ROYAL COMMISSION ON THE DONALD MARSHALL, JR., PROSECUTION

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Held: June 1, 1988, in the World Trade and Convention Center, Halifax, Nova Scotia

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

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

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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

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MR. CHAIRMAN

Mr. Orsborn.

MR. ORSBORN

Thank-you, My Lord. The first witness for this morning will be Mr. Justice Leonard Pace.

THE HONOURABLE MR. JUSTICE PACE, duly called and sworn, testified as follows:

EXAMINATION BY MR. ORSBORN

MR. ORSBORN

Before commencing, My Lords, I would just point out that Mr. Justice Pace is represented here by counsel for the Department of Attorney General in his capacity as Attorney General which will be the focus of the questioning. Nonetheless I would also acknowledge the presence this morning of Mr. Ron Downie, Q. C., who is representing Mr. Justice Pace in his capacity as a Judge of the Court of Appeal.

Q. Mr. Justice Pace, I understand that you are presently a Justice in the Appeal Division of the Supreme Court of Nova Scotia.

A. Yes, I am.

Q. When were you appointed to the bench, sir?

A. I was appointed in...on April 21st, 1978.

Q. In '78. If I may just ask you a few questions to get some information about your background, My Lord. When were you admitted to the bar?

1 A. February of '54.
2 Q. And did you practise law following your admission?
3 A. Yes, I did.
4 Q. Where did you practise, My Lord?
5 A. I practised in Halifax.
6 Q. And can you give us an indication of the type of practise
7 that you had?
8 A. A general practise. I practised some criminal law,
9 considerable tort law. I think generally, probate, company
10 work, et cetera.
11 Q. And, your entire career as a practising lawyer was spent in
12 Halifax.
13 A. In Halifax, yeah.
14 Q. And do I understand that at some time you decided to get
15 into the political arena?
16 A. Yes, yes, I did, in 1970.
17 Q. 1970.
18 A. '70, yes.
19 Q. For what district, sir, did you run?
20 A. Halifax-St.Margaret's.
21 Q. And were you elected when you ran?
22 A. Yes, I was.
23 Q. And, did you stay in politics until...from 1970 through to
24 '78?
25 A. Yes, I did.

1 Q. And were you elected as a member of government or a
2 member of the opposition?
3 A. No, I was a member of government.
4 Q. And do I understand that during some, if not all, of your
5 time in politics you were Attorney General?
6 A. Part of my time. I had two sessions.
7 Q. Yes.
8 A. As Attorney General. But my first portfolios was Labour
9 and Attorney General.
10 Q. I see.
11 A. I've always had...been dual portfolios.
12 Q. I'm sorry.
13 A. I've always had dual portfolios.
14 Q. I see.
15 A. During the time I was in government.
16 Q. And during what period, sir, were you Attorney General?
17 A. This will be a little rough.
18 Q. Of course.
19 A. Maybe. I think I was there until from October of '70 until
20 August, the end of August or September of '73. Then I came
21 back in '76 and I was there until my appointment...
22 Q. Yes.
23 A. ...to the bench.
24 Q. In the course of your practise you indicated you did some
25 criminal law, was that as a defence counsel?

1 A. Mostly as...almost exclusively as a defence counsel, yes.
2 Q. So, I take it you did do some prosecutions.
3 A. I think one or two in my whole career. They were...had to
4 do with the environment.
5 Q. Can you give us any...
6 A. Oil pollutions. I think I did two or three of those, but...
7 Q. I see. Can you give us any indication, My Lord, as to the
8 percentage of your practise that may have been devoted to
9 defence work, criminal defence work?
10 A. This would just be a guess, probably forty, fifty percent.
11 Q. Is it...there was a significant portion?
12 A. It was a significant portion, but I'm probably...I'm just
13 guessing.
14 Q. Sure. And would that include a wide range of offences?
15 A. Yes, it would.
16 Q. And jury trials?
17 A. Yes.
18 Q. Working with a wide variety of prosecutors?
19 A. Yes.
20 Q. What can you tell us from your experience, My Lord, as a
21 defence counsel of the disclosure practises of the various
22 Crown counsel that you ...
23 A. In my day there wasn't such thing.
24 Q. There wasn't any.
25 A. There wasn't any.

1 Q. Even if you asked.
2 A. You always got the same answer, and that was, "No," they
3 didn't... Now, I have to say the odd prosecutor, if there was
4 a witness that he knew was giving contrary testimony to
5 what the Crown's theory was.
6 Q. Yes.
7 A. He would sometimes call him to the stand, he'd tell you
8 about it, he'd call the witness to the stand, ask him his name
9 only and then you were left with whatever you could make
10 of it.
11 Q. And would you be advised ahead of time as to what his
12 inconsistent story was?
13 A. Oh, no, you wouldn't be. So, it was very dangerous.
14 Q. And do I understand that that practise varied by Crown
15 Prosecutor?
16 A. It wasn't practise to a great extent at all. Basically there
17 was just no revealing. If you had a multiple count situation
18 the odd time a Crown prosecutor would say, "Well, if you
19 plead your man guilty to the lesser offence, we'll accept
20 that." And it usually meant that they had rather a poor case
21 all the way, but...as I found in practise.
22 Q. How did you feel about the lack of disclosure as a defence
23 counsel?
24 A. Not very good.
25 Q. Not very good.

1 A. No.
2 Q. Given...
3 A. I thought it was... Well, it put you at a disadvantage.
4 Q. Yes.
5 A. Defending the man.
6 Q. Given that a substantial portion of your practise was defence
7 work, did you have any avenues open to you to improve
8 the situation?
9 A. I don't know what you mean.
10 Q. Well, were there complaints that you could have made to
11 the Department of Attorney General or applications that
12 could have been made to court in various instances?
13 A. I think it those days it would have perhaps gone on deaf
14 ears because I think it was generally practised that way.
15 Q. I see. In the course of your defence work, My Lord, did you
16 have occasion to defend any natives?
17 A. I'm trying to think. I think I have because I used to have
18 a...when I first started I had a Saturday office in
19 Shubenacadie, and... I really can't say for sure.
20 Q. Okay. Are you able to say from your experience then
21 whether or not there may have been any differences or
22 difficulties encountered by defence counsel in defending
23 native accused?
24 A. No.
25 Q. Do you recall?

1 A. No, I recall defending natives here in Halifax in my office in
2 Halifax, before Halifax courts and that I probably did in
3 Shubenacadie, but I'm not sure.
4 Q. You don't recall if there was any language difficulties or
5 difficulties getting instructions, anything of that nature?
6 A. There wasn't with the ones that I defended.
7 Q. Wasn't. I see. I'd like to turn to the time, sir, in which you
8 were Attorney General in '70 to '73, and ask for some
9 general information from you on your view of the
10 responsibilities of that position. How would you describe
11 the responsibilities of the Attorney General in Nova Scotia?
12 A. I suppose you were the chief law officer in the Province.
13 Q. Yes. And, I believe, Mr. Giffin in testifying before the
14 Inquiry testified that he felt you had ultimate responsibility
15 for the administration of justice in the Province.
16 A. Oh, indeed, indeed.
17 Q. Would that be fair? To whom would you be accountable, sir,
18 in that position?
19 A. I suppose the public, you're a public official.
20 Q. Uh-hum. I understand...
21 A. And you'd be accountable, of course, by the Courts and such
22 like.
23 Q. I understand that the position...
24 A. And you'd be accountable in the House under questioning or
25 whatever occurred there.

1 Q. Yes.
2 A. The House of Assembly.
3 Q. Yes. I understand the position also included what in some
4 areas is called a Minister of Justice, is that correct? There
5 was Attorney General and Minister of Justice.
6 A. Well, I don't think in Nova Scotia we were referred to as the
7 Minister of Justice.
8 Q. I...
9 A. I don't know if that's the...historically so or, it was always
10 the Attorney General.
11 Q. Do you draw any distinctions between the Attorney General
12 and Minister of Justice?
13 A. Not really, because in some provinces at that time the
14 Attorney General was called the Minister of Justice.
15 Q. As Attorney General, sir, would you be subject to any
16 direction or instruction from your political colleagues with
17 respect to the investigation of suspected crime?
18 A. Never.
19 Q. Would you be subject to any such direction or instruction in
20 the case of laying charges or prosecuting?
21 A. No.
22 Q. What about with respect to positions to be taken in court?
23 A. I don't recall there being a great deal of...I'm thinking of
24 some constitutional questions, of course, where I was
25 involved, where provincial legislation was in question. And,

1 I can't recall whether I had direction from Cabinet or...
2 Q. Other than that type of case, and I'm thinking perhaps of
3 areas...of the criminal law area, would you be subject as
4 Attorney General to instruction from your political
5 colleagues with respect to positions to be taken in criminal
6 cases?
7 A. No, indeed not, not in criminal cases, but now under some
8 provincial statutes it arises say, for instance, they have to
9 have the consent of the Attorney General to prosecute
10 under...I think there was under the Trade Union Act and
11 some of those statutes.
12 Q. I'd like to turn...
13 A. And that's when another Minister would be involved.
14 Q. Of course. I'd like to turn your view of the general
15 obligation of the Crown with respect to disclosure at the
16 time you became Attorney General. Coming from the
17 defence bar and not feeling terribly good about it, I think as
18 you said, was the issue of disclosure of the Crown of interest
19 or concern to you?
20 A. Yes, it was. And, I think we were...now, I have to say in
21 fairness as far back as in the early or early sixties or so, I
22 think there had been some direction to police officers.
23 Q. Yes.
24 A. Made by Mr. Justice...who is now Mr. Justice Malachi Jones
25 when he was a assistant to the Deputy or something. At that

time he did a great deal of their criminal litigation and I think there was some direction that they should give us more insight into...that was the direction, as I recall, was to the police.

Q. Yes, but we had that before us, My Lord, and I would propose to discuss that with you...

A. Oh, I...

Q. ...in a couple of minutes.

A. I'm sorry.

Q. No, that's all right.

A. But, as I say, in fairness, I think there was a letter that went to the police in which Mr. Justice Jones said, well, if a man confessed, certainly that should be ruled...should be open to the lawyer, made known to him. But other than that...

Q. In your view, My Lord, as chief law officer of the Crown, as you were in 1970 to '73, what obligations were there, if any, on Crown counsel to supply the statements of witness to defence counsel prior to, say, preliminary or certainly prior to trial?

A. Well, of course, your handicapped in this, as late as '72, the rather famous Duke case in the Supreme Court of Canada that said that unless the statute called for it, imposed a responsibility, of course, you didn't have to volunteer. But it seems to me in reading the Duke case, even today, that if counsel went and inquired, I certainly don't think the Duke

1 case is a barrier to that if he asked for the information.
2 Q. Nonetheless, My Lord...
3 A. But I think what we were trying to do, of course, is have full
4 disclosure, but I can't say we were successful at that time. I
5 rather suspect it's probably not fully accomplished even as
6 late as today.
7 Q. You were trying to have full disclosure.
8 A. Yes.
9 Q. Do I take it from that, My Lord, then it was, in fact, your
10 view as chief law officer of the Crown that there was an
11 obligation on Crown counsel to disclose statements of
12 witnesses?
13 A. Well, certainly when it was requested, at least when it was
14 requested, they should reveal what it was.
15 Q. And if there were no requests, was there such an obligation
16 on Crown counsel?
17 A. I think generally where, for instance, where there is
18 completely conflicting statements from witnesses, conflicting
19 with the Crown's theory of the case, then it should be
20 revealed.
21 Q. Yes. Even in the absence of a request.
22 A. Now, it was very difficult working...trying to impress
23 generally on the prosecutors that you wanted it done that
24 way and you couldn't really give a direction because the law
25 was still, as I say, as late as '72 in the Duke case, the law

1 was still in a state of flux, so you couldn't demand they do it
2 this way. It was more a matter of persuasion.
3 Q. Was it your view then as Attorney General that you could
4 not direct Crown Prosecutors to disclose statements?
5 A. I don't think you could because you have to balance what
6 the law was at the time as well as... not what your will is
7 imposing upon Crown Prosecutors. They know a fair
8 amount of the criminal law, or they should anyway.
9 Q. So, do I understand then, and please correct me if I'm
10 summarizing incorrectly, that it was your view as Attorney
11 General that, on request, statements should be provided but
12 that they...but that you could not require Crown Prosecutors
13 to provide those statements in the absence of a request
14 because of the state of the law at the time?
15 A. I think that is a pretty fair summary, Mr. Orsborn.
16 Q. What about with respect to other evidence in the possession
17 of the Crown that may be relevant but the Crown has some
18 question as to the credibility of that evidence? Is there an
19 obligation on Crown counsel to disclose that?
20 A. You're thinking if it's not even credible or...
21 Q. There may be some doubts as to whether it's believable or
22 not.
23 A. Believable. Generally my attitude was inclined to be, to say
24 "Yes" and let the defence use it as they may. Let them
25 evaluate it.

1 Q. That would be consistent with your...with your view of the
2 obligation of Crown counsel.
3 A. Yes.
4 Q. Yes. The wording may be a little trite, My Lord, but it's
5 being suggested that the obligation of Crown counsel is to
6 see that justice is done. Now as chief law officer in '70 to
7 '73, would you agree with that?
8 A. Oh, indeed I would. I've always taken...
9 Q. And would...
10 A. ...the attitude the Crown never wins and the Crown never
11 loses really. If a innocent person goes free, the Crown hasn't
12 lost.
13 Q. I see. So, you would not put Crown counsel then in a
14 position of an adversary?
15 A. Well, that wasn't the way it was practised. I think he has to
16 take some adversarial role because, maybe I'm of the old
17 school, but a good adversarial system tends to bring out, I
18 think, the truth.
19 9:55 a.m.
20 Q. Yes.
21 A. And that's...
22 Q. But it's not adversarial to the extent that you have to win at
23 all costs.
24 A. Oh no, indeed, not. But I think good advocacy is very
25 germane to seeking out the truth.

1 Q. Of course. But it would not be adversarial to the extent that
2 you would...
3 A. Win at any cost? No.
4 Q. Seek to suppress facts that were not consistent with your
5 story.
6 A. No. No. See you have an obl-, as a lawyer, you have an
7 obligation to the court, too. You're an officer of the court.
8 Q. Yes. That is touched on, My Lord, in Exhibit 81, which I
9 believe you have in front of you to your right there, and these
10 three pages represent, I believe the, perhaps the, I'm sorry,
11 My Lord, the letter there...
12 A. Oh, the letter here, yes. All right. I'll just get my glasses.
13 Q. This is, I believe, perhaps the letter to which you were
14 referring. It's a letter from Malachi Jones, as he then was, as
15 a senior solicitor, to the RCMP in 1961. And in this letter he
16 does set out, I believe, what he believes to be the general
17 views of the Department on some issues concerning disclosure
18 and I would like to touch on some of these points with you,
19 My Lord, to see whether or not, as Attorney General in '70 to
20 '73, you agreed with the views that had been espoused from
21 10 years earlier.
22 A. I think I've seen this letter.
23 Q. Yes.
24 A. Both at the time I was Attorney General, and I may have had,
25 I don't know, I may have received a copy of it when I was in

1 practice, I'm not sure.
2 Q. Was Mr. Justice Jones in the Department of the Attorney
3 General at any time when you were there?
4 A. Not when I was there, no.
5 Q. I believe he was elevated to the Bench in 1970, I think. It
6 may have been shortly before you arrived.
7 A. I thought it was before that but...
8 Q. Perhaps. If I could ask you to look, My Lord, at the second
9 paragraph on the first page which reads, "Cooperation
10 between the police..." the second paragraph on the first page.
11 A. Yes.
12 Q. "Cooperation between the police, the Department, and
13 practicing solicitors has always been at a very high level in
14 this province. And needless to say, we have every desire that
15 this should continue. Additionally, the Crown has an
16 obligation to assist the courts in the administration of justice,
17 not only in criminal, but also in civil cases."
18 A. Yes.
19 Q. As Attorney General, My Lord, would you take any issue with
20 that view?
21 A. No. No, I would not.
22 Q. And on the second para-, I'm sorry, the third paragraph, still
23 the first page of the letter, the last couple of sentences in that
24 third paragraph. "Where a person who is not a party to
25 proceedings has given a statement, it can only be used where

1 he gives evidence to the contrary to show that he has stated
2 something different on a previous occasion. This can be very
3 material, of course, on the issue of credibility."
4 A. Yes.
5 Q. Would you take any issue with that as a statement of fact, at
6 least, that inconsistent statements can hurt credibility.
7 A. No.
8 Q. And on the second page, My Lord, of the letter. I guess the
9 third paragraph on that page about halfway down which
10 starts, "In criminal proceedings..." and Mr. Justice Jones
11 writes, "In criminal proceedings, additional considerations
12 apply because the Crown is a party and, accordingly, has a
13 greater duty to see that justice is done." Would I take from
14 what you've said previously that you would not take issue
15 with that view.
16 A. No, I certainly wouldn't.
17 Q. And on the third page, Mr. Justice Jones cites from The Road
18 to Justice Sir Alfred Denning, the second quotation on the
19 page and he writes, "The duty of counsel to see that justice is
20 done is, however, best shown by what is expected of
21 prosecuting counsel. If he knows of a credible witness who
22 can speak of facts which go to show the prisoner's innocence,
23 he must himself call that witness. Moreover, if he knows of a
24 material witness who can speak of relevant matters, but
25 whose credibility is in doubt, then although he need not call

him himself, he must tell the prisoner's counsel about him so that he can call him." Again, sir, as a chief law officer, would you take any issue with those sentiments?

A. Well, as I spoke a few moments ago about that, that is probably one of the reasons they start putting witnesses on the stand and asking their names and such like. But they, you didn't have the information ahead of time.

Q. Would you take any issue with the...

A. I don't issue with the statement, no.

Q. And finally on this letter, in the following paragraph, the last sentence of that following paragraph reads, "From these authorities, it is clear that the Crown must either introduce evidence which is material to the charge whether for or against the Crown or else make the same available to the defence." And again, as Attorney General, would you take any issue with that approach?

A. I think you should make it available to the defence.

Q. Mr. Justice Jones is writing in 1961...

A. '61, yes.

Q. Are you able to indicate whether or not that reflected the views of the Department in 1970, '71, '72?

A. Well, judging from what was occurring the '60s, I think we had advanced, you know. And many prosecutors were giving certainly more information in the '70s than we were able to obtain the '60s.

1 Q. Yes. As Attorney General, sir, would you agree that these
2 views are certainly appropriate views?
3 A. I think they're appropriate views, yes. I'm not too sure at
4 that time, the time that that was published, now that was the
5 view of the whole Department.
6 Q. Now as Attorney General you were in charge of the
7 Department?
8 A. Not when that was written.
9 Q. No, I understand but in...
10 A. Yeah.
11 Q. I'm sorry, in '70, '71, '72.
12 A. Yes.
13 Q. Yes. And if you believed these views to be appropriate,
14 would it be your responsibility to see that they were put into
15 practice?
16 A. As best you could.
17 Q. While you were Attorney General, sir, were any problems
18 brought to your attention regarding the issue of disclosure?
19 A. I don't recall any. I don't recall disclosure being, any
20 complaints directed to me about disclosure.
21 Q. In the absence of those complaints then, My Lord, would you
22 be, would you assume that disclosure was being carried out as
23 set out by Mr. Justice Jones?
24 A. Well, that was set out '61 by Mr. Justice Jones and that didn't,
25 that wasn't the rule of what was being carried out. I think

1 what I was attempting to do is impress upon them that that
2 should have been so.
3 Q. I see.
4 A. But I don't know how successful I was in practice.
5 Q. No, but it was...
6 A. To get it over to them so they would do it. And, of course, as
7 I say, they had...
8 Q. Your evidence is and, again, correct me if I'm not
9 summarizing properly that you believed that these disclosure
10 principles were appropriate. That you did your best to see
11 that they were put into place, but you couldn't be everywhere
12 at once seeing that it was actually carried out.
13 A. Yeah, that's right. And if it came right down to it, as I say,
14 with the Duke case, I think, does confine the open book, if you
15 will, to, in law, even though you may desire. And of course,
16 prosecutors make you aware of that pretty quickly if you
17 interfered.
18 Q. I'd like to ask you some general questions, My Lord, about the
19 Department in 1970 to '73. I understand at least that the
20 offices in Halifax were a fairly small, closely knit group of
21 people?
22 A. Yes, it was. And at that, we had a reorganization, not really
23 the office itself but it was lawyers isolated, working for
24 various departments. And we started trying to coordinate it
25 with the AG's Department. Now they, some of them still

1 stayed in their local departments but, no, it was a small
2 group.
3 Q. And do I understand in this time period that your deputy at
4 least for most of the period was Mr. Innes MacLeod?
5 A. Yes. Innes was deputy until '72 or...
6 Q. I think some time in '72 he indicated.
7 A. Yes.
8 Q. And that you had a Director of Criminal, Mr., Judge Anderson,
9 then succeeded by Mr. Gale.
10 A. We had a Director of Criminal, Director of Civil and Director of
11 what they called Administration.
12 Q. And the Director of Criminal was Judge Anderson as he is
13 now.
14 A. That's, Robert Anderson.
15 Q. Succeeded by Mr. Gale.
16 A. Mr. Robert Anderson, yes.
17 Q. And the Director of Civil, I think, was Gerry Cavanaugh.
18 A. That's right.
19 Q. And Administration, Gerry Conrad?
20 A. That's right, yes.
21 Q. Did you regard Mr. Gale as an able Director of Criminal?
22 A. Yes, I thought he was competent because I had appeal cases.
23 He did a number of appeal cases in which I acted as opposing
24 counsel and I thought he did a creditable job.
25 Q. And in your capacity as Attorney General, would he provide

1 you with advice and opinions from time to time?
2 A. Yes, that would be on in '76, of course.
3 Q. Yes.
4 A. '76 to '78, yes.
5 Q. You had no difficulty with his advice or opinions?
6 A. That's a difficult, I may have disagreed with him on some
7 things. I'm not sure.
8 Q. Did you regard Robert Anderson as an able Director of
9 Criminal?
10 A. Robert was competent director.
11 Q. And did you regard Mr. MacLeod as an able Deputy?
12 A. Yes.
13 Q. And did Mr. MacLeod provide you with opinions?
14 A. Innes MacLeod was very familiar with all provincial statutes
15 which you're dealing with, too. I don't think Innes ever had
16 great experience in practice in the criminal law but he
17 certainly was a good administrator.
18 Q. Would he provide you with advice and opinions from time to
19 time?
20 A. Yes, he would.
21 Q. Would you describe the relationship within this group in the
22 Department, My Lord, as an informal working relationship or
23 formal working relationship?
24 A. It was being paid for. It should have been formal. The
25 taxpayer was paying for it.

1 Q. I guess by "informal," I'm not suggesting that the work didn't
2 get done but simply that people, and advice and opinions,
3 floated perhaps freely around the office.
4 A. Well, because it was a smaller group, I think...
5 Q. Yes.
6 A. I think that's true.
7 Q. Were your directors, were you accessible to your directors?
8 A. Yes, I was.
9 Q. They didn't have to go through the deputy to get to you?
10 A. Well, I think they usually did, but I even had junior counsel
11 in. I had pretty well an open-door policy on that.
12 Q. Would you describe your own style as Attorney General, sir,
13 as a hands-on style where you wanted to be involved in
14 everything or a more laid-back style where you let the civil
15 servants do their work?
16 A. The day-to-day work, most of the day-to-day work, was
17 handled by the Department and if there was something in
18 particular they wanted to see me about or, as I say, in
19 constitutional things where provincial legislation was being
20 questioned, I think I was consulted.
21 Q. Matters out of the ordinary, or out of the routine, would they
22 generally be brought to your attention?
23 A. Not really unless they were having some problem with it. I
24 was available. I wasn't always available either because I had
25 two portfolios at the time and, of course, as a Government

1 Minister you have to travel some, too.
2 Q. I'd like to turn, sir, to the effects of the Marshall case in
3 November of '71. Mr. Marshall went to trial and was
4 convicted on November 5th, 1971.
5 A. Yes.
6 Q. As Attorney General, do you have any recollection of the
7 investigation and trial and conviction of Mr. Marshall?
8 A. No, I have absolutely none. As a matter of fact the first time
9 that I was aware of even Mr. Marshall's predicament was
10 when I read it. I was visiting relatives in Cape Breton and I
11 think that was about '82. There seemed to be a little piece
12 that didn't mean very much to me in one of the, in the local
13 newspaper and that was the first I have ever heard of it.
14 Q. In, on November 15, 1971, about ten days after the
15 conviction, a new eyewitness came forward, Jimmy MacNeil,
16 saying that Ebsary, Mr. Ebsary had done the stabbing. Now
17 within the Department of Attorney General, Mr. Matheson
18 who was Prosecutor, or Assistant Prosecutor in Sydney, and
19 Robert Anderson...
20 A. I wasn't aware that he was, but obviously he was.
21 Q. He was, yes. And Robert Anderson, one of your directors,
22 were aware immediately, I think, of this development. I take
23 it from what you've just told us that you have no recollection
24 of that being brought to your attention.
25 A. I know it wasn't brought to my attention.

1 Q. Are you able to say, then, that it, as a fact...
2 A. Yes.
3 Q. It was not, it was not brought to your attention.
4 A. As a fact. It was not brought to my attention.
5 Q. Would you have expected something like that to be brought
6 to your attention?
7 A. Not necessarily. You see the day-to-day operations, and I
8 have to be careful not to reconstruct on what I know now,
9 and that's unfair. No, I wouldn't think so. And I notice, too,
10 that Milton Veniot, who would have been a junior counsel at
11 that time in the Department, I don't know how much
12 experience he had, but he wouldn't have had very much, so
13 he handled the appeal I think, did he not?
14 Q. Yes, My Lord, he did.
15 A. And obviously there was nothing in the file indicating any
16 difficulty or you'd have had Gordon Gale or someone much
17 more experienced, in my opinion.
18 Q. Judge Anderson testified that more likely than not he would
19 have brought it to Mr. MacLeod's attention and Mr. MacLeod
20 had no recollection of it. But Mr. MacLeod did indicate that
21 had it been brought to his attention, he would have most
22 certainly brought it to your attention. I take it from your
23 testimony that Mr. Anderson is simply speculating that he
24 might have brought it to somebody's attention, that he, in
25 fact, did not.

A. Well he...

Q. Because it didn't reach your desk.

10:14 a.m.

A. It didn't reach my desk. Now, how it failed to I...

Q. I'd just like to...

A. ...haven't the slightest idea.

Q. ...I'd just like to read you a portion of the statement that was taken from Mr. MacNeil on the 15th of November, 1971. I won't ask you to turn to it. I'm reading from Volume 16 at page 176. This is the statement of James MacNeil. And he says,

> The Indian put my right hand up behind my back. The coloured fellow said, 'Dig man, dig,' then Roy Ebsary said, 'I got something for you.' He put his hand in his right pocket, took out a knife and drove it into the coloured fellow's side.

Now, I'd just ask you from your experience as defence counsel, My Lord, to put yourself into the shoes of defence counsel preparing for an appeal in Mr. Marshall's case. Would that statement be of interest to you?

A. Oh, yes, any statement and then I could evaluate it.

Q. Yes. You would want to know about that if you were defence counsel.

A. I would very much like to know about it. If someone else committed the murder, I...

Q. Would I understand...

1 A. ...would think he'd want to know.
2 Q. Yeah. That being brought to the attention of defence counsel
3 prior to...prior to an appeal one would, I assume, consider
4 issues of fresh evidence and whether it should be put before
5 the Court of Appeal and whatnot. This would be the issues
6 that come to mind of a defence counsel.
7 A. Yes.
8 Q. The RCMP was then brought in at the request of Mr.
9 Anderson to review or reinvestigate the matter and the use
10 of the polygraph was discussed and authorized. Again, do I
11 take it from what you said that you have no recollection of
12 being involved in the decision to get the RCMP back in?
13 A. No.
14 Q. Bringing the RC...
15 A. That would be done by Mr. Anderson.
16 Q. That was my next question. I was just wondering if a step
17 such as that to bring in...
18 A. I'm sorry, I'm not attempting to get ahead of you. I'm just...
19 Q. To bring in a force such as the RCMP, the sort of provincial
20 source, to reinvestigate a municipal police investigation,
21 would not then, I take it, require your involvement as
22 Attorney General.
23 A. No, it would not.
24 Q. Are you able to indicate whether or not bringing in the
25 RCMP to reinvestigate a murder conviction would be an

1 unusual occurrence, in your experience?
2 A. It's not an unusual occurrence for local police forces to bring
3 in the RCMP.
4 Q. Uh-hum.
5 A. As a matter of fact, I think I had worked it out with Chief
6 Superintendent Mudge that such would...they'd make that
7 service available to us.
8 Q. Yes.
9 A. But that was only, you know, if the local force run into some
10 difficulty.
11 Q. Can you give us any indication in this time period, '70-71
12 what number of murder trials there would be in the
13 Province in the run of a year?
14 A. I can't. It wouldn't be an intelligent guess.
15 Q. It would...
16 A. I would have known at the time, but sixteen years later.
17 Q. Would it be as high as one a month?
18 A. I would suspect it was higher, but...
19 Q. Higher than one a month?
20 A. Look, it's unfair for me to answer that because I'm only
21 gazing in a crystal ball rather than...
22 Q. Is it your evidence then, sir, that although this was a fairly
23 small close-knit informal department, the fact that the RCMP
24 was brought in to look at a murder conviction was not
25 brought to your attention?

1 A. That's right.
2 Q. During the course of that investigation polygraph tests were
3 taken and we've had evidence from Al Marshall, who was
4 the RCMP gentleman charged with this reinvestigation, that
5 Donald C. MacNeil, when the results were made known to
6 Mr. MacNeil, that Mr. MacNeil phoned someone in the
7 Attorney General's Department in Halifax to advise them of
8 the result. Mr. Marshall testified that he was ninety-nine
9 percent sure that Mr. MacNeil called you. Did Mr. MacNeil
10 call you?
11 A. No, Mr. MacNeil did not call me.
12 Q. Did you know Mr. MacNeil?
13 A. Yes, I did.
14 Q. Did you know him well?
15 A. We knew...when I was admitted to the Bar I think there was
16 only three hundred of us so we all knew each other, but I
17 wasn't any personal friend of Mr. MacNeil.
18 Q. Were you on a first-name basis with him?
19 A. I think we were, as I recall most members of the Bar.
20 Q. I see. Again, your evidence is, you're not saying "I don't
21 recall," but you're saying it didn't happen.
22 A. I'm not saying I didn't, ah, I don't recall it at all. I'm saying
23 it didn't happen.
24 Q. I understand. If I could ask you to look...
25 A. I will add this to it, I don' think, in my memory, that one call

1 ever came to me direct from a prosecutor during my term of
2 office, and the reason being, of course, the Department was
3 set up and I really would have had to inquire of the
4 Department, but I can't recall a prosecutor calling me about
5 a case at all, let alone Mr. MacNeil.
6 Q. If I could ask you to look at the red volume that you have in
7 front of you there, My Lord, and page 204. The numbers are
8 at the top, the centre of each page.
9 MR. PUGSLEY
10 Which volume is that?
11 MR. ORSBORN
12 16.
13 HIS HONOUR MR. JUSTICE PACE
14 204.
15 MR. ORSBORN
16 Q. Yes, 204.
17 A. I think we've got the wrong numbers in here, oh, 204, yes.
18 Q. That is a...the report prepared by Inspector Marshall
19 following his review dated December 21st, 1971.
20 A. Yes.
21 Q. Did you ever see that report, sir, while you were Attorney
22 General?
23 A. No, I did not.
24 Q. If that...
25 A. Is this...normally they have a writer there or something.

1 Does this report come in the...the reader, I'm not sure
2 whether it was a reader or a writer. Normally I have a
3 person go over these things and that is indicated.
4 Q. There's no...there's no transmittal slip indicating where
5 it...how it got or what happened to it from the RCMP. But it
6 is signed on page 207 by Inspector Marshall. There is...
7 A. Normally they're signed or at least there's an indication
8 of...by two members of the...
9 Q. Yes.
10 A. ...police. That's the type that I've been used to.
11 Q. Yes.
12 A. The few that I've used or seen.
13 Q. Again, your evidence is that as Attorney General you did not
14 see it.
15 A. I didn't see it.
16 Q. Would you have expected to have seen that report had it
17 arrived in your Department?
18 A. No, I wouldn't expect to see it if it was in the day-to-day
19 work of the Department unless there was...unless staff
20 brought it to my attention.
21 Q. Do I take it then from your answer, My Lord, that the fact
22 that you didn't see it does not mean that it wasn't
23 somewhere in your Department?
24 A. Yeah. The only thing is, as I say, as I pointed out, that
25 normally it's co-signed by a reader or, I don't know what

1 the RCMP...
2 Q. Yes.
3 A. And that is noted on official files when it comes to the
4 Attorney General's Department. I don't notice it on this.
5 Q. That report, in summary, says that the evidence of Mr.
6 MacNeil is, at best, doubtful because of some intelligence
7 problems and it says that their consensus or opinion is now
8 that there was a robbery in place and that the stabbing took
9 place as a result of an argument between Marshall and
10 Seale.
11 A. Yes.
12 Q. Again, putting on your defence counsel hat, My Lord, would
13 this information be of interest to you?
14 A. Any information is of interest to defence counsel and, of
15 course, he in turn has to evaluate it.
16 Q. Yes.
17 A. What effect it may have on a jury or what effect it may
18 have on the judge, of course, that's for the jury or judge to...
19 Q. Yes.
20 A. ...decide.
21 Q. Would you agree with me that defence counsel armed with
22 information such as this, including the statement of Mr.
23 MacNeil, alleged eyewitness, would have an improved
24 chance of a successful appeal on a new trial?
25 A. Well, that is assuming that this is a jury trial we're talking

about. You may call this man as a witness and the jury may not believe him.

Q. I'm thinking about one step before that.

A. Oh.

Q. I'm thinking of defence counsel going to appeal and armed with the statement of a new eyewitness and perhaps some information from this report would have, at least, have a better shot of getting a new trial.

A. Well, it certainly would fall within the fresh evidence rule if you knew about it.

Q. Yes. And, as you say, defence counsel, if properly advised, could go off and evaluate it and make their own conclusions?

A. Certainly.

Q. Their own investigation?

A. Certainly.

Q. Yes. I do ask for your view, sir, as chief law officer on particular disclosure issues arising out of the Marshall case. We know that at the time of the trial previous inconsistent statements of Mr. Pratico, Mr. Chant and Miss Harriss were in the possession of the Crown, according to Lou Matheson. The evidence is they were not made available to the defence. Assuming that there was no request by defence for these statements, in your view as Attorney General, should they have been made available to the defence?

1 A. I have to put myself back in what the state of the law was
2 in '70-'72, don't I?
3 Q. Well, the state of appropriate policies as we discussed and as
4 we've reviewed from Mr. Jones' letter.
5 A. As...if you're asking for my opinion on it, that's not very
6 helpful to this Commission, I'm sure, what my opinion may
7 be.
8 Q. Well, with respect, My Lord, you were Attorney General at
9 the time and as you've indicated in charge of the
10 administration of justice and...
11 A. You often have conflicting statements from witnesses, sure,
12 defence counsel should know about it.
13 Q. Sorry?
14 A. Defence counsel should know about it.
15 Q. Should know. I take it then your evidence is as Attorney
16 General it was the obligation of the Crown to disclose those
17 statements in the absence of a request.
18 A. I have to be...I have to be careful of that in law. Yes, I think
19 that's probably true, but I recall a case in Nova Scotia, it's a
20 reported case, in which a trial judge made the Crown
21 produce a contrary statement. It went on appeal and was
22 upset. The Crown tenders the evidence in that case and I
23 don't know in law if I can entirely agree with you.
24 Q. I'm thinking less of...
25 A. In practise...

1 Q. I'm thinking...
2 A. ...as Mr. Jones' letter indicates, that...that should have been
3 known, yes.
4 Q. Yes. And not wanting to press it, but I...do I take it that
5 your evidence is, as Attorney General, that it was your view
6 that these should have been disclosed to defence prior to
7 trial or prior to preliminary as a matter of fulfilling the
8 Crown's obligation of full disclosure?
9 A. Well, that's...because you have contradictory statements. I
10 have no objection to that.
11 Q. Yes.
12 A. To a Crown Prosecutor doing exactly that, making all
13 statements available to the defence.
14 Q. Yes. And you've indicated earlier that you believe that was
15 the appropriate practise to be followed?
16 A. Yes.
17 Q. Although, as you've indicated, you couldn't personally
18 oversee every case.
19 A. No, I couldn't oversee every case and, of course, the...you
20 can't ignore the state of the law at the time.
21 Q. Uh-hum.
22 A. You see, what our practise may be now, sixteen years later,
23 wasn't exactly what was going on then.
24 Q. No. Although Mr. Jones' statement that the obligation of the
25 Crown was, even ten years back before that.

1 A. That's right. But I'm not to...I'm...as I say I'm not certain
2 how much of that was adapted as Department policy at that
3 time.
4 Q. Again, you have indicated that it was your view that that
5 was appropriate policy in '71.
6 A. Oh, I think so.
7 Q. And the...and the fact of Mr. MacNeil coming forward with
8 this eyewitness information on November the 15th, 1971,
9 this fact was known by Mr. Matheson, Mr. MacNeil and Mr.
10 Anderson, all Crown counsel. In your view, leaving aside
11 any issue of the RCMP coming in, but in your view as
12 Attorney General, was there an obligation on the Crown to
13 disclose that information to the defence with the appeal
14 pending?
15 A. I think I've answered that, yes.
16 Q. Yes.
17 A. I think.
18 Q. And that would be an obligation that should be fulfilled
19 even in the absence of any request from defence counsel
20 because they wouldn't have any way of knowing about it,
21 would they?
22 A. They wouldn't have any way of knowing about it, no.
23 Q. And, the evidence is that defence counsel was not aware of
24 that evidence, and is it your view then that Crown counsel
25 were in breach of their obligation to provide that evidence?

1 A. What obligation are you referring to?
2 Q. The obligation to disclose it to defence.
3 A. I'd have to say, yes, because I think that was their general
4 thrust of trying to give full disclosure.
5 Q. And in that sense you would be then in agreement with Mr.
6 MacLeod and Mr. Anderson who have already testified that
7 in their view, yes, it should have been disclosed?
8 A. Yes, I have no difficulty with that.
9 Q. Are you able to indicate, My Lord, who you believe should
10 have disclosed it? We understand that, you know, appeals
11 were not carried by the local Crown, but were forwarded to
12 Halifax at that time, and indeed still are. So, you've got the
13 local Crown aware of it, but the matter being transferred to
14 Halifax, at least one counsel in Halifax being aware of it, but
15 he's not the guy who's looking after the appeal. Can you
16 give us any help and suggest who, on whom specifically the
17 responsibility rested?
18 A. I suppose it would be Mr. Anderson because he's the
19 director and he must designate the counsel who will be
20 doing the work.
21 Q. To summarize then this discussion, My Lord, we have fresh
22 eyewitness evidence coming to the attention of the Crown,
23 the matter is still before the Courts. It's evidence which,
24 certainly if you believe it, which would cast some doubt on
25 the conviction. And I take it from your evidence, it's your

1 view that it was the obligation of the Crown to ensure that
2 that was disclosed to defence and to the Court.
3 A. It should have been revealed to the defence.
4 Q. Yes. And in not disclosing that evidence to the defence, is
5 the Crown not in breach of its fundamental obligation to see
6 that justice was done?
7 A. If it, and in this case it did result in injustice, the wrong man
8 being convicted and the conviction upheld, yes.
9 Q. Yes. And, I guess in our parliamentary system the
10 responsibility for that ends up finally at the desk of the
11 Attorney General.
12 A. Exactly. I have never had any doubts on that, except if it's a
13 criminal matter then, of course, some Crown Prosecutor
14 carries out the criminal deed or act.
15 Q. Of course.
16 A. Then I don't feel that I have to be responsible for that. I
17 may be responsible for the discipline of it but...
18 Q. Yes. But you would agree then, as Attorney General, that a
19 conviction which continued, or at least the appeal was
20 unsuccessful, perhaps because of failure by the Crown to
21 disclose this evidence would be an injustice?
22 A. Would be what?
23 Q. The fact that Mr. Marshall's appeal was unsuccessful in
24 1972, if that can be attributed to a failure of the Crown to
25 disclose this fresh eyewitness evidence.

1 A. No, I...
2 Q. That would be an injustice, you just indicated that.
3 A. Yes, yes, it would be an injustice. But in turn, you're
4 jumping over the fact that a jury has to weigh that evidence
5 and what they reject or what they accept...
6 Q. That they would...
7 A. I've never been able to ascertain with all that certainty until
8 I got the results, but...
9 Q. But they'd have to have that opportunity to assess it?
10 A. Oh, sure.
11 Q. Mr. Edwards, Mr. Frank Edwards, testified that the non-
12 disclosure of the inconsistent statements prior to trial and
13 the non-disclosure of this fresh evidence was really the
14 foundation on which the wrongful conviction and the
15 unsuccessful appeal rested. If one accepts that view, then
16 the basic responsibility must rest with the Crown.
17 A. Perhaps you'd be good enough to repeat that.
18 Q. Yes.
19 A. If you may.
20 10:36 a.m.
21 Q. I say Mr. Edwards, Frank Edwards testified that the, in his
22 view, the foundation on which Mr. Marshall's conviction and
23 his later unsuccessful appeal, the foundation on which those
24 rested, were the nondisclosure problems, the nondisclosure of
25 the statements, and the nondisclosure of the fresh evidence.

1 Assuming one accepts that view, I'll just ask you to assume
2 that for the sake of the question, does it not follow that the
3 basic responsibility for Mr. Marshall's conviction rests with
4 the Crown?
5 A. But you're assuming too much. You're assuming a jury, if
6 they heard Mr. MacNeil, would accept Mr. MacNeil's evidence
7 and I can't tell you that.
8 Q. Well I'm asking you to accept, for the sake of the question,
9 Mr. Edwards' conclusion.
10 A. Well, then I'm not getting the question straight.
11 Q. Mr. Edwards' opinion is that Mr. Marshall's wrongful
12 conviction rested on these issues of nondisclosure and I
13 think...
14 A. Well, that's his opinion.
15 Q. That's his opinion.
16 A. But it's much more important that a jury have similar
17 opinions...
18 Q. Yes, but I think his opinion is that a, as a prosecutor, that a
19 jury faced with the evidence would have somewhat more
20 than a reasonable doubt as to Mr. Marshall's guilt and I'm just
21 asking you, for the purposes of the question, to accept Mr.
22 Edwards' opinion. If one accepts his opinion, does it not
23 follow that the responsibility for the conviction rests with the
24 Crown?
25 A. I don't even know if you can say that. I wouldn't want to

1 venture an opinion on that fact because that would...
2 Q. Can the responsibility for nondisclosure...
3 A. Probably clear conjecture as fair as I'm concerned.
4 Q. Can the responsibility for nondisclosure rest...
5 A. It's pretty hard...
6 Q. Anywhere else than with the Crown?
7 A. Oh, the nondisclosure obviously that, the Crown...
8 Q. Yes.
9 A. Was responsible, I would assume, for the nondisclosure.
10 Q. And if it is, in fact, concluded, if it's concluded that the
11 nondisclosure led to the wrongful conviction, then we come
12 full circle back to the Crown, do we not?
13 A. If you include all those things. But that's jumping over a few
14 very important items along the way.
15 Q. A couple of final issues, My Lord. Did Mr. MacLeod, he was
16 not Deputy throughout your full term in 1973.
17 A. No, no, he wasn't.
18 Q. Who replaced him?
19 A. Gordon Coles.
20 Q. Yes. Was Mr. Coles appointed on your recommendation?
21 A. It would have to be because it happened in my time and I
22 would have to recommend him to the Government.
23 Q. Had you had any previous association with Mr. Coles?
24 A. Yes, I did.
25 Q. In what sense?

A. Not an association. I articled there with his firm, Smith & Coles.

Q. Yes.

A. Of course, I knew him in law school, but we weren't all that well acquainted in law school, but certainly as an articled clerk I spent half my time, my nine months there, four and a half months at that firm and I knew him then.

Q. Did you practice with him at any time?

A. No, I never practiced with him other than the function of an articled clerk.

Q. You do what you're told when you're told and...

A. Yes.

Q. Did you have any association with Mr. Coles in any of your political endeavours?

A. I think he helped me, see, Gordon Coles was never any, I thought he was almost nonpolitical, but I think he did it as a personal friend. In my 1970 election I think he drove a car or acted in some minor capacity.

Q. Did you approach Mr. Coles with a view to taking the position?

A. I think I did. I think I did. There were several other people at that time. I, one, who I thought was, before I even asked Mr. Coles, Mr. Keith Eaton, we interviewed him and he was moving home from I think the Gowling, MacTavish firm in Ottawa and he was showing some interest. I think we almost

1 came to an agreement but then he later changed his mind and
2 went with a law firm, local law firm.
3 Q. Thank you. If I might back up a bit with Your Lordship's
4 indulgence. You indicated to me that if I were drawing
5 conclusions about the nondisclosure of these statements and
6 fresh evidence and trying to suggest that the conviction was
7 then really the fault of the Crown that I was jumping over...
8 A. Yes.
9 Q. A bunch of things in between, apart from the obvious
10 uncertainty of any jury decision.
11 A. Yes.
12 Q. Clearly. Apart from that, are there any other items that I'm
13 jumping over in that circle?
14 A. Well, of course, in the hearing of fresh evidence, whether it
15 will be accepted by a court.
16 Q. As to admissibility?
17 A. Once you have fresh evidence and you comply with the Rule,
18 of course, but you've got to bring the witness forward and I
19 don't know how even an Appeal Court on fresh evidence may
20 evaluate the particular fresh evidence you're bringing.
21 Q. You would agree with me nonetheless that a defence counsel
22 fully armed with those inconsistent statements, and with the
23 statement of James MacNeil, would have a better shot at
24 raising a reasonable doubt than if he didn't have them.
25 A. Oh certainly, even the poor witness, as a rule, is better than

1 none at all.
2 Q. Sure.
3 A. I don't know if that's, that is necessarily true because
4 sometimes they can be so poor as to not help at all.
5 Q. One final issue, My Lord. The testimony of Mr. Giovannetti
6 before this Commission on Monday past was supplied to your
7 counsel and I presume to you and I simply wish to give you
8 the opportunity should you so desire, to make any comment
9 or to respond to that testimony. I understand that arising out
10 of my giving you this opportunity, that Mr. Downie wishes to
11 make a comment before you perhaps indicate whether you
12 want to respond or not.
13 A. Well, certainly I would love to respond but I think Mr.
14 Downie will do the talking for me.
15 MR. DOWNIE
16 If the Commission pleases, I act for Mr. Justice Pace in his
17 present capacity as a justice of the Appeal Division of the Supreme
18 Court of Nova Scotia and I request of the Commission to be heard
19 on the question put by my friend, Mr. Orsborn, and certain issues
20 which flow from that question and the fact, and the very fact that
21 it has been put to the witness. May I be heard on that now,
22 please?
23 CHAIRMAN
24 Yes.
25

MR. DOWNIE

Thank you.

There has been, My Lords, a procedural agreement or an understanding among Mr. Orsborn, Mr. Saunders, counsel to Mr. Justice Pace as former Attorney General and myself acting for him in his judicial capacity. That agreement or understanding was, and is, that Mr. Justice Pace would appear before this Commission as a witness to respond to questions relating to his tenure as Attorney General. The whole question of his compellability and his competency to appear before this Commission and, for that matter, the appearance of his four fellow justices of the Court of Appeal to respond to questions about the Donald Marshall, Jr. reference was agreed to be put aside until the matter was decided by the courts.

That issue, or those issues of competency, compellability, as you know, are now before Chief Justice Glube of the Trial Division of the Supreme Court. She has reserved decision on our application which was only heard last week. It remains to be seen what will be the final disposition of that total proceeding.

In my view it is, indeed, a neat question whether, when the procedural arrangement or the agreement was made among counsel, it was intended to cover a situation such as we have here this morning. I don't propose to argue the point one way or the other other than to say that we tried to divide Mr. Justice Pace into two parts. One part was former Attorney General and the

other part was justice of the Appeal Division. He was to appear first as, and limited to, his former Attorney General position.

Now the fact is that my friend, Mr. Orsborn, has put the recent testimony of Mr. Dana Giovannetti to Mr. Justice Pace and asked him if he wishes to make any comment. My understanding is that if no comment is made, the matter will not be further pursued before this Commission by anyone at this time. I understand further, that if Mr. Justice Pace does make comment, Mr. Orsborn and presumably other counsel, will be considered by this Commission to be at liberty to pursue the matter further by putting additional questions.

Mr. Orsborn has made the point to me by letter, bearing yesterday's date, that by taking this position he should not be understood as agreeing that this very area, that is to say, the reported conversation between Justice Pace and Mr. Giovannetti, comes within a category which is or may be judicially immune. I accept that position by my friend. And I don't think it necessary for me to argue here today whether this area, let me call it the Giovannetti conversation is, or is not within the judicial immunity area.

It's obvious, or at least in my respectful view it's obvious, that by having put the question today to Mr. Justice Pace, he is placed at somewhat of a disadvantage. The whole question of judicial immunity before this Commission for these justices respecting the Marshall reference is now before the courts. If Mr.

1 Justice Pace does accept the invitation and responds or comments,
2 such action by him might be thought to be a waiver of his judicial
3 immunity in whole or in part. Also, as already noted, we are
4 awaiting a judicial delineation and, quite frankly, if one started to
5 make answer in this area this morning, I am not at all sure where
6 the stop sign is or where the stop sign should be. I'm sure my
7 friend, Mr. Orsborn, has already identified this point and I believe
8 that that is why he has, and quite appropriately, has simply
9 extended the invitation to comment.

10 Now those are the reasons why answer, in my view, should
11 not be made.

12 On the other hand, if Mr. Justice Pace does not accept the
13 invitation and does not comment, it might be thought that he has
14 nothing to say to a matter, or to matters raised in Mr.
15 Giovannetti's evidence. It might even be thought that by not
16 making comment he is indicating acceptance of all of what Mr.
17 Giovannetti has said earlier this week. The fact that this evidence
18 was led on Monday of this week and then this question is put to
19 Mr. Justice Pace certainly does, in my respectful view, place him
20 at somewhat of a disadvantage. It may be that he will be damned
21 if he does and he will be damned if he doesn't.

22 If left on his own, Mr. Justice Pace would accept the
23 invitation as he has already indicated to make comment on the
24 testimony. I am instructed that he does have things to say and, if
25 I may be permitted, it is of his nature to speak out if something is

on his mind. To borrow an expression I read in the transcript from Monday, he is somewhat of a hip-shooter and hip-shooters don't back down.

However, for the reasons I have mentioned, I have made the decision that at this time he should not accept the invitation to comment. I have, My Lords, so advised and instructed him. He will, therefore, say nothing in this regard and we accept that option.

The absence of comment by Mr. Justice Pace should not be taken as acceptance by him of everything as stated and in the manner stated by Mr. Giovannetti. The understanding is that Mr. Orsborn is reserving the right to take the position at a later date that this very area might be pursued by Commission counsel with Mr. Justice Pace at another time.

I also reserve the option the seek an appropriate opportunity, if I choose to do so, for Mr. Justice Pace to come forward and volunteer a response or make comments on this testimony.

I thank the Commission and I thank my friend for his usual professional courtesy.

MR. ORSBORN

A couple of comments, My Lord. What Mr. Downie said with respect our agreement or our position is substantially accurate with the exception that I indicated that if Mr. Justice Pace did not wish to avail of the opportunity that I, myself, would not pursue

1 the issue at this time in view of the current litigation before the
2 court. I'm obviously not able to give that same undertaking with
3 respect to all other counsel, although I would, if other counsel
4 decided to pursue it, I would take the same position that it should
5 not be pursued at this time but I did not make any undertaking
6 on their behalf.
7 I'm not quite sure where Mr. Downie's comments leave us. I
8 think they leave us at bottom with the fact that he has certainly
9 advised his client not to comment. I would suggest that the
10 decision whether or not, the final decision whether or not
11 comment should be made, must rest with Mr. Justice Pace. I don't
12 think counsel can direct what a witness says or does not say and I
13 would simply then repeat the opportunity given earlier. It was
14 simply phrased in terms of an opportunity, it was not phrased in
15 the terms of a question. There was no issue of compulsion and I
16 believe Mr. Justice Pace knows full well that if he does not choose
17 to avail of the opportunity, that's fine. I certainly will not press it
18 any further at this time, and Mr. Downie is correct that not
19 pressing at this time is without any prejudice to raising argument
20 on it at a later date. That it doesn't fall within the rubric of what
21 we're arguing about at this time. But I do feel nonetheless that if
22 it was, if nothing else, fair, to provide the opportunity in the terms
23 in which it's been provided, to allow a comment on that. If Mr.
24 Justice Pace wishes to comment, then he perhaps should be
25 permitted to do so.

DISCUSSION

CHAIRMAN

My understanding from Mr. Justice Pace's comment a minute ago is that he would like to respond but that he will accept the, and follow the advice of his solicitor, Mr. Downie. Mr. Downie's indicated to us that he has advised him not to respond so the...

MR. ORSBORN

If that is, indeed, the position, I have no problem with that. 10:52 a.m.

MR. CHAIRMAN

I don't know if we need to hear other counsel at this time. But if anyone wishes to be heard, anything relevant. The view of the Commission is, and as I understand the position put by Mr. Downie on behalf of Mr. Pace, is not that his...that Mr. Justice Pace is refusing in perpetuity, for want of a better word, to respond to the question or questions which may be put to him with respect to testimony given to this Commission by Dana Giovannetti as it relates to Mr. Pace, but rather that it would be more prudent and probably necessary at law, we'd have to rule on that, to await the outcome of the decision of Madam Justice Glube.

We are not ruling at this time as to whether we would have the right to proceed regardless of the decision of Madam Justice Glube. That would depend on the delineation of judicial immunity that would be set forth in her decision. We may conclude that the issue raised by the Giovannetti testimony does not impinge upon

1 judicial immunity at all. But it would save a lot of time and be
2 appropriate, in our view, to hold this question in abeyance until
3 we have received the decision from the Trial Division of the
4 Supreme Court of Nova Scotia. Mr. Downie also raises another
5 issue, that even if the decision of the Supreme Court of Nova
6 Scotia, Trial Division, is such that the delineation embraces Mr.
7 Justice Pace, then it's a question of whether or not he may insist
8 on waiving that judicial immunity for the purpose of responding
9 to the evidence of Dana Giovannetti as it relates to him. So, these
10 matters will be held in abeyance pending the filing of the
11 judgement of Chief Justice Glube.
12 Now, are you ready, do you have some questions you wish
13 to put to Mr. Justice Pace, Miss...
14 THE HONOURABLE MR. JUSTICE PACE
15 I wonder if...
16 MR. CHAIRMAN
17 Maybe we can...
18 THE HONOURABLE MR.JUSTICE PACE
19 Before we start if we could have a break.
20 MR. CHAIRMAN
21 Yes, fine. The smokers have to be accommodated.
22 BREAK - 10:56 to 11:20 a.m.
23 INQUIRY RESUMES
24 MR. CHAIRMAN
25 Miss Edwardh.

DISCUSSION

MS. EDWARDH

Just so I might put our position on the record. Certainly as a matter of courtesy both to the Commission and Commission counsel and, indeed, to the Trial Division, we at this time would not intend to pursue any questions in relation to the conversation but would simply like to underline that we would like to reserve the right to argue that that particular area of questioning would not fall within the scope of judicial immunity. It may be that it's not covered at all in Her Ladyship's decision when it's rendered, and it may be. We'll all have to take a chance and read it. But I'd just like to reserve that as our position.

MR. CHAIRMAN

Yes, fine.

EXAMINATION BY MS. EDWARDH

Q. Just a few questions if I may, My Lord. My name is Marlys Edwardh.

A. Yes.

Q. I represent Donald Marshall, Jr..

A. I know.

Q. You have discussed at length issues pertaining to disclosure and your view of the obligation of Crown counsel being, in effect, to provide evidence that would assist the defence, to the defence by way of prior inconsistent statements or others. Is that a fair summary of your...

A. Yes.

1 Q. ...conclusion, My Lord?
2 A. Yes, it is.
3 Q. At the same time in your comments, I took it from you that
4 during this time period, 1970 to 1973, you were by no
5 means sanguine that your views were shared by Crown
6 counsel across the Province?
7 A. That, I think, is correct.
8 Q. So, I take it that it was at least the topic of discussion and
9 concern about the proper duties of Crown counsel as an
10 officer of the Court and to the administration of justice?
11 A. That was certainly a concern. I thought we were making
12 progress. As you know, Miss Edwardh, in law sometimes it
13 can be slow. But it had to be...there was improvement in
14 that they were revealing more than when I commenced
15 practise.
16 Q. So you...
17 A. And...
18 Q. I'm sorry.
19 A. Yes.
20 Q. You, sir, would certainly, from your own experience then be
21 well aware that the practise of Crown counsel was not
22 uniform throughout Nova Scotia.
23 A. I think that's correct.
24 Q. Now, if I can then just be a little bit more precise than my
25 learned friend. Being aware that it was not uniform and

1 having your own view about the propriety of Crown
2 counsel's policies with respect to disclosure, what steps did
3 you take, sir, between 1970 and 1973 by way of discussion
4 or written directives or memoranda that didn't amount to
5 directives, to bring about the policy which you have
6 indicated you adhered to?
7 A. I can't remember, to be quite truthful. I think my view was
8 pretty well known. I can't recall sending out any directives,
9 and I think within the immediate confines of the office here
10 in Halifax, head office, that my view was generally shared.
11 But how it was being carried out all over the Province...
12 Unless...I have to say this in fairness though, I don't recall
13 any great complaints from defence counsel.
14 Q. Maybe we've just all gotten used to it over the years.
15 A. Well, indeed, if there's...I think that was basically my own
16 attitude, that I got used to it. I knew I wasn't going to get
17 the information and I had to accept it whether I liked it or
18 lumped it.
19 Q. And you yourself had not filed any complaints or addressed
20 the issue in the...
21 A. No, I had not, no.
22 Q. So, if I understand you, sir, then it would be fair to say that
23 although you believe your views were generally well
24 known, you can't assist us by pointing to any memorandum
25 or directive or...

1 A. No.
2 Q. ...convention of Crown counsel where you would have given
3 an express instruction in that regard.
4 A. No, I can't really. I...as I say...
5 Q. And would you...
6 A. You know, if you had asked me six months after the event
7 I'd have known, but sixteen years later I'd be just...
8 Q. It's a long time. We all appreciate that. Would that have
9 also been a matter of direct concern, and really within the
10 bailiwick of the director of criminal prosecutions?
11 A. I'm sorry, I didn't follow.
12 Q. Would Mr. Anderson also have held a position which would
13 have involved him in policy matters such as disclosure, et
14 cetera, where he would have had a concern about getting
15 that kind of information to Crown counsel around the
16 Province?
17 A. On policy matters I usually, I usually worked direct with the
18 deputy because he had to know what was going on in the
19 Department in order to administer the day-to-day work of
20 it. I'm not trying to avoid your question.
21 Q. No. No, I appreciate that.
22 A. I'm just trying to honestly answer it.
23 Q. Do you recall at all ever giving to the deputy this area of
24 concern to draft or come to any more formal position about
25 Crown counsel's obligations?

1 A. No, I can't, I can't say I did.
2 Q. In retrospect, looking in terms of your own involvement as a
3 defence counsel and subsequently as Attorney General,
4 would you agree, sir, that in order to get the message out
5 effectively, there ought to be some fairly clearly defined and
6 formalized rules about disclosure?
7 A. Well, as I say, the law wasn't all that clear on it itself at that
8 time. And it's very hard to...you have to follow the law to
9 start giving directives out of the Attorney General's
10 Department or the...
11 Q. But that...
12 A. And I just mentioned the Duke case, which I'm sure you're
13 totally familiar with.
14 Q. But at its highest one would say that the cases would give a
15 discretion to Crown counsel as opposed to preclude Crown
16 counsel from providing information to defence.
17 A. I think that's perhaps a proper way to put it. It gave them
18 more discretion than perhaps I even like to see.
19 Q. And in the exercise of that discretion, it would also be fair to
20 say that Crown counsel would be informed by, for example,
21 your views as Attorney General in what the proper
22 discharge of their responsibilities were.
23 A. I would think I made my views pretty well known because
24 I traveled to each of the courts and visited the Crown
25 Prosecutors who I could find at the time. I made it a point

1 during my tenure to go around each year to the various
2 courthouses and such like, and in a goodly number the
3 Crown Prosecutors were housed in the courthouse or they
4 were close by.
5 Q. Right. My question, My Lord, though is a little narrower. In
6 light of the diversity of practises that appear to have
7 prevailed and may, indeed, still prevail, would you agree
8 that perhaps a formal set of directives pointing to Crown
9 counsel how their discretion ought to be exercised would be
10 of assistance?
11 A. Well, certainly something akin to what Mr. Justice Jones put
12 out as far back in '61 would have been at least a refresher
13 and I can't say that it ever went out.
14 Q. Right.
15 A. I don't...I have no recollection of...
16 Q. I take it from your evidence, My Lord, that you indeed had
17 no knowledge or contact of any kind with Mr. Marshall's
18 investigation, conviction and the subsequent appeal?
19 A. That's right.
20 Q. As Attorney General. Let me then just ask you, if I could, a
21 couple of general questions. You held a dual portfolio. As
22 Attorney General and as Minister of Labour, I take it,
23 between 1970 and 1973.
24 A. No, I...
25 Q. Did I understand you correctly?

A. No, I picked up...I dropped Labour and I picked up, I was A.G. and Highways Minister which was a bit awesome.

Q. And as...so you were Highways Minister.

A. But when I can't...it seemed to me that that occurred after about a year and a half or two years having Labour.

Q. But while you were Attorney General, it's fair to say you also held these other major responsibilities.

A. Yes, I did.

Q. So, could you just estimate for us in an ordinary week what percentage of your time would have been available to devote to the office of the Attorney General as opposed to the other responsibilities you may have carried, whether that be Labour or Highways?

A. Really, my head office was A.G., Attorney General, and from that there was an office in the Labour Department which was a separate building and I would visit there, I can't really tell you how often, but as often as required, and when I had the Highway portfolio, it was just two floors up from the Attorney General's office.

Q. Would you spend...would you have spent as much as a third of your time in those other responsibilities?

A. See, Highways is a twenty-four hour job, a-day job, in that you'd be called at night and everything else, but it would be just a terrific guess on my part to say how much I spent at one and how much I spent at the other. I...because we

had...when I first took the Labour portfolio, they had what you call "wild-cat strikes" here in the Province and such like. So that...those things had to be attended to. I would think, I probably all the time I was Attorney General, I at least gave fifty percent of my time to the Attorney General's job.

Q. Thank-you. Let me just ask a couple of other questions about the general relationship of the Attorney General's office to other aspects of the administration, at least, of criminal justice. Did the Attorney General's office when you occupied that position, sir, have any formal relationship with provincial coroners doing forensic examinations or pathologists doing their forensic examinations of deceased?

A. You mean where there was death?

11:33 a.m.

Q. Yes.

A. I think so.

Q. Were they appointed by, were certain of those pathologists appointed by the Attorney General's office?

A. I can't say. I think here in Halifax we have the same man, but I can't remember if we started with him, Dr. Perry.

Q. You don't recall any specific institutional relationship between the Attorney General's office and forensic pathologists.

A. None, no, I can't.

Q. Now with respect to the RCMP I believe I heard you make the remark to a question posed by my friend that you, yourself,

had had something to do with arranging for the RCMP to provide certain services to municipal police forces, is that correct?

A. I think we had, through Chief Superintendent Mudge, I think we had an arrangement whereby the local police force were able to call them when there was difficulty.

Q. And would this then be any local police force being able to call in the nearest RCMP detachment or are you talking about Halifax?

A. Well I think they had to investigate some themselves, you know. If they run into difficulty the RCMP service was available to them. That was my understanding.

Q. Did you, yourself, arrange for that contract or, I'm sorry, I thought you implied you did...

A. It may even be in our federal/provincial contract with the RCMP. I'm not sure.

Q. One last question before I sit down. Sir, we have asked at least one other counsel who appeared here whether or not they took the view that Crown counsel's obligations extended to informing, for example, the Court of Appeal, or a court, of an error. And I wonder as Attorney General, whether you would have expected people handling appeals in the Department, if they were to observe what they felt was a significant or substantial error, that the defence had not raised in the notice of appeal, whether you would have

1 expected them, pursuant to their obligation, to draw that to
2 the attention of the court.
3 A. If it wasn't in, perhaps if you wouldn't mind repeating that,
4 Ms. Edwardh.
5 Q. There has been some suggestion that Crown counsel's duty
6 extends to a situation where if they were to have found in
7 examining a transcript, for example, of a trial a substantial
8 error made perhaps by the trial judge, that it would be their
9 obligation to raise this error with the Court of Appeal. In
10 your capacity as Attorney General would you have held that
11 expectation of Crown counsel's conducting appeals?
12 A. Well having my view and saying it in general terms, I don't
13 think the Crown ever loses a case, I would assume that if
14 there was a gross error that they should bring it to the
15 attention the court. They're all officers of the court. Now, and
16 of course you're, I'm sure, more well aware of this than me
17 that you can't dictate what the appellant is going to bring
18 forth as Crown counsel unless you happen to be the appellant.
19 Q. No, I appreciate that, but as your expectation in terms of the
20 conduct of Crown counsel when you were Attorney General, if
21 such an egregious error were available or to be seen on the
22 record you would have expected them to bring it forward to
23 the court.
24 A. I would expect, and I think they would have.
25 Q. The next last question, My Lord, that I would like to ask you

is we heard testimony which is in Volume 38 at page 7020 from Mr., I'm sorry, 7023, from Mr. Veniot who testified that in the Department there were files which some departmental lawyers did not have access and these files, he believed, were "politically sensitive" files. And that they had a green stripe on them. Were you aware of the existence of such files during your tenure?

A. No, I certainly was not. The only ones that I ever recall with a green stripe on it, now how they segregated them in the Department, I'm not sure. But was when it was an ongoing investigation by the RCMP and they had asked our people to give them some direction, that's my only knowledge of that. I'd say it's a very poor place to store political files.

Q. So let's, starting with the green-striped files for a moment, I take it that any green-striped files that Your Lordship may have had an opportunity to note would have been just one that designated an ongoing criminal investigation.

A. That, I think it was the RCMP's designation of the color or something. That's the only thing that I've ever noticed.

Q. And that would only indicate at all that there was a consultation process with the AG's office going on about the investigation.

A. Yes. And somebody within the office would have given some direction on it. Now I don't know if they made it available to each other in the office, I don't know. I would assume

1 whoever the director appointed to look after the particular
2 file, now if it was an ongoing investigation I suppose they
3 would want to look after it.
4 Q. And then the last question, My Lord. Were you aware that
5 there was any special category of politically sensitive files
6 and were such files ever kept in the Attorney General's office
7 to the best of your knowledge?
8 A. No. There was none.
9 MS. EDWARDH
10 Those are my questions, My Lord. Thank you very much.
11 CHAIRMAN
12 Mr. Pugsley?
13 MR. PUGSLEY
14 No questions, My Lord.
15 CHAIRMAN
16 Mr. Murray?
17 MR. MURRAY
18 No questions, My Lord.
19 MR. BARRETT
20 No questions, My Lord.
21 MR. GAY
22 No questions.
23 EXAMINATION BY MR. WILDSMITH
24 Q. My Lord, my name is Bruce Wildsmith and I'm here for the
25 Union of Nova Scotia Indians. There's just one letter I wanted

1 to call your attention to and inquire about and as a preamble
2 to this, if you could have Volume 41 in front of you. Volume
3 41? And if you could turn to page 100 in Volume 41...
4 A. Yes.
5 Q. Page 100. This is a letter to you as Attorney General from the
6 Minister of Indian and Northern Affairs, Hugh Faulkner...
7 A. Yes.
8 Q. And I wanted to call your attention to the second paragraph
9 which indicates, and I'll give you an opportunity to read it,
10 that the Union of Nova Scotia Indians had a plan to have
11 Band-employed constables play the primary role for police
12 protection on Indian reserves.
13 A. Yes
14 Q And it goes on to say that the cooperation with the RCMP
15 would be close. That appointments of the constables would
16 be consistent with whatever law is required in your province
17 and that it's felt that the constables should receive basically
18 the same training as RCMP constables and given the same
19 peace-keeping or peace officer roles and emphasizes with
20 ultimate authority to you as Attorney General.
21 A. Um-hmm.
22 Q. And I wanted to turn from there to your response which is at
23 page 106 and perhaps first ask if you have any recollection of
24 having written this letter. It's some time ago. Ten years. Do
25 you have any recollection of it?

1 A. None at all, I have no...
2 Q. In the normal course of things would somebody else have
3 drafted this letter for your signature?
4 A. Sometimes that occurred. As a matter of fact in the Highways
5 Department we had person who did a lot of that because the
6 correspondence was tremendously heavy and you would
7 check it and either agree or disagree and send it back for...
8 Q. This matter...
9 A. I would assume some of that, if I were particularly busy,
10 would have been done in the Attorney General's Department,
11 too.
12 Q. This letter dealing with the question of policing on Indian
13 reserves, if it had not been drafted by you could you indicate
14 who, in your Department, might have done it? Would it have
15 been the Deputy Attorney General or would somebody else
16 deal more with Indian matters or policing matters.
17 A. It could have been any one of several, I would think.
18 Normally the director of the criminal branch, who'd be
19 dealing with the RCMP et cetera, or it could be the Deputy, or
20 it could be one of the senior people in the...
21 Q. Okay.
22 A. But, you know, that would be done in consultation with the
23 Department because there's a number of things I just note in
24 skimming through it.
25 Q. I wanted to call your attention to the third paragraph...

A. Yes.

Q. Where you say,

> The concept in your letter (and I think that's referring to the concept that I just referred you to) is really a municipal policing concept and that the members of such a force would not be members of the RCMP and, therefore, not members of the provincial police.

And then you go on to say,

> The Police Act of this province does not provide for this concept and, accordingly, I as Attorney General, would not have control over them, nor would the members have the benefits of the Police Act.

And then you give a second reason, I take it, for not liking the concept which is,

> That in addition, because of the status of reserves as federal enclaves, I doubt that I, as Attorney General, would have any control over the type of regulations which the Band council might enact.

A. I think, now this is a long time of recollection.

Q. Yes.

A. It seemed to me our concern there was that they wanted to enforce their own Band laws...

Q. As well as what other laws, federal or provincial, that applied to the Indian reserves.

A. Yes. And it was some concern, now supposing they were

1 trying to enforce some law that was contrary to the general
2 law, now, I recall concern about that.
3 Q. Yes. Is that perhaps why you're referring to Band by-laws
4 and the federal enclave.
5 A. Pardon me?
6 Q. Is that why you're referring to it being a federal enclave and
7 having no control over Band by-laws?
8 A. Well no, of course, reserves are a bit different, as you know.
9 They, under the Indian Act. I run into that situation in
10 dealing with native people on several occasions. One time we
11 wanted to do a road for them in, I think it was Eskasoni, and
12 of course they, the Band council had to agree to convey, of
13 course, to the highway the land.
14 Q. Yes.
15 A. And then it had to be approved by Ottawa under the Indian
16 Act...
17 Q. Yes. There are certainly complications.
18 A. There is complication, Mr. Wildsmith.
19 Q. I'm particularly, would anybody have provided you with a
20 memo or other information that corresponds with the
21 contents of this third paragraph or would this be you
22 expressing your opinion, views and information.
23 A. No. I don't know. As a Minister of the Crown, there's very
24 few times you express all your own views if your any ways
25 wise.

1 Q. Yes.
2 A. Without consulting your Department and the people who are
3 working for you.
4 Q. So you would expect in the normal course that you would
5 have received opinions and advice from other members of the
6 Department before sending out this letter.
7 A. I would assume so, because it's dealing with a number of
8 factors there and I don't believe I'd a just sat down and
9 penned that off by myself.
10 Q. Fair enough. Could I then call your attention to page 135
11 which is the response of the Federal minister to your letter
12 although, I take it, you had been appointed to the Bench now
13 and, therefore, it's addressed to the new Attorney General,
14 Mr. Mitchell. And what I wanted to know is whether you
15 could shed any light on whether the more detailed response
16 of the Federal minister, somewhat critical of your points,
17 would, in fact, be a better representation. For example...
18 A. Of course I don't think we ever made any...
19 Q. Third paragraph...
20 A. Any bones about it, you know. The federal and provincial
21 don't always agree as ministers.
22 Q. Yes.
23 A. They see things in a bit different light.
24 Q. Well the third paragraph in this letter says that,
25

> The RCMP, Department of Justice and my own department (meaning Indian Affairs) have reviewed the matter very carefully and it is our combined opinion that legislative authority exists to accommodate the Indian request.

And he goes on to refer to a particular provision in the Nova Scotia Police Act in 1974 dealing with special constables. Now can you offer any insight as to whether...

A. Not really...

Q. That is correct.

11:50 a.m.

A. Not really. I wouldn't comment on a letter to another Minister when I wasn't even in the office.

Q. You having been appointed, this letter wasn't called to your attention, then, I take it, by the new Attorney General, Mr. Mitchell.

A. No, I've never gone near the Department or any Ministers of the Crown after I was appointed.

Q. Fair enough. Was this concept of special constables under the Nova Scotia Police Act something you gave consideration to?

A. Yes, it used to arise, certainly. I remember, I think, too, and the federal people used to bring this up in federal/provincial meetings and also I think the Native Court Worker Program, which we had into being in this province...

Q. Yes.

A. Was a federal/provincial agreement.

Q. Yes.

1 A. Now I'm giving you sort of a very general...
2 Q. Yeah, I'm just wondering if there was any...
3 A. View of it as best I can, but...
4 Q. I was just wondering if there was any reason why we should
5 think that Section 34 in the Police Act would not have been
6 adequate to appoint special constables under your authority
7 as Attorney General to police Indian reserves?
8 A. I have no answer for that, Mr. Wildsmith.
9 Q. Okay. And on this concept of Indian reserves being federal
10 enclaves, your attention, your successor's attention is called
11 on page 137 to the Cardinal case in 1973.
12 A. Well, that may have been poor description, if you will. It
13 wasn't meant to be insulting or anything else, but just to... I
14 wouldn't have caught it or taken it as being that. But you do
15 have to handle reserve matters very different than you do
16 ordinary lands.
17 Q. And finally, the last point made at the bottom of page 137 is
18 that if there was a deficiency in the Police Act all the province
19 had to do was amend the Police Act to make provisions for
20 the appointment of Indian constables on reserves. Is that...
21 That's a fair conclusion, I would take it?
22 A. I would assume so.
23 Q. Yes. Was any consideration given to amending the Police Act
24 at that time to accommodate this request?
25 A. You're talking about in 19... Or at page 137?

1 Q. Yes.
2 A. Of this letter?
3 Q. Yes. This would be...
4 A. This is...
5 Q. During the last...
6 A. This is after I'd been appointed to the court. I wouldn't
7 know...
8 Q. Yes.
9 A. If there was any...
10 Q. Fair enough.
11 A. Consultation or anything else in regard to political matters.
12 Q. I'm really referring to the time period in which the request
13 had gone to you as Attorney General and then been refused.
14 And whether, in your refusal, you had given any
15 consideration to the advisability of amending the Police Act so
16 as to accommodate the request?
17 A. I don't know.
18 Q. Fair enough.
19 A. I can't answer that, Mr. Wildsmith.
20 MR. WILDSMITH
21 Thank you, then. Those are all my questions.
22 MR. SAUNDERS
23 We have no questions for His Lordship.
24 COMMISSIONER EVANS
25 Q. Mr. Justice Pace, you were admitted to the Bar in '54 and then

1 you practiced for six years doing... A good percentage of your
2 work was in the criminal law field?
3 A. I practiced 16, yes.
4 Q. And as I understand the, at that time, there was, what one
5 might say, no disclosure by Crown attorneys in defence cases.
6 A. Basically, there was no disclosure by Crown attorneys. There
7 was the odd situation, not that often, where they would put a
8 man on the, introduce a man to the court and say, "My
9 learned friend, he can now have him as his witness." Now
10 some, and I suppose, in fairness, some would tell you that
11 they had a theory contrary to what the Crown's. But that was
12 my recollection. We found that, I don't know as a defence
13 lawyer, I found that many ways the police would give you
14 some information, you know. But, basically, the Crown didn't.
15 Q. That's why I was a little curious because that letter of Malachi
16 Jones on March the 23rd, 1961.
17 A. Yes.
18 Q. That's addressed to the R.C.M.P.
19 A. Yes, it is.
20 Q. It's not addressed to Crown attorneys.
21 A. No, it's not addressed to Crown attorneys.
22 Q. So there may have been a little problem about...
23 A. I think, I think Malachi at that time was expressing a view as
24 a senior counsel, was he not, in the A. G.'s Department. I don't
25 know if he even had become the assistant.

1 Q. He's described as "senior counsel."
2 A. Senior counsel, yeah. And he was giving direction to the
3 R.C.M.P. But I think during the sixties, perhaps it was
4 attitudinal in some ways, the police start giving a bit more
5 information.
6 Q. Well, even back prior to your appointment to government or
7 elected to government, did you find that there was anything
8 wrong with discussing a case with a witness who was going to
9 be called by the Crown?
10 A. Not at all if you knew who the witness was.
11 Q. Yeah, but you'd have to do a little digging to get that.
12 A. But I must say you used caution in that because you didn't
13 want it later to be said... I usually, when I had that occasion
14 to interview Crown witnesses, and I've always taken the
15 attitude there's no property in a witness, but I always had a
16 second person present when I interviewed what was a so-
17 called Crown witness.
18 Q. And you've already told counsel, I believe, that there was a
19 failure, the failure on the part of the Crown counsel to disclose
20 the polygraph test or the evidence of MacNeil. That was
21 incorrect. That was wrong for the Crown not to disclose to the
22 defence.
23 A. Oh, they should have given it to the defence for what it was
24 worth and then the defence could proceed on... Now whether,
25 in turn, the jury would believe that evidence, weigh it and

1 believe it, you know, I really can't say.
2 Q. And you say the same with respect to the conflicting
3 statements of Chant, Pratico, and Harriss?
4 A. Yes.
5 Q. And that's based, really, on the theory that the duty of the
6 Crown counsel is to present all the evidence fairly to the, all
7 relevant evidence to the court and he's not to make a
8 judgement as to what he thinks is relevant on all occasions
9 when there's conflicting statements, certainly. Do you agree
10 with that?
11 A. Yes. Yes, because sometimes that judgement can be rather
12 warped by the evidence...
13 Q. Yeah, the theory the Crown never wins and the Crown never
14 loses is a lovely theory, but in practice, some are a little more
15 aggressive than others...
16 A. Oh...
17 Q. I don't say a Crown shouldn't be aggressive, but there's a limit
18 to the aggressiveness.
19 A. No, I've always taken the attitude, good cross-examination
20 and good examination of witnesses is more apt to reveal the
21 truth than...
22 Q. So you say a good cross-examination or a good examination,
23 no matter by whom it's undertaken, is good for the justice.
24 All right, I have nothing further.
25 A. Fine, thank you.

MR. CHAIRMAN

Q. One question I'd like to ask Justice Pace.

A. Yes.

Q. In Nova Scotia, I'm not sure it's a practice now, but I believe it used to be the practice to retain and/or appoint practicing lawyers as Crown Prosecutors in certain areas of the province.

A. Yes, it was and we, in 1970, you had a lot who were just on... Well, they were assisting prosecutors. Yes, they had them on a per diem or on a per case basis. Is that what you're...

Q. Yes.

A. Referring to?

Q. So in your day as Attorney General...

A. I don't think they held an appointment as...

Q. No.

A. I'm just trying to think. Seemed that they were...

Q. So I take it in your day, term of office, you may have had two categories of Crown Prosecutors.

A. I think...

Q. Those who were permanent civil servants.

A. Yes, we had the permanent... That came in later. I'm not too sure that didn't come in in the mid-seventies or something like...

Q. For instance, Donald MacNeil...

A. Was a civil...

Q. He was not a public servant, was he? Or was he?

A. Yes, he was.

Q. Was he?

A. I think he was.

Q. I see. I didn't realize that.

A. I think he wasn't in the first years after 1970, but then they brought in this situation where they became, if they were permanent, you know, they were made civil servants.

Q. Thank you very much.

A. Fine, thank you.

COMMISSIONER EVANS

Q. I have one other question I'm going to ask you. In your Department, do you have a clipping service, the Department of the Attorney General, do they have a clipping service of cases throughout the region, throughout the province?

MR. CHAIRMAN

You mean newspaper clippings?

COMMISSIONER EVANS

Q. Newspaper clippings.

A. They may have, but I wasn't aware of it.

Q. If they did, they must have just filed them, is that it? Because...

A. Well, this, I imagine, was what they did. Now Innis MacLeod could have, of course, answered that much more fully than I can. I was not aware of it.

MR. CHAIRMAN

Thank you very much, Mr. Justice Pace. Do you have another witness to start now?

MR. ORSBORN

We have another witness, My Lord. He would not be finished before lunch.

MR. CHAIRMAN

There's no point in starting him before lunch, is there?

MR. JUSTICE PACE

Am I...

MR. CHAIRMAN

Yes, thank you very much.

MR. JUSTICE PACE

Thank you very much.

MR. CHAIRMAN

How long do you... Who is the next witness?

MR. ORSBORN

The next witness is Superintendent Al Vaughan, My Lord. I would expect his direct examination would be around an hour.

MR. CHAIRMAN

All right, well, let's go ahead. We want to get as many, all the other witnesses out of the way this afternoon... today.

MR. ORSBORN

We'll break at 12:30, in any event?

1 MR. CHAIRMAN

2 Yes.

3 **A.E. VAUGHAN,** duly called and sworn, testified as follows:

4

5 MR. ORSBORN

6 There were a couple of exhibits being circulated, My Lord.
7 One was the Service History of Superintendent Vaughan, which I
8 believe has been distributed to counsel, consisting of two pages,
9 EXHIBIT 154. And there were also some comments of
10 Superintendent Vaughan on a couple of matters which were being
11 copied and, I hope, have been distributed to counsel.

12 CLERK

13 No, not yet.

14 MR. ORSBORN

15 They're in process. Mr... Superintendent Vaughan's counsel
16 provided us with a number of copies. There were not enough to
17 be distributed immediately and they were being copied.

18 MR. CHAIRMAN

19 It's going to be a terrible blow to the paper industry of Nova
20 Scotia when this is over.

21 MR. ORSBORN

22 They are matters, I think, will be addressed in evidence,
23 anyway.

24

25

EXHIBIT 154 - R.C.M.P. SERVICE HISTORY OF SUPERINTENDENT A.E. VAUGHAN.

EXAMINATION BY MR. ORSBORN

Q. In any event, Superintendent, we'll start. Your name is spelled V-A-U-G-H-A-N?

A. That's right, sir.

Q. You're currently resident of Halifax?

A. That's correct, sir.

Q. And you're superintendent in charge of Criminal Operations for the R.C.M.P?

A. That's correct.

Q. Since 1985?

A. Since 1985, yes, sir.

Q. And you joined the force, I believe, in 1956?

A. 1956, yes.

Q. And the exhibit that we've marked as 154, which is your two-page service history, does that accurately reflect your experience with the R.C.M.P?

A. Yes, it does, sir.

Q. Could you describe for us in general terms the responsibilities of an officer-in-charge of Criminal Operations?

A. Yes, indeed. My responsibilities, under the direction of the Commanding Officer, are to evaluate the level and quality of

1 police services in the contract area of our policing, the level
2 and quality of the federal policing services in the division, to
3 coordinate criminal operations that involve interdivisional
4 criminal operations, to insure the efficient and effective
5 deployment of resources in the investigation of crime, to
6 bring to the attention of our auditors and quality review
7 people any areas of concern that we wish to have reviewed
8 when they're doing their reviews of detachments and various
9 units, such as plainclothes sections. It is to formulate policies
10 and recommend policies consistent with our police operations
11 in the province. And to perform, and to keep the
12 Commanding Officer, of course, appraised of any significant
13 operations that are occurring within the Division.
14 Q. Does your role then cover R.C.M.P. operations both with
15 respect to its operations as a contract force for the province
16 and any federal work it may be doing in the province.
17 A. As well as federal policing, services, and protective policing
18 services.
19 Q. And as criminal operations officer, to whom are you
20 accountable?
21 A. I'm accountable to the commanding officer of the division.
22 Q. Are you, in any sense, accountable to the Department of
23 Attorney General?
24 A. No, my accountability would be to the commanding officer.
25 The commanding officer would have his accountability to the

1 Commissioner of the R.C.M.P. and to the Attorney Generals or
2 the Government of Saskatchewan, under the contract.
3 MR. ORSBORN
4 I believe the two sets of notes prepared by Superintendant
5 Vaughan have been distributed now, My Lord. There's a one-page
6 one which is headed up, "Role of Criminal Operations for Nova
7 Scotia", which we've just discussed, 155. And then there's a six-
8 page memorandum drawn up by Superintendent Vaughan...
9 EXHIBIT 155 - ROLE OF CRIMINAL OPERATIONS OFFICER FOR
10 NOVA SCOTIA - 1 page
11 EXHIBIT 156 - RELATIONSHIPS WITH RCMP PREPARED BY
12 SUPERINTENDENT A. VAUGHAN - 6 pages
13 MR. BAILEY
14 My Lords, I don't mean to interrupt, but I did want to
15 introduce myself to...
16 MR. ORSBORN
17 I'm sorry.
18 MR. BAILEY
19 The Commission. My name is Brian Bailey and I represent
20 Superintendent Vaughan. Thank you very much.
21 MR. ORSBORN
22 Yes, these exhibits were provided by Mr. Bailey through
23 Superintendant Vaughan and I'm really introducing them at his
24 request. The six-page memorandum, headed up "Relationships
25 with RCMP" will, I believe, be EXHIBIT 156.

1 MR. CHAIRMAN

2 I think these exhibits were prepared with a view to saving
3 some time rather than have Inspector... Superintendent Vaughan
4 go all the way through.

5 MR. ORSBORN

6 I would not propose going through these in any detail.

7 MR. CHAIRMAN

8 Good.

9 BY MR. ORSBORN

10 Q. Do I take it, Superintendent, that the memorandum, which is
11 Exhibit 156, the six-page memorandum, "Relationships with
12 the RCMP", accurately sets out the geographic organization of
13 the force within the province, the checks and balances that
14 exist within the operation of the force within the province
15 and the type of liaison that you have with the Department of
16 Attorney General, matters on which you would report to the
17 Department of the Attorney General?

18 A. That's correct, sir.

19 Q. And that the memorandum is accurate, at least, to your
20 knowledge.

21 A. Yes, it is, to my knowledge.

22 Q. In respect of your liaison with the Department of Attorney
23 General, do I understand that you have regular meetings with
24 representatives of that department?

25 A. Yes, I do, sir.

1 Q. And these would be with Mr. Gale and/or Mr. Herschorn?
2 A. Mr. Gale, generally; occasionally, Mr. Herschorn sits in on the
3 meetings.
4 Q. Yes, and I understand that these are informal with no notes
5 kept?
6 A. They have been, yes, sir.
7 Q. I see. Do I understand that your memorandum, Exhibit 156,
8 sets out on pages 3 and 4, the bottom of page 3 and the top of
9 page 4, the types of matters that would be discussed?
10 A. Yes, it does.
11 Q. When you speak of "problems with the prosecutorial service",
12 what kind of things do you mean by that?
13 A. What I'm referring to there is we have had experience with
14 prosecutors not attending to their responsibilities, for a
15 variety of reasons, and when we do have these difficulties,
16 then we raise that with Mr. Gale.
17 Q. What sort of responsibilities are you talking about?
18 A. It could range from nonattendance on a case, in which the
19 case was poorly represented or not represented at all. And
20 that would generally be the context of that issue.
21 Q. Do you discuss at these meetings the conduct of ongoing
22 investigations?
23 A. Occasionally.
24 Q. For what purpose?
25 A. There may be cases, and if I may give you an example, of a

murder case in Canso which was a very serious case and the public was in a state of alarm. They had imposed a curfew. And in terms of assurance to the Department so that assurance could be made to the public that sufficient resources were being deployed to the investigation, then I would inform them that, in fact, adequate resources were being employed on the investigation and to alleviate those concerns of the public. Or I may also, for example, alert the Department to the proliferation of certain types of drug abuse in the province which has a direct impact on crime, in general. Whether it's theft or whatever, to keep them apprised.

12:10 p.m.

Q. Is it your view that the direction or consent of the Department of Attorney General is required for your force or members thereof to investigate any crime or suspected crime?

A. To investigate a crime?

Q. Yes.

A. No.

Q. If the crime involved a member of a police department or municipal police department itself, would you require the consent or authority of the Attorney General to commence an investigation?

A. Yes.

Q. Why?

A. The municipal police departments are set up by charter under the Police Act and they're instituted to enforce the laws within that municipality. We're hired under contract to do the policing service in all other areas of the province where a municipal police department does not exist. So, therefore, to undertake to investigate a crime within a municipal police department, unless it's a drug enforcement case... Now I'm speaking specifically of Criminal Code cases, that type of thing. They're incorporated to investigate that themselves.

Q. Yes, if I understand your testimony, your view is that if an offence is committed within the geographic jurisdiction of a municipal police department, then the investigation of that offence falls within the ambit of that municipal police department.

A. Yes, indeed, sir.

Q. Whether the suspect is a police officer or otherwise.

A. Or otherwise.

Q. Right.

A. That's right.

Q. But if there were, say, a Code offence falling within your federal policing, the geography of it doesn't matter to you.

A. No, we may very well liaise with the municipal police department, seek their cooperation, and work on a joint forces basis, if you will, to investigate those crimes within the city. And, as a matter of fact, in most cases, we encourage that

1 type of participation.
2 Q. What is your view, sir, with respect to the authority to
3 actually lay a charge? I note that you have on page six of this
4 exhibit:
5
6 > The RCMP maintain the independence to lay what we consider are appropriate charges.
7 > However, members are encouraged and our policy suggests they are to consult with Crown
8 > Prosecutors.
9 Do I take it from that that your view is that the authority to
10 lay a charge rests with the police?
11 A. Yes, that is my view, yes, sir.
12 Q. To your knowledge, is that view... Have you discussed that
13 view with members of the Department of Attorney General?
14 A. Yes.
15 Q. Do they share that view?
16 A. Yes, they do, and... To my knowledge, they share that view.
17 I've discussed that issue with Mr. Gale. I've discussed it with
18 Mr. Herschorn. People that I interact with and there's an
19 understanding that, of course, the Attorney General's
20 Department, if they don't agree with the charges that are laid,
21 they have the prerogative to either stay that or not offer any
22 evidence or whatever the case may be. But we do reserve
23 that...
24 Q. Yes, in your experience as Criminal Operations Officer, have
25 you been in or are you aware of any situations where the

force was directed not to lay a charge or persuaded not to lay a charge?

A. No, I can't recall a case.

Q. Your memorandum, again, at page six talks about consultation with Crown counsel. Do I take it from that Crown counsel are made accessible or made available to the members of your force?

A. Yes, indeed. We certainly don't have the answer in all cases where there are sophisticated or legal implications where we would rely upon the advice of Crown counsel and our members are encouraged to seek their counsel or advice in those cases and be guided by it, if we are uncertain as to our grounds or the strength of the evidence.

Q. As a practical matter, how does a member go about accessing Crown counsel. Let's take the, say, the Sydney area as one example, and perhaps the Halifax area as another example. Would it be the case in Sydney that we simply call one of the local Crowns, anyone at all, and ask for their advice?

A. I assume that's what they're doing.

Q. What about in Halifax, where you've got perhaps a larger number of Crown counsel. Is there any particular avenue to be followed for a member to access Crown counsel?

A. Well, they would contact the Chief Crown Prosecutor in the Halifax area. I believe it's Mr. Thomas.

Q. Thomas, yes.

1 A. And ask for an appointment with one of his counsel.
2 Q. And, to your knowledge, is that the accepted way of doing
3 things?
4 A. That's the accepted way of doing things.
5 Q. Are there any particular types of cases where that is not the
6 avenue which is followed, to your knowledge, categories?
7 A. There may be instances where there are disagreements on
8 the strength of the evidence between the Crown counsel and
9 the member. And, in those instances, the members are
10 encouraged to write to their O.C.'s, if they have reason to, to
11 my headquarters and I may take the issue up with either Mr.
12 Herschorn or Mr. Gale.
13 Q. That's if a difference of opinion exists.
14 A. Yes, sir.
15 Q. Are you aware of any types of cases where the R.C.M.P. is
16 precluded from going, say, to Mr. Thomas and asking for
17 advice?
18 A. No, I can't think of any. There are, of course, statute
19 requirements where we have to go to the Department of the
20 Attorney General. If it's an immunity case or involving
21 foreign service personnel or those types of things where we
22 would go directly to the Department.
23 Q. And do I understand you to be saying that if there is a
24 difference of opinion on the strength of evidence or whatever
25 at the Crown Prosecutor member level that you feel quite free

1 to take that higher?
2 A. Yes.
3 Q. And at the end of the day, if there's a difference of opinion
4 between, say, yourself and members in the Department, do I
5 take your evidence to be that you still feel that you are
6 entitled to lay a charge against them?
7 A. Yes, indeed, and I'll qualify this to this extent. That if, in fact,
8 there is a case where I am uncertain in my mind as to the
9 interpretation of the evidence, the strength of the evidence
10 and I seek the advice of the Attorney General's Department or
11 their representatives, then I would be guided by their advice.
12 If it's a case where quite clearly in my mind or in the minds
13 of the investigators that the evidence is there to sustain the
14 charge or the laying of a charge, then we would lay the
15 charge.
16 Q. When you say you "will be guided by their advice", would you
17 go back and get additional evidence, I guess, if you felt you
18 could?
19 A. If we could. If, in fact, the decision was that there's
20 insufficient evidence to sustain a charge, then the matter
21 might necessarily not be dropped but we would go back and
22 continue the investigation.
23 Q. And I take it that you would have to at least tacitly agree
24 with the advice that you were getting if there were
25 insufficient evidence. But if you felt strongly that there was

1 sufficient evidence, you would still lay the charge.
2 A. Oh, yes.
3 Q. I'd like to turn...
4 MR. CHAIRMAN
5 How do you prevent, Superintendent, charges being laid
6 where, say, the law and maybe the evidence doesn't sustain it?
7 You know, the disagreement that you refer to between an
8 investigating officer and a lawyer with the Department of the
9 Attorney General or a Crown Prosecutor, who must bring to bear
10 his or her professional training...
11 SUPT. VAUGHAN
12 Yes, indeed.
13 MR. CHAIRMAN
14 On the facts before. How do you prevent a charge being laid
15 that shouldn't be? One thing is to say, well, the Crown can stay
16 the proceedings or not offer any evidence. But there's a danger,
17 as I see it, that the damage would have been done then to some
18 person who is not guilty at law.
19 12:20 p.m.
20 A. If, sir, there's a disagreement and it's referred to me for
21 referral to the Attorney General's Department and I am not
22 clear in my mind, and I go to the Attorney General's
23 Department for advice on it and he comes back and says you
24 don't have the evidence, then my instructions would be that
25 the charge will not be laid until such time as a further

1 investigation is undertaken and more evidence is obtained
2 that may sustain the charge.
3 COMMISSIONER EVANS
4 Q. Supposing the opposite situation arises and you're satisfied
5 that you have a good basis even after you discuss it with a
6 Crown attorney who holds a different view, what do you do
7 then? You want to lay the charge and the Crown is doubtful.
8 Do you go to your commanding officer and let them iron it out
9 in Ottawa or do you proceed to lay the charge?
10 A. We have done that, sir.
11 Q. Which?
12 A. We have, in past, I'm aware of cases, not personally involved,
13 where we have gone to Ottawa and taken that route. But if
14 I'm convinced in my mind that a charge is warranted then
15 it's, in my view, my right to lay the charge and I would take
16 that route.
17 Q. Irrespective of the contrary view of the Crown.
18 A. Irrespective of the contrary view of the Crown.
19 Q. If he wants to withdraw it or nolle prosequi or stay it that's
20 his worry.
21 A. That's right, sir.
22 Q. And you'd just probably sent your note on to headquarters is
23 what happens.
24 A. That may very well be. My duties are carried out at the,
25 subject to the orders of the Commissioner.

1 Q. Right.

2 MR. ORSBORN

3 Q. If you, in your own mind, feel that the evidence is there to
4 sustain a charge, would you run it by a Crown Prosecutor at
5 all?

6 A. If the evidence is there to sustain a charge? Oh, most
7 assuredly. He's going to have to prosecute it.

8 Q. Yes. But before you lay the charge would you get the advice
9 of the Crown? If you had already decided that the evidence
10 was sufficient to lay the charge.

11 A. I believe there's a great deal of consultation before the
12 charges are laid. As a normal rule there's a great deal of
13 inner action, to my knowledge, and perhaps in some cases too
14 much. And I'm thinking essentially of very straightforward
15 cases of a lesser nature. But by all means, serious cases, these
16 are generally discussed with Crown and gone over.

17 Q You just indicated in one of your responses that if the advice
18 came back that you don't have the evidence to lay the charge
19 that your instructions would be that the charge would not be
20 laid. That doesn't seem to admit if any, you know, any doubt
21 in your mind at all. It suggests that you will accept the
22 advice of the Attorney General. If there's not enough
23 evidence there then you won't lay the charge.

24 A. I will, as I say if, in fact, I cannot make up my mind as to, and
25 I'm not certain of the legal interpretation of the evidence.

1 Q. I see. Now you became a criminal operations officer in '85.
2 A. That's correct, sir.
3 Q. And so in the time period, '82, '83, '84 I believe you were up
4 along in Ottawa somewhere.
5 A. I was up along in Ottawa with the Commissioner's Audit
6 Branch, sir.
7 Q. That audit, I take it, has nothing to do with finances does it.
8 A. I wasn't in the financial auditing end of it, no, sir. Although
9 there was a component that did that particular function.
10 Q. And would I understand that the first person involvement
11 you had with anything arising out of the Marshall case did not
12 come until 1986?
13 A. 1986 June, yes, sir.
14 Q. If I just back up one month before that. If I could ask you to
15 turn to Volume 20. I'll just touch this one brief point before
16 lunch. Page 55 of that Volume 20, Superintendent.
17 A. Yes, sir, I have that.
18 Q. The, a copy of a letter to your commanding officer from Mr.
19 Gale confirming instructions to Superintendent Vaughan that
20 you were to turn over the Sydney Police files to Mr. Pugsley,
21 the solicitor for John MacIntyre, I believe. Do you recall
22 receiving instructions to that effect from Mr. Gale?
23 A. Yes, I recall discussing that with Mr. Gale.
24 Q. And was there anything unusual in a request or an
25 instruction to turn over documents in your possession to a

solicitor?

A. The particular, I would not undertake to do that on my own. Those were Sydney City Police files that were gathered, to my recollection, by the investigators in the 1982 re-investigation of the murder. They were obtained from the Sydney City Police. My view was that they really are the property of the Sydney City Police and were obtained on instructions of the Attorney General so we sought their advice to release them.

Q. And you were simply carrying out their instructions in so releasing them.

A. Yes, that's correct, sir.

12:26 - ADJOURNED TO 2 p.m.

2:08 p.m.

CHAIRMAN

Ten minutes late, sorry. Carry on.

MR. ORSBORN

We had almost started, My Lord.

MR. CHAIRMAN

Pardon?

MR. ORSBORN

We were about to start.

MR. CHAIRMAN

Well, why didn't you?

MR. ORSBORN

I'll take that as direction for the future.

MR. CHAIRMAN

If you would guarantee it we'd all stay home.

MR. ORSBORN

Q. Superintendent, when we left we were just, I think, about at June the 6th. And, I'd ask, if you would, to turn to Volume 20 at page 57. I believe this to be a memo of Staff Sergeant Wheaton to yourself on the 5th of June, 1986, in which Staff Sergeant Wheaton seeks your comments with respect to his proposed discussions with the media concerning the Marshall case and he indicates in that memo that if he were to speak to the media he would undoubtedly cast the Attorney General's Department in a bad light and he would say that John MacIntyre was unscrupulous and that he should be charged with counseling perjury. How did this memo come to be written to you?

A. I assumed that it was as a consequence of Mr. Bill of the CBC contacting him.

Q. Contacting Staff Wheaton.

A. Staff Wheaton.

Q. Yes.

A. To appear on the show and thereafter I was, I believe, in the, and my recollection isn't clear on this, but I believe I

1 was in the OC of Halifax Subdivision's office. He is Staff
2 Sergeant Wheaton's immediate superior.
3 Q. Superintendent Penny.
4 A. Superintendent Penny, that's correct, sir, and the issue was
5 raised at that time and I suggested to him that he submit a
6 memorandum outlining his request.
7 Q. Uh-hum. Were you concerned about Staff Wheaton's going
8 and talking to the media?
9 A. When I perused the file after receiving Staff Sergeant
10 Wheaton's memorandum, yes, indeed I was. There was
11 some suggestion that the matter was still before the courts
12 and it was certainly a significant case and I, thereby,
13 instructed him that he should not discuss it with the media
14 in any form whatsoever.
15 Q. Would it have been within the ambit of permissible policy
16 and practise within your force for Staff Wheaton to, in fact,
17 have spoken to the media?
18 A. No, not under these circumstances.
19 Q. It would not have been.
20 A. It would not have been, no.
21 Q. And would it be the normal practise that when he were
22 requested to speak to the media that he would seek
23 instructions and seek permission?
24 A. Yes.
25 Q. He would not have the authority to speak to the media on

his own behalf without getting instructions.

A. Not on a matter such as this, no, sir.

Q. And would Staff Wheaton be aware of that policy to your knowledge?

A. He should be aware of that policy.

Q. I see. Prior to your discussions with Staff Wheaton and Superintendent Penny had you had any knowledge of or involvement in the Marshall matter?

A. None whatsoever. I believe some years or over the years I may have heard of the Marshall case, but I had arrived in Nova Scotia, I believe, in the middle of September of 1985 and I hadn't any connection with it at all.

Q. Okay. You got Staff Wheaton's memo then and he says some, I think you'd agree, some fairly serious things in there. What was your reaction to it?

A. Well, I was quite concerned with the context of the...of Staff Sergeant Wheaton's memorandum and certain allegations contained therein and I reviewed the file and I expressed my concerns by memorandum back to him asking him for some clarification.

Q. Why would you be handling this rather than, say, Superintendent Penny?

A. Superintendent Penny would have had absolutely no involvement in the Donald Marshall affair as the OC of Halifax subdivision. It had been handled from Sydney

1 subdivision and at the criminal operations officer's level in
2 the past and, it quite appropriately was directed to my
3 level.
4 Q. And when you say you reviewed the file, do you recall, you
5 know, what the file consisted of?
6 A. At that time it was a cursory review. It was a fairly rapid
7 review of the file. And I can't recall whether I reviewed
8 both volumes at that time or whether it was the last volume
9 containing the reports, the 1983 reports and the 1982
10 reports. But certainly from my review of the reports that I
11 had read I couldn't relate the allegations made by Staff
12 Sergeant Wheaton to the content of the reports themselves.
13 Q. Yes. Did you ask anybody to assist you in reviewing the
14 file?
15 A. Yes. I asked our reading staff, I believe through Staff
16 Sergeant Burgess, who is the chief reader, analyst, if you
17 will, to review the correspondence and give me an opinion
18 on the content of Staff Sergeant Wheaton's memorandum
19 and their views on whether there was any validity to that.
20 Q. Okay. I'll come to the reader's reply in a moment. Page 58
21 in Volume 20 there is a memorandum from yourself, I
22 guess, to Superintendent Penny with the intent that it will
23 be forwarded to Staff Wheaton?
24 A. That's correct, sir.
25 2:15 p.m.

1 Q. And do I take it that in this memo, you were going back to
2 Staff Sergeant Wheaton saying I'm concerned about these
3 allegations that you raise. Give me some back-up for them.
4 A. That's correct, sir.
5 Q. Did you, after your own review of the division files and
6 before you had any response from Staff Wheaton or from
7 Sergeant Bentley, did you have any occasion to discuss the
8 issue with Mr. Gale?
9 A. I did, indeed. The import of the allegation concerning casting
10 the Attorney General's Department in a bad light, I had
11 related that to a 1982 report in May, where Mr. Edwards had
12 apparently phoned Mr. Gale and there was a suggestion, hold
13 the matter in abeyance for the present. I went to Mr. Gale
14 and I discussed the allegations with him and I received a
15 response from his, which to me at the time seemed
16 reasonable.
17 Q. What was that response?
18 A. The response was that, in fact, at the time there was a matter
19 of pardon or a reference or some judicial matter dealing with
20 the liberty of Mr. Marshall, charges relating to Mr. Ebsary, the
21 matter of dropping or not proceeding with perjury charges
22 against three self-confessed perjurers -- Chant, Pratico and
23 Harriss. And there may or may not have been a discussion,
24 and my recollection isn't precise on this, there may or may
25 not have been a recollection of either not having receipt of a

1 report or inadequate information in reports, but I can't be
2 definite on that point. But the others were basically the...
3 Q. What did you understand had, in fact, been placed in
4 abeyance? Was it a full-scale investigation of the Sydney
5 Police Department? Was it simply a matter of interviewing
6 Chief MacIntyre and Detective Urquhart or what?
7 A. The matter of interviewing Chief MacIntyre and Mr.
8 Urquhart.
9 Q. So as simple as that.
10 A. Yes, that's right.
11 Q. You indicated that when you read the file, this comment
12 about the investigation being placed in abeyance, you related
13 that to Staff Wheaton's views about placing the Department in
14 a bad light.
15 A. Yes.
16 Q. So did Staff Wheaton tell you why he felt he would place the
17 Department in a bad light, or was simply your own conclusion
18 from looking at the file?
19 A. I received the impression... Now I had had a discussion with
20 Staff Sergeant Wheaton. I had had a discussion with him
21 around the 16th of May, I believe, when he received a copy of
22 my request for additional information. I can recall discussing
23 it briefly with him.
24 Q. You said "the 16th of May", would that be the 16th of June?
25 A. Or the 16th of June, pardon me. Whether or not he was

1 aware that the matter had been concluded by Superintendent
2 MacGibbon, who was the C.I.B. Officer in 1984, he had not... I
3 was left with the impression, and I can't recall precisely, I
4 was left with the impression and I still am of the impression
5 that Staff Sergeant Wheaton felt that the investigation or the
6 interview of Chief MacIntyre and Detective Urquhart had
7 been stopped.
8 Q. So when you went back and looked at the file, you related
9 this comment about in abeyance to what Staff Wheaton had
10 told you. You linked the two together.
11 A. Yes.
12 Q. In your discussions with Staff Wheaton and, you know, before
13 we get into any of the documentation, did he give you any
14 reason why he considered Chief MacIntyre to be
15 unscrupulous?
16 A. He mentioned that, as far as he was concerned, Donald
17 Marshall was not the author of his own misfortune and that
18 he was the victim of an unscrupulous police officer and I
19 believe it was left at that.
20 Q. I appreciate that, that's what he said in his first memo to you.
21 A. Yeah.
22 Q. I'm just asking you if in any of our one-to-one discussions
23 with Staff Wheaton you say well, you know, "What do you
24 mean by this? What did MacIntyre do to make you say that
25 he was unscrupulous?" Anything that he said that comes to

1 your mind?
2 A. No, only other than what is written on paper.
3 Q. I see. If I could ask you to turn to pages 61 and 62 of that
4 same volume, Superintendent. This is in handwriting... Do I
5 understand this to be a response by Sergeant Bentley to
6 yourself as a result of your request to have the file reviewed?
7 A. That's correct, sir.
8 Q. And Sergeant Bentley is one of your readers?
9 A. He is, yes, sir.
10 Q. And in reading this, I particularly direct your attention to
11 Lines 4 and 5, do I understand that it was Sergeant Bentley's
12 conclusion, at least in this memo, that prosecution, at this
13 stage, was not warranted?
14 A. That's correct, sir.
15 Q. Did you discuss the matter with Sergeant Bentley?
16 A. I had a meeting with both Sergeant Bentley and Staff
17 Sergeant Burgess. I don't believe it was after the receipt of
18 this memorandum, but after, later on after I had written
19 another report or prior to writing my final report, and I
20 believe Sergeant Bentley had drafted another memorandum.
21 Q. Yes, we'll come to that.
22 A. And I had called both he and Burgess in and discussed their
23 findings, as well as my findings and how I felt about it.
24 Q. Okay, good. At least in Sergeant Bentley's first report to you
25 in capsule form, he looked at the file and said prosecution is

1 not warranted.
2 A. That's correct, sir.
3 Q. Turning to page 63, do I understand this to be the response
4 from Staff Wheaton to his Officer Commanding and
5 subsequently forwarded to you?
6 A. That's right, sir.
7 Q. And that generally the substance of this memo relates to
8 what evidence there may be to support a charge of some
9 description against Chief MacIntyre?
10 A. That's the substance of it, yes.
11 Q. Yes, and did you review that memorandum?
12 A. Yes, I read it.
13 Q. Could I ask if you reviewed it in sufficient detail to determine
14 whether or not there were any factual or other errors in it?
15 Did you review that, Superintendent, in detail such as you
16 could isolate any possible factual or other errors in it?
17 A. Yes, I read that memorandum over, but I made no decisions
18 on the basis of that. I went back and reviewed the volumes
19 of files and it was on the basis of statements, et cetera, that
20 were contained there and the reports from '82 and '83 that
21 my particular decisions were made.
22 Q. Yes.
23 A. In terms of a comparison between this memorandum and the
24 file itself, I didn't do an analysis...
25 Q. That was my question.

A. And compare it back.

Q. For example, if you look at the bottom of page 63, four lines from the bottom:

> Staff Wheaton stated that on 71-05-30, Chant will state he was interviewed by MacIntyre. In this statement, he will give evidence that he said what MacIntyre told him to say.

I think the evidence has been that that is incorrect.

A. Yes.

Q. That that has nothing to do with Mr. Chant's first statement on the 30th of May. My question is whether or not you were able to, from your knowledge of the file, to query Staff Wheaton about any difficulty such as that in his report?

A. I didn't query Staff Wheaton on this at all. I made my decisions, as I say, on the basis of the correspondence that had been submitted from the time of the investigation and I took into account, of course, initially Staff Sergeant Wheaton's concerns and then reviewed the existing investigative material to determine whether or not there was a sufficient basis to proceed as he had suggested.

Q. Okay. Now Staff Wheaton ends up in this memorandum at least recommending not that charges be laid but that further investigation be undertaken.

A. Well, charges and/or investigation.

Q. Yes.

1 A. That's in the second portion, I believe.
2 Q. Yes, he says at the last paragraph, page 65. He says, the third
3 page, which has not been completed, as the investigation of
4 former Chief MacIntyre, and he goes on to say, "We
5 respectfully submit that if an offence has been committed, it
6 bears further investigation."
7 A. Yes.
8 Q. So he, at least, is recommending further investigation.
9 A. That's correct, yes, sir.
10 Q. Now am I correct in saying that you had asked Staff Wheaton
11 not only to back up his allegation that charges should be laid
12 but also his allegation about the Department of Attorney
13 General and his allegation about John MacIntyre being
14 unscrupulous?
15 A. This is what I was interested in. The allegations to support or
16 evidence to support and references to support the allegations
17 that were made in the...
18 Q. Yes.
19 A. In there.
20 A. This memo, at least, appears to address itself to allegations
21 about counselling perjury. Did Staff Wheaton respond to you
22 about his allegations about the Department of Attorney
23 General and his further allegations that John MacIntyre was
24 unscrupulous?
25 A. No, he did not. He responded with respect to evidence to

1 support his contention that Mr. MacIntyre had counselled
2 perjury.
3 Q. Did you go back to him and say your, "This is incomplete.
4 You've made a couple of other charges here. Get me some
5 information."?
6 A. It was apparent to me that, first of all, Staff Sergeant
7 Wheaton would not have the necessary information regarding
8 holding the file in abeyance because he had gone to Mr.
9 Edwards to seek that permission and Mr. Edwards had
10 phoned Mr. Gale and that's why I went to Mr. Gale because he
11 would be the man who could answer that question, as
12 opposed to Mr. Wheaton.
13 Q. Are you suggesting, then, that Staff Wheaton had indicated to
14 you that he might cast the Department of Attorney General in
15 a bad light when he was not in possession of sufficient
16 information to do so?
17 A. I'm suggesting that Staff Sergeant Wheaton, in my impression,
18 or in my view, felt that because of that direction, hold in
19 abeyance, felt that the investigation had been stopped and
20 nothing had happened in the ensuing few years. So,
21 therefore, he felt that that would cast the Attorney General's
22 Department in a bad light.
23 Q. And what about his allegation that John MacIntyre was
24 unscrupulous? Did you ask him to back that up?
25 A. That, I believe, is obvious in the investigative reports that

Bessin /

Margaret E. Graham Discovery Service

298 PORTLAND STREET, DARTMOUTH, N.S. B2Y 1K4
PHONE: 469-5734

To: All Solicitors

From: Margaret E. Graham

Date: June 6, 1988

Re: Daily Transcripts.

Errata

Volume 72, Page 12882, Line 25 should have added:

"was submitted, that were submitted by Staff Sergeant Wheaton and, in particular, his 1983 summation." Insert corrected page as attached.

Volume 73, Pages 12966 to 12978 should have:
SUPT. VAUGHAN, EXAM. BY MR. PUGSLEY as a header, instead of exam. by Ms. Derrick.

I apologize for any inconvenience this may have caused.

M. Graham

1 support his contention that Mr. MacIntyre had counselled
2 perjury.
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4 You've made a couple of other charges here. Get me some
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20 nothing had happened in the ensuing few years. So,
21 therefore, he felt that that would cast the Attorney General's
22 Department in a bad light.
23 Q. And what about his allegation that John MacIntyre was
24 unscrupulous? Did you ask him to back that up?
25 A. That, I believe, is obvious in the investigative reports that
was submitted, that were submitted by Staff Sergeant
Wheaton and, in particular, his 1983 summation.

1 Q. Do you have any knowledge, obviously indirect, but any
2 knowledge of how Patricia Harriss' first statement, her
3 incomplete statement came into possession of the R.C.M.P?
4 2:30 p.m.
5 A. How her first statement?
6 Q. Her first statement was, I think, on June 17th, '71, and it
7 was partially completed and then she gave a completed
8 statement later on that...later on that night. I'm wondering
9 if you have any second-hand knowledge, if you will, any
10 stories related to you of how that statement came into the
11 possession of the RCMP?
12 A. Well, I'd have to be clear on the first statement. Is this the
13 statement that was alleged to have been placed under the
14 table?
15 Q. That's the one.
16 A. I have no personal knowledge of that at all, other than what
17 I've read.
18 Q. I appreciate that. You say "alleged to have been placed
19 under the table". When did you first learn that it was
20 alleged to have been placed under the table?
21 A. When it was raised at this Commission.
22 Q. I see. Did Staff Wheaton ever tell you?
23 A. No, he did not.
24 Q. In your review of the RCMP reports did you see anything in
25 writing alluding to that statement being placed under any

1 table?
2 A. No, I did not.
3 Q. If, in fact, Chief MacIntyre had placed the statement under a
4 table when the file was being turned over, is that something
5 which the RCMP officer or officers present should, in your
6 view, have written and noted?
7 A. If they considered it pertinent.
8 Q. Would you have considered it pertinent?
9 A. I don't know the circumstances of the investigation. It
10 would be...if, in fact, I had a perception that there was some
11 criminality on the part of Chief MacIntyre, then most
12 assuredly it would become quite pertinent.
13 Q. We've had some evidence from the Crown Prosecutor of the
14 day that if he had known about it he might have considered
15 charges of obstructing justice. Would...that would suggest
16 that it's a pertinent action at least. And I guess my question
17 is given that and given the importance that Staff Wheaton
18 appears to have placed on it in his testimony before the
19 Commission, would you not have expected that it be written
20 down somewhere?
21 A. Well, as I said before, I can offer you an opinion on what
22 happened. Staff Sergeant Wheaton would...if he didn't
23 consider it pertinent at all, then it wouldn't necessarily be
24 recorded on his notebook or in a report. I, and you are
25 asking my opinion.

1 Q. Well, let me just follow that up then. Do you take from the
2 fact that it was not recorded in a notebook or report, do you
3 take from that fact that Staff Wheaton did not consider it
4 pertinent?
5 A. That would be my view.
6 Q. And, do I take it that in your discussions with Staff Wheaton
7 after these allegations were raised about Mr. MacIntyre
8 being unscrupulous, that Staff Wheaton would have had
9 opportunity, either verbal or in writing, to say to you "This
10 is one reason why I think Mr. MacIntyre is unscrupulous."?
11 A. Yes. He had the opportunity if, in fact, he thought of it at
12 the time.
13 Q. And am I correct in saying that he did not take advantage of
14 that opportunity?
15 A. That's correct, sir.
16 Q. And, would it follow from that that Staff Wheaton did not
17 consider it sufficiently pertinent, at least insofar as it related
18 to his characterization of John MacIntyre being
19 unscrupulous?
20 A. He didn't obviously consider it, in my view, that way in
21 1982.
22 MR. CHAIRMAN
23 Let me put it to you, Staff Sergeant Wheaton, as I recall it,
24 testified that he and another member of your force went to Chief
25 MacIntyre's office acting on an order from the Attorney General of

1 Nova Scotia directing Chief MacIntyre to turn over to the RCMP
2 investigating officer, who was Staff Sergeant Wheaton, all
3 documents in his possession relating to the Marshall case.
4 SUPT. VAUGHAN
5 Yes, sir.
6 MR. CHAIRMAN
7 And the testimony, I'm summarizing it now, is that these
8 documents were handed over one by one and noted because they
9 had been listed. After they had gotten outside the, had left with
10 what...the office with what they perceived, understood to be all
11 the documents, Corporal Davies drew to Staff Sergeant Wheaton's
12 attention the fact that during that process Chief MacIntyre had
13 slipped one document under the desk, and they went back, faced
14 him with this and he then produced it, which turned out to be a
15 rather important document. Could you conceive of Staff Sergeant
16 Wheaton not regarding that as an important and significant act in
17 his investigation?
18 SUPT. VAUGHAN
19 My Lord, I believe that in 1982 when Staff Sergeant, and
20 this is my opinion, when Staff Sergeant Wheaton was investigating
21 this matter under the supervision of Inspector, then Inspector
22 Scott, he was not, and was not at the time, considering criminality
23 on the part of Mr. MacIntyre. And, while he may have considered
24 that there was some manipulation going on, that it didn't involve
25 criminality at the time. I believe that Staff Sergeant Wheaton is an

experienced police officer and I believe that if he felt that there was criminality involved, he most assuredly would have reported it. I don't know whether that information reached the hands of Inspector Scott at the time, but had it reached the hands of Inspector Scott, then most assuredly it should have been treated much more seriously. But I believe that's probably the reason why that wasn't reported, because they didn't view it any more than stubbornness or manipulation. That's an opinion from my reading of the file.

MR. CHAIRMAN

Well, forget for a moment the question of criminality. If what Staff Sergeant Wheaton has testified occurred is correct, then there would have been...that would constitute a failure on the part of Chief MacIntyre to comply with an order of the Attorney General of the Province.

SUPT. VAUGHAN

Yes, My Lord, it would indeed. And...

MR. CHAIRMAN

Would that strike you as being significant?

SUPT. VAUGHAN

It strikes me as being significant, yes, it does.

MR. CHAIRMAN

And significant enough to report at the time?

SUPT. VAUGHAN

It strikes me that way, sir.

1 COMMISSIONER EVANS

2 If you had been there instead of Wheaton knowing the
3 rhubarb that had gone on before about this statement, and the
4 same thing that Wheaton alleges has happened, would you have
5 noted it in your notebook and in your report?

6 SUPT. VAUGHAN

7 I would only hope that I would have. It's 1982, but I would
8 hope that I would most assuredly under those circumstances.

9 COMMISSIONER EVANS

10 Well, particularly when you were noting everything else
11 that was received, checking them all off and then there's another
12 paper alleged to have popped up from under the desk, would it
13 not seem sensible to have added that to the list or noted it?

14 SUPT. VAUGHAN

15 Yes, sir, it most assuredly would.

16 COMMISSIONER EVANS

17 And to make a note of the peculiar circumstances under
18 which it was received?

19 SUPT. VAUGHAN

20 Yes, it's pertinent. I'm not denying that. I was simply
21 offering what I felt was the reason why it wasn't noted, and I do
22 believe that they did not consider all of the factors involved at the
23 time, the consequences of that.

24 COMMISSIONER EVANS

25 I understand that Wheaton had been in Halifax, I'm sorry, in

1 Sydney some years prior to this, had he not? Are you aware of
2 that?
3 SUPT. VAUGHAN
4 I'm not aware of his service history, sir.
5 MR. ORSBORN
6 Q. Leaving aside the question, Superintendent, of criminality, I
7 take it an allegation that a police officer is unscrupulous is
8 not the same as saying that he is a criminal?
9 A. That's the way I would take it, sir.
10 Q. And is it your evidence that even when the allegation was
11 made that John MacIntyre was unscrupulous, when that
12 allegation was made by Staff Wheaton and that you
13 specifically asked him to back up that allegation, that you
14 were not advised of this alleged incident about the
15 statement under the table?
16 A. No, but in fairness to Staff Sergeant Wheaton, the reports
17 themselves outline his concerns in that area.
18 Q. But the reports mention nothing of that slipping the
19 statement under the table.
20 A. Well, they do deal with harassing tactics.
21 Q. I see.
22 A. And I inferred from the reports that that was his...
23 Q. Did you get any answer from...
24 COMMISSIONER EVANS
25 The harassing tactics are a mile away from the file and the

1 slip of paper under the desk.

2 SUPT. VAUGHAN

3 Oh, yes, indeed, sir. I'm ...I wasn't relating the slipping the
4 paper under the desk to this unscrupulous police officer comment.

5 MR. ORSBORN

6 Q. Your evidence is then that the allegation that Chief
7 MacIntyre was unscrupulous was, in your view, backed up
8 by the references in the file to harassing witnesses and what
9 have you?

10 A. That's correct, sir.

11 Q. And that you would not necessarily have to add this
12 business about the statement in order to substantiate the
13 allegation about being unscrupulous?

14 A. No.

15 Q. Did Staff Wheaton give you any explanation of why he had
16 not recommended this investigation back in, either 1982 or
17 1983, he waited until 1986?

18 A. No, Staff Sergeant Wheaton did not give me any explanation
19 for that.

20 Q. Am I correct in my understanding that in 1982 Staff
21 Wheaton or the RCMP was reinvestigating a murder
22 conviction within the Town of Sydney?

23 A. That's correct, sir.

24 Q. Now, if arising out of that investigation, and as part of that
25 investigation, the investigating RCMP officer had felt it

1 necessary to pursue this avenue of counselling perjury could
2 he have done that without authorization from the Attorney
3 General?
4 A. Yes, he most assuredly could. That would touch upon the, in
5 my view, touch upon the guilt or innocence of Donald
6 Marshall and Ebsary and be a very pertinent issue.
7 Q. And although this was an offence within the geography...the
8 geographic jurisdiction of Sydney, I take, it because the
9 force had been invited or requested to go in by the Attorney
10 General, that it would be your position the force could
11 investigate whatever was necessary arising out of that.
12 A. Most assuredly. That would not, in my view, include an
13 investigation of the Sydney City Police themselves.
14 Q. In terms of their policies and practises.
15 A. That's correct.
16 Q. I understand that. But in terms of possible criminal
17 activity?
18 A. Most assuredly, touching upon the Donald Marshall affair,
19 yes.
20 Q. So, in your view, as criminal operations officer, was there
21 anything stopping Staff Wheaton from interviewing Chief
22 MacIntyre and Detective Urquhart in 1982?
23 A. Not if, in fact, they had some belief that the actions of Chief
24 MacIntyre and Detective Urquhart contributed to the
25 conviction of Donald Marshall.

1 Q. Yes.
2 A. No, there was not.
3 Q. He certainly held that belief in 1986?
4 A. Yes.
5 Q. And assuming that he held that belief in 1982, I take it,
6 there was nothing stopping him from pursuing that
7 investigation?
8 A. No, and there should not have been necessarily a reference
9 to Mr. Edwards or to the Attorney General's Department to
10 do that.
11 Q. Page 70 of that volume, Superintendent, is a further
12 memorandum from, I presume, Sergeant Bentley, it appears
13 to be similar handwriting to the previous one.
14 A. Yes, sir.
15 Q. Why did you ask for a further review? Or, I'm sorry, did
16 you ask him to do it again?
17 A. I didn't ask for a further review.
18 Q. I see.
19 A. I asked the reading staff to do a review and...
20 Q. You got one before that said no prosecution was warranted.
21 A. Yes.
22 Q. And here you get another one.
23 A. Then there was another. I don't recall asking for another at
24 least. But it was after this second...
25 Q. He appears to change his mind in this memo and suggests

that, you know, MacIntyre and Urquhart should be...should be interviewed and some investigation should be done.

A. Yes.

Q. Do you have any knowledge of why the apparent shift in thinking from one memo to the other?

A. No, unless Sergeant Bentley went back, reviewed the files again and come to a different conclusion after his second review.

Q. Okay. Just one point in the second paragraph on page 70. And he writes, "I believe that based what is contained in Staff Sergeant's reports dated..." et cetera, "...sufficient suspicion has been raised to warrant further investigation for the offence of counselling to commit perjury, following which a determination by the Department of Attorney General should be forthcoming concerning charges." I'm interested in the reference to "a determination by the Department of Attorney General," respecting charges. Is that consistent with your view of where the authority lies to lay a charge?

A. Only if we can't decide ourselves on the strength of the evidence. If there is some question there, then I wouldn't have any hesitation if I couldn't make up my mind.

Q. But it is your evidence that the determination of whether or not to charge is laid...is not left with the Attorney General?

A. No, no.

1 Q. Now, at this stage Staff Sergeant Wheaton and, I guess,
2 Sergeant Bentley have both recommended a further
3 investigation should take place. Did you agree with that?
4 A. No, I did not.
5 Q. And for the reasons you set out in your...
6 A. For the reasons...
7 Q. ...letter.
8 A. ...I set out in my report, that's right.
9 Q. Now, once you came to that conclusion yourself, did that not
10 finish the matter internally within the RCMP?
11 A. Not necessarily. And, this...what you're leading into, if I may
12 ask you, is my reports to Headquarters Ottawa.
13 Q. Yeah, we'll get there.
14 A. Okay.
15 Q. But what I was interested...what I was leading up to is you
16 ended up writing Mr. Gale about the matter.
17 A. Ultimately.
18 Q. Ultimately. And I'm wondering once you had reached the
19 determination that there was no investigation necessary,
20 why bother involving the Crown and the Department at all?
21 Why even communicate with them?
22 A. For various reasons. First of all the Department of the
23 Attorney General had been involved in this matter for...on a
24 continuing basis over the years. They had received all the
25 police reports. I had discussed with Mr. Gale the allegations

set out by Staff Sergeant Wheaton and in addition to that I had taken a particular position and on the basis of my analysis and I would appreciate any advice that may be offered by the Department in terms of legal interpretation of my positions and the evidence.

Q. Did Mr. Gale ask you to write with your conclusions and opinions?

A. No. I may have mentioned to Mr. Gale initially that when I had discussed this at the outset that I would be doing an analysis. I don't recall whether I...he certainly didn't ask me for a report, but I sent one up and asked his opinion.

Q. Were you yourself getting any calls from the media at the time?

A. Yes. I received Mr. Story, somewhere in the back of this room, appeared in my office and he had called me a couple of times and appeared in my office one day and asked for an appointment and he brought with him the 1982 report, 20th of May, 1982, report and laid it on my desk and asked me "What about this holding in abeyance issue..."

Q. Uh-hum.

A. ...by the Attorney General's Department" and made certain inferences that the Attorney General's Department had stopped the investigation and I told them that that would not be the way I would interpret it.

Q. Did Mr. Story bring this to your attention after you had

1 spoken to Mr. Gale?
2 A. It could have been. I don't recall precisely. It was within a
3 very short period of time. We're talking fifteen days and I
4 can't recall. But I believe I talked to Mr. Gale prior to Mr.
5 Story's appearance. And, at the same time I was receiving
6 calls from the media in Toronto and various other media
7 locally on the issue.
8 Q. I guess I'm still wondering why you felt it necessary to go
9 back to Mr. Gale and say there was nothing wrong with the
10 thing being held in abeyance because this is what you told
11 me. It seems to be a bit circular. You had gone to Mr. Gale...
12 A. Would you run that by me?
13 Q. I'm just wondering why you felt it necessary to write Mr.
14 Gale this letter about the matter being held in abeyance
15 given that you were relying for your information in the first
16 place on Mr. Gale. You went to Mr. Gale and say, "What
17 happened? Tell me what happened?" and Mr. Gale tells you
18 what happened and you write him back saying everything is
19 okay.
20 A. Oh, no, there is a great deal more to the memorandum than
21 that.
22 Q. I appreciate that, but in respect to this particular issue.
23 A. I, well, simply because of this, I regard the RCMP force as a
24 professional police force and I'm not naive enough to
25 suggest that one way or the other the Attorney General's

1 Department may not come into possession of police reports.
2 We have a Commission here and so on. That's one example.
3 And any statements that are made, such as casting the
4 Attorney General's Department in a bad light, if it's not
5 based in fact, then it would be gratuitous and it does reflect
6 upon the professionalism of our department. And that's the
7 reason I made the comments in the first paragraph.
8 Q. Were you then of the view that Staff Sergeant Wheaton's
9 comments about casting the Department of Attorney General
10 in a bad light were gratuitous and not well founded?
11 A. I believe they were not based in fact.
12 Q. Did you have occasion to reprimand him or discipline him
13 for making such comments?
14 A. No, I did not do that.
15 Q. Why not?
16 A. Because first of all Staff Sergeant Wheaton, I believe,
17 expressed his opinion as he felt honestly, honestly expressed
18 his opinion. I don't believe he was in any way, shape or
19 form attempting to mislead consciously in any way, shape or
20 form.
21 Q. The letter that you ended up writing to Mr. Gale was the
22 subject of a number of drafts and transfers back and forth
23 between yourself and, I think, Assistant Commissioner
24 Schram.
25 A. That's correct.

Q. In Ottawa. And the drafts are there in the materials, I don't need to refer them...refer you to them. Why would you go to the trouble of getting this reviewed by your superiors in Ottawa?

A. Well, let me go back to the media inquiries made of me. It may not have been referred to Mr. Schram except that when the media become involved, then we have policy instructions suggesting that anything of a significant nature, which is likely to arouse national interest or involve a member of our organization, should be reported forthwith to the RCM Police headquarters. So, therefore, I phoned Assistant Commissioner Schram and advised him, first of all, of the allegations of Staff Sergeant Wheaton and secondly of the media interest in it. As a consequence of those allegations, I was ceased with a certain responsibility to determine whether or not there was any basis to Staff Sergeant Wheaton's allegations and that I would be reviewing the file and he requested that under those circumstances "You keep me advised." And, under those circumstances I kept him advised. And, he was also interested in the draft of the report and viewing it, which, in fact, is his prerogative and his right to do that.

2:52 p.m.

Q. Were you seeking the agreement of Assistant Superintendent Schram with respect to your decision not to investigate any

1 further?
2 A. If, in fact, he had any advice to offer me, I'd welcome it. But
3 it was my decision and it was clearly understood that it
4 would be my decision. But he wanted to review it and I
5 believe in Assistant Commissioner Schram's words, "To insure
6 there was conformity with national policies and practices," as
7 well as the fact it obviously is a case of national interest.
8 Q. I think it's perhaps fair to say on a reading of the draft in the
9 final version that the changes were perhaps more in style
10 than in substance?
11 A. They are, sir, yes. There was an agreement with Mr. Schram
12 that there would be no change in the substance to my
13 memorandum.
14 Q. If I could just ask you to look at page 86 through 88, the
15 changes that are made in printing on those pages. Are they
16 your changes, Superintendent?
17 A. Yes, they are, sir.
18 Q. You seem to be suggesting on the second paragraph on page
19 86, and you're adding in words like "regrettably" and
20 "unintentionally misinterpreted." It seems to be softening the
21 tone of that paragraph somewhat. You start off by saying,
22 "Staff Wheaton misinterpreted it," and then you end up
23 saying, "Regrettably, it was unintentionally misinterpreted."
24 Is there any intention of yours to soften it when writing to
25 the Department of Attorney General?

1 A. No, I don't believe that would be true. I think it is regrettable
2 and I believe it is unintentional.
3 Q. The question of the matter being held in abeyance, did you
4 discuss that with anybody other than Staff Wheaton and Mr.
5 Gale?
6 A. Hold in abeyance, ummm...
7 Q. For example, did you discuss it with Frank Edwards?
8 A. No, I've never discussed this, anything with Mr. Frank
9 Edwards. I don't know the man.
10 Q. And is it fair to say, then that your conclusions contained in
11 this paragraph... I'm looking now at page 72, that your
12 conclusions that this...
13 A. 72?
14 Q. Yeah. That your conclusions about misinterpretation and so
15 forth were based primarily on your discussions with Mr.
16 Gale?
17 A. Yes, and my belief that Staff Sergeant Wheaton had
18 interpreted that...
19 Q. Yes.
20 A. To mean that the investigation had been stopped.
21 Q. So you took Mr. Gale's interpretation to you as the correct one.
22 A. The reasons for it.
23 Q. Yes.
24 A. Yes, I did.
25 Q. Now if we can turn to page 73. You start off the top of the

page indicating it's your decision that further investigation was not warranted and this was notwithstanding the fact that both Sergeant Bentley and Sergeant Wheaton felt to the contrary.

A. That's correct, sir.

Q. And then you give the reason for that.

A. Yes, sir.

Q. In the first paragraph, Sub. (i) there on page 73, you relate, you refer to the memoranda that were prepared by members of the force in 1983. And you say in the third paragraph there of Sub.(i):

> In the correspondence referred to, the police managers; i.e., the members of our force, involved in the review of this matter made no suggestion whatever that MacIntyre or Urquhart may have counselled perjury.

Do I take it then you were taking some comfort from the fact that, in this review conducted in 1983, there was no suggestion of criminality by your reviewers?

A. Well, I wasn't necessarily taking comfort from it. What I was doing was objectively looking at it to see if there was any suggestion by these people who were very close to the investigation, whether or not counselling perjury or any criminality had been entertained by them.

Q. Did you appreciate, Superintendent, that the purpose of that review was simply to comment for the advice of the Attorney

1 General on whether or not there were improper practices and
2 procedures and to recommend what should have been the
3 proper practices and procedures?
4 A. Well, most assuredly. However, it's also a medium. Practices
5 and procedures also includes illegal practices and procedures
6 and that would be the medium to report, I believe, and plus
7 the previous reports, I believe a criminal offence has been
8 committed.
9 Q. We did hear yesterday, for example, from Staff Sergeant
10 Barlow, who indicated to us that he did not feel that that type
11 of review was the appropriate place to be indicating that
12 criminal activity had taken place, and that if he had believed
13 that a criminal act had taken place, he would not have had
14 included it in his report.
15 A. Well, I do not agree with that at all. A police report is the
16 medium for decision-making purposes. The criminality
17 aspect could have been reported in 1982, or it could have
18 been reported in 1983 when Mr. Gale, in fact, wrote his
19 request for an overview of improper practices or procedures.
20 I couldn't agree with that proposition at all.
21 Q. Okay. In Sub. (ii) on that same page, you say there was no
22 corroborative evidence available of the three self-confessed
23 perjurers. Can you give us some suggestion of what kind of
24 evidence you might be looking for?
25 A. Well, some proof of facts that would objectively lead to the

1 inference that Mr. MacIntyre had wilfully counselled these
2 witnesses to lie. Some overt act which would be of some
3 probative value or tip the scales in favour of an investigation.
4 But I didn't see any of that in the report that I reviewed, in
5 any event.
6 Q. Did you review closely the statements of those witnesses that
7 were, particularly Mr. Pratico and Mr. Chant, that were taken
8 on June the 4th, '71?
9 A. Well, to the best of my ability.
10 Q. Did you notice in those statements some degree of consistency
11 in the details which were provided by those two witnesses?
12 A. Yes.
13 Q. Did you address your mind as to how those details may have
14 been, found their way to the statements?
15 A. I've certainly thought about it, obviously. I think that Mr.
16 MacIntyre, first of all, discovered people who were not
17 adverse to telling untruths. I believe that Mr. Chant was
18 caught up in a series of lies when he saw it all, and then
19 related what Mr. Marshall had told him, I believe it was on
20 the morning of May the 20th to Mr. MacIntyre that he had
21 seen two people. I believe that John Pratico and Mr. Chant
22 were interviewed at the police office one after the other,
23 Chant after Pratico, and Chant had claimed he was in the
24 bushes and had seen the stabbing, Mr. Marshall stab Mr.
25 Seale, and since Chant had obviously claimed to have been in

or around the tracks, then obviously he's pretty much going to have to see the same thing and there may have been the power of suggestion used by the police that, in fact, you're lying, in an attempt to elicit what they believed to be the truth.

Q. Did you dismiss as simple coincidence then the fact that there are some similarities in the details of those two statements of Mr. Pratico and Mr. Chant?

A. Coincidence? I think that scenario that I related to you would take the area of coincidence, to a large extent, out of that.

Q. For example, in Mr. Chant's statement, if my recollection serves me correctly, he describes a man, I'm not sure if he names him, but he describes a fellow with a beard there as having dark hair and being in the bushes. Did you address your mind as to how Mr. Chant could have provided that kind of detail if he weren't there? And the point of my question...

A. Well, I'm just trying to rationalize. Is this the description of Chant that you're talking about?

Q. No, it's the description that Mr. Chant gave of whoever else was there, presumably, Mr. Pratico. But my question is, if you have these kinds of details that crop up, are these the kind of things that you would consider corroborative evidence?

A. No, I wouldn't... I didn't consider that corroborative evidence at all. Mr. Chant and Mr. Pratico and Miss Harriss are, have obviously lied. They lied to the police in the first instance

1 and I wouldn't consider that as being corroborative to their
2 testimony at all.
3 Q. Can you suggest any reason then...
4 A. It would have to be something independent of their
5 testimony.
6 Q. Can you suggest any reason how Mr. Chant would come to say
7 that he saw a dark-haired man in the bushes?
8 A. Well, I'm going to have to ask you again. Is this the
9 description of Mr. Pratico? The reason I ask that is they were
10 both in the police station being interrogated at virtually the
11 same time. He could see him.
12 Q. Well, I think in this particular statement, Mr. Chant was in
13 Louisbourg and Mr. Pratico was back in Sydney.
14 A. Then I'm misreading the files because I understood...
15 Q. I'm thinking of the statements on June the 4th where Mr.
16 Chant says he sees a dark-haired man in the bushes, which, in
17 fact, Mr. Pratico has dark hair.
18 A. Yeah, well...
19 Q. I'm asking you whether or not you can explain how that kind
20 of detail would get into the statement?
21 A. No, I can't explain that.
22 Q. On page 74, you give as another reason for not investigation
23 further the fact that Mr. MacNeil and Constable Mroz are
24 deceased.
25 A. Yes.

1 Q. What, in your mind, was the relevance of Mr. MacNeil to the
2 manner in which, to a possible charge of counselling perjury
3 or possible investigation of counselling perjury?
4 A. Well, it's very difficult to speculate when Mr. MacNeil is
5 deceased, but it may very well be that the police relied to an
6 extent on the advice of the Crown Prosecutor for direction. I
7 don't know. That's where I'm coming from there. I know
8 that, at least from the files, Mr. MacNeil interviewed both
9 Chant and Pratico at length, apparently, if the statements are
10 to be believed, over and over the same stories.
11 Q. What about Constable Mroz?
12 A. And Constable Mroz was, and again I don't know, he's
13 deceased. I don't know what he would have to offer, but he
14 was on site that night, allegedly checking out various business
15 premises for two unidentified individuals.
16 Q. Were there not a number of other police officers around that
17 night as well?
18 A. Oh, yes, indeed.
19 Q. Why would you seize on Mroz as one and say, Well, he's dead.
20 We can't go any further"? Use him as a reason?
21 A. Let's not take this in isolation, but he's a witness that is
22 deceased and he may or may not have anything to offer the
23 investigation.
24 Q. You conclude, at least a conclusion in the paragraph on 74,
25 close to the top of the page:

> I share the view that this is a classic case of policemen focusing their efforts on one suspect to the exclusion of all other possibilities. This, I submit, reflects poor judgement rather than conduct involving criminal acts.

A. Yes.

Q. In what respect is it poor judgement to focus on one suspect?

A. If, in fact, there's some suggestion, as there was that two others may have been around and you don't expend every effort to pursue that theory, then you're not doing a complete investigation, in my view.

Q. To your knowledge, at what time was the focus placed on Mr. Marshall?

A. To my knowledge, it was very early in the investigation, within two or three days. I believe there are telexes that were sent in suggesting Mr. Marshall as a strong suspect in the case.

Q. Yes, the telex you refer to is the very early morning telex on May the 30th. Are you also... Or were you aware at this time of the notes taken by Sergeant Murray Wood of the R.C.M.P. which suggested that the Sydney Police believe Mr. Marshall was responsible on the next morning, the 29th?

A. I'm not sure I was aware of Murray Wood's notes at that time.

Q. Is it not a fact then that the focus was placed on Mr. Marshall before even the first statement was taken from a witness?

1 A. That may very well be, but that may not also at the same
2 time be unusual to focus on a suspect that early.
3 Q. One would presumably need some evidence before focusing
4 on a suspect.
5 A. Yes.
6 Q. And if there were no such evidence, would that change your
7 conclusion that it was only a matter of poor judgement?
8 A. If there was absolutely no reason to select this man out of a
9 group of people and...
10 Q. Other than the fact that he was, of course, there?
11 A. Well, they would have no basis to do that. I'd say it's
12 extremely poor judgement to do that.
13 Q. What follows from focusing on one suspect? You then sort of
14 only look for evidence that implicates him? Is that what
15 follows?
16 A. Well, you may have a strong suspect but you may have other
17 information... In other words, you can't overlook other
18 possibilities. If, in fact, somebody says there's two other
19 people there, then you should expend effort to find out what
20 that dimension is about. But, at the same time, focus on your
21 primary suspect.
22 Q. Did you form any opinion to the effect that once focusing on
23 the suspect, the evidence was tailored to fit that suspicion?
24 A. No, I don't believe the evidence was tailored. As I said
25 before, I believe that the police discovered three people who

1 were willing to give false evidence and then the focus became
2 very intense upon that particular individual.
3 Q. You suggest some other factors on page 74.
4 A. Yes, sir.
5 Q. That support your conclusion. You say in Sub. (a):
6
7 MacIntyre and his investigators certainly had grounds to suspect Marshall in that during the
8 previous year, he had been picked up on seven different occasions in the park area where Seale
9 was murdered.
10 Is that correct?
11 A. Yes, sir. Yes, there's more to that than what's included in that.
12 That comes from Superintendent Scott's report, but there's
13 also the statement of Mr. Marshall himself given to Staff
14 Sergeant Wheaton where he considers himself, I guess, a bad
15 young man in 1971. He had been in the park robbing people
16 in past and he had been involved in offences in the cemetery
17 and something about dynamite caps. And, of course, Chief
18 MacIntyre would certainly be aware of those.
19 Q. I'd ask you to turn back to page 23 in that volume.
20 A. 23, yes, sir.
21 Q. This is Superintendent Scott's report that you referred to and
22 in the bottom paragraph on page 23:
23
24 Had Marshall not been a young person with a record, charged seven times by the Sydney
25 Police between '70 and '71 and had been

> suspected of other types of offences that had occurred in the park at a nearby cemetery...

A. Yes, sir.

Q. I'm not sure that that supports your conclusion that he had been picked up on seven occasions in the park area.

A. The "charged seven times by the Sydney City Police", and what did I say?

Q. You said "he had been picked up on seven occasions in the park".

A. Yeah, that would indicate then probably he's been picked up more than seven times.

Q. Not necessarily in the park.

A. Not necessarily in the park.

Q. In Sub. (b) there, you say:

> It was not until the Ebsary trial in 1980 that Marshall finally disclosed the full circumstances.

Do I take it by that that you're referring to the so-called robbery theory?

A. Yes, sir.

Q. And you say:

> This nondisclosure at the time of the investigation no doubt influenced MacIntyre's belief that Marshall was in some way involved in the crime.

I have some difficulty with a nondisclosure being something you don't know influencing your belief.

A. I guess what I'm referring to there is that Mr. MacIntyre would be familiar with Marshall's antisocial behaviour. The fact that he had been in the park, around the park, in the cemetery, that type of thing. And coming across two people who, for all intents and purposes, are priests or dressed like priests from Manitoba and a stabbing results, wouldn't be consistent with the individual that he was used to picking up and talking to.

3:15 p.m.

Q. Do you have any evidence, other than your own supposition that this "nondisclosure" influenced Chief MacIntyre?

A. Pardon me, sir?

Q. Do you have anything other than your own opinion that...

A. No, this is...these are simply opinions that have been drawn from reading the files. I guess I should have clarified that at the outset.

Q. You say in that paragraph that this nondisclosure "No doubt influenced MacIntyre's belief." I want to ask you to turn back on page 58 when you were asking for Staff Wheaton's comments. You talk about Donald Marshall's, the alleged robbery, and you say, "If he had told the truth from the beginning, the case may have been handled completely different."

A. May have been, yes.

Q. I take it it's not your evidence that this was a controlling

1 factor in the case?
2 A. Well, that's correct. I don't know whether it would have or
3 not.
4 Q. Are you also aware, sir, that the matter of this alleged
5 robbery was contained in the RCMP review of 1971?
6 A. Yes. The James MacNeil statement.
7 Q. Yes.
8 A. Yes, sir.
9 Q. The James MacNeil statement and also the conclusion of Al
10 Marshall that the consensus of the opinion was that a
11 robbery had taken place?
12 A. Yes.
13 Q. So, insofar as this suggests that the matter of the robbery
14 wasn't disclosed until the 1980's.
15 A. Well, that, yeah, that would be...that would be in error.
16 Q. Sorry, it was...it's not until the 1980s that Mr. Marshall
17 discussed it but it was acknowledged back in '71.
18 A. It was...it was discussed in '71, that's right, or raised in '71.
19 Q. And you mention in paragraph "C" the polygraph
20 examination of Ebsary in '71. Now, these polygraphs did not
21 take place until after Mr. Marshall's conviction.
22 A. That's correct.
23 Q. I'd suggest there's no way they could influence MacIntyre's
24 belief in the investigation.
25 A. You're quite right. That particular number "C" is out of

1 context and what I was alluding to there was that any
2 investigative action after the conviction of Donald Marshall,
3 the polygraph examination may have played a role in
4 influencing opinions.
5 Q. You then go on to set out your view of what MacIntyre's
6 defence would be.
7 A. Uh-hum.
8 Q. And simply say his methods were intended to elicit truthful
9 statements. Aren't those comments really stretching it
10 when you're setting forth what you believe the defence of a
11 fellow police officer would be?
12 A. I don't think so, I don't believe so. First of all, to interrogate
13 Mr. MacIntyre and Mr. Urquhart who are long-serving
14 policemen for an alleged criminal offence you're, at the very
15 least, going to have to warn them and I've had a
16 considerable amount of experience with policemen and I
17 think that that would be a best case scenario if, in fact, they
18 would even talk to you and that's why I make that comment
19 in that subparagraph.
20 Q. Just run that by me again?
21 A. What I was saying was that Mr. MacIntyre and Mr.
22 Urquhart are experienced policemen for many years or they
23 had been policemen for many years, and to undertake to
24 interrogate or interview or obtain a statement from them in
25 the knowledge of that it's for the purpose of investigating a

criminal offence and it...you're going to have to at the very least warn them, in 1982 warn them, and it would be my experience with policemen that this would be a best case scenario that I outline here. You may not...in all probability even get a statement from them.

Q. So, it was your view that no investigation was warranted influenced by the fact that they were long-standing policemen?

A. That, excuse me.

Q. Was your view that no investigation was warranted influenced by the fact that they were policemen of long-standing experience?

A. No, my reasons for not continuing with the investigation are set out on pages 1, 2, 3 down to 3 at the top of the page, and these are additional considerations below.

Q. Okay. So, your conclusion, the best case, you put it, that the methods are somewhat irregular or forceful, that is your view?

A. Yes.

Q. And I take it then that you disagree with Harry Wheaton almost on everything, that no investigation was warranted, certainly no charges should be laid, the Attorney General should not be cast in a bad light and Chief MacIntyre was not unscrupulous. Is that a fair reading of it?

A. I don't think that's a fair reading of it at all. First of all, I

1 didn't...I didn't close the door to an investigation. What I
2 said, in fact, was that if evidence was surfaced at this
3 Inquiry which would be of some probative value, something
4 more to lend weight to the statements of the three self-
5 confessed perjurers, then we would be in a position to have
6 a look at it. Now, the other points...
7 Q. But at this point in '86 when you were writing, you
8 disagreed with Staff Wheaton on all points.
9 A. Well, I disagreed that there was sufficient evidence to
10 launch an investigation, as he's suggesting, into that criminal
11 offence. I did not believe that the grounds were there.
12 Q. Yes. And you also disagreed with him that Chief MacIntyre
13 was unscrupulous and you also disagreed with him about
14 the Department of Attorney General being placed in a bad
15 light?
16 A. That's correct.
17 Q. Okay.
18 A. And depending...
19 Q. And again, did you have occasion to discuss this
20 disagreement with Staff Wheaton after you spoke to Mr.
21 Gale?
22 A. No. I don't believe I had any lengthy discussion with Staff
23 Wheaton at all, if any.
24 Q. Did you have any concern as to why he would be wrong on
25 all counts?

1 A. Depending on your interpretation of unscrupulous. First of
2 all, I'd like to clarify that.
3 Q. Go ahead.
4 A. You said I disagreed with him on all points. I don't
5 necessarily personally adhere to or am a proponent of
6 certain types of tactics that are alleged.
7 Q. Yes.
8 A. Because that could very well be, in my view, unscrupulous
9 behaviour. I certainly disagree with the points on casting
10 the Attorney General's Department in a bad light. And I
11 certainly disagreed that there were grounds to charge
12 and/or investigate at that point in time. I didn't discuss it
13 with Mr. Wheaton after that. I have no accountability really
14 to him for that.
15 Q. Your letter, I'm looking at page 100 of this volume, your
16 letter was replied to by Mr. Coles rather than Mr. Gale.
17 A. Yes, sir.
18 Q. Last page in the volume. Were you surprised to receive a
19 reply from Mr. Coles?
20 A. I'm not in a position to comment on that, quite frankly.
21 Q. Your dealings with the matter had been with Mr. Gale
22 throughout?
23 A. My dealings had been with Mr. Gale but I can't look into his
24 mind and tell you why he didn't respond.
25 Q. As a result of your overall review of the file and the work

that the force did in 1982 and subsequent, Superintendent, are you satisfied that Staff Wheaton took a properly professional approach to his reinvestigation and his subsequent reports?

A. There were certain issues that we've already discussed that were not included in the reports. But I do feel that Staff Sergeant Wheaton did a commendable job under very difficult circumstances in the total picture.

Q. Thank-you.

COMMISSIONER EVANS

Before you leave that or other counsel take over, a commendable job. We've been told earlier that one of the problems of police is a development of tunnel vision.

SUPT. VAUGHAN

Yes, sir.

COMMISSIONER EVANS

And Chief Constable MacIntyre was accused of that...

SUPT. VAUGHAN

Yes, sir.

COMMISSIONER EVANS

...in his case. And I had suggested to Wheaton that possibly he developed that same problem because he arrived at a conclusion that Marshall was innocent before he ever interviewed Marshall. And my recollection is that he had interviewed MacNeil, who had flunked the polygraph test. He had interviewed Sarson who

1 Marshall and Wheaton both decided was an unreliable witness.
2 He had a short interview with Chant in the funeral parlour.
3 SUPT. VAUGHAN
4 Yes, sir.
5 COMMISSIONER EVANS
6 And Chant was a perjurer and had become a born-again
7 Christian, but this was some seven or eight years, so he was no
8 longer a fourteen-year-old and he had previously told his pastor,
9 I believe, about his lies. Then we had Pratico, who was certainly
10 a...had some psychological problems. I think he interviewed him.
11 And then I also believe he interviewed Patricia Harriss.
12 SUPT. VAUGHAN
13 Yes, sir.
14 COMMISSIONER EVANS
15 I'm not sure that he had interviewed Patricia Harriss before
16 he went to Dorchester. So, on the basis of that he arrived at a
17 conclusion that Marshall was innocent. None of these witnesses, I
18 suggest to you, were very credible witnesses in looking at the
19 whole picture.
20 SUPT. VAUGHAN
21 I agree with that, yes, sir. Are you asking me whether Staff
22 Sergeant Wheaton suffered tunnel vision also, sir, is that the
23 question?
24 COMMISSIONER EVANS
25 At that stage, at that stage, having arrived at the conclusion

that Marshall was innocent.

SUPT. VAUGHAN

I...it would be my position that, no, he didn't suffer tunnel vision and the reason I say that is that while he arrived very early, which may not be unusual for a policeman, to arrive at a suspect very early in the game, but I don't believe, at least from my readings of the file, that he overlooked the possibility, for example, of collusion of Sarson and Marshall while he was in the penitentiary and he did set about to interview these other witnesses. So, while he felt that Mr. Marshall was innocent on the basis of those very, very preliminary inquiries, he hadn't overlooked interviewing these people and determining that it wasn't collusion. If it had been... there may have been some problems that developed later, in my view, as to perception of actions of policemen or criminality, that type of thing, but I don't believe in the Marshall investigation. My opinion.

COMMISSIONER EVANS

It's not uncommon, as you stated, for a police officer to suspect somebody reasonably soon after the incident.

SUPT. VAUGHAN

No, it isn't, sir.

COMMISSIONER EVANS

Just because of their proximity.

SUPT. VAUGHAN

That's correct, sir.

1 COMMISSIONER EVANS

2 And then that doesn't mean you stay inflexible, but you
3 have to battle your original impression.

4 SUPT. VAUGHAN

5 That's correct, sir.

6 COMMISSIONER EVANS

7 And I was just of the view that he hadn't done much
8 different than MacIntyre.

9 SUPT. VAUGHAN

10 Well, he had arrived at that conclusion very early in the
11 investigation but I don't think that that is unusual in, at least in
12 the investigative circles, but the other dimensions of the case
13 should not be overlooked at the same time, and I don't believe he
14 did overlook those from my reading of the reports.

15 COMMISSIONER EVANS

16 Would you say that MacIntyre's approach and Wheaton's
17 approach and the initial approaches were about the same?

18 SUPT. VAUGHAN

19 Initially.

20 COMMISSIONER EVANS

21 Yes.

22 SUPT. VAUGHAN

23 That's correct, sir. The follow up may have been somewhat
24 different, but...

25

COMMISSIONER EVANS

Thank-you.

MR. CHAIRMAN

The definition of tunnel vision is not arriving at a...or identifying a suspect early in an investigation which I would imagine most competent police officers like to do, but rather having arrived at that to exclude all other avenues of investigation.

SUPT. VAUGHAN

Yes, sir.

MR. CHAIRMAN

Well, on that piece of wisdom, we'll rise for ten minutes.

BREAK - 3:30 p.m.

3:53 p.m.

CHAIRMAN

What's this now, we're switching players.

MS. DERRICK

That's why there's two of us, My Lord.

CHAIRMAN

In hockey they call it a draft or something, I think. Anyway, Ms. Derrick.

EXAMINATION BY MS. DERRICK

Q. Thank you, My Lord. Superintendent Vaughan, my name is Anne Derrick and I represent Donald Marshall, Jr. Picking up on the question that you were being asked, or the issue that

1 you were being asked to address just before the break, and
2 that is this issue of television, I suggest to you that there are
3 some material differences between the way Staff Sergeant
4 Wheaton approached his investigation in 1982 and the way
5 that Sergeant MacIntyre approached his in 1971. It may be
6 that they both developed a tentative conclusion at the onset
7 of their investigation in Mr. Wheaton's case that Mr. Marshall
8 might well be innocent and in Sergeant MacIntyre's case, that
9 he was guilty. But the difference then developed at that
10 point, I suggest to you. Would you not agree that in Staff
11 Sergeant Wheaton's case he then methodically pursued all
12 avenues. He did an extensive number of interviews of
13 various people.
14 A. Yes, we did.
15 Q. And you took statements. And there's nothing to indicate to
16 you that he didn't do anything other than use well-accepted
17 police practices in taking those statements. Is that not
18 correct?
19 A. From what I can read in the file, that's correct.
20 Q. And, in fact, there, I suggest to you, that there is disclosed in
21 the file the fact that certain information was not pursued by
22 Sergeant MacIntyre. For instance, the description of the two
23 men. Is that not accurate?
24 A. The file itself doesn't indicate that. At least the files that I
25 read.

1 Q. Doesn't indicate that there was an extensive...
2 A. Any extensive follow-up on...
3 Q. Of the described two men.
4 A. Other individuals.
5 Q. And you would agree with me that it's not acceptable for a
6 police officer to use forceful methods to extract a
7 predetermined result.
8 A. Not acceptable. It's, I'd suggest to you that in 1971 it was
9 probably a widespread practice to use certain types of tactics
10 that were used by Detective MacIntyre.
11 Q. What types of tactics are you thinkings of?
12 A. "You're lying, tell the truth." Continually question them for
13 long periods of time. It's not unique to Mr. MacIntyre.
14 Q. What about the examination, the taking of statements from
15 juveniles.
16 A. Well, the circumstances in the file would indicate that the
17 statements were not taken in the presence of an adult which,
18 to my knowledge, at least in our organization in 1971, there
19 would have been a responsible adult present and they
20 wouldn't have been detained for lengthy periods of
21 interrogation.
22 Q. So on the basis of your understanding of approved and proper
23 police techniques, these kinds of techniques are improper and
24 were improper in 1971.
25 A. In my view.

1 Q. And are you aware that Sergeant MacIntyre denies having
2 used improper techniques, such as you have described were
3 widespread.
4 A. I have heard that, yes.
5 Q. Is it your belief that Sergeant MacIntyre's methods were
6 improper? You, in your letter, refer, and the version I'm
7 looking at which is where my notes are, on page, or Volume
8 20 at page 74, you talk about his methods of interrogation
9 may have been somewhat irregular or forceful.
10 A. Yes.
11 Q. So what are you referring to there?
12 A. I, now I'm, if, in fact, the statements that were obtained from
13 the three individuals, and in particular Patricia Harriss, if in
14 fact those statements are correct, there is allegations of very
15 lengthy interrogation of the girl lasting, to my recollection,
16 from 8 o'clock, somewhere around 8 o'clock at night until 1:30
17 in the morning, and she's a very young person and by herself.
18 That, in itself, would be intimidating and that would be
19 irregular, in my view.
20 Q. And that's an, is that an example of an improper police
21 practice?
22 A. In my view.
23 Q. Is it not also accurate to say that that kind of technique does
24 not produce reliable evidence?
25 A. It's a poor police technique and it's particularly poor when it's

1 used on extremely young people because they're very
2 suggestive to, because of their tender age, to the power of
3 suggestion. And they would be threatened by that type of
4 technique.
5 Q. And for a very good reason, it may also be subject to not
6 being admissible in a court of law.
7 A. Oh, in the court of law...
8 Q. Failure of being voluntary.
9 A. Indeed. I would agree with you.
10 Q. Can you tell us in terms of this issue of taking statements,
11 who, and from your view of the file, who did Staff Sergeant
12 Wheaton fail to take a statement from in the course of his
13 1982 investigation, if anyone, that you feel he should have?
14 A. Well, we've given this in my direct examination. If, in fact,
15 Inspector Scott and Staff Sergeant Wheaton felt there was any
16 criminality on the part of Mr. MacIntyre of Mr. Urquhart,
17 then they were, they had a responsibility to interview those
18 two. I can't recall any others that they may not. There may
19 have been but I don't recall any others that they may not
20 have interviewed.
21 Q. And in the portion of the investigation that dealt with Mr.
22 Marshall's innocence which Staff Sergeant Wheaton has
23 described as the first stage, were there any witnesses that he
24 should have spoken with that he didn't? That he shouldn't
25 taken statements from that he didn't?

1 A. As I recall the correspondence that went to, through our
2 headquarters to the CIB officer to the Attorney General's
3 Department the investigation was segregated into phases, I'm
4 not necessarily sure you can do that in a criminal
5 investigation. But they said the investigation was complete
6 and I assume that all of the witnesses who should have been
7 interviewed were interviewed under those circumstances.
8 Q. And you didn't see anything that suggested anything
9 differently to you.
10 A. No, I didn't see anything.
11 Q. Now what gave rise to your particular involvement here as I
12 understand it was a memo or a report from Staff Sergeant
13 Wheaton which is found in Volume 20 at page 59. And one of
14 the things he says in it is that if he were to answer the
15 questions that Mr. Bill was seeking to pose to him that would
16 undoubtedly cast the Department of the Attorney General in
17 bad light. And I believe it was your evidence that you didn't
18 find anything to substantiate that assertion?
19 A. No.
20 Q. I would just ask you to think about the review of the file that
21 you made and ask you whether from this review could Staff
22 Sergeant Wheaton have been referring, in fact, to the
23 prosecutorial conduct of the original case?
24 A. Not in my view. My impression, as I said before I don't have
25 a precise recall of my conversation with Staff Sergeant

1 Wheaton, but my impression was then and my impression
2 still is today that Staff Sergeant Wheaton was referring to the
3 hold in abeyance statement which was interpreted to mean
4 that the investigation had been stopped from a police
5 perspective and that is the reason why I approached Mr. Gale
6 to get his explanation or discuss the issue with him. I didn't
7 go to Mr. Gale and interrogate him. I discussed the matter
8 with him. He's an honorable gentleman.
9 Q. And from your discussion with Mr. Gale you developed the
10 impression that it was a regrettable but unintentional
11 misinterpretation that...
12 A. Not with Mr. Gale. Mr. Gale advised me of the telephone call
13 and some of the reasons for, if not all of the reasons for the
14 statement. The fact that, in my view was that since the
15 investigation had been complete, according to the police
16 reports in terms of Donald Marshall, then Donald Marshall's
17 pardon or reference or whatever wouldn't be prejudiced by
18 this. There was additional issues to be considered. That's the
19 reason for the statement and that satisfied me.
20 Q. But am I not correct in understanding that you felt it was,
21 that there had been a misinterpretation...
22 A. Yes.
23 Q. From that...
24 A. Yes.
25 Q. To mean that the investigation should be stopped.

1 A. That's correct.
2 Q. I would suggest to you that that wasn't unreasonable
3 interpretation and I say that in light of the fact that I take it
4 over this period of time that there ongoig meetings with the
5 Attorney General's Department as part of the regular
6 relationship between the RCMP and the Attorney General.
7 A. Well I disagree with you totally on that point in this respect.
8 I know what you're alluding to but I do consider the RCM
9 Police to be a professional police force and if we are going to
10 make comments and reports that are subject to review then
11 we should be making them based on some fact and not some
12 perception or some notion that comes into your mind because
13 a certain period of time has elapsed.
14 Q. Well let me ask you about a fact, then. It is a fact that the
15 Attorney General's Department didn't inquire about or discuss
16 the status of this investigation from 1982, from that point to...
17 A. I believe in 1983 was the request from Mr. Gale for an
18 overview of the proper, of practices and procedures of the
19 Sydney City Police force. And looking at the correspondence
20 there's nothing to indicate to him that a criminal offence has
21 been committed but he did ask for a report with the view to
22 "Do we go farther this?" So there was some suggestion since
23 1982.
24 Q. There was that inquiry but there was no investigation
25 commenced.

1 A. There was no direction to commence an investigation into Mr.
2 Urquhart or Mr. MacIntyre. There was a request for a review
3 of the practices and procedures, yes.
4 Q. Now as far as Staff Sergeant Wheaton not mentioning it in a
5 report about the papers being slipped under the desk incident
6 which you've heard discussed, I suggest to you that, as I think
7 I've already said, that Staff Sergeant Wheaton broke the
8 investigation down into three parts. And in 1982 he was, am
9 I not correct in saying, investigating the innocence of Donald
10 Marshall.
11 A. Yes.
12 Q. Is that correct? And so he wasn't, at that point engaged in...
13 A. Well excuse me, just a moment. He was investigating, in my
14 view, the Seale murder or reinvestigating it. And not
15 necessarily the innocence of Donald Marshall. There's the
16 matter of Mr. Ebsary and the murder to be considered there.
17 Q. Although he, in his response to you found in Volume 20 at
18 page 65, he does indicate that he felt this investigation had
19 various stages and the first stage proved Marshall's innocence
20 and that was the stage that was being completed in
21 approximately April of 1982.
22 4:08 p.m.
23 A. Yes, that's what he wrote.
24 Q. And so he gave you no indication that he was actively
25 involved in an investigation of Sergeant MacIntyre.

A. No.

Q. I want to refer you, Superintendent Vaughan, to page 68 of Volume 20. And this is a memo from Sergeant Bentley.

A. Yes.

Q. It's a handwritten memo. In the middle of the page Sergeant Bentley says, "MacIntyre," I think those words are "et al",

> Tactics have been common knowledge for a few years now and I would certainly think that Frank Edwards, Q.C., Crown Prosecutor, as well as the Department of the Attorney General were well aware of any wrongdoings by these men and undoubtedly discussed where the charges were warranted.

My question is that in light of that, why weren't you interested in looking into that further. That suggests similar conduct to what Staff Sergeant Wheaton was alleging. That there'd been a pattern of conduct.

A. Why I would not go back and look into these previous incidents?

Q. Yes, why didn't that flag you to look into it?

A. Quite frankly, I didn't consider going back and looking into previous tactics by the Sydney City Police because, first of all, I did not consider the tactics that John MacIntyre or Mr. Urquhart used as being illegal. If he's talking about aggressive tactics, that's one thing. Mr. Gale will ultimately down the road ask for, in 1983, an overview of the practices

and procedures of the City Police and that was addressed by Mr. Wheaton, Mr. Scott and Mr. Christen.

Q. This memo refers to wrongdoings and I suggest to you you basically just dismissed that. You never spoke to Frank Edwards about it.

A. I had never spoken with Mr. Edwards about it or anybody else, no.

Q. So you read that and it caused you no concern.

A. Not at that particular time, no.

Q. On page 69 Sergeant Bentley says, and this is the last sentence in his memo: "I believe we," meaning our force, "had to take over another murder investigation since the Marshall case simply because the Sydney Police did a lousy job." And prior to that, he says:

> Perhaps I might suggest that the Department of the Attorney General be approached with the idea that all murder investigations in the City of Sydney be handled by this force, not the City Police.

A. Yeah.

Q. Why wasn't that sufficient for you to look into these assertions further?

A. To look into the Donald Marshall matter further you're saying?

Q. Well, to look into these concerns by Sergeant Bentley that murder investigations be removed from the City of Sydney

Police and handled by the R.C.M.P. because of incompetence?

A. That's not the responsibility of the R.C.M.P. to ask the Attorney General to remove that type of thing from an incorporated city police force. The Police Act covers that. If the Attorney General feels on the basis of issues like this that more training is needed or training needs upgrading or whatever, then I'm sure that they will take the appropriate action. But it's not up to the R.C.M.P. to do that. Furthermore, I'd suggest to you that if, in fact, these wrongdoings that are alluded to in this report, had not been brought to the attention of the Attorney General's Department in the past, then perhaps they should have been. But I'm not aware of any, other than Sergeant Bentley, again, writing certain things down there that really don't mean a great deal to me.

Q. Don't mean a great deal to you because you didn't pursue it further, I suggest to you.

COMMISSIONER EVANS

Who is Sergeant Bentley?

SUPT. VAUGHAN

Sergeant Bentley is a reader in our Reader Analyst Shop, My Lord. Reports will come through that particular office and they will review them and break them down for the attention of the officers to whom they are reporting, either myself or Inspector Murphy or one of the other officers in that department.

COMMISSIONER EVANS

Then does he write and give his opinion on things?

SUPT. VAUGHAN

If I ask for an opinion, and I did ask him to review the Donald Marshall matter and give me an opinion on the allegations made by Staff Sergeant Wheaton, then this, of course, is the issue I was...

COMMISSIONER EVANS

As to the question about tactics used.

SUPT. VAUGHAN

Pardon me, sir?

COMMISSIONER EVANS

As to the question about tactics used by the police, Sydney Police?

SUPT. VAUGHAN

Yes.

COMMISSIONER EVANS

And then he went on to say, "Well, as far as he was concerned, they shouldn't have any murder investigations conducted by them."

SUPT. VAUGHAN

That's correct, sir.

MR. CHAIRMAN

To follow that for a moment. Supposing that some member of your force this year decides that the Halifax Police force are not

being as assiduous as they should be in investigating serious crime, would you have the right to go to the Attorney General and say, "We should take it over."?

SUPT. VAUGHAN

I think if there were a blatant example of justice not being properly attended to or cases of a serious nature not being attended to, which were offensive and certainly not being reported by the public, then we may draw to the attention of the Attorney General. But I don't believe that we would approach them and say that they shouldn't be handling serious investigations, we should. You go into the City of Halifax to do it. They have.... First, it's my view that city police forces are incorporated under the Police Act by a particular city. They're accountable to a police commission, which must be set up in accordance with the Police Act, and there's a city council. And certainly the level and quality of policing within a town should be of concern to the elected officials as well as the police commission. And not necessarily everything falling in the laps of the R.C.M.P. to be the cure-all to everything. We have certain responsibilities to safeguard society from abuse and so on. But so are city police forces incorporated to do that and they do have elected officials also.

MR. CHAIRMAN

You have a contractual relationship with the Province of Nova Scotia to police certain areas.

SUPT. VAUGHAN

Yes, we do, sir.

MR. CHAIRMAN

Whatever policing you do, I take it, is governed by that contract.

SUPT. VAUGHAN

It is, sir.

MR. CHAIRMAN

Unless there was, I suppose, a state of apprehended insurrection throughout the nation, you might have to be brought in.

SUPT. VAUGHAN

That's correct.

MR. CHAIRMAN

I have a recollection of a case in the fifties where there was some doubt as to whether the R.C.M.P. at law could come in and take over certain duties of another police force, even when there was close to that state of national concern. But these are matters that are... I'm sure you know the case I'm talking about.

SUPT. VAUGHAN

Yes, sir.

MR. CHAIRMAN

In the fifties. In any event, I take it that the governing relation... Your relationship with the Attorney General of any province is governed by the policing contract between the

1 province and the Government of Canada.

2 SUPT. VAUGHAN

3 It is, sir, and there's one provision within the Police Act of
4 Nova Scotia whereby they may direct that we take over a specific
5 investigation. But that is also contained within the contract that is
6 signed between the federal government and the Attorney General
7 or the province in which we're contracted.

8 MR. CHAIRMAN

9 If, and I think this has happened in some provinces in
10 Canada, the Attorney General decides, after consultation with the
11 municipality, that it might be in the best interest of law
12 enforcement if a municipal force did not continue, that you take
13 over the policing, would that require an amendment then to your
14 contract?

15 SUPT. VAUGHAN

16 Well, first of all, I think that would be an issue that would
17 be negotiated between the government and the Government of
18 Nova Scotia and our force, our headquarters would become
19 involved in taking over municipal policing.

20 MR. CHAIRMAN

21 That's a separate contract, isn't it?

22 SUPT. VAUGHAN

23 A separate contract, that's right.

24 MR. CHAIRMAN

25 If a municipality in Nova Scotia tomorrow decided they

1 wanted the R.C.M.P. to assume responsibility for policing, subject
2 to the approval of the two Attorneys General...
3 SUPT. VAUGHAN
4 Yes, sir.
5 MR. CHAIRMAN
6 There would be then a separate contract.
7 SUPT. VAUGHAN
8 Yes.
9 MR. CHAIRMAN
10 And my recollection is at a higher cost.
11 SUPT. VAUGHAN
12 At a higher cost, yes.
13 MR. CHAIRMAN
14 To the municipality than the cost is found in the provincial
15 contract.
16 SUPT. VAUGHAN
17 That's correct, Chairman.
18 BY MS. DERRICK
19 Q. Superintendent, is it accurate that if there are serious
20 allegations against a municipal police force that warrant
21 investigation, yours is the appropriate force to do that
22 investigation?
23 A. Well, we're not going to take over an investigation in any, of
24 any police department when there's an incorporated police
25 department to enforce the law in that community, unless we

1 get a specific direction from the Attorney General to do so.
2 And, moreover, some investigations, city police forces will ask
3 us for our assistance and, providing we have the resources
4 and it's an appropriate case, then we may very well assist
5 them to do that.
6 Q. And so the R.C.M.P. act in a very independent fashion except...
7 with respect to criminal investigation, except in an instance
8 such as you have described?
9 A. I'm... You're going to have rephrase that for me because I
10 don't know precisely what you're driving at.
11 Q. With respect to other types of criminal investigations, you
12 would simply go ahead and investigate and determine
13 whether or not charges should be laid?
14 A. Within our juris... the areas that we police, yes.
15 Q. So where it is different is if it involves a municipal police
16 force.
17 A. If there's a municipal... A crime within a municipal police
18 force, they have an incorporated police department to look
19 after crime in their community and so we wouldn't
20 automatically become involved in investigations within that
21 community.
22 Q. And what if in the event that you determined there should be
23 an investigation of that municipal police force, that you didn't
24 receive that direction from the Attorney General, would you
25 go ahead and do that investigation anyway?

A. Of the... There should be an investigation...

Q. Yes.

A. Of a municipal police department?

Q. Yes.

A. Well, bearing in mind the structure that's set up to incorporate police departments in the accountability process, we wouldn't automatically go in and investigate a municipal police department without consultation with the Attorney General's department because they contract for our resources and they're paying for them, number one.

Q. So the final decision in that respect would be left with them.

A. Of course, yes.

Q. And you would abide with them.

A. Yes.

MR. CHAIRMAN

I get a feeling we're getting off track here and at least you're losing me, but that may be my fault.

MS. DERRICK

It's probably my fault.

MR. CHAIRMAN

This case here, the case that we're talking about. The R.C.M.P. were asked by the Sydney Police Force to come in and reinvestigate...

SUPT. VAUGHAN

Yes, sir.

1 MR. CHAIRMAN

2 The conviction of Donald Marshall, Jr. and the murder of
3 Sanford Seale. That's correct.

4 SUPT. VAUGHAN

5 Yes, that's correct, sir.

6 MR. CHAIRMAN

7 So you didn't have to wait for anyone to tell you to go in,
8 you're there.

9 4:22 p.m.

10 SUPT. VAUGHAN

11 No, we went in and assisted.

12 MR. CHAIRMAN

13 So the issue, I think, that counsel have been addressing, and
14 the relevant issue, is that if in the process of carrying out that
15 investigation, your investigating officer came upon evidence
16 which could reasonably suggest to him that a police officer may
17 have committed a breach of the Criminal Code, is it your evidence
18 that he can go and should go and question that police officer
19 without any request from the Attorney General or instructions
20 from anyone?

21 SUPT. VAUGHAN

22 It's my view, My Lord, that in this particular case, we
23 accepted the invitation to investigate or reinvestigate the Seale
24 murder and if there's any criminality associated with that murder
25 by a police officer, then that's part of the mandate, we have the

perfect right to continue on and investigate the commission of that offence by that police officer. And I consider that part of the mandate. I was...

MR. CHAIRMAN

I don't want us to get off track on this business of going in and taking over the policing of the City of Sydney. Okay.

MS. DERRICK

Thank you, My Lord.

BY MS. DERRICK

Q. Superintendent Vaughan, where there are serious allegations, such as we see here from Sergeant Bentley, concerning those issues of competency, wrongdoing, certain types of police tactics, is it not fair to say that you can't know whether those amount to criminal conduct unless there is an investigation?

A. Are we talking about the Donald Marshall, or any number of cases?

Q. We're talking about the Donald Marshall case, although it may be generally applicable.

A. I asked, just to clarify this a little bit, I asked Sergeant Bentley to review the file and give me his opinion and I read his opinion insofar as the Donald Marshall matter is concerned and I reviewed the matter myself and I come to a different conclusion than Sergeant Bentley. Ultimately, the responsibility rests with me for that decision. I made it and that's the end of it. I'm not accountable to Sergeant Bentley

for his opinion. I did take it into account, though, and I did meet with him.

Q. No, I'm not suggesting that you're accountable to him. I'm simply saying that you can't know whether what is contained and what he's written here might amount to, or might have amounted to criminal conduct unless there's an investigation of it.

A. It might have, but I'm not running all over the country investigating people for criminal offences, it's a commitments of resources, unless there's some basis to do it. And, in reviewing the Donald Marshall file, as it related to Mr. MacIntyre's interrogation techniques, I did not find the basis to launch that criminal investigation that was requested.

Q. As part of that review, did you see, I believe, it's Staff Sergeant... I'm afraid I get these titles mixed up. Barlow's report?

A. Yes.

Q. It's found in Volume 20 at page 21. Now we also have in evidence before us now as Exhibit 153, the draft of that report.

A. Yes.

Q. Which I think from Staff Sergeant Barlow's evidence, you would never have seen.

A. No, I haven't read that, no.

Q. May I ask you of whether you took from his report on page

1 21 that he was being critical of the police?
2 A. Page 21?
3 Q. 21.
4 A. This Volume 20?
5 Q. Yes, Volume 20, page 21.
6 A. Yes.
7 Q. I can tell you, in fact, that the draft you haven't seen is highly
8 critical of the police and it was Staff Sergeant Barlow's
9 evidence that that is the impression that he expected a fellow
10 police officer to be left with in reading his final report.
11 A. Yes.
12 Q. And that is an impression that was created, is that correct?
13 A. Well, that may very well be.
14 Q. Were you left with the...
15 A. He was critical, yes.
16 Q. That he was being critical.
17 A. Yes.
18 Q. And that was one of the factors that you also took into
19 account.
20 A. Yes, I read his report.
21 Q. In your review of the file. I'd like to just refer you to the
22 letter that you did send to Mr. Gale, which is found in various
23 places towards the end of Volume 20, page 101, for example.
24 I'd just like to ask you some things about this letter. You're
25 quite specific in this letter, are you not? For instance, on page

1 73, when you say about the...

2 COMMISSIONER EVANS

3 Which page are you at?

4 BY MS. DERRICK

5 Q. I'm sorry, I'm on page 73 of Volume 20.

6 A. Page 73. Okay.

7 Q. When you talk about not supporting a further investigation of
8 Mr. MacIntyre and Mr. Urquhart, you say "at this time". So
9 you're speaking about a further investigation in August of
10 1986, or at that point, is that correct?

11 A. I'm talking about August, yes.

12 Q. And was it effectively your conclusion that the, that there
13 should be a public inquiry and that what evidence...what
14 evidence came out of that should be examined and then a
15 determination should be made whether or not a further
16 investigation be pursued.

17 A. Yeah, I think, I believe I said in here somewhere that I was
18 aware that an inquiry would be conducted...

19 MR. CHAIRMAN

20 Page 75.

21 BY MS. DERRICK

22 Q. Yes, page 75, you say: "It is my understanding that some
23 form of public inquiry will be held..."

24 A. Yes.

25 Q. "Following a decision of the Supreme Court of Canada on the

1 Ebsary case."
2 A. And I did, in fact, say that if some evidence of a material
3 nature or probative value happened to come out which would
4 tend swing the balance in favour of an investigation, we
5 would look at it.
6 Q. So if I can just refer you for a moment to page 99 of the same
7 volume, and you're writing to Commissioner Schram?
8 A. Uh-huh.
9 Q. You say:
10
11 > The Department of Attorney General has agreed that further investigation against the former
12 > Chief of Police John MacIntyre is unwarranted.
13
14 A. Yes.
15 Q. It was your opinion, though, was it not, that it was
16 unwarranted at that time but not that it might never be
17 warranted, is that accurate?
18 A. That's right.
19 Q. Now just to ask you about your letter, I'm again back on page
20 73. In that first paragraph, you talk about the actions of the,
21 being the opinion, of the O.C. of the Sydney Subdivision that
22 the actions of the Sydney police investigators was one of
23 overzealousness.
24 A. Yes.
25 Q. As an experienced police officer, is it not plausible that

1 overzealousness could lead to wrongful or criminal conduct?
2 A. I didn't see it in this case, but I suppose anything is possible.
3 Q. That's possible. And in the third paragraph down, you say:
4
5 > In the correspondence referred to, the police managers involved in the review of this matter
6 > made no suggestion whatever that MacIntyre/Urquhart may have counselled
7 > perjury.
8
9 When you're referring to "police managers", who do you
10 mean?
11 A. I'm talking in terms of the O.C. of Sydney Subdivision, the
12 Officer Commanding of the Sydney Subdivision and the two
13 previous Criminal Operations officers, Christen and
14 MacGibbon.
15 Q. Did Staff Sergeant Wheaton not tell you at some point orally
16 that he was of the opinion that Sergeant MacIntyre and
17 Sergeant Urquhart had committed the offence of counselling
18 perjury?
19 A. He put it in writing.
20 Q. And that was in response to your asking for more details?
21 A. The initial report of his outlined very clearly that he felt Mr.
22 MacIntyre should be charged with counselling perjury.
23 Q. Now on page 74, here you're speaking about MacIntyre
24 having grounds to suspect Marshall in 1970 and '71.
25 A. Yes.

1 Q. Now I think Mr. Orsborn has asked you about the basis for
2 saying that Mr. Marshall was picked up on seven different
3 occasions.
4 A. Yes.
5 Q. Did you review Mr. Marshall's criminal record in the
6 preparation of this report?
7 A. No, I don't believe I had. I don't believe I had Mr. Marshall's
8 record at that particular point in time. I have since had a
9 look at it.
10 Q. So you're familiar with the fact that it discloses few and very
11 minor offences; in fact, a number of Liquor Control Act
12 offences, and no violent offences at all other than the
13 conviction for, the wrongful conviction...
14 A. Yes.
15 Q. For Mr. Seale's murder.
16 A. However, his statement and other material would indicate
17 that he had a definite antisocial behaviour extending to 16 or
18 $19,000 in damage to tombstones, dynamite caps, robbing
19 people in the park.
20 Q. What statement is this that discloses all of this?
21 A. The statement that he gave to Staff Sergeant Wheaton alluded
22 to damage to, I believe, offences in the cemetery. It alludes
23 to not being unfamiliar with or participating in robberies in
24 the park area.
25 Q. This is the statement given at Dorchester in 1982...

A. Ah, yes.

Q. That you're referring to.

A. Yes, I believe so.

Q. And it does refer to an attempted robbery on the, or rolling on the night of the murder.

A. Oh, yes, it does. Yes, but...

Q. But you also believe that it discloses information about...

A. I believe so. I believe that it says something like, "I was a bad young guy and I was involved in robbery in the park," or something of that nature.

Q. Perhaps you could be referred to...

MR. BAILEY

Perhaps, My Lord, my client might be permitted to see the document being referred to, if he's being asked to comment on it.

MS. DERRICK

Volume 34 at page 52.

MR. CHAIRMAN

I'm afraid he's going to have to be referred to it tomorrow morning. We'll adjourn until 9:30.

4:34 INQUIRY ADJOURNED UNTIL 9:30 A.M. JUNE 2nd.

REPORTER'S CERTIFICATE

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

Margaret E. Graham

DATED THIS 1st day of June 1988 at Dartmouth, Nova Scotia