimed innocence not being a bar or not being a factor to be
3 considered, the need for the person to have insight into their
4 personality, and the board respecting the integrity of the
5 verdict?

6 A. I've never encountered it to be a problem. The board
7 members themselves have a great deal of discretion in the
8 factors that they consider in making a decision. And, in any
9 of my experiences I have never encountered them having
10 any difficulty in combining those three factors.

11 Q. It be a difficulty for the innocent prisoner though, is that...is
12 that not fair to say, that the innocent prisoner cannot accept
13 the verdict of the court which says that he committed the
14 offence and, therefore, he cannot have an appreciation of the
15 factors which led to it.

16 A. Granted, he cannot accept the verdict of the Court. There is
17 no reason why he cannot have an appreciation of the factors
18 in his personality at the time regardless of whether he was
19 guilty or innocent of the offence. There may well have been
20 problems in his personality at the time.

COMMISSIONER POITRAS

22 I have a problem, Miss McConkey, and I think it's the same
23 as Miss Derrick's, and that is if the accused has to acknowledge the
24 factors that led to the offence, and if he indeed did not commit
25 that offence, how then can he acknowledge the factors that led to

1 it?

2 MS. McCONKEY

3 I think perhaps I'm not making myself clear. I'm not saying
4 that he has to acknowledge the factors that led to the offence. I'm
5 saying that he has to acknowledge the factors in his personality
6 that may have led him to become involved in that type of an
7 offence.

8 COMMISSIONER POITRAS

9 But he wasn't, for purposes of this particular argument. Let
10 us say that he was not involved in the offence.

11 MS. McCONKEY

12 Uh-hum.

13 COMMISSIONER POITRAS

14 He was no where there for purposes of an abstract concept.
15 He's in jail. He pleads innocence. He contends he's innocent. And
16 here we are trying to get him to acknowledge the factors that led
17 to the offence which he says he didn't commit. As it turns out,
18 eleven years later or so he didn't commit.

19 MS. McCONKEY

20 Uh-hum.

21 COMMISSIONER POITRAS

22 Are we not then asking him, direct or indirectly, to
23 acknowledge an offence that he never committed and is that not,
24 as I think you indicated yesterday, predicated on the assumption
25 that when a person is sent to jail, he is sent to jail because he is

MS. McCONKEY, EXAM BY MS. DERRICK

1 found guilty and accordingly is guilty of the offence. And, I
2 would suggest to you that the system, therefore, is that if a person
3 is found guilty, the only way that he can obtain any form of
4 release is to at one point come to terms with that guilt,
5 acknowledge it, and, indeed, acknowledge the factors that led to
6 the commission of the offence.

MS. McCONKEY

8 I would not agree with the last statement, Your Lordship.
9 There have been, in my experience, quite a number of inmates
10 convicted of very serious offences who have maintained their
11 innocence throughout and been released, and been released on
12 parole.

COMMISSIONER POITRAS

14 Well, how about converse?

MS. McCONKEY

16 I beg your pardon?

COMMISSIONER POITRAS

18 How about to the converse? Have you come across other
19 inmates who have contended they were not guilty and, indeed,
20 were proved not to be guilty at the end of the line as has been the
21 case with this fellow Marshall? Was this the first time you have
22 ever encountered a convict who, indeed, was proved not to be
23 guilty at the end of the line?

MS. McCONKEY

25 In this serious an offence, yes, but certainly not the first

MS. McCONKEY, EXAM BY MS. DERRICK

1 time that someone has proven to be guilty...proven to be not
2 guilty.

3 COMMISSIONER POITRAS

4 You've have that in other offences.

5 MS. McCONKEY

6 Oh, yes.

7 COMMISSIONER POITRAS

8 Yes.

9 MS. McCONKEY

10 Or at least the Appeal Courts decided so.

11 COMMISSIONER POITRAS

12 Yeah.

13 MS. McCONKEY

14 But it seems like people are taking the opinion that guilt or
15 innocence is the only factor being considered by the board
16 members. It is my no means the only factor. It is one. The lack
17 of an admission of guilt may well, in some cases, be one negative
18 factor, but in a great many cases and certainly in Mr. Marshall's
19 case, as well as a number of others, it was overridden by the
20 positive factors in the case.

21 COMMISSIONER POITRAS

22 Yeah. My reflection or understanding, I think, is that
23 obviously in order to allow a person to be released, you want him
24 to come to terms with the various factors again which led to the
25 commission of the offence. And that makes sense, it seems to me.

MS. McCONKEY, EXAM BY MS. DERRICK

1 Because after all if a man is in jail and has been found guilty of an
2 offence, then you have to assume that he is guilty of the offence.
3 But there is just that small possibility that he may not be guilty of
4 the offence, yet during the entire length of his stay in jail, you
5 have to presume that he is guilty and accordingly get him to come
6 to terms with the factors that led to that offence. You've got to act
7 that way.

MS. McCONKEY

9 To a certain extent, yes. And if he does not ever
10 acknowledge his guilt, it may well be seen as one negative factor,
11 but by no means an overriding factor, ever at any time.

COMMISSIONER POITRAS

12
13 No. Thank-you.

MS. DERRICK

14
15 Q. But surely, Miss McConkey, the effect of this approach is
16 that for the prisoner claiming innocence, he has a harder
17 time getting released.

18 A. I would think so, yes.

19 Q. Now, in Mr. Marshall's case you've said it was important for
20 you to understand what happened on that night, the night of
21 May 28th, 1971.

22 A. Uh-hum.

23 Q. But what had happened had already been decided by a
24 court, a Judge and jury, is that not correct?

25 A. Yes, but Mr. Marshall did not accept that.

MS. McCONKEY, EXAM BY MS. DERRICK

1 Q. And, the parole policy says that it accepts the integrity of
2 the courts or it respects the integrity of the court's decision.

3 A. It must.

4 Q. And the person, in Mr. Marshall's case, has been convicted
5 and sentenced. So, why isn't that sufficient? Why do you
6 need to understand what happened that night?

7 A. Because I'm the person charged with making a
8 recommendation to the board whether or not this is a safe
9 individual to release, and part of what I need to know and
10 understand in order to make that assessment is where he
11 was coming from at the time, where he is coming from now.

12 Q. Are there any statistics that you're aware of that show that
13 parolees who have maintained their innocence are worse
14 risks as re-offenders than parolees who admit guilt?

MR. PRINGLE

15
16 My Lord, I ...

MS. McCONKEY

17
18 I'm not aware of any either way.

MR. PRINGLE

19
20 I had to keep rising but my friend, we assumed, was going
21 to get to the particulars of her client's interests and she has to
22 some extent, but she's back now on the general statistics and I'm
23 not sure it's helpful to anybody.

MR. CHAIRMAN

24
25 Miss Derrick, would you give me some indication as to how

MS. McCONKEY, EXAM BY MS. DERRICK

1 you're tying this into your client's...your client's interest?

2 MS. DERRICK

3 Well, certainly, My Lord. I mean I...Ms. McConkey has said
4 that it was important for her to understand what was happening
5 that night so that she could assess what kind of risk Mr. Marshall
6 was, and I'm interested in knowing whether in applying these
7 parole policies there is any basis for saying that that is an
8 important concern. That there are some statistical studies that
9 show that a parolee who...or a prospective parolee who adamantly
10 maintains his innocence is, in fact, a worse risk, and she said no.

11 MR. CHAIRMAN

12 Right.

13 MS. McCONKEY

14 I didn't say no, there aren't any.

15 MS. DERRICK

16 No, no, I know, you said....

17 MS. McCONKEY

18 I said none that I'm aware of.

19 MS. DERRICK

20 None that you're aware of, sorry, that's correct.

21 MR. CHAIRMAN

22 Well, that question is answered, isn't it?

23 MS. DERRICK

24 Yes, I know, and I was going to proceed on to another
25 matter.

1 MR. CHAIRMAN

2 Well, all right proceed on to the next matter, please.

3 MS. DERRICK

4 Q. The approach that an offender must come to grips with his
5 offence is based on an assumption that crime originates
6 from within the individual and is based on psychological
7 dysfunction, is that correct?

8 A. No, not entirely. At least certainly I don't believe that crime
9 originates entirely within the individual based on
10 psychological disfunctions. I think I and most other people
11 in the field of criminology believe that it is a combination of
12 a number of factors. The individual being one, the
13 environment being another.

14 Q. And the policy that makes it desirable to explore the person
15 coming to terms with the offence relies heavily on emphasis
16 on the individual, is that...

17 A. And his reaction to the society around him.

18 Q. And the circumstances at the time.

19 A. Yes.

20 Q. Now, you said that you felt Mr. Marshall had to work
21 through the factors which led to the offence and that the
22 board needed to be satisfied that those factors had been
23 dealt with. That was your evidence yesterday.

24 A. Yes.

25 Q. As I recall it. And you said, I believe, that this requirement

1 could be satisfied either by an admission of guilt or by a
2 general discussion of the factors surrounding the offence
3 and the unacceptable aspects of behaviour and dealing with
4 those.

5 A. Yes, I think.

6 Q. Would you like me to repeat that again?

7 A. No, I'm not sure that that's exactly what I said, but it's
8 probably close enough, yes.

9 Q. So, it's fair to say, is it not, that in having Mr. Marshall work
10 through the factors which led to the offence, it would have
11 been satisfactory if he had admitted his guilt.

12 A. It would have been helpful. We were not trying to get him
13 to work through the factors that led to the offence. We were
14 trying to get him to work through the factors in his life and
15 in his personality at the time that might have led to him
16 being involved in that offence. That's the distinction I'm
17 trying to make.

18 Q. There were many discussions on many occasions with Mr.
19 Marshall concerning whether or not he was guilty. That's
20 accurate, is it not? These materials in Volume 5 show over
21 and over again that this matter was brought up and
22 discussed. "Marshall continues to argue that he is not
23 guilty," that's found in...

24 A. I would not say there were many discussions on many
25 occasions. I did not have many interviews with Marshall,

1 and on many of them the subject never came up, on many
2 that I did have.

3 Q. Certainly your reports disclose this as being of central
4 concern. Is that not fair?

5 A. No, I would say that is not fair. It was not a major issue.

6 Q. I've...I guess that's why I'm not...

7 A. At least not with me, all right?

8 Q. I guess why I'm asking you this, Ms. McConkey, is because
9 I...it seems to me the materials contradict that. That in
10 Volume 35 of the materials we have, which are reports
11 written by you, refer to it on every occasion and I could
12 take you through that...

13 A. Oh, I agree that the reports that I wrote, which, you know,
14 admittedly at the rate of two or three reports a year over a
15 three-year period, which I would not call many occasions,
16 and I would admit that those reports refer to it on each
17 occasion. But I would also suggest that those reports are
18 two, three, four pages in length and the issue of innocence is
19 maybe one or two sentences in those reports. So there are
20 many other factors, many other elements that are referred
21 to in those reports on every occasion as well.

22 Q. I don't dispute that. But it is a fact that this issue is referred
23 to consistently in these reports.

24 A. Yes, as are many other issues.

25 Q. And it's your evidence, I believe, that he didn't initiate these

1 discussions about claims of innocence.

2 A. Yes, that's right.

3 Q. In fact, some of the language that's used with respect to
4 these claims suggests that Mr. Marshall was resisting the
5 official version of reality. For example, I'm looking at
6 Exhibit 69 which Mr. Spicer referred you to yesterday. It's a
7 March 2nd, 1978, report, and in the second paragraph, I'm
8 reading in the middle of the second paragraph, "It was
9 decided that once all avenues of appeal are eliminated, the
10 case will be discussed with the parole board in order to
11 ascertain if they would at some future date be willing to
12 consider a gradual release program, possibly leading up to
13 full parole for Marshall, even though he persists in
14 maintaining that he is innocent of the murder charge."

15 A. Uh-hum.

16 Q. That language suggests to me that Mr. Marshall persisting in
17 claiming innocence was causing concern.

18 A. For me at that time, I had not had an individual doing a life
19 sentence maintaining his innocence who had been released
20 on full parole. I knew what the parole board policy was. I
21 knew that this was not an absolute bar to being released on
22 full parole. I did not know at that time, since I had never
23 discussed Mr. Marshall's case with the parole board,
24 whether or not that policy of theirs would include right up
25 to parole, full parole for a lifer claiming innocence of

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1 murder. Once Mr. Marshall appeared before the parole
2 board for the first time in June of that year and we did
3 discuss it, I discovered that, yes, that policy would allow him
4 to be released on full parole. But at that point I did not
5 know that.

6 9:52 a.m.

7 Q. Until you had concerns about how it might affect him.

8 A. Yes.

9 Q. And would you agree with me, Ms. McConkey, that the system
10 really doesn't allow for an innocent or other words wrongfully
11 convicted person. It makes a blind assumption that anyone...

12 MR. PRINGLE

13 Objection. Objection. The blind assumption is based on the
14 system's court system and it's not a blind assumption, I hope it's a
15 very valid assumption.

16 CHAIRMAN

17 I would hope so.

18 COMMISSIONER POITRAS

19 Reword the question I think.

20 MS. DERRICK

21 Q. Ms. McConkey, perhaps I'll ask the first question first. Would
22 you agree that the system doesn't acknowledge that a person
23 may be wrongfully convicted.

24 COMMISSIONER EVANS

25 What system?

1 MS. DERRICK

2 The prison system, the parole system.

3 A. I don't think it can. It must accept the verdict of the courts.

4 It's not there to retry the case.

5 Q. And in the course of dealing with Mr. Marshall you did not
6 question the issue of his guilt. You accepted that he was
7 guilty.

8 A. I did not question the courts. I questioned it in my own mind
9 initially until I became convinced at that time that he was, in
10 fact, not innocent. I'll admit I was wrong but I did become
11 convinced that he was guilty.

12 Q. And you did not interpret his maintaining of his innocence
13 and the fact that he was becoming increasingly frustrated and
14 angry as indications that he was wrongfully convicted...

15 A. No.

16 Q. And an innocent man. And would you agree, perhaps because
17 of your experience in this case that no matter how carefully
18 the legal rules are designed, the truth won't be established in
19 every case?

20 A. Well they weren't in this one anyway.

21 Q. Were you aware in this case that there seemed to have been
22 some doubts expressed about Mr. Marshall's guilt and I just
23 want to refer you to Volume 35 at page 110. Perhaps you can
24 identify what this is. It's a telegram, a telex to Regional
25 Secretary in Moncton.

1 Q. And you based your insights into his behavioural problems on
2 that belief.

3 A. No, I based my insights into his behavioural problems on the
4 behaviour I saw in the institution. The attitudes I saw in the
5 institution. The information I received from him as to what
6 his behaviour on the street was like at the time and the
7 information I received from the community assessment about
8 what his behaviour on the street was like.

9 Q. Would you agree with me that assessing someone's
10 institutional behaviour is not a reliable indicator of their
11 behaviour as a potentially law-abiding person on the street?

12 A. Alone it isn't, no, but it is one factor.

13 Q. And that might be particularly true in the case of a person
14 who's wrongfully convicted.

15 A. It might be, yes.

16 Q. So if I understand you, what you're saying in July 1978 is not
17 that you gave up trying to get Mr. Marshall to admit his guilt
18 and try a backdoor approach, you're saying that that's not
19 what you were doing.

20 A. Certainly not.

21 Q. But you were basically saying, Mr. Marshall, you won't admit
22 to this murder but at least admit that you could have
23 committed such an offence.

24 A. I suppose so, yes.

25 Q. And isn't the effect of this really the same. That you're no

1 longer requiring Mr. Marshall to admit to a particular offence
2 but you're requiring him to admit that he has particular
3 tendencies.

4 A. I'm requiring him to admit that there are elements in his
5 personality that could lead him to be involved in a violent
6 offence in the future.

7 Q. Would it be a fair suggestion that by this time Mr. Marshall
8 had given up trying to convince you that he was innocent?
9 That he gave up arguing with you about it.

10 A. Mr. Marshall rarely ever argued with me about it, prior or
11 after, this time.

12 Q. He just quietly maintained that he hadn't committed this
13 offence.

14 A. He never maintained he hadn't committed the offence, at least
15 in talking to me. He simply never said he had. There's a
16 difference.

17 Q. But he maintained his innocence to you.

18 A. No, he never admitted his guilt to me.

19 Q. I thought you told us yesterday that there were various
20 versions and they consisted of him saying, "I wasn't there..."

21 A. Yes.

22 Q. Him saying, "I came back and found Sandy stabbed," to him
23 saying, "I was there, we were both stabbed by an unknown
24 assailant."

25 A. All right. If you interpret those as maintaining his innocence

1 then, yes, you're right.

2 Q. Well it's the same thing as saying...

3 A. He maintained his innocence.

4 Q. "I didn't do it."

5 A. Okay. But he never said, "I didn't do it."

6 Q. But you don't have to...

7 A. He said those sorts of things.

8 Q. You don't have to if you've said that.

9 A. No, you're right.

10 Q. Right?

11 A. Okay.

12 Q. Are temporary leaves of absence not used to reward
13 prisoners who admit to their crime and accept the
14 institutional version of reality?

15 A. No.

16 Q. I'd like to just ask you about a statement in Volume 35 at
17 page 101. Now you didn't write this letter I just want you to
18 tell me whether or not this statement can be interpreted that
19 way. It's a letter to Chief Christmas from Rod Blaker. And it
20 says in the second paragraph,

21

22

23

24

25

Information provided by the Canadian
Penitentiary Service indicates that it is common
practice for the professionals of the service to
help the inmate realize the seriousness of the
crime for which he was convicted prior to
benefiting from a temporary leave of absence

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program or a parole.

1 That sounds like it's held out as a benefit.

2 A. It certainly sounds like it's what Mr. Blaker believed.

3 Q. But you're saying that's an inaccurate representation.

4 A. I would say that is inaccurate, yes.

5 CHAIRMAN

6 Mr. Blaker, is he with the National Parole Board?

7 MS. McCONKEY

8 No, he was an MP.

9 MR. SPICER

10 I think he's the parliamentary secretary of the Solicitor-
11 General.

12 CHAIRMAN

13 Oh, I see. I see, yes, he was a member of Parliament.

14 MS. DERRICK

15 Q. Now Ms. McConkey...

16 A. But certainly that was not my understanding, no.

17 Q. Thank you. Ms. McConkey, you said yesterday and we just
18 mentioned a minute ago, that in your discussions with Mr.
19 Marshall there were several different versions of the events
20 on May 28th.

21 A. Yes.

22 Q. And I suggest to you that there was one single immutable
23 theme in all these versions and that was that Mr. Marshall
24 didn't kill Mr. Seale and that whoever did, he didn't know
25

1 who they were.

2 A. Yes.

3 Q. Is that accurate?

4 A. That is accurate.

5 Q. And he didn't deviate from that.

6 A. No.

7 Q. And that's really the central issue, in fact.

8 A. Yes.

9 Q. And it was later proved, would you agree with me, that Mr.
10 Marshall and Mr. Seale were, in fact, stabbed by an unknown
11 assailant.

12 A. Yes.

13 Q. So that central part of Mr. Marshall's representation of the
14 events was accurate.

15 A. Yes.

16 Q. Now is it not fair to suggest that no matter what Mr. Marshall
17 told you wouldn't have believed him unless he had told you
18 that he, in fact, killed Mr. Seale?

19 A. No, that is not fair.

20 Q. So how is it that despite the fact that he never changed from
21 this central version of the facts you still believed he was
22 guilty throughout your dealings with him?

23 A. If Mr. Marshall's version of what happened that night had
24 been consistent in the majority of the details and if he had
25 not had a reputation in the community of not admitting to

1 offences he was involved in, then it is quite likely that I
2 would have come to believe that he was innocent.

3 Q. And this second part, you got that information from
4 community assessment reports?

5 A. Yes.

6 Q. That I think we've seen.

7 A. Yes.

8 Q. In the materials. So it was the peripheral details that
9 changed, that maintained your belief in his guilt is that...

10 A. Yes.

11 Q. Correct? But if he had told you that he had committed the
12 offence you would have started to believe he was coming to
13 grips with the offence, is that not fair to say?

14 A. If he had suddenly told me that he had committed the offence
15 I would not have been likely to believe he was coming to
16 grips with it. I would have thought it was the same sort of
17 thing as when he said in Dorchester that he had committed
18 the offence because he wanted to get transferred to
19 Springhill. I would have continued talking to him about the
20 factors going on in his life at the time. His behaviour at the
21 time. His unacceptable behaviour, aside from the offence,
22 which was what was of chief concern to me.

23 Q. You got to the point, may I suggest, where you didn't expect
24 that he was going to tell you anything different though, is that
25 correct?

1 A. No. Nor was it important.

2 Q. In your reports that are found in Volume 35, I only noticed,
3 and please correct me if I'm wrong, your noting the version
4 whereby Mr. Marshall said that he and Mr. Seale were
5 stabbed by a third unknown assailant. Is that correct?

6 A. In the reports that are in here, yes, I believe so.

7 Q. And you had an impression that Mr. Marshall had no faith in
8 the system.

9 A. Right.

10 Q. Would you agree that that's consistent with his being
11 innocent? That is, a wrongfully convicted person would have
12 no faith in the system that wrongfully convicted him?

13 A. In retrospect, yes.

14 Q. Would it not be fair to suggest that he also might have no
15 faith in you, that you would represent the system to him?

16 A. He might have. I don't know.

17 Q. He didn't express that...

18 A. No.

19 Q. Directly to you?

20 A. He, the closest he ever came to that was when he expressed
21 the opinion that the parole service were supposed to be there
22 to help the inmates and I wasn't helping him. And I
23 explained to him, at the time, and this is in one of the reports,
24 that we were there both to help the inmate and also to
25 represent and protect society and I had to play both roles.

1 Q. But those expressions indicated, at least an initial expectation
2 from him, that you would help him...

3 A. Yes.

4 Q. And he obviously misunderstood the role you occupied within
5 the process.

6 A. I tried to help him by referring him to people who might help
7 him appeal his sentence.

8 Q. But that wasn't your sole function and he...

9 A. Yes, and I explained to him that was one of my functions but
10 that was not my only function. And he accepted that. At
11 least I felt that he accepted that.

12 Q. And I, if I'm correct, I think you told us yesterday that, in
13 fact, your principal function was to prepare reports for cases
14 going to the Parole Board on behalf of the Parole Board.

15 A. Yes. I never accepted or felt that I was preparing those
16 reports solely on behalf of the Parole Board. I felt that it was
17 a dual on behalf of, in part as an advocate of the individual
18 and in part on behalf of the Parole Board.

19 Q. Your principal responsibility, though, was with respect to the
20 Parole Board, is that not correct?

21 A. I, 60-40 maybe.

22 Q. In the parole process if a prisoner had wanted an advocate I
23 take it that there was provision that they could either have a
24 friend or a relative assist them or penitentiary legal services
25 when it existed or Legal Aid?

1 A. Not at that time. They can now. But at that time the right to
2 have an assistant had not yet come into the parole system.

3 Q. Is that right. So between 1976 and 1979, perhaps I should
4 ask you this. Are you familiar with the penitentiary legal
5 services...

6 A. Yes.

7 Q. We heard some evidence about it.

8 A. Yes.

9 Q. And I believe, am I not correct, that it existed...

10 A. It did exist, yes.

11 Q. During those years...

12 A. But at that stage they never appeared at Parole Board
13 hearings.

14 Q. So that was not one of their functions.

15 A. No. Not then.

16 Q. And was the same true of Legal Aid?

17 A. Yes.

18 Q. As well.

19 A. The same was true of Legal Aid. The only time there was
20 ever an assistant at a parole hearing in those days was in the
21 case of native offenders where occasionally a native liaison
22 worker, employed by the parole service would be with the
23 individual at the hearing.

24 Q. So any advocacy that a prisoner received would be provided
25 by the parole service, either in the form of yourself or in the

1 case that you've just mentioned...

2 A. Yes.

3 Q. With native prisoners.

4 A. That's right, yes.

5 Q. And so that's where you would have derived a portion of
6 your role as you've described it as being on behalf of the
7 prisoner.

8 A. Yes. That's why it was very important, for example, to me
9 and to most other parole officers at the time that the prisoner
10 knew exactly what we were recommending to the Parole
11 Board and why.

12 Q. You testified yesterday that you understood from the
13 community assessment reports that Chief MacIntyre of the
14 Sydney Police opposed Mr. Marshall's release into the
15 community.

16 A. Yes.

17 Q. Is that correct?

18 A. Yes.

19 Q. And I believe you said that it was generally the case that the
20 police did not oppose release into the community.

21 A. Yes, that is right.

22 Q. Is that generalization true, or was it true of the Sydney Police,
23 in your experience?

24 A. I can't tell you absolutely yes or no. I do not have a memory
25 of the Sydney Police generally opposing parole, no.

1 Q. So this opposition by Chief MacIntyre was a deviation from
2 the norm as you recall it.

3 A. As I recall it, yes.

4 Q. Was any attempt made to explore the basis for that
5 opposition as a result of it being a deviation?

6 A. No, because the basis for it was outlined in the reports that
7 expressed it.

8 Q. I see.

9 A. Chief MacIntyre didn't simply say, "I'm opposed period" for
10 no reason.

11 Q. No, I'm aware of that. So the position that he took wasn't
12 explored further...

13 A. No, there was no need to.

14 Q. Beyond what was...And that wouldn't have been your function
15 anyway, is that correct?

16 A. No, it would not.

17 Q. Now, I just have a few more questions, Ms. McConkey,
18 concerning some of the reports at Volume 35 at page 120, I
19 can just refer you to it although I'm not going to be going
20 through it in any detail. You describe this as a cumulative
21 document.

22 A. Yes.

23 Q. Does, and that means that it was prepared over time by
24 reference to earlier materials in Mr. Marshall's file, is that
25 correct?

1 A. Yes.

2 Q. So the material in here isn't all original material obtained by
3 you.

4 A. No, it's prepared after reading his file, reading all of the
5 documentation in his file up to that point. Talking to him to
6 clarify anything that may not have been clear. And then
7 writing a summary document.

8 Q. So is it fair to say that actual parts of the text would have
9 been taken from earlier reports and incorporated into this
10 cumulative summary?

11 A. Yes. Yes.

12 Q. I think you said yesterday that Mr. Marshall spoke softly and
13 he was sometimes hard to understand.

14 A. Hard to hear.

15 Q. Hard to hear. Did you ever find yourself having to piece
16 together things that he told you because they didn't come out
17 particularly clearly?

18 A. No.

19 Q. And did you understand that he spoke Micmac as a first
20 language?

21 A. Yes, I did.

22 Q. You refer in this cumulative report at page 121, Mr. Spicer
23 drew your attention to it yesterday, robbery with violence as
24 being one of the criminal activities Mr. Marshall was engaged
25 in prior to going to the penitentiary.

- 1 A. Um-hmm.
- 2 Q. Now am I correct that those are your words.
- 3 A. Yes.
- 4 Q. So you took from what Mr. Marshall said and described it in
5 those terms.
- 6 A. Yes.
- 7 Q. Did Mr. Marshall give you any more details on this as to, I
8 think you've described them as grabbing drunks in doorways
9 and getting money from them. Did he say when this
10 happened? How old he was?
- 11 A. It would have been after he turned 16 so, and he was in the
12 penitentiary by the time he was 19 so it had to be in between
13 there.
- 14 Q. Did he say that it happened on the reserve?
- 15 A. No, he told he did not get into trouble on the reserve that he
16 only got into trouble in town.
- 17 Q. Well, in fact, the reports, I think, say that he wasn't much
18 trouble on the reserve.
- 19 A. Wasn't much trouble on the reserve, okay.
- 20 Q. So did he specifically say these incidents happened in town
21 or...
- 22 A. They were in town, yes.
- 23 Q. You recall that, do you?
- 24 A. Yes.
- 25 Q. Was he prone to expressions of bravado or acting tough?

1 A. He may well have been, yes. In retrospect, that may have
2 been what he was doing then.

3 Q. And do you feel that he was capable of, in a sense, enhancing
4 his own trouble-making status? Embellishing it?

5 A. I never thought about it before as to whether, it does not
6 impress, it does not come, I can't think of the word I want...It
7 is not consistent with Donald Marshall as I knew him, that he
8 would have done that. That he would have tried to make
9 himself be more of a desperado than he was. That isn't
10 consistent with how I knew him.

11 Q. Did inmates receive status in prison for adopting that kind of
12 position?

13 A. No. Not in my experience, they didn't.

14 Q. Not in your experience. Have you ever seen Mr. Marshall's
15 criminal record and did you refer to it when you prepared
16 any of the reports?

17 A. I have seen it and I know there is no robbery with violence
18 on it.

19 Q. In fact, no violent offences at all with the exception of the
20 wrongful conviction for murder.

21 10:15 a.m.

22 A. Yeah. I am also aware of the fact that unfortunately criminal
23 records are an inaccurate description of what someone has,
24 in fact, been convicted of. They rely on the police reports
25 sending the convictions into the RCMP, otherwise they don't

1 appear on the record. Many local police forces do not.

2 Q. Well, there's been no evidence in front of this Commission
3 that this record inaccurate.

4 A. No.

5 Q. I don't believe.

6 A. That may well be, but I'm saying that at the time many
7 criminal records were inaccurate.

8 Q. I believe you said that Mr. Marshall was active in the
9 institution. Is that correct? He was involved in upgrading,
10 involved in the native brotherhood.

11 A. I didn't say that, but he was.

12 Q. I'm sorry, I thought perhaps you had. He was involved in
13 sports, as well.

14 A. Yes.

15 Q. Is that correct?

16 A. Yes.

17 Q. And I believe did he also run the canteen in the institution?

18 A. I don't recollect. He may well have.

19 Q. Would you agree that these were strategies for survival, this
20 was Mr. Marshall coping with his environment?

21 A. It may well have been, yes.

22 Q. Now, that you've had an opportunity to look back on this
23 case, would you agree, and I believe you yesterday
24 described Mr. Marshall as a difficult inmate, would you
25 agree that that could be substantially attributed to the fact

1 that he was a wrongfully convicted person?

2 A. I did not describe him yesterday as a difficult inmate. I did
3 not consider him to be a difficult inmate.

4 Q. I'm sorry. I had thought you had.

5 A. I may have been misunderstood. I did not consider him to
6 be a difficult inmate. I said he was a typical inmate.

7 Q. I'm sorry. Well, I heard difficult when you said typical. I'm
8 glad to hear that you don't think he was a difficult inmate.

9 A. No, I felt that I along very well with him and I did not
10 consider him a difficult inmate.

11 Q. So, he wasn't, in fact?

12 A. No.

13 Q. You said that Mr. Marshall, and I hope I'm hearing this
14 correctly, that Mr. Marshall would have more adjustment
15 problems than an average lifer because he had fewer
16 releases.

17 A. Yes.

18 Q. Would you also not agree that any difficulties Mr. Marshall
19 may have experienced or may still be experiencing now
20 would be compounded by the fact that he had served a long
21 sentence for something he didn't do?

22 A. Certainly the result of serving a long sentence, I would think
23 that if you served a long sentence for something you, in fact,
24 didn't do, it might add to the problems that you have, yes.

25 Q. So, it would be reasonable from your experience in prisons

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1 that that would result in a very difficult adjustment.

2 A. Yes, I would think it would be harder to serve a long
3 sentence for something you didn't do than it would be to
4 serve a long sentence for something you did do.

MS. DERRICK

6 Thank-you. Those are my questions.

MR. PUGSLEY

8 I have no questions, My Lord, thank-you.

MR. MURRAY

10 No.

MR. CHAIRMAN

12 Mr. Pink.

MR. PINK

14 No, My Lord.

MR. CHAIRMAN

16 Mr. Wildsmith. Mr. Ross.

EXAMINATION BY MR. ROSS

18 Q Miss McConkey, my name is Anthony Ross and I will be
19 asking you some questions on behalf of Oscar Seale. I
20 propose to refer to some documents in exhibit book number
21 35, have you got it?

22 A. Yes.

23 Q I take it that the reports in this volume you would have
24 reviewed yourself, and would have discussed with Donald
25 Marshall, Jr..

1 A. Yes.

2 Q I'd ask you to look at page 3, the second last paragraph, the
3 last line it is written here, "When questioned in regard to
4 the appeal, subject stated that he would be prepared to
5 plead guilty to a charge of manslaughter for reasons of a
6 reduced sentence." Did you discuss that with Donald
7 Marshall, Jr.?

8 A. No.

9 Q But you read this before?

10 A. I read this, but that report was written five, six years before
11 I ever met Mr. Marshall.

12 Q Understandable, but I also understand when you referred to
13 the report on page, I think it's 120, the cumulative report,
14 what you indicated to Miss Derrick was you reviewed the
15 entire file and discussed it with Marshall.

16 A. I didn't discuss every sentence in every report, no.

17 Q But you discussed the file in general?

18 A. Yes.

19 Q But in your general discussion you did not discuss that
20 particular statement with him.

21 A. No.

22 Q I see. At page 71 there is another cumulative summary and
23 there is a section where it refers to "precipating
24 circumstances - gang warfare - states he was stabbed
25 because of self defence, he stabbed a person with his own

1 knife and resulted with death." Did you discuss that
2 statement with Donald Marshall, Jr.?

3 A. Yes, I did, and...

4 Q. Yes, and what did he tell you?

5 A. What he told me is that that is the story that he gave the
6 staff at Dorchester Penitentiary in order to get a transfer to
7 Springhill Institution.

8 Q. I see.

9 A. But that the story was not true.

10 Q. I see. And over on page 76 there is another reference, and
11 this is in November of 1975 and in paragraph 2 it says,
12 "Subject admits to having killed the victim but in self-
13 defence." Does all this relate to the same story?

14 A. It all relates to the same situation, yes.

15 Q. Yes. And on page 81 there is a case conference report, did
16 you discuss this report with Donald Marshall, Jr.?

17 A. Yes.

18 Q. Yes, here it says that, "The victim," who I take is Seale, "Of
19 the crime was a black man and Donald (Marshall) knew the
20 man quite well for over two years prior to the offence." Did
21 he tell you that?

22 A. I was not at the case conference.

23 Q. Yes. Did you discuss it with him?

24 A. I discussed in general with him whether or not he knew Mr.
25 Seale.

1 Q Well, here he indicates further that they had played hockey
2 together on the same team. Did he ever tell you that
3 personally?

4 A. He did not specifically say they played hockey on the same
5 team. He said they played sports together.

6 Q I see. He further says, "Approximately two weeks prior to
7 the murder Marshall claims that he was having an argument
8 with his girlfriend on the street, the victim just happened to
9 be walking by and tried to interfere." Did you discuss
10 that...that scenario with him?

11 A. I don't...I do not remember discussing that with him, no.

12 Q I see. Later on he claims that he was pretty well jumped by
13 Seale and there was a fight and he happened to get Seale's
14 knife and stabbed him in that report.

15 A. That is the same story that he told in order to get the
16 transfer from Dorchester to Springhill. It's repeated in a
17 number of different reports.

18 Q And all for the same purpose.

19 A. All for the same purpose.

20 Q I see. Over on page 90.

21 MR. CHAIRMAN

22 Before you leave there, Mr. Ross. This report on page 81,
23 cumulative report, where did that go, Miss McConkey?

24 MS. McCONKEY

25 That was a ...that report on page 81 was completed by the

MS. McCONKEY, EXAM. BY MR. ROSS

1 psychiatrist who examined Mr. Marshall at that time. A copy of
2 that would have gone on his institutional file, a copy would have
3 been sent to the parole service and a copy would have been sent
4 to the parole board.

5 MR. CHAIRMAN

6 These are the only three institutions.

7 MS. McCONKEY

8 Those are the only three copies that would have been
9 prepared, yes.

10 MR. CHAIRMAN

11 So, no one else would have had access to that report?

12 MS. McCONKEY

13 No. As I said it was a psychiatric report so it would, in fact,
14 have been on his medical file at the institution.

15 MR. CHAIRMAN

16 Fine, thank-you.

17 MR. ROSS

18 Thank-you, My Lord.

19 Q Over on page 90 this was the request for a community
20 assessment for temporary absence. Down in paragraph
21 number 3 at the bottom it says, "Halifax City Police opinion
22 of the proposed T.A. should be sought."

23 A. Yes.

24 Q Do you know whether or not such opinion was ever sought?

25 A. I don't remember it being sought, no.

1 Q Would it be re...would it be a normal thing to require to seek
2 this opinion?

3 A. Not on an escorted temporary absence, no, and that's what
4 this was for.

5 Q I see. Over on page 102, there is something under the
6 caption "Police and Judiciary Comments" it says, "Sydney
7 Police would be opposed to subject's going to the area on
8 T.A. They feel there might be reprisals from the black
9 community." And it goes on. Did you ever discuss with
10 Junior Marshall that there might be reprisals from the black
11 community?

12 A. Yes.

13 Q And what was his reaction to that?

14 A. He agreed that there had been problems between the native
15 community and the black community following the events.

16 Q I see. And, then I'd ask you to refer, please, to page...to
17 Exhibit 69, have you got that handy?

18 A. Yes.

19 Q Yes. Over on, I think it is the evaluation report, page 2, and
20 I'd refer you to paragraph 3. Near the end of that
21 paragraph there is a report, as I understand it, of statements
22 given by MacIntyre and I've noted a section where he said,
23 "He feels that there might still be some reprisals from the
24 black community and recalls that the entire Marshall family
25 had to move out of Sydney because of possible reprisals."

1 Did you discuss that with Junior Marshall?

2 A. He said his family did move, yes.

3 Q. And then it goes on, the next sentence it says, "During my
4 home visit," would that be your visit?

5 A. No, that was the visit of the person who wrote this report.

6 Q. It's also signed by you.

7 A. No, it's signed by Kevin Lynk from Sydney.

8 Q. I see. Oh, sorry. Did you discuss this report with Junior
9 Marshall?

10 A. Yes, I did.

11 Q. Well, he goes on to speak about the...in this report, "Pius
12 having to..." is it ...the words are, "During my home visit at
13 the Marshall home, Pius recalls that he had to sit in the
14 upstairs window alone with a shotgun while the family
15 resided in Whycocomagh." Did you discuss that with Junior
16 Marshall?

17 A. I wouldn't say I discussed it. I told Junior Marshall what
18 the community investigation said.

19 Q. I see. And was there any reaction to that?

20 A. He said that his family did experience a rough time
21 following the events.

22 Q. I see. Did he elaborate, tell you what the rough time
23 constituted?

24 A. Not any more than is in the report, no.

25 Q. I see.

MS. McCONKEY, EXAM. BY MR. ROSS

1 A. He simply agreed that what was in the report was accurate.

2 MR. CHAIRMAN

3 Would this report have been shown to Donald Marshall?

4 MS. McCONKEY

5 No, it wouldn't have been shown to him, but I paraphrased
6 it to him. At that point we were not allowed to show them the
7 reports, now you are, and so I would have paraphrased to him
8 what it said.

9 MR. CHAIRMAN

10 And would you have also discussed with him the views of
11 the court worker, the native court worker...

12 MS. McCONKEY

13 Yes.

14 MR. CHAIRMAN

15 ...Bernie Francis?

16 MS. McCONKEY

17 Yes.

18 MR. CHAIRMAN

19 Who apparently was not in favour of a release at that time
20 either.

21 MS. McCONKEY

22 Yes, that's right.

23 MR. CHAIRMAN

24 What was his reaction to that? Did he know Bernie Francis?

25 MS. McCONKEY

1 He knew Bernie Francis. He was annoyed. He felt that
2 Bernie Francis should have been on his side.

3 MR. ROSS

4 Q So, I take it then, Miss McConkey, that as far as the
5 institution was concerned, any variations, any different
6 stories advanced by Junior Marshall, we're looking at it in
7 retrospect, was for the purpose of being transferred from
8 Dorchester to Springhill.

9 A. Yes.

10 Q I see. At page 166 of Volume 35. The paragraph number 3
11 refers to the escape, and it reads, "Junior captured while
12 on..." Sorry, "Junior escaped while on day parole in 1979.
13 According to file material he claimed that at the time he was
14 on his way to check into his appeal. He now admits that he
15 was heading for the United States." Did you discuss that
16 with Junior Marshall? Did you have an opportunity to?

17 A. No, sir, this report was written in 1981 at which point Junior
18 Marshall was in Dorchester Penitentiary and I no longer had
19 any involvement with him.

20 Q I see. I see. Were you aware though that he had made this
21 statement that he was on his way to the United States?

22 A. I never saw his file after he left Springhill Institution.

23 Q I appreciate that, but I just wanted to know if you were
24 aware that he had made that statement.

25 A. Was I aware when?

MS. McCONKEY, EXAM. BY MR. ROSS

1 Q. At any time around 1981.

2 A. No.

3 Q. Okay. Thank-you.

4 A. I had no contact with him.

5 Q. Sure. Thank-you.

6 MR. ROSS

7 Thank-you very much, Miss McConkey, no more questions.

8 MR. CHAIRMAN

9 Mr. Wildsmith.

10

11

EXAMINATION BY MR. WILDSMITH

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Q. Miss McConkey, my name is Bruce Wildsmith and I'm here for the Union of Nova Scotia Indians. Could you begin by indicating whether the fact that Mr. Marshall is an Indian was a factor at all in his assessment or evaluation?

A. Never at any time. I'm sorry, that's not an accurate answer. Generally, no, it was not a factor. However, one or two of the day parole programs he applied for were day parole programs specifically for native inmates and thus, yes, certainly in assessing him for those, the factor that he was a native was a factor because he couldn't have gone on them if he was not. But other than that, no, generally it was not.

Q. The reports appear in various places to draw attention to the fact that he's an Indian. For example, you don't have to look these up, but just for the record, pages 2, 3, 4, 44, 72,

1 89. Is there anything that we should draw out of the fact
2 then that attention was called to the fact that he's an Indian
3 if it's not a factor in the assessment or evaluation?

4 A. I don't think so. None of those were my reports, but in any
5 of my reports I would...my opening statement on any report
6 on any individual would say he's a twenty-five year-old
7 native inmate or he's a twenty-five-year-old Caucasian
8 inmate or he's a twenty-five-year-old black inmate or
9 whatever.

10 Q. So, you would say it's just a point of description.

11 A. It's just a description, yes.

12 Q. Okay. Maybe I could call your attention to page 3 in Volume
13 35, under the heading of "Evaluation" the last paragraph
14 says, "Marshall is the typical young Indian lad that seems to
15 lose control of his senses while indulging in intoxicating
16 liquors." Can you comment on the validity of that
17 statement?

18 A. I cannot comment on it. I did not write it. I do not know
19 the individual who did. It is not something I would have
20 ever written.

21 Q. Do you agree that it's a racist remark?

22 A. I would agree it is, yes.

23 Q. And inappropriate.

24 A. Yes, I would agree it's inappropriate.

25 Q. Okay. Direct your attention to page 72. In the what looks

1 likes box number 29 on this cumulative summary for brief
2 comments it says, "This young Indian serving a life sentence
3 for non-capital murder appears to have a great propensity
4 to proving his self-worth - three acts of violence (partly a
5 matter of culture and environment). Can you help us out as
6 to whether this reference to culture and environment is a
7 reference to the prison culture and environment or a
8 reference to his native culture and environment?

9 A. I do not know.

10 Q. Because you're not the author.

11 A. Exactly, and I don't know the person who is or it was.

12 Q. If it's a reference to his native culture and environment,
13 what would you say?

14 A. I would say that if it is a reference to his native culture and
15 environment then it represents the opinion of Mr. Leslie
16 who wrote it about...

17 Q. One that you would share or not?

18 A. That I would share? I would not say that acts of violence
19 are a feature of native culture and environment, but it is...it
20 does appear to be the case that for the natives who appear
21 in the penitentiary, more often than not they are there as a
22 result of violent crimes rather than non-violent ones.
23 Whether that's because they engage more in violence or
24 whether it's because they don't get sent to penitentiary
25 unless they engage in violence, I don't know.

- 1 Q. What about the comment "proving his self worth"?
- 2 A. There are many inmates with a great propensity for proving
3 their self-worth, native and non-native.
- 4 Q. Would it be fair to say that the prison culture and
5 environment aggravates those particular traits?
- 6 A. I would think it might in some cases.
- 7 Q. As part of the kind of norms of conduct in the institution.
- 8 A. Violence is not encouraged in the institution.
- 9 Q. No, no, but would it be part though of the culture of the
10 inmates?
- 11 A. I would not think so, no.
- 12 Q. Prisons are not a violent place.
- 13 A. Not particularly, no.
- 14 Q. Okay.
- 15 A. Not in my experience. There are some acts of violence in
16 prison just as there are in society but not primarily a violent
17 place, no.
- 18 Q. Perhaps you could move on to page 158 in the volume.
19 Towards the bottom of page 158, the last large paragraph.
20 It says, "Perhaps Mr. Marshall will be able to reach some
21 form of understanding of himself, both as a human being
22 and as an Indian, during the time he is likely to be required
23 to spend at Dorchester." Can you help us out with what that
24 may be a reference to? I'm referring particularly to as a
25 human being and as an inmate?

1 A. I can't help you out a great deal. I can help you out some in
2 that the native inmates who were in the penitentiary
3 certainly felt very much like they were out of their element
4 and that because they were a minority group, the particular
5 aspects and values that were of most importance to them
6 and their culture were not necessarily respected in the
7 larger white man's culture of a penitentiary, and thus had
8 some difficulties in trying to maintain their traditional
9 values and not get subsumed into the white man's culture,
10 and I would suspect that when Maud Hoady wrote that,
11 that's what she was referring to.

12 10:37 a.m.

13 Q. So it would be fair to say that it's calling attention to the fact
14 that there are particular cultural attributes associated with
15 Indians that caused them difficulty in prisons?

16 A. That what?

17 Q. Cause them difficulty in prisons?

18 A. No, I wouldn't say it caused them difficulty, no, but that are
19 not respected in...

20 Q. Okay.

21 A. In prisons because they are not understood.

22 Q. By the other inmates or by the staff?

23 A. Both. Although, you know, many staff, virtually all staff, but
24 there are probably some exceptions, have take courses from
25 native leaders to help us understand and appreciate some of

1 the different aspects.

2 Q. Okay. So if I can summarize that. What I'm hearing you say
3 is that there is some recognition of the part of the correction
4 service of the need to foster native culture while within
5 prisons.

6 A. Yes.

7 Q. Perhaps you could now turn to page 170. This appears to be
8 part of a psychological report and in the first paragraph it
9 seems to be referring to the results of some tests that were
10 conducted and it says something about,

11
12 Mr. Marshall having received from psychologists
13 information to the effect that his test results
14 were not valid. He never did understand this
15 interpretation and I went to great lengths to
16 explain the exact definition of the term. I
17 indicated to him that because he is a native he
18 probably does not understand several of the
19 items and that cultural differences probably
20 account for that fact that he cannot fit into white
21 Caucasian American norms.

18 Am I correct in thinking that what this paragraph is telling us
19 is that test, psychological tests were applied to Mr Marshall...

20 A. Yes.

21 Q. And that the psychological tests were based on white
22 Caucasian American norms.

23 A. Yes.

24 Q. And that he did not fit into those norms.
25

1 A. Yes.

2 Q. And that, therefore, the test results were not valid because he
3 was a native person and not a white Caucasian American.

4 A. Yes. They were standard psychological tests, the MMPI, that
5 are applied to all inmates. They don't fit in, they don't work
6 when applied to native inmates. They don't work when
7 applied to black inmates. They don't work when applied to a
8 lot of inmates, but they are the standard tests that are used
9 on all inmates.

10 Q. Maybe I could just inquire about that a little bit. Why would
11 the test be applied to be Mr. Marshall, who was well known to
12 be an Indian, if you're saying the tests would not be valid in
13 any event?

14 A. They're routinely applied to every inmate who walks in the
15 front door. In some cases although an individual may be a
16 native, either an Indian or an Inuit or black or one of the
17 other ethnic groups, they may still be valid. They're not
18 routinely automatically not valid because the person isn't a
19 white. But the MMPI test results, as to what is the norm, is
20 based on a largely white Caucasian population. And some
21 aspects of it will be valid, some will not.

22 Q. Okay, well that was really my question. Whether it's possible
23 to garner useful information ...

24 A. Yes, it is.

25 Q. And that's why it was applied.

1 A. It is.

2 Q. And is it also fair to think that the more Indian you are, the
3 more you're into Indian culture, the less likely it is that valid
4 information would be acquired by the test.

5 A. I would think so, yes.

6 Q. And, therefore, one thing we learn from this is that Mr.
7 Marshall's Indian background was a predominant feature of
8 his personality.

9 A. I would expect it would be.

10 Q. Yeah, okay. I call your attention now to page, it's really going
11 backwards now, page 75, and again, this appears to be
12 another case conference and the author of this on page 75,
13 third page of the case conference is talking about various
14 personality features. It says, "He does not talk too freely.
15 Tended to be monosyllabic in his answers. Tense, anxious.
16 Began to sweat somewhat. Had great difficulty in verbalizing
17 his thoughts and feelings."

18 A. Um-hmm.

19 Q. Are those attributes that could be attributed to his Indian-
20 ness as much as to him as an individual?

21 A. Some of them could have been. Some of them were probably
22 a reaction to the fact that in this case conference there would
23 have been a large, not a large number, but maybe half a
24 dozen people in the room at the time that Mr. Marshall was
25 being interviewed by the psychiatrist. And from my

1 recollection of Mr. Marshall, he would not have felt
2 comfortable in that kind of a setting.

3 Q. And some of the reason for his lack of comfort, if you will, is
4 to do with his Indian culture?

5 A. Some...

6 Q. Fair assumption?

7 A. I cannot assess how much was related to his Indian culture
8 and how much was related to his basic personality of being
9 shy.

10 Q. Okay, well that brings up another area I wanted to inquire
11 about. And that's, you've mentioned something about many
12 of the staff in the correction service having taken courses or
13 seminars or something to sensitize them to native culture.

14 A. Um-hmm.

15 Q. I take it you've taken such a course?

16 A. Yes.

17 Q. And can you tell us, just quickly, what kinds of things happen
18 in that seminar or workshop?

19 A. Some of the things that they try to convey to us and train us
20 in would be, for example, for Caucasians a pause in a
21 conversation of more than 20, 30 seconds is very
22 uncomfortable, for natives it is not. It is not unusual. So not
23 to become uncomfortable if you ask a question of a native
24 inmate and you get a long pause before the answer or if
25 there's a long pause in the conversation. Another example

1 would be to make us aware of the fact that the sense of time
2 that natives have is not the same rush-rush, go-go, hurry-
3 hurry of white man's society. So not to be putting pressure
4 on the native inmates to do things at our speed and at our
5 pace.

6 Another aspect is that the sense of family and tradition is
7 much greater for native people than it is for white people. So
8 that while it might be quite reasonable to suggest to a white
9 inmate that he should relocate to another part of the country
10 and have a better chance of succeeding, that that is not a
11 reasonable option to try to impress upon a native. Those
12 sorts of things.

13 Q. Fair to say then that you would take those kinds of factors
14 into account when evaluating a native inmate like Mr.
15 Marshall?

16 A. Yes, I would hope so.

17 Q. Some reference to the Native Brotherhood. Could you just
18 indicate what that is?

19 A. To, I have never attended a Native Brotherhood meeting but
20 to the best of my understanding from what the native
21 inmates have told me, it's, in Springhill at that time it was
22 primarily a social group for native inmates whereby the
23 natives could get together and natives from outside would
24 come into the institution and meet with them and also help
25 them deal with their problems by allowing them to talk about

1 their problems to people who understood where they were
2 coming from better, perhaps, than the staff did. Since that
3 time Native Brotherhood, as I understand it, has evolved
4 considerably whereby it is now much less of a social group
5 and more oriented around the elder system and the sacred
6 ceremonies, those sorts of things. I have much less
7 familiarity with that.

8 Q. Okay. The Native Brotherhood operated throughout the piece
9 that Mr. Marshall was in Dorchester and Springhill?

10 A. To the best of my recollection, yes.

11 Q. And it still operates today?

12 A. Yes, as far as I know.

13 Q. You mentioned something about a native liaison service.

14 A. Yes.

15 Q. Was that something that was run by the Union of New
16 Brunswick Indians?

17 A. I don't believe so. What I was referring to was during the,
18 much of the time that I was employed as a parole officer in
19 Truro, we also employed a native worker to work with the
20 inmates at Springhill.

21 Q. I see. What about at Dorchester? Do you have any
22 knowledge of that?

23 A. I never worked at Dorchester.

24 Q. Okay. Is that still done? I had the impression that you said it
25 worked at one point but it's not operative today.

MS. McCONKEY, EXAM. BY MR. WILDSMITH

1 A. No, it is, to the best of my knowledge it is not operating now,
2 no.

3 Q. Okay. And I'm looking at a report which was, the chairman of
4 the national Parole Board's presentation to the standing
5 committee on justice and to the Solicitor-General in December
6 of 1987, and it refers to a low parole rate...

MR. PRINGLE

7
8 Well, My Lords, I'm not, excuse me if I may. My learned
9 friend is now referring to some national reports that appears from
10 the Parole Board and I'm wondering, first of all, what he's
11 referring to, and what relevance it may have to his clients and
12 this witness.

MR. WILDSMITH

13
14 I think I've identified what the document is. These are the
15 comments of the national, of the chairman of the National Parole
16 Board to the standing committee on justice and the Solicitor-
17 General. It is a report that is put out by the National Parole Board
18 and put out by the Government of Canada, December of 1987. I
19 just wanted to refer her to one of the statements of the chairman
20 of the National Parole Board.

CHAIRMAN

21
22 I would assume that any statement made by the chairman
23 of the National Parole Board would be the official policy of that
24 board.
25

1 MR. PRINGLE

2 Oh, I'm not objecting to that, My Lord. Certainly I'm
3 questioning the relevance at this time when my friend stands up
4 with this document as to what it may have to do with this witness
5 and his client.

6 CHAIRMAN

7 Well...

8 MR. WILDSMITH

9 Well, obviously, it has to do with...

10 CHAIRMAN

11 Mr., you may have been thrown because a lot of Mr.
12 Wildsmith's questions have been relating to Donald Marshall, Jr.
13 when his clients are the Union of Indians.

14 MR. PRINGLE

15 I understand that.

16 CHAIRMAN

17 He may be getting closer now to pursuing relevant questions
18 from his client's point of view than he was earlier.

19 MR. PRINGLE

20 Yes. Well my other concern, My Lord, is how far this
21 examination is intended to go by my friend. If he intends to get
22 into an examination of the National Parole Board policies and so
23 on...

24 CHAIRMAN

25 Well I'm sure this witness can't help us on that but...

1 MR. WILDSMITH

2 Quite so.

3 CHAIRMAN

4 But the question that is about to come I can't rule on it
5 unless and until I hear it.

6 MR. WILDSMITH

7 Q. Very good. In this report at page 34, the chairman of the
8 National Parole Board says, "It is recognized that natives have
9 a high rate of incarceration and a low parole grant rate." My
10 question to you is, is that statement, in fact, correct, that
11 natives have a low parole grant rate in applications to the
12 National Parole Board?

13 A. It is my understanding that natives statistically have a lower
14 parole grant rate than non-natives, yes.

15 Q. Okay.

16 CHAIRMAN

17 Has that been your experience working in Nova Scotia?

18 A. Yes, I think that that is true. I think, in large part, it's true
19 because they do not apply for parole either at the same rate
20 than non-natives do. And it's, without being facetious, it's
21 difficult to be granted parole if you don't apply for it.

22 CHAIRMAN

23 Is there any reason for that, you know, why the natives do
24 not apply for parole at the same rate as others?

25

DISCUSSION

1 MR. WILDSMITH

2 It might be helpful to Your Lordships, I have some
3 photocopies here of material, I think there may be an objection
4 about it, but it relates to other comments of the chairman of the
5 National Parole Board and refers exactly to the issue that you've
6 been speaking about and that the witness referred to. That is, the
7 lack of applications by natives to the National Parole Board. And I
8 had intended, at a later date, to seek to introduce as an exhibit
9 this one page with two clippings from the newspaper.

10 CHAIRMAN

11 All right. We'll leave that for another day then, I guess.

12 MR. WILDSMITH

13 Well I mean I was intending to do it with this witness today
14 and concerning the issue that Your Lordship just raised.

15 MR. PRINGLE

16 Well, I guess we'll state our objection in respect to these
17 newspaper articles that my friend is tendering or purports to
18 tender with this witness.

19 CHAIRMAN

20 Well this witness obviously had a great deal of experience
21 and has a lot of skills in the parole and/or corrections system and
22 I have no quarrel with taking advantage of her presence to solicit
23 from her any professional advice she may wish to advance.

24 MR. PRINGLE

25 I trust My Lordship is not saying that we're going to be

DISCUSSION

1 examining the National Parole Board and its system, but rather,
2 some aspect of my friend's client's interest, am I correct in that
3 assumption? Because we take the position, with respect My Lord,
4 that the provincial inquiry has no constitutional mandate to
5 examine the National Parole Board. The case law is quite clear on
6 that and, however, we'll put the witness forward to speak about
7 the certain, particular matters that are directly relevant to this
8 Commission and we certainly want to assist in that regard.

CHAIRMAN

10 We'll take note of the pre-Charter decisions in that regard.

MR. SPICER

12 My Lord, if I might say, that was a position that we have
13 discussed...

CHAIRMAN

15 I realize that and...

MR. SPICER

17 With our friends.

CHAIRMAN

19 And I understand that this witness, and maybe some others,
20 are here without prejudice to the sacred jurisdictional rights of
21 provinces...

MR. PRINGLE

23 Yes, My Lord.

CHAIRMAN

25 And the Government of Canada. But we, it is relevant with

DISCUSSION

1 respect to this Inquiry as to the treatment afforded Donald
2 Marshall, Jr. whilst an inmate in a federal institution.

MR. PRINGLE

4 Yes, My Lord, but I understand that the newspaper clippings
5 that my friend now purports to put in don't relate to the Maritime
6 provinces at all, they're some other part of the country and I'm
7 questioning how that can be relevant.

CHAIRMAN

9 Well that may not be. I don't know what papers...

MR. PRINGLE

11 I've had some advance knowledge that my friend tends to
12 put forth, put forward these documents and we've taken
13 instructions on the matter and I may say, My Lord, that there is at
14 least one post-Charter decision that's very relevant to the
15 constitutional issue decision of the Supreme Court of Canada last
16 fall, O'Hara and The Queen, where the Supreme Court once again
17 reaffirmed the constitutional principles of provincial inquiries in
18 federal...

COMMISSIONER EVANS

20 What are these reports? To what these newspaper reports,
21 or whatever they are, do they refer to the Maritimes, refer to
22 Nova Scotia?

MR. WILDSMITH

24 I believe they refer to the country as a whole.

DISCUSSION

1 COMMISSIONER EVANS

2 But was she talking about natives here?

3 MR. PRINGLE

4 My Lord, if I may, one more point. This witness has
5 testified, and it's borne out in Exhibit 35 at page 105, 106 and 113
6 that Mr. Marshall, received day parole within weeks after his first
7 eligibility. He was eligible on June 4th, 1978, as I recall and he
8 applied and was recommended prior to that date and received it
9 within weeks after. So I'm not sure how the statistics that my
10 friend refers to are relevant directly to, at least, Donald Marshall.

11 COMMISSIONER EVANS

12 That's the problem.

13 MR. WILDSMITH

14 Should I mark it as an exhibit, My Lord?

15 CHAIRMAN

16 No, let's take a look at that.

17 MR. WILDSMITH

18 It's in the second column that the witness, that the National
19 Parole Board chairman comments on the issue that my, that the
20 witness referred to.

21 CHAIRMAN

22 I'm concerned about these, you know, clippings from
23 newspapers going in which represent, to a large extent, a
24 summary as the writer, or reporter sees it of what a person is
25 saying. It may be not the intention of the speaker...

DISCUSSION

1 MR. WILDSMITH

2 Yes, and my intention was to ask this witness whether she
3 can verify the information that is in the clippings so that we can
4 have it from a reliable source rather than simply what the
5 reporter says.

6 CHAIRMAN

7 Without referring, without putting the Whig-Standard
8 clipping before us, because we are stretching the rules of
9 relevancy, I see nothing wrong with your putting to this witness
10 certain questions arising out of what you have read from there.

11 MR. WILDSMITH

12 Yes, fair enough.

13 CHAIRMAN

14 The source is not that important to know, it's the, so try it
15 that way and we'll listen carefully to make sure it's relevant.

16 MR. WILDSMITH

17 Q. This discussion began with the comment in the official
18 document where the national chairman, chairman of the
19 national board, is representing to the standing committee on
20 justice that there is a low parole grant rate for native
21 offenders. And I think your evidence is that you understand
22 that to be the case statistically.

23 A. Yes, sir.

24 Q. Are those statistics based on the country as a whole?

25 A. I believe they are, yes.

10:58 a.m.

1 Q. And can you tell us what those statistics are, in rough terms,
2 if not exact?

3 A. To the best of my recollection, and I may be wrong, I believe
4 that the grant rate for natives is approximately 10% lower
5 than the grant rate for non-natives.

6 Q. Okay. My learned friend quite properly draws to my
7 attention, when we speak about "native" and "non-native,"
8 when you're referring to "non-native," are you including
9 blacks and members of other minorities?

10 A. Yes, sir.

11 Q. In the non-native category?

12 A. Yes, sir.

13 Q. Are you able to relate the statistics between Indians and
14 whites?

15 A. No, I don't. To the best of my knowledge, they're not broken
16 down by ethnic group. They're simply... I have only ever
17 seen them broken down between natives and non-natives.

18 Q. Okay. This report also indicates that the Chairman of the
19 National Board chairs an interdepartmental working group
20 comprised of representatives of the Ministry of the Solicitor
21 General and the Ministry of Indian and Northern Affairs to
22 identify means to more effectively meet the needs of native
23 offenders. Do you know if that's the case?

24 A. It is my understanding that it is the case, yes.
25

1 Q. And it indicates that this working group is examining the
2 process which native offenders go through from the time of
3 admission to a federal penitentiary until the expiry of the
4 warrant and that the working group focuses on improving
5 penitentiary placement for natives, improved institutional
6 programs for natives, improved preparation for all forms of
7 conditional releases, and improved and innovative
8 supervision. Is that also your understanding?

9 A. It is my understanding that that is the mandate of that group,
10 yes.

11 Q. Yes, and it also indicates that the working group will examine
12 and propose ways of involving the native community in the
13 reintegration of native offenders, also correct?

14 A. I believe so, yes.

15 Q. Has anything come out of the working group, to your
16 knowledge?

17 A. I don't think their final report has been submitted at this
18 point. It is my understanding that their report is due in the
19 near future.

20 Q. Coming back to the newspaper clipping, a quote... I should
21 say, is Aullie Ottinger still the Chairman of the National Parole
22 Board?

23 A. To the best of my knowledge, yes.

24 Q. And in 1987, according to this clipping, he stated "There
25 seems to be, in general, a systematic negative discrimination,"

1 there referring to native prisoners.

2 MR. PRINGLE

3 Well, I'm going to object to that. He's quoting from a
4 newspaper articles and we've had objections before to that sort of
5 thing and as to the accuracy to those sort of quotations. And
6 whether it be right or wrong, it's just that it's highly dubious
7 whether you can trust it as being completely accurate to be
8 quoting and putting questions to his witness.

9 MR. CHAIRMAN

10 The phrase "negative discrimination" seems to me to be
11 open to all sorts of interpretation. So I disallow that question, Mr.
12 Wildsmith.

13 MR. WILDSMITH

14 Fair enough. Maybe I can reword it and accomplish a
15 similar purpose.

16 BY MR. WILDSMITH

17 Q. Is it common knowledge or discussion within Correction
18 Services that you work with that the treatment by the Parole
19 Board of native offenders does amount to systematic
20 discrimination?

21 A. No, sir.

22 Q. The report also indicates that, this newspaper clipping, that
23 "departmental statistics show natives waive their right to
24 appear before the parole hearing more often than other
25 federal prisoners." Is that correct?

MS. McCONKEY, EXAM. BY MR. WILDSMITH

1 A. That is my experience, yes.

2 Q. Also attributed to the Chairman, it says: "When they do
3 appear, they are more likely to be denied parole." I guess
4 we've just gone over that.

5 A. Statistically, that appears to be true. That was not my
6 experience when I worked in Nova Scotia, no.

7 Q. Okay. And "if they are released, they had a better chance of
8 having their parole revoked." What about that?

9 A. I suspect that if the Chairman said that, then statistically that
10 must be true.

11 Q. Okay. Also suggests that a native advisory council...

MR. CHAIRMAN

12
13 Before we leave there, Mr. Wildsmith. What was your
14 experience in Nova Scotia?

MS. McCONKEY

15
16 When I worked in Springhill Institution, we did not have a
17 large number of native inmates there. I think we had a total of
18 ten out of 400 inmates. So we're not talking a large number of
19 individuals.

MR. CHAIRMAN

20
21 I see.

MS. McCONKEY

22
23 So it's heard to make generalities based on such a small
24 group.

1 MR. CHAIRMAN

2 I appreciate that.

3 BY MR. WILDSMITH

4 Q. I take it there are no statistics available on that issue either?

5 A. On which issue, sir?

6 Q. On the parole grant rate for native prisoners at Springhill?

7 A. None that I've seen, no.

8 Q. It also suggests that a native advisory council will be
9 established and that the Board will continue to support
10 "culturally sensitive programs to assist natives to prepare for
11 release." Can you help us out as to whether there is a native
12 advisory council?

13 A. I'm not certain.

14 Q. And I take it from your previous evidence that culturally
15 sensitive programs is an issue supported by the Corrections
16 Service?

17 A. Yes, and has been for the last ten years at least.

18 Q. It's suggested that one of the problems might be that natives
19 are confused about what is required of them in parole
20 hearings, do you agree with that?

21 A. I think that is accurate, yes.

22 Q. And it's added that natives may be intimidated by the
23 process.

24 A. They, and many other inmates.

25 Q. Fair enough.

MS. McCONKEY, EXAM. BY MR. WILD SMITH

1 A. It's a pretty intimidating process.

2 MR. WILD SMITH

3 Thank you. Those are my questions.

4 MR. CHAIRMAN

5 Mr. Pringle?

6

7 EXAMINATION BY MR. PRINGLE

8 Q. We'll keep it very brief. I don't think anyone asked you, Ms.
9 McConkey, what your background educational degrees are
10 and so on with respect to the work that you do?

11 A. I have a Masters degree in Criminology from the University of
12 Toronto.

13 Q. When did you obtain that?

14 A. In 1973.

15 Q. And since that time, you've been working with the
16 Correctional Service or the Parole Board?

17 A. Yes, sir.

18 MR. PRINGLE

19 That's all I have. Thank you.

20 MR. CHAIRMAN

21 That's all. Thank you, Ms. McConkey.

22 11:05 a.m. INQUIRY RECESSED UNTIL 11:36 a.m.

23

24

25

1 MR. SPICER

2 My Lords, the next witness is Jack Stewart.

3
4 JACK STEWART, duly called and sworn, testified as follows:

5 EXAMINATION BY MR. SPICER

6 MR. SPICER

7 My Lords, Mr. Stewart is also a representative for the
8 Correctional Service Canada or the Parole Board... Correctional
9 Services Canada, and before I commence questioning him, I just
10 want to refer back to some comments actually that were made by
11 George MacDonald in Volume 40 some time ago dealing with the
12 constitutional problem; that is, to the extent to which we as
13 commission counsel and, in our view, the Commission, would
14 intend to get into areas of federal competence. I bring it up now
15 because I certainly sensed in the examination of Diahann
16 McConkey that my friends from Justice were objecting to certain
17 matters that Mr. Wildsmith was getting into and, in fairness, we
18 have discussed with them the position that Commission counsel
19 would take in the event that we sense that other counsel were
20 getting into the federal area and our view is that we should not be
21 doing that because it was not conceived to be within our terms of
22 reference. George MacDonald had made that point some time ago,
23 in fact, in Volume 40 at page 7454 and had explained to the
24 Commission the agreement that we had reached with the National
25 Parole Service and with Corrections Canada that, in return for

MR. STEWART, EXAM. BY MR. SPICER

1 people, and in fact, Diahann McConkey coming forward and
2 speaking about a specific policy and that policy being the
3 guilt/innocence issue, to that extent, we would be getting into
4 areas that would otherwise be federal. But beyond that, we would
5 not and that we would agree with objections that were made if we
6 thought that they were getting into, other counsel were getting
7 into matters of federal jurisdiction. And in that respect, with
8 those two newspapers clippings which Mr. Wildsmith was seeking
9 to put in as exhibits, he had indicated to me some time ago that he
10 would seek to do that and I had told him that, in our view, that
11 those were matters that were outside the terms of reference of
12 the Commission and that we would be objecting to them. And that
13 was the intent of my comment when I said that we had had
14 discussions with Mr. Pringle and Mr. Bissell prior and I wouldn't
15 want to see that happen again. At least happen again in the sense
16 that the commissioners would not be fully aware of the position of
17 the Commission counsel in respect of those matters.

MR. CHAIRMAN

19 I recall the advice that was tendered by Mr. MacDonald as
20 Commission counsel when some witness who was an employee of
21 the Government of Canada, as I recall it, was to give evidence and
22 we fully appreciate that. Clearly, the Province of Nova Scotia does
23 not have the jurisdictional right to, nor did it include in our terms
24 of reference or in our mandate, matters that impinge upon federal
25 jurisdiction. We have been trying as best we can to insure that

MR. STEWART, EXAM. BY MR. SPICER

1 we obtain all relevant evidence as it relates to the Donald
2 Marshall, Jr. case and still stay within our own jurisdictional
3 backyard. Counsel will appreciate that on occasion there will be
4 an attempt to go over or under the jurisdictional fence and if we
5 see that happening, we will have to do our utmost to prevent it.
6 So all I can assure you is, assure counsel is that we will do our, use
7 our best efforts. Using our best efforts may not be the answer.
8 We have no choice but to stay within our mandate to insure that
9 we operate within the mandate, the constitutional mandate and
10 otherwise, that is imposed upon us by our terms of reference. So
11 I would ask counsel if they would, all of whom fully appreciate
12 the constitutional niceties if they will follow suit.

MR. SPICER

14 Thank you, My Lord.

BY MR. SPICER

16 Q. What's your full name, please?

17 A. John Alexander Stewart.

18 Q. And you go by "Jack"?

19 A. Yes, I do.

20 Q. What's your current position, Mr. Stewart?

21 A. I'm the Coordinator of Community Resources for Nova Scotia
22 District, Correctional Service.

23 Q. Sorry, could you say that again for us?

24 A. I'm the Coordinator of Community Resources for Nova Scotia
25 District.

1 Q. Community Resources for Corrections Canada?

2 A. Correctional Services Canada, yes.

3 Q. For how long have you been employed with Correctional
4 Services Canada?

5 A. Approximately 15 years.

6 Q. Can you tell us briefly what your career with corrections has
7 been?

8 A. My initial employment with Corrections was in 1970 for a
9 year at the West Georgia Centre, a community correctional
10 centre in Vancouver.

11 Q. Doing what sort of work?

12 A. I was a counsellor at that time and then in '73, I joined
13 Correctional Service Canada, after working in the community
14 with young offenders and people in conflict with the law.

15 Q. That would have been in Halifax?

16 A. Yeah, it was in Halifax, yes. I ran group homes here in
17 Halifax.

18 Q. Would those have been group homes for offenders or group
19 homes for kids?

20 A. No, they were for children between the ages of 14 and 18,
21 both male and female. A number of them had come
22 voluntarily from the courts. There is an option to sentencing.

23 Q. Is this diversion projects and that sort of thing?

24 A. It was a diversion project. It was an alternate
25 accommodation. A number of them had no homes. And then

1 in '73, I joined the Correctional Service again working at the
2 Carlton Centre. I worked at the Carlton Centre as a counsellor,
3 senior counsellor, and ultimately superintendent. And
4 approximately three years ago, I transferred to our district
5 office in my current position.

6 Q. So for what number of years would you have been associated
7 with the Carlton Centre?

8 A. From '73 to '84, '85.

9 Q. Eleven or twelve years?

10 A. Yes.

11 Q. Can you explain to us what the Carlton Centre is, how it fits
12 into the penitentiary system?

13 A. The Carlton Centre is a community correctional centre. It...

14 Q. It's located in Halifax?

15 A. It's located in Halifax near the Charles Tupper Medical
16 Building. It is one of a series of community correctional
17 centres across Canada. They are designated as penitentiaries
18 under the Act. They're run by Correctional Services Canada.
19 Previously, they were run by the Penitentiary Service. They
20 are to facilitate the reintegration of offenders back to the
21 community, with some control. They're primarily used as day
22 parole centres.

23 Q. Can you give us any idea at all over the period of your time
24 with the Carlton Centre how many inmates would have come
25 under your jurisdiction?

1 A. I would say close to 400, 450.

2 Q. Over that entire period of 12 years?

3 A. For the entire period. It's got a bed capacity of 16. The
4 normal turnover time would be an average of four months.
5 That would vary, obviously, with the case. So during that
6 time, I would suspect about 400.

7 Q. How many people from Correctional Service work, were
8 working at the Carlton Centre, what's the staff?

9 A. The staff has changed somewhat. The maximum number
10 would have been seven with some assistance for contract
11 security through the Canadian Corps of Commissionaires.
12 Currently, there would be five with the same security system
13 back-up.

14 Q. At the time Junior Marshall was there, what would the
15 staffing have been?

16 A. The staffing would have been a counsel... three counsellors,
17 senior counsellor, superintendent, and support staff.

18 Q. So five plus the support staff?

19 A. Yes, plus the commissionaire coverage.

20 Q. And the commissionaire coverage is physical security of the
21 building?

22 A. Physical security of the building on the back shift and on
23 weekends with back-up and support from the counsellors and
24 on-call personnel.

25 Q. You said that the bed capacity was 16. Was it 16 at the time

1 Junior was there?

2 A. Yes, it was

3 Q. And would it generally be the situation that you would be
4 filled to capacity?

5 A. Generally filled to capacity and quite often a waiting list.
6 That varies from time to time, depending on the releases.

7 Q. Over your period of years with Corrections Canada, have you
8 then had personal experience in assisting inmates in
9 reintegrating into society?

10 A. Yes.

11 Q. Can you give us some idea of how many inmates you would
12 have so assisted over that period of time?

13 A. Well, as the Carlton Centre worked on a team supervision
14 basis, during the time I was there, it would be close to 400.
15 You'd have varying degrees of responsibility. Each individual
16 is assigned a counsellor. The other counsellors would work as
17 part of that counselling team. The senior counsellor and the
18 superintendent would be involved in all cases and all
19 decisions would be made through them.

20 Q. Do you have any educational background or professional
21 background that you would consider led you into this
22 particular line of work?

23 A. My educational background is a Bachelor's degree in
24 Anthropology that I finished when I was 25. I had worked
25 during my time at university with friends who were running

MR. STEWART, EXAM. BY MR. SPICER

1 like a halfway house for narcotic addicts in Vancouver who
2 were attempting to reduce their habits and...

3 Q. Is it fair to say you learned your work on the street?

4 A. Quite extensively, yes.

MR. CHAIRMAN

5
6 Mr. Stewart, this centre is the only federal centre of its kind
7 in Atlantic Canada?

MR. STEWART

8
9 No, sir. The Carlton Centre is located in Halifax. There is a
10 centre called "Partown Centre" in Saint John, New Brunswick and
11 there is a centre in the Parrsboro area called "Sand River" which is
12 operating jointly with Scott Paper where individuals go on day
13 parole prior, usually, to going to a place like the Carlton Centre or
14 Partown. But they are all three considered community
15 correctional centres. But the two major urban centres would be
16 the Carlton Centre in Halifax and the centre in Partown.

MR. CHAIRMAN

17
18 The arrangement with Scott Paper, as I recall it, starts, often
19 starts very early in an inmate's period of incarceration in
20 Springhill?

MR. STEWART

21
22 The involvement with Scott Paper, not to bring Scott Paper
23 totally into this...

MR. CHAIRMAN

24
25 No, but I mean...

MR. STEWART, EXAM. BY MR. SPICER

1 MR. STEWART

2 Scott Paper operates...

3 MR. CHAIRMAN

4 Day parole working with Scott Paper.

5 MR. STEWART

6 Day parole for Scott Paper works through Springhill
7 through a tree nursery system. Now that's on the grounds of the
8 penitentiary. The Sand River Community Correctional Centre is
9 about 16 to 20 miles, as the crow flies, from Parrsboro, right in
10 the middle of the woods. And when individuals are there, they
11 have all the rights and responsibilities of an individual on day
12 parole at a community correctional centre. So they can go out on
13 weekend passes, et cetera. But they ar working cutting paper...
14 pulp for Scott Paper during the day throughout the week. They're
15 actually learning how to use chainsaws, wood safety, et cetera. So
16 it's a contractual arrangement to provide employment.

17 MR. CHAIRMAN

18 Thank you.

19 BY MR. SPICER

20 Q. Can you explain to us how a person gets to the Carlton Centre?

21 A. The individual has to be identified by the case management
22 team in the institution.

23 Q. Could that be either Springhill or Dorchester?

24 A. Springhill, Dorchester, or Westmoreland. They could also be
25 identified by case management teams at any other

1 case management team and developed a release plan that
2 includes day parole, the option of a community correctional
3 centre is examined. If the individual chooses to take that
4 route, then a day parole application to the National Parole
5 Board is filled in. It goes through about four months of
6 processing, on an average, and during that time, the
7 individual is referred for consideration to the community
8 correctional centre, both for a community assessment and for
9 the reaction of the community correctional centre to see if
10 that individual would be suitable.

11 11:50 a.m.

12 Q. So do I understand you correctly then, that in addition to the
13 applicant having to be considered to be suitable for day
14 parole in a general sense by the National Parole Board, in
15 order to arrive at the Carlton Centre they also, that person
16 also has to be acceptable to the receiving institution, that is,
17 the Carlton Centre.

18 A. Yeah, let me clarify. They don't necessarily have to
19 acceptable at that point to the National Parole Board for day
20 parole nor do they necessarily have to be totally acceptable to
21 the case management team. If the individual wants to apply
22 he can apply and be either supported or not supported by the
23 case management team. More often than not they're
24 supported by the case management team.

25 Q. The case management team is a group of individuals who

1 work with the inmate in the institution?

2 A. Within the institution, yeah.

3 Q. All right, but to come back to my question, is it, in fact,
4 though the case the the Carlton Centre itself and the people in
5 it, get to make a judgement themselves as to whether or not
6 they want to accept somebody into that program.

7 A. Yes.

8 Q. Notwithstanding what may have occurred at the other end.

9 A. Yes. And we have input into that.

10 Q. Okay. You've been present for some of Ms. McConkey's
11 testimony and perhaps all of it.

12 A. Most of it.

13 Q. Most of it. If you could help us a little bit, Exhibit 150, we
14 understand that to be two versions of the National Parole
15 Policy in connection with claims of innocence.

16 A. Yes

17 Q. Are you familiar with that?

18 A. I've seen it and read it.

19 Q. Is it the case that the Carlton Centre, notwithstanding the fact
20 than an inmate may have received day parole while
21 maintaining his innocence, does the Carlton Centre have the
22 ability to say, no, we don't want that person because he isn't,
23 still maintaining he's innocent?

24 A. Yes. The National Parole Board is the releasing authority.
25 Correctional Service Canada has the responsibility for

1 administering the sentence. To come to the Carlton Centre
2 from another institution requires a transfer, institutional
3 transfer. We've not gotten up to the point of absolutely
4 refusing an individual while the board's been saying, yes, you
5 will take them. But we've come very close on several
6 occasions. The procedure there is if the National Parole Board
7 grants a day parole, for example. And if it's the strongly held
8 belief of the Carlton Centre that that individual is not suitable
9 then transfer will be refused and it will be referred to the
10 Deputy Commissioner of Correctional Service Canada Atlantic
11 and the chair of the National Parole Board Atlantic. And they
12 will discuss it. They will try and reach a reasonable decision.
13 If the Deputy Commissioner Atlantic says yes, you will accept
14 transfer, then, of course, we do. But we've had a very, I think
15 a very fine working relationship where we haven't had to go
16 up and actually test that.

17 Q. So you've never been in a situation where you've had to
18 consider refusing admission to the Carlton Centre because a
19 person who had otherwise, who had been released was
20 claiming to be innocent.

21 A. No, we'd never run into that specifically.

22 Q. Can you tell us in general terms what it is that you do with
23 the inmates who come to stay at the Carlton Centre? What is
24 it that you're hoping to accomplish and what sort of things do
25 they do?

1 A. Well it varies depending on the length of time the individual's
2 been in and obviously on the offence they've committed. But
3 generally what we're...

4 Q. Let's take a lifer then if that makes it easier.

5 A. A lifer? Okay. What you're attempting to do is sort of two-
6 fold. Test the individual on the street when you still have
7 very, very strong control over his comings and goings. Where
8 you...

9 Q. When you say you have, sorry to keep to interrupting...

10 A. That's all right.

11 Q. When you say you want to test the individual on the street
12 when you have a strong degree of control over their comings
13 and goings what do you mean by that?

14 A. If you assume that protection of society is paramount in
15 Correctional Service Canada, or one of the three major
16 responsibilities we have, you want to insure that when an
17 individual comes out, especially after having done a long time
18 or for a violent offence, that the behaviour you're seeing in
19 the institution is, in fact the real behaviour. So what you're
20 attempting to do is observe them in a number of more natural
21 settings then, say, an institution. I'll give you an example. If
22 an individual has had an alcohol problem or an addictions
23 problem, you can test that to a degree in an institution. But
24 the real test has to come when the individual's out and that is,
25 it's available to him. So if you're walking down the street you

1 can step into a bar, you've got to see that. He passes the bar
2 by. You've got to see that under stress, for example, he
3 doesn't immediately grab a drink or, you know, using that as
4 an example. So one of the things you're trying to do is test.
5 You want to see, for example, without the requirement of
6 gates and things like that, whether he'll stay within a 25-mile
7 limit. You want to start observing the behaviour, but at the
8 same time pick up on things very quickly if you see any
9 deterioration happening. That's one the aspects.

10 Q. What, are you able to generalize and tell us what generally is
11 the situation that, or the characteristics that a lifer presents to
12 you when they come to the Carlton Centre?

13 A. The most overriding first characteristic is they're scared.
14 When they hit the street they're very nervous. Because most
15 of them have been in a very closed situation with some
16 releases, temporary absences by, either escorted or
17 unescorted, or limited day paroles. They've been living in a
18 very structured limited community for often 10, 11, 12 or
19 more years. The whole focus in an institution is attempting to
20 get out the gate, to leave the institution. So a lot of the
21 normal patterns that a lifer would go through are geared to
22 that end. And suddenly when they hit the street they're
23 confronted by a whole lot of things. Like, for example, they
24 are not getting absolute close supervision that they would get
25 in an institution. They're not scrutinized. They can eat a little

1 more freely. They can choose their own food. They suddenly,
2 though, have to start dealing with things like real money.
3 They have to start dealing with rules that are quite different
4 from an institution. If you assume that an institution, if you
5 break them all down, it's maybe got 50 to 100 rules, that
6 control most social interactions and business interactions.
7 When you hit the street those rules change all the time and
8 it's very difficult after you've been out of that for a long
9 period of time to adjust.

10 Q. Is part of what you're trying to do is to facilitate their re-
11 entry into those sorts of situations then?

12 A. Yeah. Both by trying to guide them through certain things as
13 simple, for example, as going into a restaurant and ordering,
14 to giving them a buffered place to come back. There has to be
15 a sanctuary where a person can come back and process and
16 that's one of the major functions in my view of a community
17 correctional centre, the buffering zone.

18 Q. Is there any, what kind of, what period of time does it take
19 for a lifer to make that sort of adjustment in your experience?

20 A. A lot of that depends on the lifer but you're looking a
21 minimum of six to eight months probably in the, a place like
22 the Carlton Centre, where there's daily return and a little
23 increased freedom. Then you're looking at probably a period
24 of five and two which means five days out and two days back.
25 You're looking at a five and two for possibly three or four

1 months. Again, depending on how the individual's
2 responding. But the adjustment process is longer than that.
3 Once an individual leaves it's, to my experience, a lifer tends
4 to go through a number of phases and the other phase is the
5 individual might go through would happen maybe a year
6 after he had left a place like the Carlton Centre. Quite often
7 the supervision is shared between the supervising parole
8 office and the Carlton Centre if the individual is staying in
9 Halifax just simply to help them over the last phase of his
10 adjustment.

11 Q. So could it be the case that after somebody leaves the
12 residential aspect, and leaves the Carlton Centre, that you
13 would still nevertheless have some involvement with that
14 person as a parolee?

15 A. Yes. Yeah, both, if it's decided officially to maintain that and
16 maintain the supervision and also by joining the case
17 management team in the community because you continue to
18 be a resource.

19 Q. And has that been your practice with some parolees?

20 A. Yes.

21 Q. With a lifer is, is a person who has a life sentence now out on
22 parole, is that person ever out of the jurisdiction of
23 Correctional Service?

24 A. No. No. Life sentence means exactly that. The sentence and
25 where the individual does the sentence is, differs. The place

1 of doing the sentence differs. But the sentence is always
2 there. An individual can do it in a federal institution or in a
3 CCC or under parole, but the sentence is still there. And we're
4 simply administering the sentence at that point.

5 Q. So there's always, throughout that person's life there's always
6 a contact with the correctional service.

7 A. Absolutely, yeah.

8 Q. Right up till the time the person dies, if I understand you.

9 A. Yes.

10 Q. Mr. Marshall came to the Carlton Centre in March of '82,
11 March 29th or so, I think, or 1982.

12 A. Yes. To my recollection.

13 Q. When did you first become aware of Junior Marshall?

14 A. The first time I actually became aware of him would have
15 been about September of the previous year.

16 Q. You don't need to look at it but in Volume 27 there's a note of
17 Steve Aronson's that he had started having telephone
18 conversations with you in about the fall of 1981, September,
19 October or so.

20 A. That would be correct, yeah.

21 Q. And was that your first involvement, was a call from
22 Aronson?

23 A. I'm trying to remember back. I believe we entertained an
24 application previously from Donald Marshall, Jr. and I believe
25 we turned him down at that point. But again...

1 Q This is prior to the fall of '81.

2 A. Prior to the fall, but I don't have any documentation on that
3 and I didn't have access to a file so I couldn't check that out
4 but the first real contact that I can recall was with Mr.
5 Aronson in the fall. I got a telephone call and he asked if he
6 could speak to me.

7 Q You knew Steve Aronson, in any event, didn't you?

8 A. Yes.

9 Q At that point.

10 A. Steve, while he was preparing for law school and in law
11 school worked with me with the kids that I talked about
12 earlier. He was working on a street law project and we'd
13 been friends for quite some time.

14 Q Okay. When you were first contacted by Aronson in the fall
15 of '81 what was it that he was saying to you? What did he
16 want you to do?

17 A. He said that he was working on land claims, native land
18 claims in Nova Scotia, and during that time he'd come to know
19 Donald Marshall, Sr. quite well. And he'd been hearing
20 rumblings, rumors, et cetera about the guilt or innocence of
21 Donald Marshall, Jr. He was, at that point, beginning to look
22 into the validity of those rumours and he wanted to know a
23 couple of things from me. One, did I know anything about
24 him and at that point I didn't. Two, would we be open to
25 considering any information on him if it came up. And

1 obviously if we were doing a community assessment or
2 anything else, we'd be looking into everything we could. And
3 three, did I know anybody who was a good investigator.
4 Well, to the last one I had no idea. So I agreed to maintain a
5 communication with him as I would with anybody else.

6 Q. And you did that?

7 A. Yes.

8 Q. Did you meet Junior Marshall prior to him coming to the
9 Carlton Centre?

10 A. The first time I laid eyes on Junior Marshall or spoke to him
11 was when we picked him at the Airport Inn Hotel when he
12 was released.

13 Q. You've got Volume 35 in front of you there, Jack. If you'd
14 look at page 199...

15 A. I have it.

16 Q. A letter from Steve Aronson to yourself and that is within a
17 couple of weeks of Junior Marshall's coming to Carlton Centre.

18 A. [Witness nods "yes".]

19 Q. If you could now flip over to 205, same volume, it's a
20 community assessment which is signed by yourself.

21 A. Yes.

22 Q. And dated, I don't know what the date is. March 24th date
23 completed in any event, in Box 12. What was the reason for
24 this community assessment being done?

25 A. An application for day parole had arrived from the Moncton

1 district office asking us to look into the possibility of
2 accepting Donald Marshall, Jr. as a resident of the Carlton
3 Centre. The reason for referral was listed in the top section,
4 that special instruction. They wanted us to take a look at him
5 because they found that his behaviour was changing
6 somewhat. And they wanted us to take a look to see if he
7 would be a good potential resident.

8 Q. By this stage of the game, that is by the third week of March,
9 was there anything publicly that you knew of, concerning Mr.
10 Marshall's case. Was there anything in the press at that
11 point?

12 A. We were starting to get some phone calls here and there and
13 there was information going through to other people that
14 there was something going on.

15 Q. Right.

16 A. I wasn't getting anything directly on that at all. And we
17 knew there was something afoot, didn't know what it was.
18 From the time we got the request for community assessment
19 in consideration of the Carlton Centre suddenly this, all this
20 other information started pouring in so we held onto the
21 community assessment because we thought it was somewhat
22 relevant.

23 Q. In your community assessment you indicate that you
24 contacted two people, Steve Aronson and Gordon Gale.

25 A. Yes.

1 Q. And in the third paragraph of that section you say, "The area
2 of greatest concern was Mr. Marshall's total denial of guilt in
3 his offence and his frustration with staff attempting to deal
4 with him in this area."

5 A. Yes.

6 Q. Was that your own view?

7 A. That was the view, my view, and therefore, the view of the
8 Carlton Centre. We put, and continue to put a great deal of
9 emphasis on whether or not a person takes responsibility for
10 his offence and would have at that time.

11 Q. And at this stage of the game, in March of '82, did you have
12 any sense that perhaps you were about to get a person who
13 wasn't, in fact, guilty? Or were you still treating him as just
14 somebody who's coming out on day parole?

15 A. We were treating the application, when we got the application
16 we were treating him as an individual who's being referred
17 who was continuing to maintain his innocence. Had we not
18 received additional information, specifically from Mr. Gale
19 and Mr. Aronson, or through Mr. Aronson, we would have
20 treated the file the same way we would have treated anyone
21 else who is coming down with a profession of innocence. We
22 would have gone into a very specific procedure on that on.

23 Q. What would you have done?

24 A. We would have immediately informed Moncton that unless
25 the issue was addressed, we would not entertain him as a

1 resident of the Carlton Centre.

2 Q. What does that mean, the issue was addressed?

3 A. The issue of guilt or innocence, one of the major concerns,
4 again, going back to our mandate, is protection of society. If
5 an individual is not professing guilt or is denying guilt,
6 especially for a serious offence, that can lead to some
7 difficulties for the community later on. For example, we've
8 had other individuals who have stated they were guilty but
9 stated they couldn't remember the offence. Well that would
10 be an equal concern to us. Our procedure with this would
11 have been if the institution and the case management staff
12 was supporting this individual strongly, we would have
13 insisted on moving him to a forensic psychiatrist for a full
14 assessment just to see what we were dealing with. Because if
15 you don't know what you're dealing with then you can't deal
16 with the individual and you can't, in fact, protect society. So,
17 you know, we would go into that procedure immediately.

18 Q. But in this specific case, the information that you refer to, you
19 file in a separate report which appears on page 207 and that's
20 your "Confidential Information Report."

21 A. Yes.

22 Q. And you indicate in that you'd talked to Mr. Aronson, you'd
23 also talked to Mr. Gale, and if I could just take you to the fifth
24 paragraph, you have a quote, I think from Mr. Gale in the
25 fifth line. "He did say that he had 'good reason to believe that

1 Mr. Marshall did not kill Mr. Seale."

2 A. Yes.

3 Q. And that was the information that made your taking Junior
4 Marshall different from taking somebody who was otherwise
5 professing his innocence.

6 A. Yes, when we get, when you get information from the
7 Attorney General's Department and when you know that
8 other investigations are going on, and I believe at that time
9 the Federal Justice Department was starting to get
10 information as well, as well as the National Parole Board,
11 again, you have to take that into consideration. We can't
12 continue to decide the guilt or innocence of individuals who
13 have been found guilty by the court and this seemed to be a
14 very mitigating circumstance to us.

15 Q. Was Mr. Gale supportive of the notion that Mr. Marshall could
16 go to the Carlton Centre or would that even have come up in
17 your conversation?

18 12:10 p.m.

19 A. He knew I was asking for information and he knew why I
20 was asking for it, because I identified myself very clearly. I
21 didn't get any positive or negative response from him, but I
22 assumed that since he was giving me the information, I could
23 certainly utilize it and I don't think he had an opinion one
24 way or the other. I certainly got none out of his voice.

25 Q. In that same paragraph, you say in the line above, the one I

1 just referred to: While I could not receive a copy of the police
2 investigation..." Did you ask Mr. Gale for one?

3 A. Yes, I wanted to document it because I was getting into
4 territory that I had never been into before. So I wanted to
5 have as much documentation as possible. I asked for it. It's a
6 routine procedure to ask for any information you can get. At
7 that point, I can't say whether it was complete or incomplete.
8 But at that time, I think he felt... He probably felt it was
9 inappropriate to give it to me at that point but he was
10 certainly was able to quote from it and I didn't necessarily
11 have to push it at that point. His word was good enough for
12 me.

13 Q. Have you received police investigation reports from the
14 Attorney General's Department in other cases?

15 A. Currently, we receive reports on anyone we ask for, pretty
16 well.

17 Q. From the A.G.'s office or from the police forces?

18 A. From a combination. That's a very recent change in
19 procedure. We, at that time, would routinely ask for police
20 reports and presentence reports. And while we didn't get
21 them directly from the Attorney General's Department, we'd
22 quite often get them from the police departments that were
23 involved. There were very few instances where we had to go
24 directly to the Attorney General's Department for anything.

25 Q. On the next page of that report on page 208, in the first full

1 paragraph, it says:

2
3 Mr. Aronson and Mr. Marshall's family are
4 understandably very anxious to get him out of
5 prison...

6 The next sentence:

7 In addition, the press in Cape Breton are aware
8 that an investigation by the R.C.M.P. was
9 conducted into the Marshall case...

10 Had you been contacted at this point, that's March 24th, by
11 the press in Cape Breton?

12 A. I honestly don't know. We were starting to get phone calls
13 from the press. Now I can't say if it was from the press in
14 Cape Breton, but the press were certainly starting to look into
15 it.

16 Q. They were what?

17 A. They were aware that there was an investigation. I don't
18 know if they were aware of what the contents of it were but
19 they were certainly starting to track what the possible routes
20 would be if the individual was released, and the Carlton
21 Centre was one of the logical places to check.

22 Q. As a result of the community assessment and the Confidential
23 Information Report, I believe the materials will show that on
24 page 209 that it was the following day, the 25th of March that
25 day parole was granted to Junior Marshall.

A. Yes.

1 Q. And March the 29th, I believe, that he came to the Carlton
2 Centre.

3 A. Yes.

4 Q. Can you tell us how Mr. Marshall got to the Carlton Centre,
5 who brought him and where he came from?

6 A. Yes, he was... Arrangements were made for him to be picked
7 up by his parents at Dorchester Penitentiary. I believe they
8 picked him up in the morning. He was to report to the Carlton
9 Centre, I will say by four o'clock, and I'm purely picking that
10 one out of the air, but a reasonable amount of travel time was
11 given to allow him to proceed from Dorchester to the Carlton
12 Centre. We were in touch with the Marshall family and the
13 individuals at Dorchester that were responsible for releasing
14 him. We made arrangements for them to call us when they
15 were halfway down. We made arrangements then, Mr.
16 Aronson and myself, to pick him up at the Airport Inn, near
17 the Halifax International Airport.

18 Q. Why were you going... Why were you doing that?

19 A. Why were we doing that?

20 Q. Yeah.

21 A. Because by the time he was being released, we had a press
22 contingent like I'd never seen before. They were all around
23 the Carlton Centre. One of the concerns we had was that we
24 were, again, getting into unfamiliar territory. We didn't know
25 what the case plan was going to be. If we were bringing

1 somebody out that we knew we were going to have for a
2 period of time and we knew why we had him there, you
3 know, for a very specific offence, et cetera, we would have
4 been able to plan a little more easily. This way, we were sort
5 of playing it on the wing. One of the things we were intent on
6 was not making Junior Marshall a celebrity within the Carlton
7 Centre. Because, remember, we still had 15 other people that
8 were in there trying to get on with their reintegration. And I
9 know Mr. Aronson wanted to limit contact with the press as
10 much as possible. Then we considered that, or I considered
11 that an extremely reasonable request. I also wanted to have
12 Mr. Marshall walk in the same way everybody else did,
13 carrying his own bags without a whole bunch of flash bulbs
14 and things like that. So what we did was a little roust. We
15 picked him up, after we lost the press, we went out and
16 picked him up there. He had a chance to say good-bye to his
17 parents. We put him in the van. When we got close to the
18 Carlton Centre, Mr. Aronson called and set up a press
19 conference for seven-thirty at the Parole offices, Parole
20 supervision offices in the boardroom. The press left for there
21 and at twenty-five after seven, we walked Junior Marshall
22 into the front of the Carlton Centre with his bags in his hand.

23 Q. They can be tricked.

24 A. No comment. We felt it was important. We felt it was
25 important because we were starting the person's

1 reintegration and it might sound foolish, but it seemed
2 important at the time and I still believe it was, to have the
3 individual taken in without the notoriety, because that caused
4 a lot of problems later on.

5 Q. Give us your impressions of Junior Marshall during the first
6 few days that he was at the Carlton Centre?

7 A. He was confused. He was nervous. He was very happy to be
8 out of Dorchester. He was sort of in a state of shock, is the
9 best way to say that.

10 Q. Did he present himself as... Or can you distinguish between
11 the way he presented himself and the way a normal lifer
12 would seem to you coming to the Carlton Centre? Is there
13 any difference?

14 A. It's really hard to say because he had the same sort of
15 understated euphoria that everybody has when they first
16 walk out. And he also had the nervousness of it. But it was
17 very difficult to judge because, again, we had, we had a lot of
18 cameras and we had a lot of people always around. A normal
19 lifer, you could take out for a walk. You could go and have a
20 cup of coffee or do something like that. That wasn't possible
21 at that time. We were surrounded. And so it was very
22 difficult to try and figure out his reactions to us, because he
23 was meeting us for the first time. His reactions to us, the
24 reactions to the other people in the house because he had to,
25 you know, establish himself there, and his reactions to just

1 what was going on. Because it really was quite stressful for
2 everyone at that point, simply because everybody, and
3 understandably, people wanted to get a picture of him, talk to
4 him and everything else like that. We had to sort of keep the
5 door barred and... So it was very difficult to figure out what
6 his real reactions were at that point. I know he was also very
7 tired, because I don't, you know, he hadn't slept for several
8 days before coming out.

9 Q. Were you able to take him out, though, for walks and stuff, or
10 were you just not able to do that at all?

11 A. Oh, no, we got him out. Again, I'm sounding like a bit of a
12 marshaller of resources, but at one point, to get him out, we
13 got all the fellows to put on their jackets and leave at the
14 same time. And when the press said, "Hey, Donald,"
15 everybody said, "Yes," and we walked out the back door with
16 him. So, you know, it was that kind of situation. It seems
17 very humorous at this point, but, believe me, at the time, it
18 wasn't humorous. It was anything but humorous. So we
19 were able to get him out from time to time. And I'm not
20 saying he was held prisoner by the press. I don't want to
21 give that impression. I want to hint at it a little bit, but it
22 made the whole thing unreal. He didn't have the same, nor
23 did any of the other guys and that started causing some
24 problems after awhile because, again, as I say, he was the star
25 as far as everybody was concerned. However, we had 15

1 other people there that we were trying to do exactly what we
2 had them there to do-- get them out on the street.

3 Q. Were you then trying to treat him the same way you would
4 treat any other lifer who was at the Carlton Centre?

5 A. Yeah, that was the thing that when we talked as a staff, that
6 was the thing that was absolutely critical. The only thing that
7 had changed was that there was, at that point, a very clear
8 indication from people that we had to listen to that the issue
9 of guilt or innocence was not impacting on protection of
10 society, okay? What we had to do, however, we still had to
11 administer the sentence because it didn't matter what the
12 Attorney General said or Justice Department said or anything
13 else until that individual was dealt with. We still had that
14 sentence to administer. So we had to walk again that fine line
15 and it put us in a bad spot, as individuals because, as I say,
16 we were going into unfamiliar territory. We had never run
17 into this before. So we had to sort of strain everything
18 through. How do we deal with this? How do we deal with
19 that? Well, the obvious thing was we deal with him the same
20 way we deal with everybody else. Again, otherwise, you've
21 got a dynamic happening in a very small unit that's not
22 beneficial for anybody.

23 Q. How did he react to being treated the same way as everybody
24 else?

25 A. At times, positively; at times, other times, he was very angry.

1 Q. Could you sense why he was angry?

2 A. Oh, he said, "Look, I'm out. I didn't do it. Now why don't you
3 just let me go?" Right? And the answer to that was obvious,
4 "We have no authority to do that," and at that point, even if
5 we had the authority, if I had had anything to say about it,
6 we wouldn't have acted that way because he still had to come
7 out. He still had a lot of time...

8 Q. What does that mean, "He had to come out"?

9 A. Well, he had to come out of... He had to come out of a very
10 structured institutional setting, okay? And he had to start
11 learning how to deal on the street again.

12 Q. What had he lost over that period of years, in your
13 assessment, when he came out?

14 A. The normal sort of evolutionary socialization that takes place.
15 You notice it with a lot of long timers. The ability to interact
16 with people. The ability to think in sort of a critical fashion as
17 opposed to necessarily a paranoid fashion. To be a little less
18 focused. Most fellows that come out, they're focused very
19 much on rules, regulations. Am I going to get into trouble? Et
20 cetera. Well, to give you an example, if you consider, take
21 yourself at age 18, 17 or 18, and then consider yourself at age
22 28 or 29. What are the differences in your life between then
23 and now and what did you learn? And what real situations
24 did you get up against? If you wind up in a community that's
25 a fairly isolated, by design an isolated community, you miss a

1 lot of just the normal socialization.

2 Q. What sort of things are you talking about?

3 A. Well, example, a lot of people who've done a long time, men
4 go out and they try and date a woman. If a 28, 29, or 30-
5 year-old man walks up and has the same social skill
6 development as, say, a 17 or 18-year-old, then it becomes
7 obvious fairly quickly. And you find an awful lot of difficulty
8 just in establishing normal male/female relationships, even
9 on a dating basis. Because you don't have the same
10 socialization experience.

11 Q. Did you sense that in Junior?

12 A. Oh, yeah. Yeah, very definitely, yeah. You sense that in most
13 lifers that come out.

14 Q. During the time that Junior Marshall was at the Carlton
15 Centre... You don't need to look at it, it's in a different
16 volume, but there were a number of weekend passes, I
17 believe, that he got over that...

18 A. Yes.

19 Q. Period between March and... I think he left the Carlton Centre
20 in July.

21 A. Uh-huh.

22 Q. And during that period of time, there were a number of
23 weekend passes that were granted.

24 A. Yes.

25 Q. What would have been the purpose for granting those passes?

1 A. Twofold. One was to allow him to participate in certain
2 events, okay? For example, there was, as I recall, a gathering
3 at Chappell Island, and it was fairly important to him and to
4 his family, and I guess to the rest of the Micmacs. So that
5 would be like a resocialization, reintroduction, reorientation.
6 Some of them were purely to give him some time where he
7 could put his feet up and, again, be out of the spotlight with
8 people that could be reasonable models for him, to address
9 some of the issues. He had to be able to socialize and, again,
10 that's not just peculiar to him. That's to most lifers. They
11 have to be in a situation where they can be in a
12 noninstitutional setting.

13 Q. Was the weekend pass program for him any different than it
14 would have been for any other person at the Carlton Centre?

15 A. Not in frequency, no. No.

16 Q. In some other way?

17 A. Yeah, we were a little more... We were, I think, a little more
18 sensitive to why he was going out and we would talk to him
19 about why he was going out a little more than we talked to
20 somebody going out on a recreational pass.

21 Q. Did you see any noticeable change in Junior Marshall during
22 the time he was at the Carlton Centre from March until July,
23 in terms of the way he was dealing with being out of
24 Dorchester?

25 A. Yeah, there were a number of things and I'm trying to cast

1 back. First of all, being very happy he was out. That's a very
2 normal first reaction. Then a frustration that out didn't mean
3 what he thought it would mean.

4 Q. Didn't mean free.

5 A. It didn't mean free. And that's a very, again, a very common
6 thing with long-term offenders. That first couple of weeks to
7 the first month, it's like, you know, Christmas every day but,
8 suddenly, they're saying, "Well, I'm not free. I'm still
9 incarcerated. I'm still in a jail." And with Junior Marshall, it
10 was again sort of clouded by everybody having free advice
11 for him. You know, like everybody had advice. He was trying
12 to deal with people that maybe he hadn't seen for a number
13 of years who said, "I've been with you all along," and the
14 question there was, "Well, where were the letters?" Trying to
15 go out and date. Again, trying to avoid the press, and I don't
16 want to keep coming back to that, but it was very difficult
17 because he didn't have the anonymity, okay? And most
18 people when they come out after a very long time feel that
19 everybody is looking at them, anyway. You know, the first
20 thing they want to do is get rid of their institutional clothing
21 and things like that. So they're feeling very much on display
22 and very fragile. He also had the issue of lack of anonymity
23 to go with that. The other was, he just... None of us at that
24 point, and I'm sure some people did, but a lot of us didn't
25 have any idea where this was going. So when he would ask a

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1 question, "How long am I going to be here?" Well, nobody had
2 any answers to that. And those things continued to cloud the
3 ability of the staff of the Carlton Centre to get him focused in
4 the way we normally try to focus a long-term or life offender.

5 MR. SPICER

6 It would be a good time to break perhaps.

7 MR. CHAIRMAN

8 Okay, until two o'clock and at two o'clock, we will deal with
9 an application of Mr. Pugsley with respect to the issuing of certain
10 subpoenas.

11 12:30 p.m. INQUIRY RECESSED UNTIL 2:00 p.m. INQUIRY RESUMES

12 - 2:00 p.m

13 MR. CHAIRMAN

14 What I propose to do with the...with respect to our ruling on
15 the application of Mr. Pugsley is to read it, but to omit the
16 quotations which will be...but the quotations will be contained in
17 the transcript.

18 We've been asked by Mr. Ronald Pugsley, Q.C., to subpoena
19 two journalists - Michael Harris and Heather Matheson - to testify
20 before this Inquiry. Mr. Harris is the author of a book concerning
21 Donald Marshall, Jr., entitled Justice Denied and Ms. Matheson is a
22 CBC reporter who researched and produced a documentary on the
23 Marshall case for the show "Sunday Morning" which was aired in
24 November, 1983. Mr. Pugsley argues that the evidence of these
25 two individuals will assist the Commission in assessing the

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1 | credibility of Staff Sergeant Wheaton, and further that the
2 | mandate of the Commission should extend to consideration of the
3 | appropriate limits, if any, that should be placed on members of a
4 | police force regarding disclosure to the media during the course of
5 | an investigation.

6 | The Rules of Practise and Procedure adopted by this
7 | Commission at the commencement of its activities outline the
8 | procedure for calling witnesses. Article 5(5) provides that
9 | persons with standing may apply to Commission counsel to call a
10 | witness. In the event Commission counsel choose not to call that
11 | witness, the party asking that the witness be called may apply to
12 | the Commission for directions.

13 | A request to call these witnesses, pursuant to our Rules, was
14 | made by Mr. Pugsley to Commission counsel, which was refused
15 | by letter of March 10, 1988. The reasons given by Mr. MacDonald
16 | in his letter of refusal were that, and they're quoted:

17 | The only possible reason to have such
18 | persons appear would be to test the credi-bility
19 | of Staff Sergeant Wheaton. He has been
20 | questioned concerning his discussions with these
21 | individuals and has provided his answers. It is
22 | my recollection that Staff Sergeant Wheaton
23 | admitted speaking to each of these individuals,
24 | but could not recall the details of the discussion.
25 | In our opinion, no useful purpose could be
served by having these witnesses, assuming they
would [sic], testify concerning the details of the
discussion as we are concerned and we want to
make every effort to limit the evidence to be

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1 called before the Commission to issues which are
2 directly relevant to the points under
3 consideration.

4 Mr. Robert Murrant appeared on behalf of Mr. Harriss, Ms.
5 Matheson and their employers (in Mr. Harris' case, his former
6 employer) and argued against Mr. Pugsley's application. He has
7 placed before us affidavits of Mr. Robert Martin and Mr. Claude
8 Vickery, two local journalists. Mr. Murrant's submission is that
9 both Mr. Harris and Ms. Matheson object to giving evidence at this
10 Inquiry as it would,

11 constitute an invasion of their confidentiality as
12 journalists (and that of their employers),
13 together with an abuse of their functions were
14 they to be used as instruments of impeachment.

15 His written submissions refers to recent cases on "freedom of the
16 press," including those which consider the protection provided to
17 "freedom of the press" by s.2(b) of our Canadian Charter of Rights
18 and Freedoms. These cases confirm that a balance must be struck
19 between the right of the press to protect their sources and their
20 ability to gather information and the right of the courts to hear all
21 evidence relevant to its inquiry. See: Democratic National
22 Committee v. McCord; Pacific Press v. The Queen; Descoteaux v.
23 Mierzwinski; Coates v. The Citizen. Mr. Murrant refers also to the
24 judgement of Tidman, J. in Rocca v. Great Eastern News Company.
25 In Coates, MacKeigan J.A. stated that:

Relevancy is the first and paramount

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1 requirement for an Order compelling a witness
2 to testify. Despite the breadth of our rules, the
3 acid test for compellability, the test which must
4 be applied before entering upon any balancing of
5 public interest, is whether the answer sought is
6 relevant at all and appears 'reasonably
7 calculated to lead to the discovery of admissible
8 evidence.'

9 At page 60, Tidman J. quotes extensively from Coates, including
10 the following passages:

11 The judgements delivered by Lord Denning, M.R.,
12 Orr and Scarman L.JJ. lend valuable assistance in
13 the difficult problem of dealing with the rights of
14 the free press in the Courts. I quote a passage
15 from Lord Denning's judgment at Page 34, with
16 which I am in respectful agreement:

17 'Next there is the special position of the
18 journalist who gathers news of public concern.
19 The courts respect his work and will not hamper
20 it more than is necessary. They will seek to
21 achieve a balance between these two matters.
22 On the one hand there is a public interest which
23 demands that the course of justice should not be
24 impeded by the withholding of evidence. : See
25 Rogers v. Home Secretary; Gaming Board for
Great Britain v. Rogers, [1973] A.C. 388 at 401,
[1972], 2 All E.R. 1057, by Lord Reid. On the
other hand, there is the public interest in seeing
that confidences are respected and that
newsmen are not hampered by fear of being
compelled to disclose all of the information
which comes their way. " See Democratic
National Committee v. McCord [1973] 356 F. Supp.
1394, in the United States. As we said in this
Court as to the oral testimony of a newsman:

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1 proper and indeed necessary question in the
2 course of justice to be put and answered.' : See
3 A.G. v. Mulholland; A.G. v. Foster, [1963] 2 Q.B.
4 477 at 489, [1963] All E.R. 767.

5 It is clear that no absolute privilege exists which would
6 permit journalists to place their professional loyalties above their
7 responsibility to assist the courts where their testimony is
8 relevant and necessary to further the interests of justice. The
9 approach of the courts in dealing with journalistic privilege
10 mirrors the approach taken recently by Madam Chief Justice
11 Glube of the Supreme Court of Nova Scotia, Trial Division, in
12 dealing with the obligation of Cabinet Ministers to testify where
13 their evidence might be relevant to the matter in issue. A
14 balancing must be done, weighing the relative importance of the
15 interest being protected by the privilege, and the interest in the
16 administration of justice. This balance is struck on an individual
17 basis, and with relevance being a key factor.

18 In the question now before us, it is clear that even where
19 some relative journalistic privilege may exist, it may be waived
20 by the source. This was admitted by Mr. Murrant in his oral
21 argument. It must be noted that Staff Sergeant Wheaton in his
22 evidence before this Inquiry released Mr. Harris and Ms.
23 Matheson from their obligation to protect him as a "source". [See:
24 Volume 44, page 7986]. Given that the source himself does not
25 wish to be protected, we cannot accept the suggestion that the two
journalists in question have any legal basis on which to make

1 their claim that giving evidence before this Inquiry will interfere
2 with their function as journalists.

3 Mr. Murrant has noted that requiring Mr. Harris and Ms.
4 Matheson to testify in this case would be improper if the purpose
5 was to impeach the credibility of sources, and also that it may, in
6 effect, put their 'work' on trial, particularly in the case of Mr.
7 Harris. We do not consider it relevant to the issues raised by this
8 Inquiry to deal with the merits of that submission.

9 In summary, no absolute privilege exists in Canada to
10 protect journalists, and even where a relative privilege does exist,
11 it can be waived by the source. Staff Sergeant Wheaton has
12 released both journalists from any protection that might attach to
13 communications with him, and since such privilege exists to
14 protect the source and not the journalist, Mr. Harris and Ms.
15 Matheson cannot now claim immunity from testifying on that
16 basis.

17 We have carefully considered whether the evidence of Ms.
18 Matheson and Mr. Harris is relevant to the Commission, or
19 whether such evidence raises collateral issues which should not be
20 pursued. The primary focus of the application by Mr. Pugsley to
21 question these individuals is to attack the credibility of Staff
22 Sergeant Wheaton, since Wheaton's evidence contradicts that of
23 Chief MacIntyre in material ways. It is clear that the conflicts in
24 evidence between Wheaton and MacIntyre must be resolved by
25 the Commission. John MacIntyre and Harry Wheaton are key

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1 the Commission. John MacIntyre and Harry Wheaton are key
2 witnesses in the Inquiry.

3 The Terms of Reference define the Commission's mandate.
4 The scope of the mandate has been further clarified through
5 various statements from the Commission. We have stated that the
6 1982 RCMP reinvestigation is part of our examination into the
7 circumstances surrounding the death of Sandford Seale and the
8 prosecution, conviction and eventual acquittal of Donald Marshall,
9 Jr. The reinvestigation of Staff Sergeant Wheaton and Corporal
10 Carroll has been the subject of intense discussion in this Inquiry.
11 We note, for example, that Harry Wheaton himself was on the
12 stand for six days, almost two days of which were taken up by Mr.
13 Pugsley's cross-examination. After hearing many witnesses on
14 this subject, there is still one key matter in issue, namely, an
15 incident in April 1982 in which John MacIntyre allegedly slipped
16 Patricia Harriss' first statement under his desk in an attempt to
17 conceal it from the RCMP investigators. This is a matter which is
18 germane to the issues before the Commission and which bears
19 materially on the credibility of both MacIntyre and Wheaton.

20 Mr. Pugsley suggested in his written submission that we
21 adopt the test of relevancy as stated by Howland, J.A. for the
22 Ontario Court of Appeal in Re Bertolucci et al and the Ministry of
23 Housing which states:

24
25 ...A full and fair inquiry in the public interest is

COMMISSION RULING

1 opinion, any evidence should be admissible
2 before the Commission which is reasonably
3 relevant to the subject matter of the
4 Inquiry.

5 While the test of relevancy in Bertolucci is fairly broad, it
6 must be noted that we already have before us the evidence of
7 Staff Sergeant Wheaton, who admitted discussing the Marshall
8 case with journalists before the investigation was concluded. We
9 have also received as evidence Exhibit II, Exhibit 3, no Exhibit
10 11000, which is the RCMP policy on disclosure of information
11 gathered during an investigation to media...to members of the
12 media. We conclude that we are able to deal with the issue of
13 Staff Sergeant Wheaton's alleged disclosure to the media of
14 information gathered during the RCMP reinvestigation of the
15 Marshall case without hearing further evidence.

16 The Wheaton/MacIntyre credibility issue is of concern to us,
17 but we do not think that calling Ms. Matheson and Mr. Harris as
18 witnesses would be of assistance to us in making any
19 determination in this area with one important exception. Ms.
20 Matheson has...had only one meeting with Harry Wheaton and, to
21 our knowledge, spoke to John MacIntyre only briefly in an
22 unsuccessful attempt to set up an interview with him. She has
23 been examined for discovery in the libel action taken by John
24 MacIntyre against the CBC, and this testimony is before us as
25 Exhibit 106 (Volume 37). Based on these factors, we will not
order that a subpoena be issued to compel Ms. Matheson to come
before us and will not pursue her testimony in other ways.

COMMISSION RULING

1 Mr. Harris, on the other hand, had several interviews with
2 Staff Sergeant Wheaton who is specifically acknowledged for his
3 assistance in preparation of Justice Denied by Mr. Harris in the
4 preface to the book. It appears that he did not interview John
5 MacIntyre. While Mr. Harris' book is not before us as an exhibit,
6 it has been referred to by counsel on several occasions during the
7 examination and cross-examination of witnesses before this Royal
8 Commission. The conclusions reached by Mr. Harris as to factual
9 matters, while of interest, are not necessarily the same as those
10 that will be reached by this Royal Commission. Mr. Harris' purpose
11 in writing Justice Denied may be different from our purpose
12 which is, in short, to hear all relevant evidence, to decide the
13 issues fairly on the material before us, and to make
14 recommendations related to those findings. No relevant purpose
15 can be served by questioning Mr. Harris in detail about the
16 information contained in his book, how he reached that
17 information or the basis on which he reached his conclusions.

18 There is one matter, however, on which we would like
19 information from Mr. Harris. Considering the extensive research
20 which was obviously done in preparing his book and considering
21 the interviews which he had with Staff Sergeant Wheaton and
22 others, Mr. Harris may be able to assist us in considering the
23 allegation by Harry Wheaton that in April 1982 John MacIntyre
24 attempted to conceal the first Patricia Harriss statement, an
25 allegation which John MacIntyre has denied. It is relevant to our

MR. STEWART, EXAM. BY MR. SPICER

1 Inquiry into these matters to know whether Mr. Harris was told of
2 this alleged incident by Harry Wheaton. If the answer is "no," the
3 questioning of Mr. Harris stops there. If the answer is "yes," we
4 would like to know the details of this disclosure, noting that it was
5 not included in Justice Denied.

6 We would like to follow the same procedure in obtaining the
7 answer to this question (or questions) as was followed with Mr.
8 Alan Story. If Mr. Harris declines to answer, a subpoena will be
9 issued to require him to appear as a witness.

MR. CHAIRMAN

11 Mr. Spicer.
12 2:15 p.m.

MR. SPICER

13 Q. When we broke at lunch, we were just talking about the
14 weekend passes that had been issued from time to time for
15 Junior. The next matter that I wanted to raise with you, if
16 you turn to page 214 of that volume. I believe this refers to
17 an incident in July when Junior Marshall didn't come back or
18 came back late. Can you tell us what happened on that
19 occasion and how it was dealt with by the Carlton Centre?

20 A. There was a softball tournament in Restigouche, New
21 Brunswick, where a number of teams from a number of
22 reserves got together. I guess it's an annual event. Mr.
23 Marshall asked permission to go. He said he was going with, I
24 believe it was Noel Doucette. I'd have to double-check. We
25

1 saw no reason not to grant the pass. He was eligible for a
2 pass. It was an event that would be in line with his sports
3 actions within the institution and the person he was going
4 with was of solid reputation. We didn't get him back when
5 we expected him to come back. So we immediately started
6 making telephone calls as fast and furiously as we could.

7 Q. Was there a time when he was required to be back?

8 A. Yes, it would be the time noted on the pass. I don't have it in
9 front of me.

10 Q. Yeah, he wasn't there, anyway.

11 A. He wasn't there. We had 24 hours to, after violation of
12 curfew to take action. What we did was we tracked him
13 down and got word back that the game had, in fact, gone a
14 little over. The tournament was carrying on a little further
15 and there had been neglect at phoning in and checking in.
16 When the game was over and when the tournament was
17 rolled up, it was too late to, for the group to travel, because he
18 was traveling with a group, and we were satisfied he was in a
19 safe place that night in reasonable care of the individuals he
20 was traveling with who were responsible. When he got back
21 to Halifax, he went to an apartment as opposed to coming
22 directly into the Carlton Centre. We, again, got him and said,
23 you know, very clearly, "Get in here." He came in, we sat
24 down and talked to him about it. He made...

25 Q. Was he intending to come prior to you making that call to him

1 at the apartment, or do you know?

2 A. Yes, he was intending to call. He just, he was having a shower
3 and a few other things like that. We reconfirmed the events,
4 dressed him down quite considerably. Not... simply because
5 he had disobeyed and hadn't follow the rules and regulations
6 as he agreed to. We were satisfied that nothing untoward had
7 happened and instead of taking any action, like suspending
8 his day parole or sending him back, we followed a course that
9 we normally took with people if we felt there was some
10 reason to be applied and we disciplined him internally. We
11 grounded him, I believe, for two weeks. That meant he had
12 to be in each night at six o'clock. He didn't go out. And he
13 had to do extra working duties around the house.

14 Q. How did he deal with that?

15 A. The same as everybody else. He was very upset and angry,
16 but knew why it was there. And because that was the
17 standard operating procedure at the Carlton Centre, he
18 accepted it.

19 Q. On page 215 in the first full paragraph, there's some
20 comments, "It's understandable under the prevailing
21 circumstances..." Now at this point, we're in July of '82.

22
23 The subject is undergoing severe bumps and, at
24 various stages, he simply shuts down and begins
to cope.

25 What does that mean?

1 A. Okay, that's terrible jargon. What that means is that he was
2 starting at that point to wonder what was happening. There
3 was a tremendous air of, I'm searching for the word... Nobody
4 knew what was going on at that point. Everything seemed to
5 change day to day. It was almost like if you hadn't heard a
6 rumour by nine, start one. And so he had a real problem
7 dealing with that. That, of course, caused a great deal of
8 stress and instead of actively participating in anything we
9 were actually trying to do at that time, he'd sort of go back
10 inside himself and he'd try and just deal with the situation.
11 You see it quite often. People will just sort of go into
12 themselves and sit around and become noncommunicative,
13 sometimes angry.

14 Q. Deal with it alone.

15 A. Deal with it alone. They go back, they handle it very much
16 the same way as you might in an institution.

17 Q. And that's what you mean by "shutting down and beginning
18 to cope"?

19 A. Yeah.

20 Q. In the last paragraph you mention that Junior Marshall was
21 working full-time during the summer months with the
22 Department of Northern and Indian Affairs and wants to live
23 out in the community and report to the Centre. You go on to
24 say you're "not fully prepared to support this request and are
25 intent on protecting subject from himself and others, thus

1 allowing subject to adjust more easily in a free community."

2 Was that the substance of the reason why you didn't want to
3 let him out on his own at this point?

4 A. Yeah, he wasn't ready at that time. He was too new out. He
5 was too new out. He was not able to cope with some little
6 things. You know, some of the timing aspects. Just some of
7 the things we saw with him sort of going back inside himself.
8 We wanted to make sure that if he was undergoing any kind
9 of stress, we had him close by. That's what we were looking
10 for.

11 Q. And yet it was only, what, three weeks later, a little more
12 than three weeks later on July 29th when he got out on bail?

13 A. Yeah, things were going awful fast.

14 Q. Yeah, at that stage of the game when he was released on bail,
15 which I think the documents will show was on the 29th of
16 July or about that time...

17 A. Obviously.

18 Q. Where did he go then?

19 A. He either went... Now I'm not positive. He either went to
20 Ogilvie Towers or the Quinpool Court apartments. I can't, for
21 certain, say which location he went.

22 Q. In either event, he was no longer under the direct supervision
23 of Carlton Centre in terms of further...

24 A. No, because he was out on bail and, again, that's something
25 we'd never experienced before. He was no longer our direct

1 responsibility. We had no authority over him at that point.

2 Q. Was he, in your view, was he any more ready to be out on
3 July 29th than he was on July 5th when you made this note?

4 A. No.

5 Q. Did you have any involvement, any supervisory involvement
6 of Mr. Marshall subsequent to him leaving the Carlton Centre?

7 A. Not supervisory involvement. I have had involvement with
8 him since I first met him, but not...

9 Q. You spent a fair amount of time with Junior Marshall, didn't
10 you?

11 A. Yes, I did.

12 Q. After he left the Carlton Centre?

13 A. Yeah.

14 Q. What sort of shape was he in when he left the supervision of
15 the Carlton Centre in July?

16 A. He was very hopeful, thankful to be out of there. He felt that
17 this was another step in him being "free". He was, I believe at
18 that time, maintaining a relationship with a young woman
19 and felt that he could pursue that a little more openly. He
20 still didn't have a lot of the coping skills that we felt that he
21 had to have.

22 Q. Was he getting in any trouble at this stage of the game
23 outside?

24 A. No. He started getting into, well, trouble, to use your word, a
25 little later.

1 Q. What word would you use?

2 A. I think he was becoming a little more self-destructive. For
3 example, the one issue I would pick up would be the more
4 that went on and the further away he got from immediate
5 support, the more, for example, alcohol started playing a part.
6 And so you'd see him a little more hung over from time to
7 time, et cetera.

8 Q. What was your sense of his drinking habits at the time he
9 came to the Carlton Centre in March?

10 A. Moderate to nonexistent and that was maintained for a large
11 period of the time there, primarily, I believe, because of the
12 efforts of Charlie Gould.

13 Q. Who was Charlie Gould?

14 A. Charlie Gould was an individual who came down from Sydney
15 who was sent by, I believe, a number of the chiefs that had
16 gotten together and asked Charlie to go down to give him
17 community support. I don't think there was a full
18 understanding of what the Carlton Centre was at that time
19 specifically. So Charlie was sent down officially to support
20 him. When we found out who Charlie was and checked how
21 he had gotten there and why he was there, we incorporated
22 him into the case management team at the Carlton Centre,
23 which we had every right to do, and he became Junior's
24 shadow, primarily. So he had access to...

25 Q. Did he continue to shadow him after he left the Carlton

1 Centre, as far as you know?

2 A. Less directly. Again, Charlie had a life in Sydney and
3 eventually had to go back. And, again, nobody had any idea
4 how long this was going to go. So at a given point, Mr. Gould
5 had to go back to Sydney, but I know he did come down on
6 occasion and did host Junior at his place.

7 Q. Did you have any discussions with Junior Marshall at or
8 around the time when he appeared in the Court of Appeal on
9 the reference in December of '82?

10 A. I had discussions with him. I'm not sure...

11 Q. Did you talk to you about his appearance in court and how he
12 felt about that?

13 A. I'm sure I did.

14 Q. Do you have any recollections now?

15 A. The biggest recollection I have about going to court was he
16 was very angry at having to go to court because he felt that
17 he was being put on trial again and he had a very clear
18 picture in his mind that when he came out, that was the end
19 of it. That would be the end of it.

20 Q. When he came out of...

21 A. Of Dorchester. It would start to wind down and in his
22 frustration, a lot of his frustration seemed to be that instead
23 of winding down, it was winding up and that was his
24 overriding feeling at that point, as I recall.

25 Q. Did you have any involvement with Junior and with Felix

1 Cacchione during the time that the compensation matter was
2 being dealt with?

3 A. Yes, I did.

4 Q. Can you describe to us from your own experience what sort of
5 condition Junior Marshall was in at about that time?

6 A. Very bad, very bad condition. His drinking had increased.
7 His relationship, previous relationship had broken down. I'm
8 not sure if he had been through another short relationship or
9 not. And again, was just a little further into that feeling is
10 this never going to end. Why are these proceedings
11 continuing, continuing, continuing?

12 Q. Did he express that view to you from time to time?

13 A. Yeah, in a number of words from time to time I would get
14 that from him, a lot of frustration.

15 Q. Did you spend any time with Junior Marshall at about this
16 time when the compensation thing was going on late at night,
17 early in the morning? Was it that kind of a relationship at
18 that time?

19 A. It would depend. Sometimes I would run into him. Other
20 times, I'd get a phone call. On one occasion, I got a phone call
21 from Felix because there had been an incident near the Clyde
22 Street Liquor Store and it had been a dispute in his
23 relationship that was, to my knowledge, there was
24 intervention by a police officer and I believe Junior threw the
25 officer away or pushed him away and was arrested. That was

1 at the time, I believe, when the Pope was visiting and security
2 was very high around Halifax. Felix and I wound up at the
3 City lock-up that night and the police officer was very
4 understanding, very supportive of Felix's discussion with him
5 and we took him from there back to the Carlton Centre and I
6 believe we watched a hockey game or something like that.
7 Basically, we sat there for several hours and the content of
8 our discussion was let's get you into some treatment program
9 or something that's going to give you a hand to start dealing
10 with all of this.

11 Q. Was he accepting of that idea?

12 A. Alternately accepting and rejecting.

13 Q. Can you give us any sense as to why he was rejecting?

14 A. I think he was, at that point, so confused, you know, he
15 was... I don't think he was very clear at that point. I think
16 he was at the point where you were doing crisis
17 intervention. It was crisis intervention more than any long-
18 term planning.

19 2:30 p.m.

20 Q. You indicated to me a couple of minutes ago that you didn't
21 think that he was ready to be out on the street in July of '82.
22 What would your assessment have been of whether or not
23 he was ready to be out on the street at the time the
24 compensation matter was being dealt with with regards to
25 how he could deal with it?

1 A. Oh, he was...well you're dealing with almost two different
2 things, one, you know, one is just knowledge of the
3 community, and just handling the idea of being back out in a
4 larger community, but the other one that was, I think, after
5 a great deal of deterioration and I don't think he was
6 capable of handling it either when he got out or when the
7 compensation was going on.

8 Q. If he had been a person over which the Carlton Centre had
9 continued to exercise some control, that is if a bail
10 application hadn't been successful and he continued to be a
11 lifer on parole, can you give us any assessment of how long
12 you think it would have taken to reintegrate him into the
13 community so that he could handle things?

14 A. I could only guess. I would have kept him probably the
15 better part of six or eight months, minimum, at the Carlton
16 Centre. Probably would have kept him on a five and two or
17 a limited release for four or five months, I think, as again
18 with hindsight and that's what I'm struggling with. I think
19 had he started to display some of the, sort of relief drinking
20 patterns that I think he was starting to get into I think I
21 would have been moving very strongly to get him into a
22 good program.

23 Q. And if he was still under your control is that something that
24 you could exercised a little more control over whether or not
25 he got into it?

1 A. Yes, yeah, we could have moved him, for example, to
2 another location. We could have kept him at the Carlton
3 Centre. You know, I have looked in, since that time, to
4 programs across the country. There aren't that many but
5 there are some very good ones here and there and I think I
6 would have been tempted to try and move him into one of
7 those.

8 Q. Have you looked into those in connection with Junior
9 Marshall or just generally?

10 A. No, in connection with Junior Marshall and I still have a
11 concern, you know.

12 Q. Are you able to tell us whether or not after Junior passed
13 out of the formal control of the Carlton Centre in the
14 summer of '82 whether or not any formal offers were made
15 to him by Correctional Service or, yeah, by the correctional
16 service people to say, "Look, you still need help, we'd like to
17 offer you the following assistance."

18 A. Yeah, I made that offer to him. One of things I think you
19 have to understand is that our job is to work with people
20 that are released from institutions and reintegrate them into
21 society, and it also...there is a little line that says "Offenders
22 and ex-offenders".

23 Q. Right.

24 A. Now, that seems to me that that's an open book. We get
25 people calling us, last week I had four different people call

1 me that are no longer on parole. And I'll think you'll find
2 with most parole officers, and especially people who work in
3 a residential setting for a period of time, you get
4 very...you're working in very close quarters. You see more
5 of them than you would, say in a normal parole supervision.
6 That continues on.

7 Q. And insofar as your own contact with Junior Marshall was
8 concerned, subsequent to July of '82, was that your own
9 personal initiative because you still had a concern about
10 Junior Marshall?

11 A. It was my personal initiative, at the same time I have kept
12 my superiors and supervisors, you know, involved, not in
13 detail, but I'd certainly say that I'm continuing. So it's very
14 common knowledge that I'm continuing to respond if I get a
15 telephone call, et cetera.

16 Q. Did you ever have any discussions during the time
17 that...during the discussions you had with Mr. Marshall
18 about his...there was evidence earlier today that at some
19 stage of the game he admitted committing this offence in
20 1975 at one point when he was in Dorchester. Did he ever
21 talk to you about that?

22 A. Not to my recollection. I read the report while I had the file
23 at the Carlton Centre, obviously I was interested in reading
24 the file. Again, by the time he came to the Carlton Centre
25 there were a number of legal possibilities being put around

1 and one was a Royal prerogative of mercy another was an
2 appeal. We weren't sure what was going on. So, we felt our
3 most prudent course of action since we had heard from the
4 Attorney General's Department and since so many levels
5 seemed to be involved that we had better take the prudent
6 route and not try and influence one way or the other. So
7 that sort of precluded a lot of probing. Again, Mr. Marshall's
8 lawyer was there quite often and we felt it was better to
9 leave it to the people that were going to sort the thing out
10 and not get in the middle of it.

11 Q. And would that comment then also apply to whether or not
12 you would have had any discussions with him about the
13 attempted robbery and the rolling and that business in the
14 Park?

15 A. Again, where does it start and where does it stop. We were
16 more interested in his behaviour and his re-establishment
17 in the community than going over things that we felt were
18 going to be dealt with later on by the courts.

19 Q. Did you ever speak to him, to Junior Marshall, about the
20 adequacy of the compensation about the dollars and cents of
21 it?

22 A. No. By that time...by the time compensation came through
23 that wasn't something that was a point of discussion.

24 Q. At that point in time what were the points of discussion
25 with Junior Marshall, this would have been in '84?

MR. STEWART, EXAM. BY MR. SPICER

1 A. A number of the points of discussion would be around when
2 is this going to end, where is it going to go, things like what
3 kind of job can I do? We talked about, you know, drinking
4 or not drinking beer, you know, most of them were around
5 situations. If he, for example, didn't have a job and was
6 very frustrated with that it, it was around, you know,
7 options for jobs and things like that. I know he tried
8 involvement with a youth group, I think, at Shubenacadie
9 and we talked about that. Some of them were very hopeful.
10 Sometimes he was up, sometimes he was down, other times
11 he'd just call me to say "Hello".

12 Q. Other than the matters that I've asked you about are there
13 any other significant aspects of your involvement with
14 Junior Marshall over that period of time that you want to
15 comment on?

16 A. None that I can think of at this point.

MR. SPICER

18 Thanks very much.

MR. CHAIRMAN

20 Mr. Stewart, do you hear from Donald Marshall, Junior,
21 now?

MR. STEWART

23 The last time I heard from him was about four or five
24 months ago. He gave me a call and said, "I haven't seen you for
25 awhile, can we get together for an afternoon? " So we got

MR. STEWART, EXAM. BY MR. SPICER

1 together and chatted for awhile.

2 MR. CHAIRMAN

3 Does he ever drop by the centre, Carlton?

4 MR. STEWART

5 Well, I'm no longer at the Carlton Centre.

6 MR. CHAIRMAN

7 I see.

8 MR. STEWART

9 He called me at my office.

10 MR. CHAIRMAN

11 I had forgotten that. So, the...the other...during the period
12 that he was with you at the Carlton Centre and you were involved
13 with him in an official capacity, for want of a better word, the
14 issue of guilt or innocence or facts surrounding the occurrences in
15 1971 were not part of your discussions.

16 MR. STEWART

17 That wasn't, I didn't consider that part of my job at that
18 time.

19 MR. CHAIRMAN

20 All right. Ms. Derrick.

21 COMMISSIONER EVANS

22 I understand that you considered or you did discuss with
23 him the possibility of him entering into some treatment house,
24 house for treatment, I take it that was for alcoholism, was it?

25

MR. STEWART, EXAM. BY MR. SPICER

1 MR. STEWART

2 That...yes, that was after we had had our, after he was out of
3 my jurisdiction.

4 COMMISSIONER EVANS

5 Right.

6 MR. STEWART

7 We had a discussion at one point and...because the publicity,
8 the ongoing legal processes, et cetera, he asked me what I thought
9 about it and my suggestion was he go some place where he could
10 be, you know, one, out of the public eye; two, get some addiction
11 assistance; and three, primarily put the whole thing in some sort
12 of perspective because at some point it's got to be let go.

13 COMMISSIONER EVANS

14 I take it nothing came of that conversation or discussion.

15 MR. STEWART

16 Very positive at the time, didn't carry over past twenty-four
17 hours, which is not unusual with anyone in that situation.

18 COMMISSIONER EVANS

19 Right, thank you.

20 MS. DERRICK

21 Thank you, My Lord.

22 EXAMINATION BY MS. DERRICK

23 Q. Mr. Stewart, my name is Anne Derrick, and I represent
24 Donald Marshall, Jr.. Just so that I understand something
25 you said earlier in your evidence, I believe you said that

1 you have never...when you were at the Carlton Centre
2 you've never refused anyone being released to the Carlton
3 Centre because they were making a claim of innocence, is
4 that correct?

5 A. I never refused anyone.

6 Q. Never refused anyone on that basis.

7 A. Well, I had never had anybody claiming innocence. I've had
8 people claiming that they couldn't remember.

9 Q. I see.

10 A. But certainly if there is any doubt what I was saying is we
11 would not...we not take the person if there was any doubt,
12 we'd want to find out why they couldn't remember, why
13 they were claiming innocence.

14 Q. So as you're describing it then, at least in your experience, a
15 claim that...or some doubt cast on the person's guilt might
16 stand as an obstacle or would stand as an obstacle to the
17 person being released to the Carlton Centre.

18 A. Repeat that, please.

19 Q. You never actually had someone say, "I'm innocent, I didn't
20 do this."

21 A. Yes, I've had one other person do that and we refused
22 acceptance and as it turned out the person eventually did
23 admit and there was evidence that came up that he had
24 done it. But that was on a fairly minor offence. But this was
25 the only clear statement of "I am innocent," and being

1 maintained that I had run across. I've certainly run across
2 people referring to the accident or saying, "I can't recall. I
3 remember before and after but not during," but this is the
4 first time I had run into this.

5 Q. So anything short of accepting responsibility for the offence
6 caused you concern.

7 A. Absolutely.

8 Q. Would that be fair?

9 A. Yeah.

10 Q. And here it wasn't a problem because there was some
11 official expression of doubt as to Mr. Marshall's guilt, is that
12 correct, coming from Mr. Gale?

13 A. Yeah, yeah.

14 Q. So it didn't act as an obstacle to your accepting Mr. Marshall
15 because you had had this discussion with Mr. Gale.

16 A. That had resolved...that had resolved a concern, the same as
17 a forensic assessment may resolve a concern with an
18 individual that couldn't remember a crime. The same
19 principle is at work, again concern about protection of
20 society was at work initially on the selection. That was...that
21 to me was resolved sufficiently with Mr. Gale's statements.

22 Q. When you talked to Mr. Gale did he read portions of the
23 RCMP or police report to you?

24 A. My impression is that he wasn't reading them specifically,
25 he was referring to sections.

- 1 Q. So he gave you details as to the new evidence that had come
2 forward with respect to the witnesses...
- 3 A. That's...
- 4 Q. ...that had lied and...
- 5 A. That's what satisfied me, more the physical evidence, et
6 cetera, and the sequence of the investigation.
- 7 Q. So you came away from that discussion with some
8 understanding as to the basis for this case being reopened.
- 9 A. Yes.
- 10 Q. I'd like to ask you some general questions about penal
11 institutions. I think you've said that you have worked with
12 Correctional Services for twelve years, is that...
- 13 A. Twelve or fourteen years.
- 14 Q. And you've had very considerable experience with inmates
15 coming out of penal institutions.
- 16 A. Yes, I have.
- 17 Q. And have you also had experience actually in the
18 institutions themselves?
- 19 A. I've worked in...primarily on a special task forces in
20 Westmoreland, which is a minimum security farm camp on
21 the surrounding grounds of Dorchester. I was there for four
22 months to assist the superintendent because they were
23 having some difficulties with the inmate population. I did
24 several task forces in Springhill and in 1980 I was taken to
25 Dorchester for five months to plan and coordinate the

1 opening of Dorchester after the security lockdown that
2 lasted between four and six months. So, that's my
3 experience within the institutions.

4 Q. Can you give us some idea of what prison life is like
5 generally? What are some of the stresses that an inmate in
6 prison experiences. For instance, is it a violent
7 environment?

8 A. That would, again, depend on the institution you were
9 talking about.

10 Q. If we're talking about Dorchester, for example.

11 A. If you're talking about Dorchester I think the overriding
12 feeling in Dorchester is boredom. I think that's it. You've
13 got an area there approximately the ground size of the
14 Public Gardens. It covers a little over seventeen acres and
15 you have up to, at times, four hundred people in there,
16 including staff. So it gets a little bit crowded. There is not
17 an awful lot to do. There aren't enough positive work
18 locations for everyone. It's rather like being on a ship. It's
19 sort of a grind that's every so often interdispersed with
20 visits, sports activities, work activities, et cetera. But I think
21 the overriding thing is boredom. In terms of violence, not
22 the popular notion of violence. From time to time you might
23 have disturbances that are going on, but they're usually
24 very specifically related to something or are quite usually
25 quelled quickly.

MR. STEWART, EXAM. BY MS. DERRICK

1 Q Are there examples of individual inmate violence, one
2 inmate against another?

MR. PRINGLE

4 Well, My Lord, I rise again I gather that there's going to be
5 an argument by my friend that this relates to her client, and
6 certainly it does.

MS. DERRICK

8 Yes.

MR. PRINGLE

10 He spent the time in there. But perhaps the best person to
11 give the evidence would be her client on the specific examples of
12 what he may to talk about and not be...not the general from this
13 witness.

MR. CHAIRMAN

15 That is an appropriate objection, and this is one of the
16 reasons why I asked this witness as to what occurred with respect
17 to some of these issues when Mr. Marshall was in his custody, so
18 that we would not have cross-examination on areas that he is not
19 in a position to testify on and also into areas that are coming...that
20 fall outside the mandate of this Commission, and that does.

MS. DERRICK

22 My Lord, if I can just respond to that. I'm not suggesting for
23 a minute that this Commission should, because of the
24 jurisdictional issue, be making recommendations to Corrections
25 Canada concerning its institutions. What I am interested in

MR. STEWART, EXAM. BY MS. DERRICK

1 bringing out through this witness is the kind of experiences that
2 an inmate would have in an institution such that those can then
3 be contrasted with the kind of experience an inmate then has
4 when he is on the outside. And I think that understanding what
5 the inmate experiences inside is very significant in terms of
6 understanding how that inmate then responds to being outside.

MR. CHAIRMAN

8 Well, he's told us that...we have that and I didn't interrupt
9 him when he was giving us his general views as to what one could
10 expect to find in a federal penal institution such as Dorchester,
11 where Donald Marshall was incarcerated for a period of time. And
12 he's given us that. But now when you move into the area of
13 policy, I must ask you to cease and desist. I have heard from Mr.
14 Stewart the kind of evidence that I consider to be relevant as it
15 relates to your client and his period of incarceration at Dorchester.
16 The boredom, the lack of activity, the...some instances of violence.
17 And that covers that area.

MS. DERRICK

19 Well with the greatest respect, My Lord, I wasn't intending
20 to explore policy. I'm simply intending to explore the
21 environment and I was intending to ask him about issues of
22 violence, issues of high degrees of tension as a result of...

MR. CHAIRMAN

24 Well, he's covered the first three. If you want to put a
25 question about tension within a federal institution of the kind that

MR. STEWART, EXAM. BY MS. DERRICK

1 Donald Marshall was incarcerated in I'll certainly allow that.

MS. DERRICK

2
3 Thank you, My Lord. I also wish to ask him about the effect
4 of being separated from family and friends and the denial of
5 affectional bonds.

MR. CHAIRMAN

6
7 Well, that's a very general question that could apply to any
8 institution, custodial institution, I have no problem with that.

MS. DERRICK

9
10 Thank you, My Lord.

11 Q You've described the boredom, Mr. Stewart, and you've said
12 that's a predominant feature of, I think you said Dorchester,
13 is that true as well of Springhill where Mr. Marshall was also
14 incarcerated?

15 A. I, again, think it's general to institutions both penal and
16 otherwise.

17 Q And otherwise. In terms of the atmosphere, is the
18 atmosphere in Springhill and Dorchester, a fearful one? Are
19 there higher levels of tensions as a result of crowding or
20 other factors?

21 A. There is always a level of tension in institutions and if you
22 were at a higher security level institution you get
23 correspondingly, usually higher tensions, partially because
24 of the environment, partially because of the population that
25 is there. For example, if you have a very high proportion of

MR. STEWART, EXAM. BY MS. DERRICK

1 violent offenders you're probably going to have a higher
2 degree of tension than if you have high number of property
3 offenders, for example.

4 Q So would there be different levels of tension between
5 Dorchester, for instance, and Springhill based on what you're
6 saying?

7 A Generally, yes.

8 Q Dorchester being the maximum security institution.

9 A At that time, yes, it would have had a higher level of tension
10 than Springhill.

MR. CHAIRMAN

11 How do you categorize Springhill? Is that medium?
12

MR. STEWART

13 Springhill institution is a medium-security institution. It's
14 built on an open-plan concept, so it covers a much larger acreage.
15 The living units are separated. You have double-security fencing
16 as opposed to thirty foot walls. So, it's...just visually it's different
17 and it's a medium security, high medium security penitentiary. So
18 you're getting, or you were getting at that time because they are
19 changing right now, you were getting less volatile offenders there.
20 You were getting more volatile offenders in Dorchester. I don't
21 know if that's answering the question.
22

MR. CHAIRMAN

23 Yes, I believe it used to be, I presume still is, a fairly
24 extensive rehabilitation training and courses available at
25

MR. STEWART, EXAM. BY MS. DERRICK

1 Springhill that you would not necessarily find in a maximum
2 security institution.

MR. STEWART

4 Again, you ...the lower your security, generally the lower
5 security your institution the more leeway you have for innovation
6 in courses, et cetera, and often you have an awful lot more
7 freedom of movement than you would, say, in a maximum
8 security institution. So that, you know, by its very definition
9 provides more resourcing. Springhill has more space, they have
10 more shops, they have a fairly extensive, extensive program of
11 living units and counseling, et cetera. Living unit officers, for
12 example, who don't work in uniform. In Dorchester at that time
13 you had classification officers and correctional officers, CX's who
14 were more security. So there was more interaction in Springhill
15 on a face-to-face basis than you find in Dorchester. You, in
16 Springhill, ate in communal dining rooms. In Dorchester you ate in
17 your cell after picking up your tray, tier by tier. So there are
18 those difference. You could go on for quite a long time discussing
19 them.

2:52 p.m.

20 Q Mr. Stewart, it's a fact that there is very considerable
21 separation from family and friends with respect to either
22 institution, is that correct?

23 A. More than you find in a community, yes, definitely.

24 Q But there is visiting that's permitted?
25

1 A. There is visiting in all federal institutions. Dorchester had a
2 combination of closed and open visits. Closed visits being
3 where you made no physical contacts and closed[sic] visits
4 being in a room approximately this size under supervision
5 with tables. Springhill had primarily open visits. At the time
6 we're discussing, there were not, the family visiting facilities
7 that we have now at all the institutions, which allow weekend
8 visits for families.

9 Q. They didn't exist?

10 A. They didn't at that time, as I recall, no.

11 Q. And closed visits for someone like Mr. Marshall at Dorchester,
12 would he have been entitled to have open visits?

13 A. I'm sure he would have. Closed visits are generally only used
14 if there's a real concern that, say, contraband is going to be
15 passed or if there is some other reason. But that, they are
16 used very sparingly in the federal system.

17 Q. And used as a security measure then.

18 A. For the security in the institution, yes.

19 Q. In your experience, have you made any observations that
20 would suggest that incarceration affects a native inmate in a
21 particular way that's different from a white inmate?

22 A. No, I can't honestly say I have. I think incarceration,
23 especially over a long period of time, affects everyone. You're
24 subject to the same things. You're subject to removal from
25 family, removal from the community, and some of the issues

1 I've mentioned to Mr. Spicer in terms of just loss of skills and
2 trends. I think that affects everybody. It doesn't matter
3 what culture or ethnic group they're coming from.

4 Q. And you made no observations about differences in the
5 native culture that might be particularly affected by being in
6 an institution for a long period of time.

7 A. Not in particular. I imagine if we discussed it for a period of
8 time. Not specifically, no.

9 Q. Are you able to say whether there are any differences
10 between how native inmates cope with institutional life as
11 opposed to white inmates, from your experience and
12 observations?

13 A. Mmm. Native inmates in the institutions tend to form groups
14 that are identifiable, but I don't think that that's totally
15 because they're native inmates. I think people from
16 Newfoundland form the same groups.

17 Q. The membership being cultural or regional?

18 A. Cultural, regional, people from the same families will form
19 groups. I think that's the most identifiable thing. I think, you
20 know, over the last number of years, the Correctional Service
21 has been trying very strongly to support some of the values
22 that have been stated by representatives of various ethnic
23 and religious groups and have made changes over the past
24 few years from everything from diet to access to ceremonies,
25 et cetera. But I think that's in response to requests and I

1 don't think it's been because of anything observable
2 necessarily in the institution. I don't know.

3 Q Have these developments happened since Mr. Marshall left
4 these institutions?

5 A. Some of them have. Some of them were ongoing beforehand.

6 Q So, in your observations, there's been a developing cultural
7 sensitivity on the part of the Correctional Services?

8 A. Oh, yes, yeah.

9 Q Can you make any comment as to what additional
10 institutional stresses there might be on an inmate who
11 professed his innocence? In your observations, what is the
12 institutional reaction to an inmate who maintains his
13 innocence?

14 A. Well, you accept that statement. You don't necessarily believe
15 it because most, I won't say all, but a great number of the
16 inmates in the federal institutions either didn't do it, were set
17 up, doing it for a friend, it was misinterpreted, they had a bad
18 lawyer. You know, all of that stuff comes rolling in. So when
19 you hear this stuff, you have to sort of put it through your
20 screen and say how much do I buy. And once that's all been
21 said, fine, were do we start. That's what we have to do. We
22 have to get back to a starting spot and say, "Okay, if we can
23 agree to disagree. If you're doing your time for your friend,
24 you're here, let's start dealing with it. Let's see how you can
25 avoid doing it for your friend next time." So the ordinary

1 reaction is to accept it and say, "Okay, if that's what you need,
2 but let's get down to business."

3 Q But to treat it as a further rationalization in a range of
4 possible rationalizations.

5 A. Generally.

6 Q Is it fair to say that there is very limited ability of an inmate
7 to have a case reopened if they are in prison. They have very
8 limited resources, limited ability to have something
9 investigated?

10 A. I'm in an area where I'm not sure. I mean there are
11 correctional investigators. There are access to lawyers. There
12 is access to legal aid. Certainly I've seen classification officers
13 who've taken it upon themselves to investigate small things.
14 We, as a matter of course, try and clear up outstanding
15 charges simply so the person has got a clear shot on the
16 outside. I believe an inmate has a number of resources, more
17 now maybe than in the past, but that continues to evolve.

18 Q Can you make any comment as to what the institutional
19 reaction is to an inmate who seeks to have his case reopened?

20 A. Generally okay, and if there is assistance... I've seen, again,
21 classification officers and other inmates assist an individual
22 who can't write very well, type out applications. You're
23 dealing with a dual function of helper/jailer, if you care to use
24 those two terms.

25 Q Is it your experience that it's to a prisoner's benefit to have

1 temporary leaves of absence or other forms of release in the
2 duration, in the course of a long sentence?

3 A. Oh, yeah, definitely.

4 Q. And for all intents and purposes, the Carlton Centre was and
5 is, it's an institutional facility.

6 A. Yes.

7 Q. Now I want to ask you about the issue of difficulties with
8 respect to adjustment on the outside. Particularly, I want to
9 get around to talking about Mr. Marshall. I believe you said
10 in your evidence that there are different rules on the street
11 than exist for the prisoner in the institution. Now is it fair to
12 say that the rules in the institution are fixed? The prisoner
13 knows what they are? That there's a greater degree of
14 certainty for the prisoner than with respect to existing on the
15 street?

16 A. I would say that, yeah. Rules of interaction, heirarchies,
17 there's certain individuals that have higher status than
18 others.

19 Q. So we're talking both in terms of institutional rules and social
20 rules.

21 A. Oh, of course.

22 Q. If I can say that.

23 A. You have a formal and an informal system in any institution
24 and they are always at play in federal institutions. The
25 informal being primarily the inmates.

1 Q. And in both instances, they are both more predictable and
2 less variable for the inmate...

3 A. Yeah.

4 Q. Than on the outside.

5 A. Yeah.

6 Q. Now with respect to Mr. Marshall, when Mr. Marshall came to
7 the Carlton Centre, did you have concerns that it was essential
8 that he be accepted by the other residents in the centre? Was
9 that part of your motivation to treat him like any other
10 person and not allow him to become, you know, too much of a
11 celebrity as much as you could prevent that?

12 A. Yes, there were two parts to that. Well, actually, three. We
13 didn't want him to feel that he was a celebrity. We also didn't
14 want the residents to feel that he was getting special time or
15 attention that they wouldn't get. Because, as I say, we still
16 had 15 other men there that all were trying to deal as clearly
17 with their life as he was with his. So that was extremely
18 important. Also, as the superintendent, I wanted to insure
19 that the staff, all of the staff were following my direction in
20 terms of administering the sentence. Because, again, when we
21 had indication that protection of society was at least assured
22 with the information we were getting from the officials, then
23 administration of the sentence had to continue. We had to
24 deal with Junior Marshall as a resident of the Carlton Centre
25 until it was resolved officially. And I wanted to make very

1 sure that we followed all of the procedures just so if it ever
2 happened again, we wouldn't get ourselves in a bind so the
3 other residents couldn't call "foul" or, you know, all of those...
4 Again, we were making it up as we went along. We were
5 trying to stick with our three guiding principles.

6 Q. So you wanted to insure that management of his case was
7 consistent both with respect to him and also with respect to
8 the other inmates.

9 A. Absolutely. The other thing is, you know, we had the
10 information. You know, we didn't know how anything was
11 going to go. If it all fell apart a year down the line, you want
12 to make sure that you haven't painted yourself into a terrible
13 corner as well.

14 Q. I think you said that when Mr. Marshall was released, he had
15 the expectation that things would now wind down and be
16 resolved, I take it, in fairly short order.

17 A. Mmm.

18 Q. Is that correct? Did he have any other expectations,
19 expectations in terms of how the community would react to
20 him? Expectations that he would be treated as an innocent
21 man now that he was out?

22 A. Sure, yeah. Those were the overriding feelings I believe he
23 had.

24 Q. Did he have expectations with respect to himself?

25 A. I think he expected to be declared, again, innocent. Have

1 people say, "Sorry this happened to you. What can we do to
2 give you a hand?" And then carry on and set up his life as he
3 perceived it.

4 Q. So he expected that now that it was beginning to be
5 acknowledged that a mistake had been made, that people
6 would rally around.

7 A. Yes.

8 Q. And get him back on his feet.

9 A. And normalcy would set in and everything would end
10 happily, yeah.

11 Q. Did he feel that life had left him behind? Did he feel out of
12 step with his friends, with the rest of the community?

13 A. Certainly he felt he had missed a great deal in terms of his
14 immediate family growing up and things changing there.
15 Certainly a number of the events that had gone on in the time
16 he was in the institutions. Again, some of his friends stayed
17 fairly loyal to him. Other friends sort of disappeared. Yeah,
18 he felt fairly, I think fairly isolated from all of that.

19 Q. And did this affect his feelings of self worth?

20 A. I think so, yeah. I think they contributed to his feelings of,
21 lack of feelings of self worth.

22 Q. Did you come to know Mr. Marshall as, and I don't want to
23 suggest words to you, but as an unassuming and shy person?
24 Would that be a fair description of how you would have found
25 him to be?

1 A. Yeah, he certainly was with me. You know, very... I, quite
2 frankly, didn't know what to expect when I went out to get
3 him. And I was, to echo Diahann McConkey's statement, I
4 found him to be extremely soft spoken, interested in a
5 number of things. Like he was interested in going smelt
6 fishing and a bunch of things like that. That's not really what
7 I expected. I don't know really what I expected because I
8 hadn't seen him before. But, yeah, he was a fairly soft
9 spoken, self assuming person at that point... Self effacing
10 person at that point.

11 Q. Did you find him to be not very communicative about his
12 feelings, someone who wouldn't be very forthcoming about
13 how he was feeling?

14 A. He wasn't very forthcoming with me. I think he was much
15 more forthcoming with Charlie Gould. But, again, that was
16 very understandable.

17 Q. Understandable because Mr. Gould was an Indian?

18 A. Also he wasn't part of the system and was sent there to
19 support him. There's an inherent conflict with starting to
20 trust a person who is also responsible for your incarceration
21 at that time so , you know. And that happens with everyone,
22 not just, not with just Junior Marshall. But, no, Charlie Gould
23 was by far and away the person he trusted the most at that
24 time.

25 Q. Did you ascribe any of the characteristics you've observed

1 about Mr. Marshall to the fact that he was Indian?

2 A. At a couple of points, yeah. Primarily because he told me
3 that. He said on a number of times he wanted to just go for a
4 walk. Instead of, say, going down to Barrington Street, he'd
5 like to go out smelt fishing or something. And I can't
6 remember the, I can't remember the fish that runs. It's a
7 small...

8 Q. Gasperaux?

9 A. Gasperaux. Every year the gasperaux would run and that was
10 something he looked forward to because that had great
11 association with family. I guess I got more a sense of him
12 being a very tight family person, as opposed to an Indian
13 person, if you catch my drift.

14 Q. Yes.

15 A. But certain things he said, you know, "This is traditional. This
16 is what we do." So if he told me that, I bought it. If that's
17 what you're saying. And I had no reason to disagree.

18 Q. So you found him to be very connected to his traditions and
19 his family.

20 A. Very much so. As a matter of fact, that's one of the reasons
21 Charlie Gould was very important for him because he
22 preferred when he was really upset to speak in Micmac, and
23 to be understood in Micmac because there were certain
24 points.... At one point, he said to me, and I'll try and quote
25 him, he said, "I wish you could speak Indian because I've got

1 some stuff to tell you." Okay? Now that was in the context of
2 him feeling up and down, okay? So his communication was
3 with Charlie Gould and that's, I think, where the real
4 discussions went on and Charlie continued to bring back in
5 some of the things that Donald's father had told him. Again,
6 understanding that Donald's father's position in the Micmac
7 nation. So, does that make sense?

8 Q. It does to me.

9 A. It all worked together, okay?

10 Q. So what you're saying as well then is Mr. Gould was a central
11 factor in Mr. Marshall's adjustment to coming out of prison?

12 A. In my view, he represented Mr. Marshall's culture and that's
13 why he was sent there.

14 Q. Do you feel that Mr. Marshall's shy nature made his
15 adjustment that much more difficult? For instance, did it
16 make the notoriety even harder for him to cope with?

17 A. Yeah, he didn't like the press. He liked to stay away from
18 them as much as he could and they made him irritated. He
19 wanted to stay away from them.

20 Q. Was he the type of person that it was harder for him to seek
21 help or to admit that he was having problems coping?

22 A. I'm not sure if it was any more than most lifers I've seen. I
23 think most lifers have that difficulty because there is a
24 difficulty in opening up after a long period of time. So I'm not
25 sure if he had any more difficulty than anyone else.

1 Q. So that's a characteristic of lifers, not necessarily especially of
2 Mr. Marshall.

3 A. That's my opinion, yeah.

4 Q. Can you comment on whether the types of skills that a lifer
5 develops to cope with institutional life are a help or a
6 hindrance when that person then comes out of the prison, or
7 are they, as an alternative, a neutral factor?

8 A. No, they're not really neutral. This is purely from my
9 observation and my experience.

10 Q. Yeah, that's what I'm asking.

11 A. A lifer, when he goes into an institution, has to establish
12 himself, simply because that's going to be his place for a very
13 long time. A lifer has to be maintained in a higher security
14 level over the first, say, three or four years because you
15 definitely don't want him while he's trying to cope with the
16 concept of a life sentence to bolt and run, because that's,
17 again, a danger to society. So a lifer has to go through, in the
18 first three or four years, sort of an almost an acceptance
19 transcendence into doing a life sentence and during that time,
20 the other inmates and the other lifers either defer or support
21 him in that. Because a lifer, that's his house. Everybody else
22 is coming in or out. He's staying there. So you're in his house
23 sometimes, if you're in the inmate population. So there's a
24 deference to lifers almost in a lot of cases by the other
25 inmates int the population, which makes it easier to do that

1 time. Now when the lifer comes out, that status or assumed
2 status doesn't carry out on the street, okay? He's gone from
3 some sort of the high part of his informal hierarchy in there,
4 the informal system. He comes out and suddenly here he is
5 at, say, 28 or 40 or whatever age it is, and he's not really
6 qualified. He's not really a high point on anybody's status
7 group out here. He's looking at people that are his
8 chronological age and he still hasn't got the same things they
9 have. Very happy to be out for the first little while but then
10 the reality starts setting in. That causes a lot of confusion,
11 okay? And you see an awful lot of difficulty for a lifer during
12 that period from, say, four months to a year. Usually after a
13 year, they're settled in and have at least accepted parts of
14 that. But what we've noticed is that, in the second year, there
15 seems to be another little bump that comes along, right?
16 Because suddenly they've lost their position. They've been
17 out of the institution for, say, a couple of years. It's very
18 difficult to walk back into that institution when everything is
19 changed, okay? Administration, staff, the whole works, and
20 re-establish yourself. So then... I've had lifers tell me that's
21 like a little fear reaction. I don't really belong here and I
22 don't really belong there now, okay? I don't know if that
23 addresses it.

24
25

MR. STEWART, EXAM. BY MS. DERRICK

3:14 p.m.

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2
3
4
Q. Would it be fair to say that, in fact, a lifer leaving prison acquires something of a negative status in the general community for having done time for an offence?

5
6
7
8
9
A. To a degree, but with some people, he assumes a slightly higher status because they think you've got to put more time into a lifer. Some of the ex-offenders tend to give him a little more status. But then it's very hard to sell a lifer, say, to a businessman or to anyone else, you know.

10
11
12
Q. So does this mean that lifers and, in fact, other people who have done time in prison become an isolated group in society and look to each other for support and affirmation?

13
14
15
16
17
18
A. I'd say on the inside, that's probably accurate. I think, on the outside, they become slightly more isolated than most of your population because, again, a lifer always knows he's got more to lose than a person who has, say, done time for break and enter. They tend to be a little more isolated, I believe, on the street. That's my experience.

19
20
21
22
23
Q. I believe Mr. Spicer touched on this. Are you aware, Mr. Stewart, of Judge Cacchione's evidence with respect to his dealings with Mr. Marsahll and that around the crucial times like court appearances, Mr. Marshall became increasingly anxious and tense and frustrated? I wanted to ask you...

24
25
A. I didn't hear Judge Cacchione's evidence. I know that at the times as things came closer, if there was an appearance or

1 anything of significance, yeah, the agitation grew. That's
2 usually when I got a call.

3 Q. So that would be consistent with your experience with Mr.
4 Marshall as well?

5 A. Yes.

6 Q. In fact, is it fair to say that during the period you had
7 involvement with Mr. Marshall through the Carlton Centre,
8 and I'm just going to read you something out of Volume 35.
9 This, I think, is a telex. It's on page 189. It just says, and it's
10 dated, it's dated in April of 1982.

11
12 This is to inform you that we are granting a
13 weekend pass to the subject, Mr. Marshall, to run
14 from April 3rd, 1982 to April 5th, 1982 with the
15 activities of the past week, Mr. Marshall has
16 reached a point where he is exhausted and
17 somewhat confused and it is felt that he needed
18 some time away from the centre.

19 So is it accurate as well that this experience of being released
20 was an exhausting one for Mr. Marshall?

21 A. Yes, and if I can just refer to that telex. One of the things that
22 made it very exhausting for him, as well as the other
23 residents at the Centre, was at that time, Steve Aronson was
24 trying to keep him as far away from everyone-- press, old
25 friends, et cetera, as he could and it was like a constant game
of hounds and hares. So that also was something that just
made it almost intolerable at times.

1 Q. Did you ever discuss with Mr. Marshall the Court of Appeal
2 decision that acquitted him?

3 A. I didn't discuss it with him. I certainly watched him during it
4 and he's made comments about it to me.

5 Q. What was his reaction to the decision?

6 A. He felt that he was being put on trial and was very angry
7 with that and very frustrated with that.

8 Q. And that was his reaction once the decision came out in May
9 of 1983, is that what you're referring to?

10 A. I'm referring to the... Once the decision was made, even
11 during the process, he had referred to that as... He felt that
12 he was being put back on trial.

13 Q. I think the effect of your evidence is that the drawn out
14 proceedings-- the reference, the Ebsary matters, the
15 compensation, were all very stressful to Mr. Marshall. Is that
16 correct?

17 A. Yes.

18 Q. Is it accurate as well to say that all of this preoccupied him a
19 great deal?

20 A. I think it would be more than fair to say, yes.

21 Q. And this was in addition to the already stressful experience
22 that he was having as a lifer, effectively, in adjusting to
23 coming out of the prison.

24 A. Yes.

25 Q. You've referred to, I think you remarked on "relief drinking

1 patterns" and I just want to ask you what you meant by that.
2 Do you mean drinking in order to provide himself with relief,
3 effectively?

4 A. Yeah, when it's, when it got too much. You know, there's one
5 way to get away from it. You know, have a good stiff belt or a
6 number of them, either alone or with friends. And if you're
7 feeling at all, and I don't think it's just operational with him, I
8 think for a lot of people, the one place you can get away from
9 people while being in a crowd and socializing is going to a
10 tavern. Because all you need is the price of a draft and
11 you've got all sorts of friends. And I think that was the
12 method of coping, one of his methods of coping. But that's
13 something that I think a lot of our people do.

14 Q. In Volume 35 at page 216, there's a progress summary. I just
15 want to read you a short portion of it. Page 216, under
16 "Personal Development." This is July 6th, 1982. You say:
17 "Subject enjoys a social drink and occasionally embibes, never
18 to excess." So is it accurate to say that these drinking
19 patterns developed in response to the increasing stress of this
20 case, effectively?

21 A. Certainly as it....Certainly as everything dragged on and as
22 Charlie Gould left and where it became increasingly
23 complicated for everyone involved in it. Certainly that's
24 when the drinking really started to pick up. You know,
25 before that, it was, as I say, the tutelage of Charlie Gould and

1 the newness of being out and all. But as it progressed, yes,
2 and you could see it almost going lock step.

3 Q. In your opinion, was Mr. Marshall's adjustment to society
4 made even harder by the fact that he had been wrongfully
5 incarcerated for a long period of time?

6 A. Let me answer it this way, if I could. If an individual has
7 committed an offence, part of the getting out of the institution
8 is dealing with the offence and starting to set up plans to put
9 that offence behind. Right up until several days before he
10 came to the Carlton Centre, his focus, unlike the normal lifer,
11 if we can say that, was on getting out the gate to prove that
12 he was not guilty. So I think the normal institutional process,
13 that sort of natural evolution was missing. So I think if one
14 accepts that, yes. I would answer yes to that question.

15 Q. Was it your experience that Mr. Marshall, as a result of the
16 experience, had his, any faith he may have had in society and
17 in institutions fundamentally undermined? Did he ever
18 express that to you or discuss that with you?

19 A. He's made some cynical remarks that would indicate that.

20 Q. And would you agree that that might not also contribute to it
21 being harder to adjust?

22 A. Oh, yeah.

23 Q. Is it fair to say as well that Mr. Marshall never experienced
24 the degree of post release support that he would have had
25 had he been just a regular lifer?

1 A. No, he didn't.

2 Q. And so, therefore, this made it more difficult for you to help
3 him.

4 A. Yeah, it was... Here's the good news, here's the bad news,
5 okay? The good news is that your appeal came through. The
6 bad news is we cannot access resources for you. You know,
7 and I'm not saying that very specifically, but, you know, once
8 an individual is away, you lose access to the resources, the
9 federal resources, because we have no authority to expend
10 once a person is out of our system and their warrant is
11 expired.

12 Q. So he was on his own, effectively.

13 A. In terms of our ability to put him into specific programs, yes.

14 Q. Other than what personal initiatives you may have taken to
15 assist him beyond that.

16 A. Yes.

17 Q. Could you tell me who paid for Mr. Gould's services, if they
18 were paid for?

19 A. I couldn't say that with any assuredness.

20 Q. Was it the Correctional Services?

21 A. No. No, it was not, no. The only thing that Correctional
22 Services did was insure that we incorporated Mr. Gould in the
23 case management team and gave him the same access and
24 privileges that any other management, case management
25 team member would have.

MR. STEWART, EXAM. BY MS. DERRICK

1 Q. And that was to enable him to assist Mr. Marshall more
2 effectively?

3 A. Yes.

MS. DERRICK

4
5 Thank you, Mr. Stewart. Thank you for your help with
6 respect to Mr. Marshall. Those are my questions.

MR. PUGSLEY

7
8 I have no questions, My Lord. Thank you.

MR. MURRAY

9
10 I have no questions, My Lord.

MR. CHAIRMAN

11
12 Mr. Pink?

MR. PINK

13
14 We have no questions.

MR. DROLET

15
16 No questions.

MR. CHAIRMAN

17
18 Mr. Wildsmith?

MR. WILDSMITH

19
20 Just a couple, My Lord.

MR. CHAIRMAN

21
22 Ms. Derrick has pretty well covered your area.

MR. WILDSMITH

23
24 Certainly, at my invitation.
25

MR. STEWART, EXAM. BY MS. DERRICKMR. CHAIRMAN

1
2 That's the kind of cooperation we've been trying to instill
3 into counsel.

EXAMINATION BY MR. WILDSMITH

4
5 Q. I take it from your testimony so far... Or I guess I should
6 identify myself. I'm Bruce Wildsmith for the Union of Nova
7 Scotia Indians. I take it from your evidence so far that in
8 your work with Mr. Marshall, you felt that it was important to
9 take into account the fact that he was Micmac Indian?

10 A. Yes.

11 Q. Can you help us out in the various ways in which you thought
12 it was important?

13 A. I don't know if I could very... hit things very specifically.
14 Given that I knew that he came from a very spiritual family,
15 simply by the position his father holds, and my knowledge
16 that he had a first language of Micmac and enjoyed a number
17 of the cultural activities... I don't know if I can be any more
18 specific than that. I'm having difficulty with the question, I
19 guess.

20 Q. I was giving you an open invitation to talk about whatever
21 you thought was appropriate, but I take it that whenever an
22 opportunity arose, such as the ball tournament at Restigouche,
23 or the gathering at Chappell Island, that you were supportive
24 of his efforts to attend.

25 A. Well, of course. I guess if you got right down to the bottom of

1 it, if you're attempting to reintegrate a person into their
2 community, you certainly ask their community for support as
3 often and as clearly as you can. And if your community
4 happens to be a Micmac community, then certainly you access
5 that as often and as deeply as you possibly can.

6 Q. I'm wondering if you or anyone else in the Correctional
7 Service made efforts to access the community or whether it
8 was more a matter of the opportunities coming to your
9 attention and you simply being supportive?

10 A. I'd like to say that we accessed them. I'd be more honest to
11 say that Mr. Gould showed up on our doorstep uninvited and
12 we certainly took advantage of that. The Restigouche ball
13 tournament came up. We took advantage of that. Yeah, we
14 used whatever came our way as opposed to going out and
15 hunting that up. That doesn't preclude us doing that on
16 occasion.

17 Q. And I would take it from your comments that you think that
18 it's generally helpful to involve the Indian community in the
19 process of reintegrating native offenders into society?

20 A. If it'll assist, yes.

21 Q. Is there any way in which that is done in an activist sense
22 today?

23 A. Certainly the institutions across Canada have contracts and
24 financially support the attendance of elders in the
25 institutions.

MR. STEWART, EXAM. BY MR. WILDSMITH

1 Q. Yes?

2 A. There are...

3 Q. "In the institutions," meaning at places like Dorchester and
4 Springhill?

5 A. Dorchester, Springhill. I believe they had sweet grass
6 ceremonies, sweat lodges, special diets. I believe, I was
7 chatting with a friend from out west and I believe they had
8 participation in Indian games out west. I think at this point if
9 the institutions or the correctional services community is
10 approached, we'll certainly entertain most requests for
11 participation or access.

12 Q. Fair enough. You mentioned alcohol. This is sometimes a
13 problem with offenders at the point of their release?

14 A. It's one of the major problems we've got with offenders right
15 across Canada. If you do a needs analysis survey, you'll find
16 that alcohol and drug use is right up there, the number one
17 problem.

18 Q. Despite the fact that they spent a number of years in an
19 institution?

20 A. Your addiction...

21 MR. PRINGLE

22 Well, My Lord, I think we're back into the policy, practices,
23 and procedures of the federal institution again.

24 MR. CHAIRMAN

25 Close, yes.

MR. STEWART, EXAM. BY MR. WILDSMITHMR. PRINGLE

1 I'm sure we'll recognize we recognize that there are
2 problems in the institutions, but I do't think this is the forum to
3 canvass them across the country.
4

MR. WILDSMITH

5
6 Q. Okay, well, let me move on from there then. Accepting that it
7 is a problem and you mentioned various treatment programs
8 that Mr. Marshall might have had access to, are you familiar
9 with the existence of something called the "Micmac Lodge at
10 Eskasoni"?

11 A. Yes, I am.

12 Q. And is that a treatment centre for native people who have
13 alcohol and drug problems?

14 A. Yes, it is.

15 Q. And would that have been one of the kinds of treatment
16 programs that you thought would be advisable?

17 A. It would have been one of the type of programs, yes.

18 Q. Is that a program that is run by Micmacs?

19 A. Yes, it is.

20 Q. How is it regarded?

21 3:31 p.m.

22 A. It's regarded very highly. I don't believe at the time Mr.
23 Marshall was coming out that it was fully operational.

24 Q. And finally let me move on to a different area. With respect
25 to his communication skills in English, I take it from your

MR. STEWART, EXAM. BY MR. WILDSMITH

1 evidence that they were not as good as they might be?

2 A. No, I didn't say that. I said that his first language is MicMac
3 and he felt more comfortable in expressing certain things in
4 MicMac. His skills in English are remarkably good. If when
5 he was talking with Mr. Gould there were certain things that
6 couldn't be translated, I had talked to Mr. Gould and Mr.
7 Marshall about that. There were certain things that...or it
8 would be colloquialisms or references that I don't think
9 could be adequately translated.

MR. WILDSMITH

11 Thank-you, no more questions.

MR. CHAIRMAN

13 Mr. Pringle.

MR. PRINGLE

15 No questions, thank-you, My Lord.

MR. CHAIRMAN

17 Thank-you very much, Mr. Stewart. A very helpful witness.
18 Is there another witness?

MR. SPICER

20 No, we have another witness, My Lord, but we need a shift
21 change up here so if perhaps we could have a break.

22 BREAK - 3:32 p.m. to 3:57 p.m.

MR. CHAIRMAN

24 Mr. Orsborn.

MR. ORSBORN

MR. STEWART, EXAM. BY MR. WILDSMITH

1 Thank-you, My Lord. The next witness will be Staff
2 Sergeant Thomas Barlow.

3 STAFF SERGEANT THOMAS BARLOW, duly called and sworn,
4 testified as follows:

EXAMINATION BY MR. ORSBORN

5
6 Q. Could we have your full name, please, Staff Sergeant?

7 A. Thomas Edwin Barlow.

8 Q. And you're currently a Staff Sergeant in the RCMP?

9 A. Yes.

10 Q. Where do you live?

11 A. I live in Sydney.

12 Q. And do I understand that you're presently a section NCO in
13 the Sydney subdivision of the RCMP?

14 A. Yes, I am.

15 Q. And that you have been in that position just a couple of
16 weeks?

17 A. Yes.

18 Q. And do I understand that previous to that you were the
19 plainclothes coordinator in the Sydney subdivision?

20 A. Yes, I was from 1982 until three weeks ago.

21 Q. 1982 until three weeks ago.

22 A. Yes.

23 Q. And do I understand that you took over that position from
24 Staff Sergeant Wheaton?

25 A. Yes.

1 Q. How long have you been with the RCMP?

2 A. Twenty-nine years.

3 Q. So, you've been then in Sydney from '82 until the present
4 time. Had you been stationed in the Sydney area previous
5 to 1982?

6 A. I was stationed in Sydney from early 1960 until mid-1963
7 and I went from there to Inverness for about a year.

8 Q. Uh-hum.

9 A. After that I was posted to the identification section in
10 Halifax for about a year and a half and then on Halifax
11 detachment for five years, New Glasgow for six years, Digby
12 for seven years, Yarmouth for one year, and since then in
13 Sydney.

14 Q. Been around.

15 A. Been around the Province a couple of times, yeah.

16 Q. What are the duties of a plainclothes coordinator?

17 A. Basically beside criminal investigation, I supervised three
18 sections, two federal enforcement sections, drug section,
19 customs and excise, migratory bird section and the general
20 investigation section.

21 Q. In your capacity as the plainclothes coordinator since
22 August of '82, was it August?

23 A. August, about August, yes.

24 Q. August. Yes. In that capacity did you have any
25 involvement in the investigation involving Roy Ebsary?

- 1 A. I played a minor part in that investigation. I accompanied
2 Corporal Carroll to Mr. Ebsary's residence, I think that was
3 in the fall of 1982.
- 4 Q. Yes.
- 5 A. As a result of a phone call from Mr. Ebsary and I was back
6 to the residence once, I think, or twice with Corporal Carroll.
- 7 Q. Were you involved?
- 8 A. That involved Mr. Ebsary giving Corporal Carroll a statement
9 regarding the Marshall case.
- 10 Q. Were you present when that statement was taken?
- 11 A. No, I wasn't.
- 12 Q. And did you not, in fact, testify at one of the Ebsary trials, I
13 think the last trial.
- 14 A. Yes.
- 15 Q. Concerning your presence at Mr. Ebsary's house?
- 16 A. Yes, I did, yeah.
- 17 Q. Any other involvement in the Ebsary matter apart from
18 that?
- 19 A. No, that was it really. I didn't have anything other than that
20 to do with it.
- 21 Q. Now, do I understand in your capacity as plainclothes
22 coordinator that you were asked in 1983 to review and
23 comment on the files that were in the possession of the
24 RCMP concerning the 1971 Marshall investigation?
- 25 A. Yes, I was.

1 Q. If I could direct your attention to Volume 20, which I
2 believe you have before you, Staff Barlow, at page 4, there is
3 a letter from Mr. Gale to the commanding officer of "H"
4 Division in Halifax, which I believe was forwarded by
5 Superintendent Christen to the Sydney subdivision. Do you
6 recall seeing that correspondence?

7 A. Yes, I do.

8 Q. And, in that correspondence the RCMP is requested to
9 review your files to see if there was any evidence of
10 improper police practises or procedures, to comment on
11 same and to suggest what might have been proper
12 procedure.

13 A. Yes.

14 Q. And, if you could turn to page 6 of that same volume, Staff
15 Barlow, a memo, I believe, from Superintendent Christen to
16 the officer-in-charge of the Sydney subdivision, who I
17 believe was Superintendent Scott at that...Inspector Scott at
18 the time.

19 A. Yes, it was, yes.

20 Q. And do you recall seeing this memo from Superintendent
21 Christen?

22 A. Yes, I do.

23 Q. And he indicates that while it may be difficult to define
24 improper procedure that he's at least looking for your
25 comments.

1 A. Yes.

2 Q. And, on page 5 going down the line a memo from Inspector
3 Scott to, I guess, yourself.

4 A. Yes, that would be my position at the time, yes.

5 Q. Asking that you conduct the review.

6 A. Yes.

7 Q. And did you, in fact, conduct such a review?

8 A. Yes, I did.

9 Q. What did you understand that you were being asked to do?

10 A. I understood that I was to review the material on hand, the
11 three volumes of files that we had, that had already been
12 generated on the case, and to...and to comment on...to
13 comment as indicated in the letter from Mr. Gale.

14 Q. Did you understand that it was for the purpose of advising
15 the Department of Attorney General so that they could plot
16 any future actions?

17 A. Yes, that's what I understood, yes.

18 Q. Yes.

19 A. Well, to advise our headquarters in Halifax and the...they
20 would advise the Attorney General's Department, yes.

21 Q. Yes. But the ultimate result would be coming over to the
22 Attorney General.

23 A. Yes, that's right.

24 Q. Yes. Did you understand that you were to limit your work
25 to the review of existing files and not do any investigation

1 or interviewing?

2 A. Yes, I was...understood that I was to limit it...limit it to the
3 file material only.

4 Q. Yes. And I understand from looking at the documentation
5 that we had that Staff Wheaton and Corporal Carroll were
6 also to do similar reviews.

7 A. That's right, yes.

8 Q. In the course of your review, did you have access to the
9 reports by Staff Wheaton and Corporal Carroll, their own
10 reviews?

11 A. I had access to Corporal Carroll's because he worked in my
12 office and any of the material that he wrote went through
13 me first. I had access to that, plus I had access to the file
14 that was already generated. At some point in time I had
15 access to Corporal...Staff Sergeant's Wheaton's material and I
16 don't remember when that was. It was some time during
17 my review I think, near as I can remember. I'm not sure.

18 Q. So, in doing your own review and report, were you then
19 utilizing both the material on file and the reviews done by
20 Corporal Carroll and Staff Wheaton?

21 A. Yes.

22 Q. Did you have discussions with Corporal Carroll and/or Staff
23 Wheaton concerning the matter?

24 A. I discussed the file with both. Corporal Carroll was present
25 in my office all the time. I discussed the case with him...I

1 had previously before I was asked to do the review, and I
2 recall talking to Staff Sergeant Wheaton once or twice,
3 maybe three times, on the phone during that time period.
4 I'm not sure when it was.

5 Q. Do you remember when you were doing your review if you
6 had in your mind whether or not you should be thinking of
7 the possibility of charges arising out of the conduct that you
8 were looking at?

9 A. I don't think it was written anywhere, but as I recall at the
10 time there was some verbal discussions about whether or
11 not there would be an inquiry. And I understood that I was
12 to review the material to advise the department with that in
13 mind, and not to do an investigation.

14 Q. So, you were not in the frame of mind, if you will, of looking
15 at possible criminal activity.

16 A. No, I was not.

17 Q. Okay. Did you find this a difficult job, sort of dropping in in
18 August after all this had happened and then having to
19 review the matter?

20 A. Yes, I did. I discussed that with Inspector Scott. My
21 familiarity with the file up until that point in time was...I
22 had done a cursory review of the report file. I had other
23 duties that I didn't have time to spend a lot of time with the
24 file at all and I questioned Inspector Scott on whether a
25 review by Staff Wheaton and Corporal Carroll would not be

1 sufficient and he asked me to do a review anyway, I
2 suppose for a fresh approach or something to it, and I did it
3 with that in mind.

4 Q. Did you feel that you had sufficient information on which to
5 do a review of the police practises and proceedings?

6 A. Well, I had the complete file that was generated in that
7 office and that contained just about all the material there
8 was.

9 Q. Do you recall if there was any questions raised in your mind
10 as to other things you might like to know or people you
11 might like to talk to?

12 A. I borrowed a transcript of the trial from Mr. Edwards; I
13 recall reviewing that, yes.

14 Q. Uh-hum. In your view was there sufficient information on
15 which you could carry out the request from the Attorney
16 General?

17 A. I think to do what I was asked to do there was, yes.

18 Q. And, your report is found at pages 21 and 22 of that same
19 volume. The page numbers are at the top. Is that the
20 report which you completed and forwarded...

21 A. Yes.

22 Q. ...to Inspector Scott?

23 A. Yes, it is.

24 Q. A couple of questions on that report. You say in the second
25 paragraph that "The treatment of the witnesses, important

1 witnesses, Chant, Harriss and Pratico, was highly suspect, to
2 say the least." Could you elaborate on what you meant by
3 that?

4 A. Well, in discussions with Staff Sergeant Wheaton and from
5 the material that he had written on the file there were
6 allegations at least there that the witnesses had in some way
7 been pressured into the statements that they had given.
8 That was fairly obvious from the material that I read. There
9 were statements from one or two witnesses, partial
10 statements or something, and then another statement that
11 was different.

12 Q. Were you relying on Staff Wheaton's own views to any
13 extent in coming to your own conclusions?

14 A. Well, he had written a fair bit of material on the file and
15 that's the material I was reviewing. A lot of the things that
16 I read were probably his views, yes.

17 Q. So, if to any extent that he was in error, if he were, then to
18 that extent, would your own views reflect any error of his?

19 A. I suppose they would, yes.

20 Q. You say at the conclusion of that paragraph, you make
21 reference in the fourth last line in the second paragraph, to
22 the manner in which Chant conducted himself at trial. What
23 are you getting at there?

24 A. I recall reading a reference in some material, whether it be
25 the transcript or some of the file material, where Chant did

1 not identify Marshall as the person who did the stabbing
2 and I think that was just before he was declared hostile.

3 Q. So, you're...

4 A. I'm relying on my memory now.

5 Q. You're thinking again of the, I take it, the manner in which
6 he gave his testimony at trial as you...

7 A. Yes.

8 Q. ...read from the transcripts.

9 A. Yes.

10 Q. I see. Then you go through a couple of paragraphs of
11 comments which relate to factors which supported Mr.
12 Marshall's initial story and you continue over onto the
13 second page commenting about Mr. Ebsary and you say, "His
14 manner of dress and his potential for violent crime was also
15 known." Are you able to give us the basis for that
16 statement?

17 A. There was a criminal record on Mr. Ebsary in some years
18 before the stabbing incident and there were...there was
19 reference in the file to his manner of dress, a captain's hat,
20 I think he wore and a cloak.

21 Q. Yes.

22 A. Which I would suggest is unusual for people in the Sydney
23 area, his age, his size, the dress.

24 Q. Was it your conclusion then that a man of Mr. Ebsary's
25 description should have been found by the Sydney police in

1 '71 had they had the kind of description that you just
2 related about the cloak and what have you?

3 A. Well, there was several references to that description from
4 both Mr. Marshall and from two or three other witnesses
5 and I saw some material that suggested that the uniformed
6 police officers had done some searching around the city that
7 night. They checked taxi drivers, restaurants, the wharf,
8 bus stations or something looking for a person of that
9 description.

10 Q. Yes. But other than the fact that Mr. Ebsary had a criminal
11 record at the time did you have any other information
12 leading you to the conclusion which is suggested here,
13 namely, that they should have focused on Mr. Ebsary given
14 that description? Any indication that Mr. Ebsary was well
15 known about town that you were aware of?

16 A. Other than the record, which was something...

17 Q. Other than the record.

18 A. The record, I recall. I don't recall what else but...

19 Q. Okay. In the next sentence you say "In August, 1971,
20 Detective Urquhart received information Ebsary was
21 responsible for the murder."

22 A. That should read 1981 because that was brought to my
23 attention some time after I wrote that and I checked my
24 notes and the reference there is August, 1981. It should not
25 be '71.

1 Q. I see. So, insofar as your commenting on practises and
2 procedures in 1971, this would have no relevance at all.

3 A. No, the relevance I think I was suggesting there was that in
4 August 1981, there was a reference to Ebsary being
5 responsible.

6 Q. Yes. But the fact that that came forward in 1981 could not
7 be any reflection on police conduct in 1971.

8 A. No.

9 Q. You say in the following paragraph, that "Given the amount
10 of material available that the police and the prosecutor
11 should have had a more serious look at the two other men
12 theory, and that police have a responsibility to check it out."
13 From your knowledge of the file and from your own
14 experience as a policeman, what was not done in the
15 checking out that should have been done, in your view?

16 A. From the material that I reviewed on the file, I could see
17 that on the first night of the murder or early in the morning
18 where police patrols were looking for these two men.

19 Q. Yes.

20 A. Or it appeared that from two or three reports that I read,
21 after that I found no evidence that anything was done to
22 look for those two people that I can recall. I saw nothing
23 that I can remember that suggested that anything...any
24 follow up was done on that.

25

1 4:15 p.m.

2 Q. What should have been done in your view?

3 A. Well, in my view, forget about the fact that they were
4 possible suspects, they would have been fairly good witnesses
5 if they could have been found. Several people had put them
6 in the Park at the crucial time and that to me would have
7 been reason enough to look for them fairly seriously.

8 Q. So is the fact that you don't see a record of them being
9 looking for, doesn't mean to say that it didn't happen.

10 A. No, I suppose not. I found no indication of it.

11 Q. You say in your final paragraph that, "Many complex factors
12 played a part in the case. The pressure on investigators, the
13 mood of the city..." et cetera. Where did you get that
14 information from that there was pressure on the investigators
15 and that the...

16 A. There's reference in the material written by Staff Sergeant
17 Wheaton that there was some pressure.

18 Q. Yes.

19 A. There was suggestions of racism and things like this.

20 Q. So am I correct in, that in this sentence at least, you're relying
21 on Staff Wheaton's conclusions?

22 A. That and, I don't know if anybody else said that on the file
23 but certainly he made reference to it, yes.

24 Q. You go on to say,
25

STAFF SGT. BARLOW, EXAM. BY MR. ORSBORN

1 It's relatively easy to criticize the investigation
2 and wants you to be conscious of all the factors
3 involved. No less the consideration in these
4 factors is the many years of loyal and dedicated
5 service of Chief MacIntyre to his community.

6 Were you finding it difficult to comment on the practices and
7 procedures of another police officer?

8 A. No, I don't think I had any problem with that but I was aware
9 that Chief MacIntyre had been on that force for a number of
10 years, 35 or something. At the time, in 1983, he seemed to be
11 taking all the heat in the Marshall case. It wasn't being
12 spread around very much, I don't think. I think there was
13 lawsuits against him and, you know, I'm not so sure that was
14 a fair place to put all the heat.

15 Q. What did that have to do with your review?

16 A. Probably nothing as it comes to police practice but somebody
17 should have thought about it. That was my feeling at the
18 time.

19 Q. I'm not sure what one is left with after reading this report in
20 total, Staff Barlow, given that you were asked to comment on
21 improper practices or procedures or the manner in which
22 certain procedures were followed and perhaps point out what
23 should have been done. I don't see much of that in there. It
24 seems like a...

25 A. Well, when I wrote that material, when I wrote this I was
aware that Staff Sergeant Wheaton and Inspector Scott and
Corporal Carroll and probably the CIB officer all would be

1 making further comments and all of those people had been
2 dealing with this case much longer than I had.

3 Q. Um-hmm.

4 A. You know, I would have needed much more time to get into
5 all those areas. As it was, I found myself short of time to
6 review the material during the time that was given me and,
7 as a matter of fact, I think in the first part of June there's
8 reference on page 5 of Volume 20 where one of the CIB
9 reviewers asked me when they might expect my report. I
10 was overdue.

11 Q. That's the handwritten note on the bottom of page 5.

12 A. Yeah, that's in my writing.

13 Q. So you were onto (some heat?)...

14 A. I didn't, you know, I really, I would have looked for a lot
15 more time to get into all other areas.

16 Q. Now I understand that you prepared a draft report prior to
17 this final version?

18 A. Yes.

19 Q. And that is not in the materials, My Lord. It has been
20 distributed. I would ask that it be entered as an exhibit.

21 EXHIBIT 153 - DRAFT REPORT PREPARED BY STAFF SERGEANT

22 BARLOW - 83/06/16 - 2 pages

23 Q. Is that draft report that you, yourself, prepared?

24 A. Yes.

25 Q. And in the transition from the draft to the final version, did

1 anybody review that draft other than yourself?

2 A. No, no. Other than my secretary probably.

3 Q. Would I understand then that whatever changes there may
4 be between the draft and the final version are your
5 responsibility?

6 A. My own, yes.

7 Q. Again, some comments on the draft report, Staff Barlow, and
8 I'll be asking you primarily for the reasons for the changes
9 between the draft report and the final report. About the
10 middle of the first paragraph, after speaking of Chant, Harriss
11 and Pratico you say, "No court, I suggest, would approve the
12 police tactics used on these people. Certainly improper."
13 When you get to the earlier, or the final report, you use the
14 phrase, "Highly suspect." What is the reason for the change in
15 that?

16 A. Well the, most of the reasons for the changes in that is
17 probably the manner in which I do reports. I had notes and I
18 had the three volumes of files and the transcript and this
19 draft copy is, I condensed a lot of that stuff into something a
20 little more manageable. And I went over it again.

21 Q. Was it your conclusion that the police methods, as you had
22 seen them in your file, were improper?

23 A. I think the treatment of, there was a young, female witness I
24 think it was, that had been picked up by the police and
25 questioned for a number of hours, I think she was 14...

1 Q Right.

2 A. That must have been Harriss, I believe?

3 Q Um-hmm.

4 A. I would, from what I read I concluded that that interview
5 was improper, yes.

6 Q. Any reason why you didn't say that in your final report?

7 A. Well I thought I did.

8 Q. Well you said, "It was highly suspect and no court, I suggest,
9 would approve of the manner in which these individuals were
10 handled."

11 A. I think I was basically saying the same thing. Maybe the
12 terms were not quite as strong but...

13 Q. You say further down in that paragraph speaking of Donald
14 MacNeil. "There was a note in his handwriting indicating that
15 he was told by witness Chant that Marshall did not stab
16 Seale." I can direct you in Volume 16, I believe you have in
17 front of you, to a handwritten note on page 146, I believe it's
18 been identified at least as being Mr. MacNeil's handwriting
19 and about four lines up from the bottom of that page there is
20 a reference, "Marshall didn't stab Seale." Are you able to say
21 if this is the reference to which you were referring in your
22 report?

23 A. It was either there or the transcript that I saw some evidence
24 that Chant had made that statement.

25 Q. Our understanding is that at least this comment arose out of

1 an incident with Mr. Pratico and not Mr. Chant. Do you have
2 any knowledge of any other handwriting of Mr. MacNeil
3 involving Mr. Chant?

4 A. I recall seeing the reference in material that Chant had made
5 that statement, I think maybe he was declared hostile or
6 something and...

7 Q. A handwritten...

8 A. Where I, right now, I'm not sure.

9 Q. I see. Your last sentence in that first paragraph you say, "It
10 would seem the case was rammed through court." It seems
11 particularly strong. Last sentence, first paragraph.

12 A. On the second page?

13 Q. No, I'm sorry, the first page. First paragraph, last sentence.

14 A. Well I would say from Chant's reference to Marshall not
15 stabbing Seale there was reference to Pratico after he had
16 testified in the transcript, there was reference to Pratico
17 telling the sheriff or someone that he had not told the truth.

18 Q. Then when you say "rammed through court," by whom?

19 A. Well, you know, I've seen mistrials for a lot less reasons and,
20 you know, I thought, I felt, I still do, that had that been
21 known at the time that seemed to me would have been
22 grounds for a mistrial if nothing else, at that time.

23 Q. When you say "it was rammed through court," rammed
24 through by whom?

25 A. Well by only the one person that it would be putting it

1 through would be the prosecutor.

2 Q. I see. The first sentence in the second paragraph you say, "In
3 my opinion there is one main point any investigator, if he was
4 being objective, should have looked at very seriously." And
5 you go on to list out the number of evidentiary matters
6 supporting Mr. Marshall's story. Do I draw from that first
7 sentence in the second paragraph that your conclusion was
8 that the investigators were not objective?

9 A. Well I think in not following up that theory of the two other
10 men theory or whatever you want to call it, you know, like I
11 say, for no other reason than the fact that they may have
12 been good witnesses, there should have been some greater
13 effort put into finding them than what evidence that I saw
14 that there wasn't very much. There was probably, what, five
15 or six people, at least, described those same people.

16 Q. But did you draw from that that the investigators were not
17 being objective?

18 A. I would say they were not objective because they didn't
19 follow that avenue that may have led them somewhere.

20 Q. And that does not appear in your final report, any concerns
21 about objectivity. Can you give us any reason why not?

22 A. Well, I don't think I may have said it in the same terms but I
23 think it's there.

24 Q. Were you making an attempt to be charitable to the
25 department and investigators?

1 A. No. I, after I wrote that draft copy I did more review and I
2 may have certainly toned these things, some of this down a
3 bit but I was saying the same things and I think the people I
4 wrote the memorandum to would get the point. They'd be
5 condensing it and writing something further. I didn't have
6 any problem with the policeman that I knew would be
7 reading it understanding what I was talking about.

8 Q. The final paragraph of that draft memo, or just before we get
9 to that, in the second last paragraph of that memo you speak
10 of the November 1971 incident with Mr. MacNeil coming forth
11 and the polygraph. Was this work with the polygraph part of
12 your review that you were undertaking? Were you looking at
13 what was done in November of '71?

14 A. I read those reports, the polygraph operator's report and
15 Inspector Marshall's report. What was done there was
16 documented.

17 Q. That was not done by the Sydney Police Department?

18 A. Pardon me?

19 Q. That was not done by the Sydney Police Department. The
20 polygraph work.

21 A. No, it was done by members of the RCMP. That was all
22 documented. I didn't comment on it because everything that
23 there was say to about it had pretty well already been said
24 other than...

25 Q. The final paragraph of your draft report. You again talk

1 about the pressure on the investigators and you say "their
2 personal desires for advancement." Can you give us the basis
3 for that comment in your draft?

4 A. I can only answer that by saying that somewhere in the
5 material I found some suggestion of that because I had no
6 personal knowledge at that time of anything like that.

7 Q. Again, you're saying that you're relying on a conclusion
8 reached by somebody else?

9 A. I was relying on either something that someone had told me
10 or something I found in the material I reviewed.

11 Q. You say further on, middle of that paragraph. "Marshall was
12 the victim of an improper and erroneous police investigation
13 by an experienced police officer who as under a great deal of
14 pressure to produce."

15 A. That seemed to be the suggestion from the material I read,
16 yes.

17 Q. I see. And that was a conclusion you reached based on the
18 material you read?

19 A. Yes.

20 Q. You did not say that in your final report.

21 A. Not in the same terms but...

22 Q. I don't think you said it any terms, sir, in your final report.

23 A. It was said by Staff Sergeant Wheaton, maybe that's why I
24 dropped it.

25 Q. I see. Did you look upon the report that you were producing

STAFF. SGT. BARLOW, EXAM. BY MR. ORSBORN

1 as your own work or were you simply looking at it as
2 complimentary to Staff Wheaton's?

3 A. Well, the basic, the majority of the material I reviewed was
4 something that, a lot of it was generated by Staff Sergeant
5 Wheaton. His influence was all through it. That's what I was
6 working with.

7 4:30 p.m.

8 Q. You said also earlier though that when you queried
9 Inspector Scott as to whether or not you should be doing the
10 work at all that he felt that an objective approach would be
11 helpful.

12 A. Someone that wasn't familiar with it, looking at it, but that
13 didn't alter the fact that I still had to review his material.

14 Q. Yes. But I guess what I'm asking you is whether or not this
15 statement that you make here was an objective conclusion
16 that you reached on your own?

17 A. I can only say that it was reached as a result of something I
18 read or something someone told me and that's what I was
19 asked to do, review what other people had done.

20 Q. You talk about Chief MacIntyre being a victim of
21 bureaucratic pressure, the bureaucratic syndrome if you
22 like, it sound likes a sickness. Can you tell us what you
23 mean by that?

24 A. There was some suggestions in some of the material that
25 there were pressure from two or three different groups to

STAFF. SGT. BARLOW, EXAM. BY MR. ORSBORN

1 solve that case or there was pressure from, I'm not sure if it
2 was a prosecutor and I concluded that that was part of the
3 bureaucracy in which he was operating.

4 Q. Both these reports, both the final report and the draft
5 report, in the last sort of summary paragraphs, focus on
6 Chief MacIntyre and the pressures and the service to the
7 community. Other than the 1971 or '81 reference to
8 Detective Urquhart there is little reference to Detective
9 Urquhart. And my recollection of the materials is that,
10 certainly from the statements of the witness, sometimes
11 MacIntyre is mentioned, sometimes Urquhart is mentioned,
12 sometimes they don't know the name and so on. Can you
13 give us any reason why you would focus on Chief
14 MacIntyre?

15 A. Inspector Urquhart's part in the material he seemed to be
16 there all the time but he, Chief MacIntyre was in charge of
17 the investigation, at least that's what I concluded, Urquhart
18 seemed to take a lesser part in it.

19 Q. Was there anything in your discussions with either Staff
20 Sergeant Wheaton or Corporal Carroll which would tend to
21 make you focus on Chief MacIntyre more than Detective
22 Urquhart?

23 A. He seemed to be the dominant figure. There was nothing...I
24 can't think of anything that...

25 Q. Were you advised by Staff Wheaton or Corporal Carroll that

STAFF. SGT. BARLOW, EXAM. BY MR. ORSBORN

1 Chief MacIntyre was the dominant figure?

2 A. I was...well, I knew somehow from...that he was in charge of
3 the investigation and Inspector Urquhart would have been a
4 subordinate.

5 Q. Did either Staff Wheaton or Corporal Carroll in any way try
6 to influence your conclusions in your report?

7 A. Well, I discussed several matters with them. Corporal
8 Carroll didn't even see that report when I...until after I
9 submitted it.

10 Q. Uh-hum.

11 A. Staff Sergeant Wheaton, I have no knowledge of whether he
12 has even seen it to this day. I presume he has, but I didn't
13 run it by them before I submitted it.

14 Q. Uh-hum. Do you know Sergeant Herb Davies?

15 A. Yes.

16 Q. Do you have any knowledge, obviously second-hand, but
17 any knowledge of how Patricia Harriss' first statement, her
18 incomplete statement, came into the possession of the
19 RCMP?

20 A. Only thing I know about is what was told to me by probably
21 Sergeant Davies and probably by Staff Sergeant Wheaton or
22 Corporal Carroll that they've...they were of the impression
23 that Chief MacIntyre tried to hide it. There was reference
24 that was told to me, and I don't know if there's anything
25 written on that or not but...

STAFF. SGT. BARLOW, EXAM. BY MR. ORSBORN

1 Q. If there had been anything written on that in the file
2 material with...do you think it would be likely that you
3 would have commented on that as a...

4 A. If I found anything there I think I probably would have.
5 That was a verbal thing that was covered by, I presume it
6 was being covered by Staff Sergeant Wheaton.

7 Q. If that, in fact, happened would you consider that to be
8 something serious?

9 A. Yes, yes, I would.

10 Q. If it happened to you would you write about it?

11 A. Would I?

12 Q. Would you write it, would you write about it in your report
13 or notes?

14 A. Oh, I'm sure I would, yes.

15 Q. I think I can indicate to you that based on a review of the
16 documentation that that incident, per se, does not appear in
17 print. Would that...would that surprise you?

18 A. I don't recall reading it, but I certainly was told about it.

19 Q. Yes. Would it surprise you that it does not appear as such in
20 a report?

21 A. No, nothing would surprise me.

22 MR. ORSBORN

23 That's fine, thank you.

24 MR. CHAIRMAN

25 Some indication from counsel as to how long we're going to

STAFF. SGT. BARLOW, EXAM. BY MR. ORSBORN

1 be here, what the possibilities are of finishing this witness this
2 afternoon.

3 MS. DERRICK

4 I'll be five or ten minutes, My Lord.

5 MR. PUGSLEY

6 I suspect I'll be the same, My Lord.

7 MR. CHAIRMAN

8 Is there anyone else that has to cross-examine? I don't see
9 any other takers. Go ahead, Miss Derrick.

10 EXAMINATION BY MS. DERRICK

11 Q. Staff Sergeant Barlow, my name is Anne Derrick and I
12 represent Donald Marshall, Jr.. Mr. Orsborn has referred you
13 in Volume 20 at page 21 to your final report.

14 A. Yes.

15 Q. That's the report that went back to the Attorney General's
16 Department, did it?

17 A. Well, went to my headquarters. I presume it went over
18 there, I'm not sure.

19 Q. And it was your intention that that be the report in
20 response to the request from Mr. Gale.

21 A. Yes.

22 Q. And the draft that you prepared initially, did that go
23 anywhere?

24 A. No, it stayed on the file.

25 Q. It stayed in the file.

1 A. Uh-hum.

2 Q. I see. Did you discuss the draft with anyone or your views
3 represented in the draft before you prepared your final
4 report?

5 A. No, no one saw that draft copy. Well, I, you know, when I
6 finished with it I put it on the file and whoever else looked
7 at the file next would have seen it. I didn't discuss it with
8 anyone, no.

9 Q. And you have...so you had no discussions about your
10 conclusions from...

11 A. No.

12 Q. ...your review of the material.

13 A. No.

14 Q. Is it fair to say that the draft report does, indeed, reflect
15 your views?

16 A. The draft report was myself condensing my notes into
17 something, a more manageable piece of paper, and it's
18 nothing more than that. I did that on a typewriter by
19 myself, because I don't write very clearly and I try to keep
20 my hand at a typewriter and I do it that way purposely.
21 Some of those thoughts were running through my mind as I
22 skipped over my notes and I put them down in that form
23 and I did more review after that and it, you know, it
24 certainly appears that I may have watered it down. It was
25 no intention to water it down, it's just that I think I said the

1 same things in a more sensible way maybe.

2 Q. In a more, I'm sorry.

3 A. Sensible, sensible.

4 Q. I didn't catch the word you used.

5 A. I'm not sure if that's the right word, but something like that.

6 Q. Because there certainly seemed to be some very strong
7 conclusions as to improper police and prosecutorial practises
8 in your draft report. And you'd agree with me that the
9 strength of that language is absent in your final report.

10 A. Well, that report is meant to be read by policemen, my
11 officer commanding and the officers in Halifax, and they're
12 policemen and I think, you know, they would get the
13 message of what I was writing no matter what terms I
14 wrote it in. It was meant for them.

15 Q. So you felt that the final report would disclose to a police
16 officer reading it the same...

17 A. Yes.

18 Q. ...kind of concerns that your draft report expressed.

19 A. Yes, I think so.

20 Q. You just didn't feel there was a need to express it in that
21 strong language.

22 A. Something like that, yeah.

23 Q. The effect, would you not agree with me, is that the
24 criticisms that you make in the draft report are really
25 absent from the final report?

1 A. In the terminology used, yeah, they're absent. Yes, they're
2 absent, yes.

3 Q. In fact, you refer less to the police in your final report than
4 you do in your draft report, isn't that correct?

5 A. I never thought of it in those terms, but it was not...if that's
6 what it appears it was not done with that intention.

7 Q. Just for instance, in the first paragraph you talk about the
8 treatment of the witnesses, important witnesses, Chant,
9 Pratico and Harriss. And in that sentence you, sorry, in that
10 paragraph you refer to the prosecution, I'm looking at the
11 final report now.

12 A. Yes.

13 Q. In that paragraph you refer to the prosecution, but in
14 that...roughly that same aspect of your draft report you
15 refer to the police and their improper handling of those
16 witnesses. Do you see what I'm pointing out?

17 A. Well, the first two sentences of the second paragraph I'm
18 referring to the police.

19 Q. But you don't say that in the final report, whereas you do
20 say that in the draft report?

21 A. Oh, okay. I was referring to the police, that's what I, you
22 know, the way they were questioned is what I was talking
23 about.

24 Q. And you felt that should be readily apparent to a police
25 officer reading your final report that you meant the police?

- 1 A. That's what I intended.
- 2 Q. So you didn't intend that these criticisms you had would
3 disappear.
- 4 A. No, not exactly, no, because the people reading it would have
5 read, were reading other people's reports along with this,
6 Staff Wheaton's, Corporal Carroll's and Inspector Scott's and
7 I think that all three or four of us commented on the same
8 things.
- 9 Q. So, if anyone reading your final report were to take from
10 that that the police should not have been criticized for their
11 handling of the 1971 investigation that would be an
12 unfortunate interpretation in your opinion. You intended
13 there to be the interpretation that the police should have
14 been...
- 15 A. Yes, that's what I intended.
- 16 Q. And it concerned you, for instance, that the two men were
17 not followed up, the two men that were referred to by a
18 number of witnesses were not followed up by the police, is
19 that correct?
- 20 A. Yes, that's true, and I think you have to look at some other
21 things that go along with that, the fact that Seale was
22 stabbed on the left side, Marshall was cut on the left arm,
23 Marshall being left-handed. I think you have to look at that
24 in context with the other things.
- 25 Q. You felt that that lended support to Mr. Marshall and Mr.

- 1 Seale being stabbed by...
- 2 A. Someone else.
- 3 Q. ...an unknown assailant. Someone else.
- 4 A. Yes.
- 5 Q. In both reports you refer to Mr. Marshall providing an alibi.
6 May I suggest to you that, in fact, that's not correct? Mr.
7 Marshall denied involvement in the offence. He didn't...it
8 wasn't an alibi strictly speaking, he was there and he denied
9 an involvement.
- 10 A. Well, he was there, I mean there's no question about that.
- 11 Q. So the use of the word "alibi" is, in fact, technically wrong?
- 12 A. Technically, okay, well.
- 13 Q. Did you have a belief in the preparation of this report that
14 the Sydney Police had a preconceived notion as to Mr.
15 Marshall's guilt? For instance, you say in the draft, and I'm
16 looking at the second full paragraph on page 2, "In this case
17 with the great amount of material that suggested someone
18 else may have stabbed Seale there is no indication any
19 serious attempt was made to explore that area of the
20 investigation." Was it your impression from reviewing the
21 file and the other supporting material that the Sydney Police
22 in 1971 had a preconceived notion that Mr. Marshall was
23 responsible?
- 24 A. Well, it was obvious at some point in time they formulated
25 the idea that Marshall was the target and they ignored some

1 of these other things.

2 Q. And disregarded other evidence.

3 A. I think so, yes.

4 Q. Is it fair to say in spite of these criticisms that you, as a
5 police officer, had some understanding and some sympathies
6 for a fellow police officer, and that's why you refer to Mr.
7 MacIntyre's good service record?

8 A. Well, I knew him personally, that probably had something
9 to do with it. I've known him since probably 19...sometime
10 in 1960 and for the three or four years I was in Sydney
11 around that time I didn't have frequent contact with him. I
12 never worked with him directly but any dealings with the
13 city police and the RCMP would quite frequently involve
14 him. He was always helpful, he was always knowledgeable,
15 and then from the time I left Cape Breton until I came back
16 in 1982 I saw or heard nothing of him for a lot of years. I
17 guess probably my first impressions of him in the early
18 1960's were probably good ones.

19 Q. There have been some suggestions to this Inquiry that the
20 RCMP were reluctant to offend another police department in
21 1982 when the matter was reinvestigated. Were...did you
22 have any of those concerns? Were you concerned about
23 offending the Sydney Police in the preparation of such a
24 report?

25 A. No. I didn't personally, no.

STAFF SGT. BARLOW, EXAM. BY MS. DERRICK

1 Q. Now whether or not this statement is actually included in
2 your final report, and it's not, is it accurate to say that you
3 concluded from your own review of the file and the
4 supporting materials that, as you've stated it in your draft,
5 "Marshall was the victim of an improper and erroneous
6 police investigation by an experienced police officer who
7 was under a great deal of pressure to produce."

8 4:45 p.m.

9 A. Yes, I think that statement is fair because there was
10 indications that there was a lot of pressure to produce. That
11 the manner in which the witnesses alleged to have been
12 pressured was improper and the error in following, it was
13 erroneous to not follow up on all the possible leads.

14 Q. And those were your conclusions from reviewing the
15 materials that you had.

16 A. Yes.

17 MS. DERRICK

18 Thank you, those are my questions.

19 EXAMINATION BY MR. PUGSLEY

20 Q. Staff Barlow, my name is Ron Pugsley, I'm appearing for John
21 MacIntyre. I take it that you accepted everything that Harry
22 Wheaton told you concerning his part in the re-investigation.

23 A. By everything, I'm not just exactly sure what you mean.

24 Q. Well is there anything...

25 A. He was certainly more familiar with the matter than anybody

1 else.

2 Q. Is there anything you did not accept that he told you?

3 A. I can't think of anything at the moment.

4 Q. He had strong opinions about John MacIntyre.

5 A. I think that he may have felt that there was some criminal
6 responsibility on the part of Chief MacIntyre and I didn't, I
7 don't think I agree with him on that.

8 Q. No. All right. I say he had strong opinions about John
9 MacIntyre and none of those opinions were good.

10 A. From what I've heard I would say, yes, that's a pretty fair
11 statement, yes.

12 Q. Yes. And from what, and that is an accurate statement from
13 what you heard from Staff Wheaton in 1982 prior to the time
14 you completed this report in 1983.

15 A. I don't think I even talked to Staff Sergeant Wheaton about
16 this case in 1982. It was in a different stage at that time. It
17 was not until 1983 when there was starting to be talk about
18 an inquiry and things that then I started discussing it with
19 him while I was reviewing the file.

20 Q. And during those occasions...

21 A. I didn't see him in the, hardly, I saw him very little of him in
22 the meantime.

23 Q. In 1983 on those occasions when you did discuss the matters
24 with him, he had nothing good to say about John MacIntyre, I
25 take it.

1 A. He certainly had some strong opinions about the things that
2 he felt Chief MacIntyre should have done in the case, yes.

3 Q. Yes. Is it fair to say that he had nothing good to say about
4 Chief MacIntyre?

5 A. I wouldn't go so far as to say that. I'm aware that Staff
6 Sergeant Wheaton knew Chief MacIntyre from a previous
7 time when he was stationed in Cape Breton and I think he
8 used to work with him. I'm not so sure he felt, I didn't get the
9 impression that he was that strong.

10 Q. I see. All right.

11 A. At all. No, I didn't.

12 Q. Your opinion with respect to the criticism that should be
13 directed towards Chief MacIntyre, is that based in part on the
14 information that is contained in the second paragraph on page
15 21 of Volume 20, that is the, of your final report, taking a
16 look at the second paragraph you say in the last sentence,
17 "Had he been informed as he should have been of the
18 different statements given by the above witnesses and the
19 manner in which Chant conducted himself at trial, then it
20 would seem likely he would have been aware that there were
21 serious doubts about the credibility of these witnesses." Is
22 your opinion, with respect to the criticism that should be
23 directed against MacIntyre, based in part upon the
24 information contained in that sentence?

25 A. Well it would seem to me that the prosecutor should have

1 been aware that there were more than one statement taken
2 from those witnesses. If that being the case, then I think he
3 probably would have, should have had a different view
4 toward those witnesses than he did.

5 Q. And my question, sir, to you is is your criticism of Chief
6 MacIntyre based in part upon the fact that you feel that Chief
7 MacIntyre did not give both sets of statements to Donald
8 MacNeil?

9 A. It's possible that he didn't. I don't...

10 Q. No, the point I'm trying to make to you is your criticism of
11 Chief MacIntyre that you've spoken about today based in part
12 upon the assumption that Chief MacIntyre did not give to
13 Donald MacNeil both statements taken from Chant and Pratico
14 and Harriss?

15 A. Well in 1971 it may not have been that you would give the
16 prosecutor more than one statement...

17 Q. Just bear with me, sir, just think about the question that I'm
18 asking you. Is your criticism of Chief MacIntyre that is
19 contained in this report and in your draft, based in part upon
20 your assumption that Chief MacIntyre did not give both
21 statements of Chant, Pratico and Harriss to Donald MacNeil?

22 A. No, I don't think so, no. I think the prosecutor, no. Not, you
23 know there's other criticisms are more serious than that one.

24 Q. Well my question is is your criticism based in part upon the
25 assumption...

1 A. No, I don't think so, no.

2 Q. I see. Taking that sentence, I take it from your sentence that
3 you did not believe that Donald MacNeil had both sets of
4 statements.

5 A. I don't think he did. I found no evidence that he had.

6 Q. Yes. The evidence before this Commission is that he did.

7 A. He did?

8 Q. He did. He had both sets of statements from Chant, Pratico
9 and Harriss. That's the evidence of Lou Matheson.

10 A. I'm not aware of that.

11 Q. That being so...

12 A. Then my criticism in that paragraph would be directed
13 toward Mr. MacNeil.

14 Q. Unjustified. Yes, quite so. The manner in which Chant
15 conducted himself at trial, that obviously would be apparent
16 to Donald MacNeil.

17 A. Yes.

18 Q. At the bottom of page 21 you talk about Chant in his
19 statement of May 30th, 1971, mentioned two other men and
20 are you suggesting, or do you infer that MacIntyre should be
21 criticized because he failed to follow up that lead?

22 A. Yes, because Chant was only one of several people that
23 suggested two other people.

24 Q. Were you aware, in fact, that the information Chant gave in
25 that May 30th statement was a tissue of lies? That he did

1 not, in fact, see two other men? Were you aware of that?

2 A. I didn't, no, I wasn't aware of that.

3 Q. Okay. In the draft report, Exhibit 153, on the second page,
4 you deal with the re-investigation in 1971 consequent upon
5 Jimmy MacNeil coming forward.

6 A. Yes.

7 Q. And you say, "One must wonder how serious the review was
8 taken by investigators." Who are the investigators you had in
9 mind when you wrote that?

10 A. There were only two, Inspector Marshall and Sergeant
11 McKinley.

12 Q. Yes. Those are the RCMP investigators.

13 A. That's right, yes.

14 Q. Yes. And I take it that the inference is that you did not feel
15 they undertook that review very seriously.

16 A. I don't think they went far enough.

17 Q. What should they have done?

18 A. I think they should have gone at least to the three crucial
19 witnesses and re-interviewed them.

20 Q. Right. Now my friend, Mr. Orsborn, asked you about the
21 failure of Staff Wheaton to include in his written reports the
22 allegation that Chief MacIntyre slipped Patricia Harriss
23 number one under the table and you indicated that, as I
24 understand your evidence, that that should have been
25 included in Wheaton's report.

STAFF SGT. BARLOW, EXAM. BY MR. PUGSLEY

1 A. If I was doing that I would include it. I have no reason, I had
2 no knowledge of why he didn't. I certainly would have
3 included it.

4 Q. Of course. But it was an important matter.

5 A. I think so, yes.

6 Q. You then went on to say in response to another question by
7 Mr. Orsborn, "Well were you surprised that it was not
8 included?" and you said, "Nothing surprises me." Was that
9 just sort of an offhand comment and did you really mean that
10 it does not surprise you that Wheaton did not include this?

11 A. Well that remark was not directed toward Wheaton. I'm
12 simply saying as a police officer for 29 years there's not very
13 much that surprises me. Police officers take a different, many
14 police officers take a different view of different things so...

15 Q. But a significant matter of that kind you would have included.

16 A. Yes, I would have, yes.

17 Q. Yes, thank you.

18 EXAMINATION BY MR. MURRAY

19 Q. Staff Sergeant Barlow my name is Donald Murray and I'm
20 representing William Urquhart at these hearings. If you'd
21 take your draft report, Exhibit 153, and you indicated to Mr.
22 Orsborn in your direct examination that the August 1971 date
23 ought to be August 1981.

24 A. Yes.

25 Q. When did you discover that error, sir?

STAFF SGT. BARLOW, EXAM. BY MR. MURRAY

- 1 A. It was sometime not long after I had submitted that report I
2 got call from, I think one of the CIB reviewers that pointed
3 that out to me and I recall checking through something in my
4 notes and the indication is definitely 1981, not '71, and it's
5 quite clear in my notes and it's just a, well...
- 6 Q. Did you submit a correction at any time?
- 7 A. Pardon me?
- 8 Q. Did you submit a correction at any time?
- 9 A. No, I didn't because I understand that they were going to do
10 that, you know, they, apparently they didn't but, you know, I
11 understood it was corrected. You know, I knew the difference
12 and I presumed everybody else did.
- 13 Q. You go on in the draft report about that information and say,
14 "No action was apparently taken on that information." On
15 what did you base that, sir?
- 16 A. That information came to Detective Urquhart from a Mr. Paul,
17 I think, was his name. I can't recall. I recall seeing some
18 handwritten notes and Paul, there was something in the note
19 that Mr. Paul was to get back to Inspector Urquhart...
- 20 Q. Yes.
- 21 A. With more information...
- 22 Q. Yes.
- 23 A. And he didn't and nothing further was done about it.
- 24 Q. And also included in that note, does your recollection assist
25 you, that Mr. Urquhart went to the Crown Prosecutor and

1 advised him of that information from Mr. Paul? Perhaps the
2 witness could see Exhibit 88.

3 A. It's possible, I can't recall exactly. Page?

4 Q. In fairness, that ought to have been included, would it not, if
5 he had gone to the Crown Prosecutor rather than saying no
6 action was taken?

7 A. Well I would have thought that that kind of information
8 about a topic that crucial, if Mr. Paul didn't get back to him
9 then I would have gone looking for Mr. Paul.

10 Q. Exhibit 88.

11 A. That's my impression. That was my intention in mentioning
12 that that why wait for Mr. Paul, go after him. Yes, I recall
13 seeing that note, yes.

14 Q. You do recall that.

15 A. Yes.

16 Q. You pointed us out in your direct evidence to the fact that you
17 received a call from a reader in Halifax, I believe, asking you
18 when your portion of the report would be ready?

19 4:58 p.m.

20 A. Yes.

21 Q. And you said "two or three weeks." Had you completed
22 anything on that at that time or were you still in the process
23 of review?

24 A. Well, in the...

25 Q. I believe it's about page five in Volume 20.

MR. BARLOW, EXAM. BY MR. MURRAY

1 A. That was on the 2nd of June. The draft is not written until
2 the 16th of June. So I had notes written, I'm sure, but I
3 hadn't completed it, I'm sure of that.

4 Q. I see. And then you said you reviewed between... You
5 reviewed the file material again between the time of first
6 doing a draft report and making up the final report that
7 appears on page 21/22.

8 A. Yes, I did.

9 Q. How long did you spend doing that, sir?

10 A. The date remains the same on both of those, and that may
11 be... The date I actually wrote that final one, probably was
12 after the 16th. The date may have remained on there when
13 my steno typed it. I would... A few days, probably, would
14 have gone by, at least a few days.

15 Q. Did you feel rushed in the completion of this?

16 A. Yes, I did.

17 Q. Yeah, and I suggest that you also felt that any comments that
18 you would have to make would be superfluous to the ones
19 that Carroll and Wheaton would have made already?

20 A. Well, they would have been repetitive, I think.

MR. MURRAY

22 I have no further questions.

MR. ROSS

23
24 No questions, My Lord.
25

EXAMINATION BY MR. BISSELL

1
2 Q. Just two very brief questions, Staff Sergeant Barlow. My
3 friend, Mr. Orsborn, in questioning you whether or not you
4 felt that what you were doing was a review with possible
5 charges in mind. I'd ask you if you'd look at page four of
6 Volume 20? I direct your attention to the last sentence or
7 two of that particular letter. Does that set out your terms of
8 reference?

9 A. Yes, it does.

10 Q. What does that suggest is in mind?

11 A. Well, they're not suggesting criminal charges at all. They
12 wanted the information to advise the Attorney General on
13 the, whether or not there should be a... If it warrants any
14 type of an inquiry.

15 Q. The other question that I had for you, sir, is there is some
16 suggestion that perhaps you toned down your report because
17 it was another police department that you were reviewing.
18 The question that I have for you is that at any time during
19 your career, and I don't want you to get into any specifics,
20 have you conducted investigations that have resulted in
21 charges against members of municipal police departments?

22 A. Yes, I have.

23 MR. BISSELL

24 Those are all the questions that I have, sir.
25

1 MR. CHAIRMAN

2 Q. Staff Sergeant Barlow, you indicated that you felt the
3 information concerning the allegation that Chief MacIntyre
4 had slipped the first statement of Patricia Harriss under the
5 desk when Wheaton and Davies were there to get the file was
6 of sufficient importance to, for Staff Sergeant Wheaton to
7 have included it in his report.

8 A. Yes, if I was doing that and had been in that situation, I
9 certainly would have included it, yes.

10 Q. And looking through the report, then I gather from your
11 evidence that you had read as part of your review, or had
12 you?

13 A. I read Staff Sergeant Wheaton's report, I can't remember
14 when. I believe it was sometime before I finished my review,
15 yes.

16 Q. And it's not in there.

17 A. No.

18 Q. There's nothing in there.

19 A. It's not in there, no.

20 Q. Did I understand you to say that you had heard it from Staff
21 Sgt. Wheaton?

22 A. Yes.

23 Q. Well, such being the case, why didn't you include it in your
24 report?

25 A. I was aware that Staff Sgt. Wheaton had discussed it with Mr.

STAFF SGT. BARLOW, EXAM. BY MR. CHAIRMAN

1 Edwards and it had been discussed... I really don't know. I
2 can't give you a reason why I didn't. It was significant and it
3 had been discussed. I know it was discussed verbally. I
4 presume that it would have been in, written by Staff Sgt.
5 Wheaton somewhere but... At that time, Staff Sgt. Wheaton
6 was in Dartmouth and I don't know what he wrote. I didn't
7 have copies of everything he wrote.

8 Q. Just one other question. Did you have before you when you
9 were doing your review the report of Inspector Al Marshall of
10 1971?

11 A. Yes, I did, I had access to that report.

12 Q. Do you know where it came from?

13 A. The report.

14 Q. Yes.

15 A. On the file that I had in my office there was a copy, a
16 photocopy of that report, ah, it came something...out of
17 division headquarters in Halifax, I believe, or possibly from
18 the archives in Ottawa. I'm not sure. I don't know where it
19 was resurrected from.

20 MR. CHAIRMAN

21 Thank you.

22 5:05 p.m. - ADJOURNED TO 1 JUNE 1988 - 9:30 a.m.

23
24
25

