

MS. GOULD, EXAM. BY MR. WILDSMITH

1 and they're listening and their faces are almost non-  
2 expressive and, you know, and then they go out and they  
3 come back in, and I can't comment because I just have no  
4 contact with people on juries. You just sit and watch them  
5 and...

6 Q. No comment or no observation.

7 A. No.

8 MR. WILDSMITH

9 Thank-you. That's the only question.

10 MR. CHAIRMAN

11 Thank-you very much, Mrs. Gould, you've been a very  
12 intelligent witness. I thank you for coming.

13 MS. GOULD

14 Thank-you.

15 MR. CHAIRMAN

16 Two o'clock.

17 INQUIRY ADJOURNS - 12:36 p.m.

18 INQUIRY RESUMES - 2:09 p.m.

19 MR. CHAIRMAN

20 All right.

21 MR. SPICER

22 The next witness is Mr.Endres.

23 MR. REINHOLD ENDRES, duly called and sworn, testified as follows:

24 EXAMINATION BY MR. SPICER

25 Q. What's your full name, please, Mr. Endres?

1 A. My name is Reinhold Maurice Endres.

2 Q. That's E-N-D-R-E-S.

3 A. Right.

4 Q. You graduated from Dal Law School in 1975.

5 A. Correct.

6 Q. Where did you serve your articles?

7 A. I served articles with a firm that was called Hopkins, Dillon  
8 and Associations in Bedford.

9 Q. Okay. Did you practise with them at all after you finished?

10 A. No.

11 Q. Where did you go then?

12 A. I started with the Attorney General's Department  
13 immediately after my articling.

14 Q. Would that have been March of '76?

15 A. That's right.

16 Q. Okay. In what capacity?

17 A. I started as Crown Prosecutor in Dartmouth.

18 Q. For how long did you do that?

19 A. About two and a half years.

20 Q. Subsequently to that?

21 A. Following my prosecutor's duties I transferred to the head  
22 office, and I was active in criminal appeals for almost two  
23 years.

24 Q. So, that gets us to around 1980 or so, '81.

25 A. Roughly 1980, yes.

1 Q. Okay. After you concluded working in criminal appeals,  
2 what did you do next?

3 A. I then started to work in civil law, in civil litigation  
4 primarily.

5 Q. At that stage of the game when you started were you doing  
6 trial work?

7 A. Yes, I was.

8 Q. Okay. And for how long did that go on?

9 A. I am still doing that now.

10 Q. What is your title?

11 A. At this point?

12 Q. Yes.

13 A. I am director of civil litigation.

14 Q. As a director of civil litigation, do you get involved in the  
15 actual cases yourself?

16 A. Yes, I do. It depends on the nature of the case.

17 Q. Okay. For how long have you been director of civil?

18 A. Since 1986.

19 Q. During the years that you've been doing civil, for how many  
20 years prior to becoming director were you involved in civil  
21 litigation?

22 A. Just after I finished doing criminal appeals work.

23 Q. That is what, '81, '82?

24 A. 1980, the end of 1981, beginning of 1982.

25 Q. To who do you report in the Department of the Attorney

1 General?

2 A. We have an executive director. His name is Mr. Conrad,  
3 Gerald Conrad.

4 Q Right.

5 A. I report to him directly.

6 Q During the time that you were Crown Prosecutor, what types  
7 of cases would you be prosecuting?

8 A. Any kind of criminal case under the Criminal Code of  
9 Canada, not provincial offences, except for the rare case.

10 Q Now, would that have been from '76 until middle of '78 or  
11 so when you were doing that sort of work?

12 A. That's right.

13 Q During that period of time, what did you understand the  
14 nature of the obligation to disclose to be, to defence counsel?

15 A. I don't recall that we had at that point in time any specific  
16 direction as to the nature of disclosure with defence counsel.  
17 It was a matter that I addressed individually myself.

18 Q What was your practise?

19 A. Generally I was quite receptive to meet with counsel to  
20 disclose to them on the basis of the Crown Sheet, which I  
21 obtained from the police, of course, the nature of the case  
22 against the accused.

23 Q Would you disclose statements of...in your possession to  
24 defence counsel?

25 A. It would vary. Sometimes I would, sometimes I would not.

1 It depends just on what counsel was looking for.

2 Q. If counsel didn't ask, would you think it was your obligation  
3 to disclose in any event?

4 A. No.

5 Q. Did you have any discussions with any of your superiors in  
6 the Attorney General's Department concerning that  
7 viewpoint, that is, that you didn't feel you had a positive  
8 obligation to disclose?

9 A. I do not recall that as being an issue, so I would have had no  
10 occasion to obtain any instructions.

11 Q. Do you know whether or not your policy was consistent with  
12 the policy of other prosecutors operating in the Halifax-  
13 Dartmouth area at the time?

14 A. I don't know that, but I would expect that individual  
15 prosecutors had approached the matter differently.

16 Q. In your understanding was there any policy at all in effect  
17 between the years 1974 and 1976?

18 A. When I started in 1976 I certainly was not aware of any  
19 policy on disclosure with defence counsel.

20 Q. Were you given any advice by superiors in your department  
21 as to what your obligation was?

22 A. No.

23 Q. So how did you come to the conclusion that it was  
24 appropriate not to disclose unless the material was  
25 requested?

1 A. Well, it's just a matter of the way things worked out. I  
2 wouldn't...as a matter of fact, I would not make any  
3 disclosure unless defence counsel would ask for it.

4 Q. Right.

5 A. In other words I would not go to the defence lawyer and  
6 say, "Would you like to see the Crown file?"

7 Q. Were you ever subject to any criticism as a result of  
8 embarking on that policy by...

9 A. Only, I'm sorry.

10 Q. By anybody in the Attorney General's Department?

11 A. No, not at all.

12 Q. By any defence counsel?

13 A. Yes, I was going to say, some defence lawyers did not  
14 particularly appreciate my willingness, sometimes  
15 unwillingness to disclose. There were occasions when I did  
16 not disclose statements.

17 Q. What would be the basis of your unwillingness to disclose?

18 A. Well, it depended on the lawyer, frankly. I do recall that  
19 there were occasions when a defence counsel had made,  
20 what I considered to be, inappropriate use of statements  
21 which were really not relevant to the case at all. I had an  
22 occasion like that and in that event I was more cautious the  
23 next time. In other words, I was not as forthcoming with  
24 information.

25

1 2:15 p.m.

2 A. But, invariably, the Crown sheet would be disclosed. Not the  
3 paper, per se, but...necessarily, but I would disclose what is in,  
4 what was in the Crown sheet.

5 Q. Verbally?

6 A. Yes. I would tell the lawyer, "This is what it says in the Crown  
7 sheet."

8 Q. If the lawyer asked to see the Crown sheet, would you oblige?

9 A. Normally I would, yes,

10 Q. Would there be circumstances, again, where you wouldn't?

11 A. Yes.

12 Q. What sorts of situations?

13 A. Again, it would have depended on my relationship with the  
14 lawyer, frankly. There were very few cases when I would  
15 not make disclosure. There were very, very few.

16 Q. During your time as prosecutor, would you have had contact  
17 with the police?

18 A. Yes, of course.

19 Q. And which police force would you be dealing with?

20 A. The Dartmouth City Police.

21 Q. Are you able to comment on whether or not the Dartmouth  
22 City Police thought it was their obligation to lay a charge or  
23 whether they would consult you before that was done?

24 A. The Dartmouth City Police and I had a very close working  
25 relationship and unless, and except in the case of a very

1 routine charge, they would invariably come to me and ask for  
2 my advice before charges would be laid.

3 Q. Would there be circumstances where you would suggest to  
4 them that there weren't grounds to lay a charge?

5 A. Yes.

6 Q. Would they accede to that view?

7 A. Yes.

8 Q. Invariably?

9 A. Always.

10 Q. Was it your view that you had the right to decide whether or  
11 not a charge was laid?

12 A. No, no, that was not my view. It was my position to advise  
13 the police on whether the facts that they had accumulated  
14 were sufficient to lay a charge. But if the police had wanted  
15 to go ahead against my advice, that would have been their  
16 right.

17 Q. But as a matter of practice it just never happened.

18 A. It never did, that I recall.

19 Q. Did you deal with the RCMP at all?

20 A. No.

21 Q. No. When you took over doing civil work, included in that  
22 work would you negotiate settlements from time to time?

23 A. Yes, I would if there were such negotiations, but they were  
24 very rare.

25 Q. What sorts of cases would you be involved in on the civil side



1 in the AG's Department?

2 A. Today, I am primarily involved in, almost exclusively, in  
3 constitutional cases. That is, cases under the British North  
4 America Act including the Charter of Rights.

5 Q. What about when you first started?

6 A. When I first started, I did any litigation that was assigned to  
7 me and a lot of that would amount to Chambers applications  
8 where there would be no disputed facts.

9 Q. What was your experience in the years '83 and '84 with civil  
10 cases involving damages? That is, where a party was  
11 claiming damages?

12 A. I'm sorry, I'm not sure if I can understand what...

13 Q. Well, what I'm asking is whether or not you had any  
14 experience in '83 and '84 with cases in which you might be  
15 asked to settle a case on the basis a quantum of money was  
16 involved in the settlement.

17 A. Yes, I would have had cases where a settlement was arranged  
18 ultimately. In other words, claims in tort or whatever,  
19 perhaps contract, where the matter did not go to court.

20 Q. Would you take instructions with respect to settlement of  
21 those claims from superiors in your Department?

22 A. No, I don't think, not in the normal case. The ones that I can  
23 think of, they were all relatively minor cases and I would  
24 have recommended a settlement to, if anything, I would have  
25 recommended a settlement to my superior who would have

1       been Conrad at that time as well.

2       Q. Prior to your recommendation of the settlement, would you  
3       have had complete carriage of the matter on your own then?

4       A. Oh, yes.

5       Q. Was there a dollar figure beyond which you had to  
6       recommend settlement?

7       A. In past cases?

8       Q. Yes.

9       A. Not that I recall, no. No, see, I would be working pretty much  
10       independently on a case. And if I came to the conclusion that  
11       it would have been, that it would be in the best interest of the  
12       government to settle rather than go to court, then I would  
13       make a recommendation to my superior and I would  
14       recommend to my superior what I consider, what I would  
15       consider to be an appropriate range for settlement.

16       Q. Upon what basis would, generally, would you arrive at what  
17       you consider to be an appropriate range of settlement?

18       A. Well it's not that difficult in the ordinary tort situation. You  
19       have a kind of case where you would get, say, a motor vehicle  
20       case against the Department of Transportation. We know a  
21       person was injured, injuries are worth a certain amount.  
22       There are tables for that purpose. We know what an arm is  
23       worth, what a leg is worth and so on and so forth. We know  
24       what a car is worth. So in the ordinary event, it is not  
25       difficult to determine an approximate range of what a tort

1 claim is worth.

2 Q. Right. In order to arrive at that range, it would be necessary  
3 for you to research the relevant law to figure out what the  
4 range would be.

5 A. Yes. You do it by precedent.

6 Q. If you had, if your view was that the range was 10 to  
7 \$20,000, would it be fair to say that you'd try and settle it as  
8 close to 10 as you could?

9 A. Yes, perhaps even lower. Sure.

10 Q. And would it be fair to characterize that as, in the negotiation  
11 of the normal civil case, you would be seeking to settle it for  
12 as little as you could?

13 A. That's quite right, yes.

14 Q. If you had...

15 CHAIRMAN

16 I take it in that regard you're no different from any other  
17 practicing lawyer.

18 A. I hope not.

19 CHAIRMAN

20 At least if my memory serves me accurately.

21 MR. SPICER

22 Q. When was your first knowledge of the Donald Marshall  
23 matter? Your first involvement in that?

24 A. My first involvement is easier to quantify than my first  
25 knowledge, which is it?

1 Q. Well, let's start with the first knowledge you had of Donald  
2 Marshall matter.

3 A. That is a difficult question to answer. I knew generally that  
4 the Donald Marshall case, if I may call it that, was about, it  
5 was in the Department, it was being dealt with by people in  
6 my Department, but I had no involvement with the case per  
7 se until April, late April or early May of 1984.

8 Q. You say you had some knowledge of it, the fact that it was  
9 being dealt with by people in your Department prior to that.  
10 Did you have any discussions with people in the AG's  
11 Department about the Marshall case prior to becoming  
12 directly involved in it?

13 A. Undoubtedly I had casual discussions with persons such as  
14 Martin Herschorn and others perhaps, yes, but I don't recall  
15 anything specific about that.

16 Q. The first document, if you could look in Volume 32 at page  
17 274.

18 A. Yes.

19 Q. There's a note from yourself to Gordon Coles. Would that  
20 have been your first formal involvement in the Donald  
21 Marshall matter?

22 A. November 1983. I don't, no, this would not have been my,  
23 that would not have been involvement in the Donald Marshall  
24 matter, per se. I really think my involvement did not  
25 commence until April or May of 1984. What this letter

1 records is simply my findings upon examining the records  
2 and talking to the people at the Prothonotary's office of the  
3 status of the Donald Marshall case, the civil case, against the  
4 Chief of Police in Sydney. But this did not involve me, per se.  
5 If I recall correctly, and this would be a normal thing for me  
6 to do, the Deputy Attorney General, in that case would have  
7 contacted me and said, "What is the status of this case?" I  
8 would go through my routine channels and I make an inquiry  
9 and then report back to him. But that's really all I did in that  
10 case.

11 Q. And is it your recollection in this case that the procedure that  
12 you just discussed, that is, being contacted by the Deputy  
13 Attorney General, is probably what happened here?

14 A. I don't recall him contacting me and I don't see anything to  
15 that effect here but I expect that's what happened. And it's a  
16 normal matter for him to do that. He will do that quite  
17 frequently in anything that relates to civil matters, any civil  
18 claim that he's interested in, he would contact me in the  
19 normal course.

20 Q. Prior to this notation, November of 1983, do we take it then  
21 that you didn't have any involvement at all in the setting up  
22 of the reference that went to the Court of Appeal?

23 A. Oh no, I had no involvement.

24 Q. How did you come to be first involved then in the Marshall  
25 matter?

1 A. It was sometime after the Government announced the  
2 Campbell inquiry and that would have been in March of 1984.  
3 It was sometime after that that the Deputy Attorney General,  
4 Mr. Coles, asked me to come to his office and I don't know if it  
5 was in the latter part of April or in the early, very early part  
6 of May. He asked me to come to his office and asked me  
7 whether I had, whether I was interested in participating in  
8 the Campbell inquiry.

9 Q. Right. What was your response?

10 A. I expressed an interest.

11 Q. Yes. Was there anything else discussed at that time, at that  
12 particular meeting?

13 A. Just in general, I asked him, of course, what sort of role I  
14 would play and we had a general discussion about that.

15 Q. And what did he describe your role to be?

16 A. The Deputy Attorney General told me at that time that my  
17 role would be to safeguard, protect or to represent the public  
18 interest, essentially. Not, per se, the Government, I do recall  
19 that much. But the public interest.

20 Q. All right. Can you explain to me what the distinction was in  
21 your mind between safeguarding the public interest and the  
22 Government?

23 A. Yes, I asked about that myself and what I recall about it is  
24 this that I was to insure that the Campbell inquiry would  
25 have before it all the relevant information in order to make

1 the... to come to a conclusion on the matter of compensation.  
2 So it was not a partisan role, that is, to ensure that the  
3 Government was being represented, but a more independent  
4 role, to ensure that the Campbell inquiry would have all the  
5 relevant information.

6 Q. In order to enable the Campbell Commission to make a  
7 reasoned decision?

8 A. To make a proper decision with all the facts. And that  
9 included, by the way, cross-examining witnesses that might  
10 have been called before the Campbell inquiry.

11 Q. Was there anybody else present at that meeting? Just  
12 yourself and Mr. Coles?

13 A. I don't recall anyone else being there.

14 Q. What was your next involvement?

15 A. I've had, there was no further involvement until sometime in  
16 the middle of May of 1984 when a meeting took place  
17 between Mr. MacIntosh, who was counsel to the Campbell  
18 inquiry, the Deputy Attorney General, Mr. Cacchione and  
19 myself.

20 Q. Perhaps you could turn to page 425 of Volume 33. It's the  
21 next volume.

22 A. Yes.

23 Q. Are those your notes?

24 A. Yes.

25 Q. And those are notes of the meeting to which you just

1 referred?

2 A. Yes.

3 CHAIRMAN

4 I missed the page number.

5 MR. SPICER

6 Sorry, 425, My Lord.

7 Q. We've heard previous testimony concerning this meeting and  
8 I think it's fair to say that one of the things that came out of  
9 that meeting was that Mr. Cacchione suggested why don't we  
10 save ourselves a lot of trouble and just try and work this out.

11 A. That's quite right.

12 Q. Okay. And I note on page 431, next to the notation, "Felix -  
13 Marshall now in need of psychological assistance. It may be  
14 advantageous for him to settle now." At that point in time  
15 then, did Mr. Cacchione disclose to he meeting what sort of  
16 shape Mr. Marshall was in psychologically?

17 A. Yes. To the point of my note. No more. What is said to the  
18 right of "Felix" would be approximately what Mr. Cacchione  
19 offered at the meeting and that is simply that his client was  
20 in need of psychological assistance and that it may be  
21 advantageous for him to settle. Those were the words of Mr.  
22 Cacchione at the meeting.

23

24

25



1 2:30 p.m.

2 Q. At the bottom of the page you just have a...and it's  
3 something that's marked "Note", "With a structured  
4 settlement we would keep this whole thing private!" and an  
5 exclamation mark. What was the point of that?

6 A. It was my idea and as it turned out that was an idea that  
7 was shared by Mr. Cacchione and apparently his client as  
8 well, very much so, that we were into a private forum to  
9 negotiate something and that we should keep that private  
10 and between us, because it was a private settlement. It was  
11 not the anticipated public inquiry of the Campbell  
12 Commission. So I would have preferred, and that is the  
13 effect of my note, that all of our discussions in the course of  
14 attempting to negotiate a settlement would be kept  
15 privileged or private. But as I indicate that was shared and  
16 it was...it's made clear in later notes by my friend, Mr.  
17 Cacchione.

18 Q. And on page 434, again, is that your writing?

19 A. Yes, it is.

20 Q. Okay. And that's a meeting between yourself, Mr. Coles and  
21 Mr. Giffin on the same date, May 16th.

22 A. That's right. We were simply reporting to the Minister the  
23 result of our meeting.

24 Q. And at that meeting, about halfway down, you have a  
25 notation, "We have no particular mandate, no figures were

1           mentioned." Did you have any sense at all that there was  
2           any limit?

3           A.    Moneywise.

4           Q.    Yes, moneywise, yeah.

5           A.    No.

6           Q.    What was it that was being discussed, then, when you say  
7           you had no particular mandate?

8           A.    What we exposed the Minister to was simply the idea that  
9           there might be room to negotiate a settlement rather than  
10          going ahead with the Campbell inquiry. And we  
11          recommended to the Minister that we might explore that,  
12          and he agreed and said, "Go ahead and try it," but that is as  
13          far as his instructions went at the time. He did not say to us  
14          try to settle it at any particular figure or anything of the  
15          kind.

16          Q.    Did you have a sense at that point of what your direction  
17          was?

18          A.    No, I had none really except to say that on...in the course of  
19          the meeting that we had in the presence of the Campbell  
20          Commission counsel with Mr. Cacchione present on the same  
21          day, a figure was mentioned of \$1-million. So I had some  
22          idea as to the parameters within which we were operating.

23          Q.    And at that meeting, to which you just referred, Mr.  
24          Cacchione also mentioned some other figures, did he not, on  
25          page 430. He brought to your attention the New Zealand

1 claim, 430 at the bottom of the page.

2 A. That's right.

3 Q. 1.3 million. Did you understand to be 1.3 million New  
4 Zealand dollars?

5 A. I assumed that's what it was.

6 Q. Okay.

7 A. But at that meeting, as well, there were other figures  
8 mentioned.

9 Q. Yes.

10 A. As you will see in my note.

11 Q. Yeah.

12 A. And I would have been aware at that time of the New  
13 Zealand inquiry because I had done some reading and some  
14 research in that respect as to what other inquiries may have  
15 taken place, not in Canada because I could not find any  
16 precedents in Canada, but otherwise in the rest of the world.  
17 And I was aware, for example, that there were, at that point,  
18 on the 16th of May, that there were at least three reported  
19 inquiries in England, two of which resulted in awards, to my  
20 knowledge, one of which was seventeen and half thousand  
21 pounds, the other one a hundred thousand dollars. I was  
22 aware, as well, of a case in Japan where a person had  
23 served thirty-four years in jail and was then compensated  
24 to the tune of three hundred thousand dollars roughly. So,  
25 yes, I had some idea about the figures in my own mind, but

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1 I had certainly not conceptualized anything.

2 Q. At the time that you met on the 16th with Mr. Giffin and Mr.  
3 Coles did you advise them of the sort of ranges that you had  
4 just been talking to us about?

5 A. No, I don't recall that.

6 Q. Was any inquiry made by either Mr. Giffin or Mr. Coles as to,  
7 well, what's the ballpark here?

8 A. No. No, Mr. Coles would have been aware of the one million  
9 dollar figure because that came up in his presence, but no,  
10 there would have been nothing more mentioned.

11 Q. Was the work that you did, with respect to researching  
12 these other cases and claims in other countries ever reduced  
13 to any kind of a memo to the Minister or to Mr. Coles?

14 A. No, and I don't want to overstate the case. I researched it in  
15 a general way. It was not a research project that I, ah, I was  
16 not...as things developed, and they developed very quickly  
17 after that first meeting on May the 16th, I just did not get to  
18 the point of researching the matter completely so as to  
19 produce anything in writing.

MR. CHAIRMAN

20  
21 Mr. Endres, at page 430, we're...your note at the bottom  
22 after the one million, what does the rest of that mean?

MR. ENDRES

23  
24 The note about actuarial figures?  
25

1 MR. CHAIRMAN

2 Yeah.

3 MR. ENDRES

4 That one. It says "Actuarial figures are short of \$400,000  
5 but then there are all these nebulous areas." These are...this is  
6 what Mr. Cacchione informed us of in that...I understood him to  
7 say that he had an actuarial appraisal of the loss of wages that Mr.  
8 Marshall suffered during the course of his imprisonment and that  
9 those figures were somewhere in the area of \$400,000. I  
10 understood him to say, that is what my note is supposed to reflect,  
11 that Marshall lost about \$400,000 of earnings in those eleven  
12 years that he had been deprived of his freedom.

13 MR. SPICER

14 Q. On page 437, is that your handwriting?

15 A. That is my writing, yes.

16 Q. Okay. What is that note a record of?

17 A. It's record... that note on May 17, '84, simply records a  
18 conversation I had with the Deputy Minister who informed  
19 me that the Minister had spoken to colleagues at Cabinet, I  
20 assume, and that he had been told to go ahead and  
21 determine if a negotiated settlement could be achieved.  
22 And in that respect I had detailed...more detailed  
23 discussions with the Deputy Attorney General who  
24 instructed me to contact Mr. Cacchione and to establish the  
25 groundwork for a possible settlement. It also records that

1 we were to treat these discussions in private, and I  
2 understood that that was important, not simply as I  
3 explained before because this was to be a private  
4 negotiation, but also because of the existence of the  
5 Campbell Commission at the time. We certainly did not  
6 want to create the appearance that there was a competing  
7 kind of a forum being set up and create all kinds of  
8 difficulties in that respect for the Campbell inquiry. We  
9 were doing this, as it turns out later, with the concurrence  
10 and the support of the Campbell inquiry.

11 Q. You say, "I should contact Felix Cacchione, ask that he give  
12 us his position in writing and tell him that we are prepared  
13 to try and negotiate a settlement by way of ex gratia  
14 payment."

15 A. That's important, ex gratia, and I underlined it.

16 Q. Yeah.

17 A. The importance there, of course, is that we would not  
18 assume any responsibility. We would not accept any legal  
19 responsibility to pay anything. The matter was to be dealt  
20 with on an ex gratia basis, that is simply recognition of a  
21 hardship, of suffering which the government felt compelled  
22 to compensate in some fashion without any acceptance of  
23 responsibility or liability.

24 Q. Was it your view at the time that there was any  
25 responsibility on the part of the government?

MR. ENDRES, EXAM. BY MR. SPICER

1 A. It was my view at the time, and I expressed that several  
2 times to my superiors, that there was a very marginal claim  
3 against the government. In other words, I was not  
4 intimidated by the prospects of a civil suit. If there were a  
5 civil action against the government I was of the view it was  
6 a very marginal one.

MR. CHAIRMAN

8 How does an ex gratia payment differ from any other  
9 negotiated settlement? All...most settlements are without  
10 prejudice.

MR. ENDRES

12 That's right.

MR. CHAIRMAN

14 On the question of liability, aren't they?

MR. ENDRES

16 That is a very good point. All settlements that I would ever  
17 have carried out where I paid money in the end would have been  
18 ex gratia. And even if there was a threat of legal action, even if  
19 there was a legal action in place, the settlement would have been  
20 ex gratia at any rate because it would have been made on denying  
21 liability. There's no sense in accepting liability and then trying to  
22 negotiate. That's not a feasible way to go about it. So I think  
23 you're quite right. The payment's ultimately always ex gratia.

MR. CHAIRMAN

25 For some reason I thought ex gratia was a phrase used to

MR. ENDRES, EXAM. BY MR. SPICER

1 keep auditors general happy because often there would be  
2 a...money would not have been voted in estimates to cover or  
3 alternatively to avoid creating a precedent within the public  
4 service.

MR. ENDRES

6 The latter, I understand, certainly is a very important factor  
7 in that respect. One does not want to create a precedent out of  
8 settlements of any kind. I don't know about the matter with the  
9 auditor general. I'm not familiar with that aspect. It may well  
10 have something to do with that. The way I understood it when I  
11 said to Mr. Cacchione the settlement will be ex gratia, what I  
12 wanted to communicate was simply that there was no recognition  
13 of any legal responsibility here whatsoever. Now...

COMMISSIONER EVANS

15 If all your settlements were made on that basis...

MR. ENDRES

17 Quite right.

MR. CHAIRMAN

19 As they are in the private sector.

MR. ENDRES

21 Yes.

MR. CHAIRMAN

23 You're simply saying we'll pay you some money but we're  
24 not...we're not admitting liability, we want a complete release.

MR. ENDRES



1           That's right.

2           MR. CHAIRMAN

3           You want to be sure there's nothing different in these  
4 negotiations than others that...

5           MR. SPICER

6 Q.       Would it not be that in the normal civil case though, ones  
7 that you referred to a couple of minutes ago, these tort  
8 cases, you could go and look in a book and get a range as to  
9 what would be reasonable. Notwithstanding the fact that  
10 you eventually ended up paying it, in your words, ex gratia.

11 A.       One has more guidance in the ordinary tort case, of course,  
12 yes.

13 Q.       You also said a couple of minutes ago that you think advised  
14 people in your department that any case against the Crown  
15 was marginal, I think, to use your word.

16 A.       Yes.

17 Q.       What factors would there have been in your mind that  
18 would even have given rise to a marginal claim against the  
19 Crown?

20 A.       There are cases on record in malicious prosecution, for  
21 example. That would have been the one that comes to mind  
22 now and that is probably what would have come to my  
23 mind then. Malicious prosecution is a recognized tort that  
24 allows a person to sue the Crown, Crown Prosecutors in some  
25 cases, but there is a very restricted, a very limited avenue

1 in that respect, and it is a rare case where the Crown has  
2 been successfully sued in malicious prosecution. So yes,  
3 there is such an action, for example, against the prosecutor,  
4 and I could have envisaged that Mr. Cacchione may have  
5 filed a claim against a Crown Prosecutor who was involved  
6 in the prosecution initially of Mr. Marshall, but I was not  
7 terribly concerned that that claim would be successful  
8 ultimately because of the very narrow aspect on which you  
9 can succeed in malicious prosecution. It has to be  
10 fraudulent in other words. The prosecutor would have to  
11 act, conduct himself in a fraudulent manner before you can  
12 succeed in malicious prosecution against a Crown.

13 MR. CHAIRMAN

14 Yeah, I appreciate, I understand that. There was also an  
15 action at one point, I think, against either the City of Sydney or  
16 Chief of Police John MacIntyre.

17 MR. ENDRES

18 Chief of Police. Yes. There was when I was...when I became  
19 involved in the matter, I think at that point still there was a civil  
20 action on the books against the Chief of Police in Sydney and  
21 perhaps the Town of Sydney, the Town of Sydney, City of Sydney.

22 MR. CHAIRMAN

23 What's your opinion with respect to that action insofar as  
24 any Crown responsibility was concerned?

25

MR. ENDRES, EXAM. BY MR. SPICER

1 MR. ENDRES

2 I did not see the Crown responsible in that action at all. The  
3 Crown was not named as a party. This was strictly, and this is the  
4 one that is referred in that letter that we looked at originally, I've  
5 forgot the page. There were only...the Crown is not a party, so I  
6 did not consider that to be of any consequence to us.

7 MR. CHAIRMAN

8 So in approaching it initially from the question of liability,  
9 and properly so, your mandate was to look at any legal liability  
10 imposed upon the Crown in the right of Nova Scotia.

11 MR. ENDRES

12 That is correct. That was my only concern. And that is...that  
13 was borne out subsequently by the release that we obtained from  
14 Mr. Marshall through his counsel, which releases the Crown, but  
15 not the...not Sydney or the Chief of Police.

16 MR. CHAIRMAN

17 All right.

18 MR. SPICER

19 Q. Would your attitude as to the marginality of the case against  
20 the Crown have been any different if it had been a fact that  
21 the Crown had failed to disclose to defence counsel the new  
22 evidence that came to light ten days after Junior Marshall  
23 was convicted?

24 A. Yes and no, I...as I indicated the suit of...the tort of malicious  
25 prosecution exists but it exists in very narrow parameters,

1 and if that had been known to me I would have had to  
2 determine then whether that may constitute a fraud of some  
3 sort that would bring in that particular claim. I did not  
4 contemplate that.

5 Q. Did you have any information to that effect at the time you  
6 were thinking about it?

7 A. No, none at all. No, I had not idea about that.

8 Q. You go on to say in the next paragraph of your note on page  
9 437 that the...the period of time that was to be dealt with  
10 was the period starting with the date of incarceration  
11 following conviction.

12 A. Yes.

13 Q. Was that the period of time that you focused on throughout  
14 the period of negotiations?

15 A. That was the underlying instruction to me to arrange a  
16 settlement to compensate Mr. Marshall for his time...for the  
17 time of his incarceration. But I do not recall that we dwelled  
18 on that in any way. In other words, I do not recall any  
19 particular exchange between Mr. Cacchione and myself once  
20 we got into the negotiations themselves to the effect that  
21 which time period are we talking. At that point we were  
22 talking dollars.

23 Q. Right.

24 A. And, ah...

25 Q. But did your instructions ever change as to the period that

1 was to be covered by the compensation?

2 A. No. No, no.

3 Q. Perhaps then I could just ask you, I'm just going to skip  
4 ahead for a second so that I can see that... If you could flip  
5 ahead to page 532 of that volume for a second. That's not  
6 the signed version but there is a signed version in the file,  
7 but is that the release or copy of the release that was  
8 eventually signed... I'm sorry, it is the one that was  
9 eventually signed by Mr. Marshall.

10 A. Yes.

11 Q. I direct your attention to page 2 of that release, it's on page  
12 533 and the paragraph, "Now therefore..." The last three or  
13 four lines. "...from any action, cause of action, claims for  
14 damages or demands ever had arising in any way from the  
15 arrest and incarceration of Donald Marshall, Jr."

16 A. Uh-hum.

17 Q. Does that not cover a period greater than the period of  
18 incarceration following conviction?

19 A. Yes, it does.

20 Q. And if your instructions hadn't changed why does the  
21 release release the Crown from the pre-incarceration period  
22 as well?

23 A. Well that would have been the normal procedure in the  
24 course of negotiating a claim. I may focus on a particular  
25 event, but when it comes to settling the claim and before the

1 payment is made I would want to protect the Crown from  
2 any possible future claims. That is a normal procedure from  
3 my point of view, and that is the way I would normally  
4 conduct myself. That is to get a complete protection,  
5 complete shelter in return for the payment of monies which,  
6 by themselves, may only compensate for a particular event.

7 Q. Right. You're very specific though in the release in using the  
8 words, "From the arrest and incarceration of Donald  
9 Marshall, Jr." Were you focusing at the time the release was  
10 drafted on any issues arising out of his arrest?

11 A. I was not, no. My intention was to protect the Crown and  
12 shelter the Crown from any civil claims in the future arising  
13 from any matter with Don...with Mr. Marshall.

14 Q. How is that, Mr. Endres, consistent with your instructions,  
15 which as I understand you to tell me it never changed, but  
16 the compensation that was to be paid was to cover the  
17 period starting with the date of incarceration?

18 A. Well, I think it's consistent in that my instructions were to  
19 arrange a settlement of compensation for a certain period of  
20 time.

21 Q. Yes.

22 A. My instructions were not to obtain a release for that  
23 particular event. On the contrary I think my notes will  
24 disclose at some point that we several times over spoke of a  
25 complete and final release which would have meant, of

1 course, a release covering all aspects of the matters relating  
2 to Mr. Marshall.

3 Q. You referred to the complete and final release, indeed, on  
4 page 437. This is the page we've been looking at on that  
5 meeting of May 17. "We should require..." down at the  
6 bottom, "...a complete and final release if payment can be  
7 agreed upon." Was that your instruction from the Deputy?

8 A. I couldn't be sure now if that was an instruction or if that  
9 was just a note that I made for myself. It wouldn't surprise  
10 me if it was an instruction, but I'm not sure. But I know  
11 that the matter of the release came up in meetings with Mr.  
12 Cacchione, of course it came up several times, and I do recall  
13 making a note to that effect. I don't know where it would  
14 be in the book.

15 Q. I'll take you through your notes.

16 A. All right.

17 Q. But in any event, in...at this point in May of 1984 your  
18 instruction was that the period was the date of incarceration  
19 following conviction and either by way of instruction or a  
20 note to yourself you were at that time thinking you should  
21 require a complete and final release.

22 A. Oh, yes, no, I rather would not want to go into any  
23 negotiations for a settlement unless I could come back with  
24 a complete release that would release the Crown from any  
25 future claims. That...unless someone instructed me

1 otherwise, that is the way I would proceed.

2 Q. Was there any discussion at this meeting on May 17th,  
3 between yourself and the Deputy, of the sorts of principles  
4 that might be applicable in arriving at a compensation  
5 settlement?

6 A. Not that I recall, no.

7 Q. Did you ever have that sort of discussion with Mr. Coles?

8 A. We did subsequently, upon receiving Mr. Cacchione's first  
9 proposal for a settlement, which was the \$550,000 proposal,  
10 certainly we had discussion then.

11 Q. The next page, sir, on page 438, May the 18th. Again, is that  
12 your writing?

13 A. Yes.

14 Q. Okay. And what does that note record?

15 A. That's just then returning to Mr. Cacchione upon the meeting  
16 which had taken place two days before to inform him that  
17 we were prepared to entertain discussions towards a  
18 settlement to see if we could agree on an ex gratia amount,  
19 that the negotiations were to be in confidence and without  
20 prejudice, or I assume what I meant there was that he  
21 could...he was still free to pursue whatever avenues were  
22 open to him.

23 Q. Uh-hum.

24 A. That the claim was to start with...from the date of  
25 imprisonment and it was to exclude punitive damages and



1 that must refer to the pre-imprisonment period, that is the  
2 manner in which Mr. Marshall would have been dealt with by  
3 the police. That the final figure was to take into account an  
4 interim payment which would have been rendered at that  
5 point upon the recommendation of Mr. Justice Campbell in the  
6 amount of \$25,000. And that Mr. Marshall was to, Mr.  
7 Cacchione was to provide us with a proposal in writing, yes,  
8 and that's the letter I refer to which then subsequently  
9 arrived. I asked for a written proposal that would allow us to  
10 advance into the negotiations to settle. And I obtained that  
11 subsequently.

12 2:51 p.m.

13 Q. This is a notation of what you advised, Felix, I take it, is it?

14 A. That's right.

15 Q. Okay. And I take it then from your note that you advised  
16 him that the discussions were to relate to a period that  
17 started from the date of imprisonment?

18 A. Not so much the discussions but what I told him was that...

19 Q. Negotiations?

20 A. The negotiations are to be in confidence and that the claim,  
21 that is the claim for compensation...

22 Q. Right.

23 A. Is to start from the date of imprisonment. But discussions  
24 could have ranged much wider.

25 Q. Were you trying to convey to Mr. Cacchione that, in

1 determining a reasonable claim to be made on behalf of  
2 Junior Marshall, that he should consider that period to  
3 commence with the date of imprisonment and forget about  
4 everything that predated that?

5 A. That was certainly the subject of discussion at the initial  
6 meeting at which the Deputy Minister was present and there  
7 was considerable discussion about that. I recall that Mr.  
8 Marshall's lawyer, Mr. Cacchione, was very much concerned  
9 about the pre-imprisonment period and wanted that very  
10 much to be an important, significant factor in whatever may  
11 have happened subsequently, whether it was the Campbell  
12 inquiry or any negotiations. But I recall, as well, that the  
13 Deputy Attorney General was very insistent that  
14 compensation be restricted to the period of incarceration.

15 Q. Did he ever articulate to you why he was so insistent on that  
16 position?

17 A. Why the Deputy Attorney General was so...

18 Q. Yes.

19 A. No, but he didn't have to because the Campbell Commission  
20 was set up within those parameters. The Campbell inquiry  
21 was to address, the way I read the charter, was to address the  
22 period of incarceration.

23 Q. It's fair to say, though, isn't it, that there was a bit of dispute  
24 about whether or not that was the ambit of the Campbell  
25 Commission.

1 A. There was. And, yes, and even counsel for Mr. Justice  
2 Campbell entered into that discussion and there was some  
3 question as to whether or not Mr. Justice Campbell ought to  
4 state his position as to what the parameters of the inquiry  
5 might be and if they were too broad for the Government that  
6 the Government may wish to say something about that and  
7 so on. Yes.

8 Q. Do I take it, then, that your answer is that Mr., you've never  
9 discussed with Mr. Coles why he was so insistent on the claim  
10 starting from that particular point in time, that is, the date of  
11 incarceration.

12 A. I don't recall any particular discussion to that effect with Mr.  
13 Coles. As I say, I really didn't need it.

14 Q. At this point in time, on May 18, do I take it then that what  
15 you've done at this point by calling Felix Cacchione was  
16 essentially to initiate the process of discussion?

17 A. Yes, I wanted him to put his case in writing.

18 Q. Okay.

19 A. And I did that by telephone deliberately because I did not  
20 want to take the first step.

21 Q. At that point, I just want to ask you some general questions  
22 about the knowledge and the information that you had,  
23 around this time in the middle of May, you had some  
24 knowledge of Junior Marshall's condition, psychological  
25 condition.

1 A. I had some but very, very sparse.

2 Q. And during the course of the negotiations, did you pick up  
3 more knowledge?

4 A. No, not really. I was aware that he was having difficulties in  
5 adjusting, if I can put it that way. And I was made aware  
6 that he was obtaining, or in the process of obtaining  
7 counselling. But beyond that I don't really recall much  
8 discussions.

9 Q. When Felix Cacchione gave testimony, he indicated, page  
10 11526 which respect to that issue, "There's no doubt in my  
11 mind that Mr. Endres was fully aware of his (being Junior  
12 Marshall's) precarious psychological situation." Would you  
13 agree with his view of that?

14 A. I would have been, not totally. I would have been aware that  
15 Mr. Marshall was having difficulties in adjusting to a lifestyle  
16 out of prison, and that does not surprise me. Any person who  
17 spends 11 years in jail is going to find it very difficult to  
18 adjust to a lifestyle outside of that setting. So no one had to  
19 tell me that. On the other hand, I do not believe, and my  
20 recollection does not help me, does not tell me otherwise, that  
21 I was under the impression at the time that he was in  
22 extremely dire straits, no, and, of course, I'd never met Mr.  
23 Marshall.

24 Q. Right. Mr. Cacchione said on page 11525, "I told him (saying  
25 he told you), 'The guy is falling apart. He's cracking up.'" Do

1           you remember?

2           A. He may have said that, yes. Yeah.

3           Q. In any event, you had some knowledge of Mr. Marshall's  
4           psychological condition during the time you were negotiating  
5           a settlement.

6           A. No question.

7           Q. Did you ever convey that information, that is, the information  
8           concerning Mr. Marshall's condition, to the Attorney General,  
9           Mr. Giffin?

10          A. I don't recall that I did that, no.

11          Q. Would you think that that would be a matter that would be of  
12          interest to the Attorney General?

13          A. I didn't think so at the time, no, no.

14          Q. Why not?

15          A. It is a, well, for several reasons. I had very little concrete  
16          information in my hands to determine for myself just what  
17          Mr. Marshall's state of mind was, his condition was. But  
18          beyond that, we were really looking in terms of figures,  
19          money, and I don't think the, that any particular  
20          psychological or physical condition would have really changed  
21          anything. We were, at that point, starting to negotiate dollars.

22          Q. And also in May of '84, the Court of Appeal certainly had  
23          rendered its decision concerning Mr. Marshall. Did the  
24          comment of the Court of Appeal concerning Mr. Marshall's  
25          responsibility for his conviction play any part, in your mind,

1 in the way you negotiated with Mr. Cacchione?

2 A. What comments?

3 Q. That he was, these words aren't used, but essentially that he  
4 was the author of his own misfortune, substantially  
5 responsible for the conviction.

6 A. I was aware of this aspect of the decision of the Court of  
7 Appeal when I went into the negotiations, and that statement  
8 would have made some, would have had some role in the  
9 course of the negotiations, yes. But not a great, not a great  
10 role.

11 Q. Would that have been something that would have been a factor  
12 in your mind in looking at dollar figures in terms of what Mr.,  
13 what might be a reasonable figure ...

14 A. Indirectly, I undoubtedly, although I don't recall it  
15 specifically, I undoubtedly raised that at one point or another  
16 and said look what the Court of Appeal said to the effect that  
17 your client carries some blame in this matter. I'm quite sure  
18 I would have said that although I don't specifically recall that.

19 Q. Mr. Cacchione had indicated at page 11528 that, "The feeling I  
20 got from the comments that were made (that's during the  
21 negotiations) were that that decision, in large part, loomed  
22 over the negotiations." Did you have any sense that it was,  
23 had that much of an effect that it "loomed over the  
24 negotiations"?

25 A. I wouldn't subscribe to that, not in that way, no. Because

1           once we get into the negotiations and we have a figure on the  
2           table of roughly half a million dollars, my concern was really  
3           to see where the bottom line might be. And I did not do that  
4           by way of very specific arguments or propositions to say,  
5           "Well look, your client is partly to blame for his own problems  
6           so, therefore, let's deduct \$50,000." That is so unspecific and  
7           so, it's useless really. We were really battling about figures  
8           more than principle.

9       Q.    Would the Court of Appeal decision, or those comments, at  
10           least be a tool, I suppose, in a sense, when you're negotiating  
11           with Cacchione.

12       A.   Yes. I'm quite sure I mentioned it and made use of it.

13       Q.    Sure. Were you proceeding on the basis that the Crown  
14           carried no blame?

15       A.   Yes, I would have made that point. Again, I don't specifically  
16           recall it, but I'm quite certain I would have made the point  
17           that this is, the Crown accepts no liability in this matter and,  
18           indeed, in that respect I do recall it. The Commission had  
19           been set up by that time to determine, to inquire into and  
20           determine compensation level. So we had a forum already  
21           that the government felt relatively comfortable with for  
22           determining the thing that we tried to negotiate. I would  
23           have said to him, "Yes, we have no blame, no responsibility  
24           perhaps or we have nothing to lose perhaps." I don't know,  
25           something like that.

1 Q. Would you have ever said to him, "Look, if we can't work this  
2 out by settlement, we'll just go back to the Commission."?

3 A. Oh, for sure. I recall that definitely. I used that in argument  
4 during the negotiations and that was my conviction. That if  
5 we could not settle at a figure that personally I felt  
6 comfortable with, that we would go to the Commission, to the  
7 inquiry, and we'd have it determined there.

8 Q. Did Mr. Cacchione ever express any views to you as to  
9 whether or not he had any worries or concerns about going  
10 back to the Commission?

11 A. Yes. He was concerned about going to the Campbell  
12 Commission and I recall specifically one of his concerns, which  
13 was the original discussion about the parameters of the  
14 Commission. The Deputy Attorney General saying that the  
15 Commission would be restricted to determining compensation  
16 for the term of imprisonment. Mr. Cacchione, of course,  
17 wanting to go behind that or into the area of arrest and  
18 prosecution. And the, what I recall particularly then about  
19 this is that Mr. Cacchione was concerned that there would be  
20 tremendous delays. That there would be all sorts of legal  
21 battles before the Commission would even get off the ground  
22 to hear evidence and his client probably did not want to wait  
23 that long. So that was one big concern that they expressed.  
24 And another concern was that the Campbell inquiry, of  
25 course, was set up to determine and recommend a figure to



1 Government. And I, undoubtedly, raised that with my friend  
2 at the time and said that even if they came out on top of it in  
3 the course of nego-, in the course of the Campbell inquiry, and  
4 the inquiry recommends a certain figure, that's not to say that  
5 the Government will accept it and will pay. So, yes, there's no  
6 question that Mr. Cacchione was concerned about going to the  
7 Commission inquiry while I was not very much concerned  
8 about the inquiry. I would have gone to it.

9 Q. Right. And if I understand your comments correctly, indeed,  
10 it was his concern about going to the inquiry was something  
11 that, in a sense, could be turned around, and you could say,  
12 "Well, even if they do recommend this, the Government may  
13 not pay it."

14 A. That's right. That was my understanding. That this was a,  
15 the Commission was to recommend a figure to Government.

16 CHAIRMAN

17 Q. Is that a realistic concern? I mean the Government sets up a  
18 commission of inquiry to ascertain and establish a reasonable  
19 award. I would find it difficult to accept that any government,  
20 having set up this inquiry, would ever reject the amount of  
21 the award. Certainly not if, maybe if it was too low, but not if  
22 it was what the government considered to be too high.

23 A. You're quite right. It was a small point to my advantage if it  
24 was anything, but it's something I raised and it doesn't, I do  
25 recall something like that being responded when I raised it.

1 That politically, it would be suicide for the government to  
2 ignore a recommendation of a commission that it had set up  
3 itself. Now, again, I knew of no precedent in that respect and  
4 I really was not terribly concerned about it. But it's  
5 something I raised as being of some value to me at the time. I  
6 agree with you that on analysis it would have been of little  
7 value in order to advance my position, or our position.

8 Q. The other point you mentioned, and I think Mr. Cacchione  
9 mentioned it as well, that there was concern on his part at  
10 least, and maybe on yours as well, that there would be delays  
11 caused by protracted litigation and what sort of litigation  
12 were you fearful of? By whom?

13 A. There were concerns about protracting the inquiry, the  
14 Campbell inquiry, whether it was litigation, I think that term  
15 was used and may have been used unwisely because what I  
16 had in mind at the time is that there could certainly be all  
17 kinds of obstacles in the way of the Campbell inquiry. If the  
18 Campbell inquiry had made it known that the parameters for  
19 its inquiry including the arrest and the prosecution, for  
20 example, it may well be that the Government would have not  
21 accepted that and would have done something it. Now I'm  
22 not so sure. Well, what the government could have done, of  
23 course, is to simply cancel the inquiry. That would have been  
24 a difficult move. What the government could have done as  
25 well, and that is where litigation actually comes in, is to go to

1 court and ask for a court to interpret the terms of the  
2 reference so there could have been litigation there. That  
3 could have gone to appeal and we would have looked at a  
4 year to resolve that at least. Even for the, in these two courts.  
5 Yes, so I think there was some concern about tremendous  
6 delays, some of which were litigation-related.

7 Q. Although somewhere in this volume it seems to me there,  
8 maybe it's a letter from Mr. Coles to Mr. MacIntosh saying if,  
9 in effect, if Commissioner Campbell has any doubts as to the  
10 scope of his mandate, that he should bring them to the  
11 attention of the Government of Nova Scotia ...

12 A. Yes.

13 Q. And ask that the terms of reference be amended accordingly.

14 A. Yes, the Deputy Attorney General, Mr. Coles, wrote a lengthy  
15 letter to Mr. MacIntosh, I believe it was addressed to  
16 counsel...

17 Q. Yes.

18 A. And that was exactly about the point of whether the  
19 Commission, or if the Commission had any doubt about the  
20 parameters for the inquiry, that that should be made known.  
21 I understand that Mr. Coles is very concerned about the  
22 extent to which the Campbell inquiry would go. He felt very  
23 clear, in his mind, and that's not surprising because he  
24 drafted the documents by which the inquiry was set up. He  
25 was very clear in his mind that the Campbell inquiry was to

1 concern itself with compensation for the term of  
2 imprisonment only. But you see in my note that I made, May  
3 the 16th of '84, the original long note I made on the original  
4 meeting with Mr. MacIntosh and the Deputy and so on. I was  
5 concerned about the Deputy's request, repeated request, that  
6 if Mr. Justice Campbell had any problems or concerns about  
7 the terms of reference, he ought to make them known.  
8 Frankly, I thought we should just go ahead and see how it  
9 develops, argue the point in front of the Commission if  
10 necessary, and if it cannot be resolved there, we could then  
11 try and do something about it. In other words, I quite did not  
12 share his view that Mr. Justice Campbell should simply come  
13 forward say "I think my terms are this." I rather thought  
14 that wasn't necessary.

15 Q. But surely if, and I suspect this happened on many inquiries,  
16 that after the commission of inquiry commences its  
17 deliberations or even preparatory to that, if they feel that the  
18 mandate is too restricted that they go back to the government  
19 and say, "Will you clarify this and here's what we would like  
20 to see." And it would be a very rare occasion where that  
21 request would be denied, I would think.

22 A. Yeah.

23 Q. It may not be important now but it seemed, listening to Mr.  
24 Cacchione's evidence, that there was a lot of concern around  
25 the negotiating table that the final resolution of compensation

1 by the Campbell inquiry would be delayed because of  
2 protracted litigation and I'm not sure that that's...

3 A. He was certainly concerned about that. There is no doubt in  
4 my mind, that he was very concerned that there could be...

5 Q. That is, the Deputy Attorney General was...

6 A. No, Mr. Cacchione.

7 Q. Mr. Cacchione.

8 A. Mr. Cacchione was extremely concerned if I, I think that is  
9 putting it the right way, he was extremely concerned that  
10 there would be considerable delays in determining finally as  
11 to what the terms of reference would be for the commission  
12 to begin with before the commission would even hear  
13 evidence and at that point, too, Mr. Marshall was the one that  
14 was going to lead evidence into the inquiry. He was going to  
15 be a charge, well, Mr. Marshall and his counsel were going to  
16 take charge of the inquiry. They wanted to get on with it, it  
17 was pretty clear to me. They wanted to get...

18 Q. I can't understand that, why they would want to get on with  
19 either settling or having the Campbell Commission start its  
20 work. One more point, and we may already have evidence on  
21 this. Were there any negotiations between the solicitor for  
22 Donald Marshall, Jr. and the solicitor for the Government,  
23 namely you or Mr. Coles, as to the terms of reference, you  
24 know, in consultation before the draft was submitted to the  
25 Govern-, Lieutenant-Governor-in-Council.

1 A. Before the Commission was set up?

2 Q. Yes.

3 A. No, My Lord. I don't know of any. I know of no  
4 communication between Mr. Cacchione and anyone in  
5 government that would go towards the structuring of the  
6 terms of reference for the Campbell inquiry. If there were  
7 such, I'm unaware of it.

8 3:11 p.m.

9 MR. SPICER

10 The letter, I think, My Lord, that you referred to, there are  
11 really two of them. There's on 407 from Mr. Coles.

12 MR. CHAIRMAN

13 Yes.

14 MR. SPICER

15 And the one in which he specifically refers to an  
16 amendment of the Order-in-Council is at page 435, to Mr.  
17 MacIntosh, that's dated May 17th, and it's on page 436.

18 Q. Did you have any discussions with Mr. Coles concerning, in  
19 particular, this letter of ...at 435 of May 17th to Mr.  
20 MacIntosh?

21 A. No, I had no discussions with him about that. I knew he felt  
22 quite strongly about it and he did not need to confer with  
23 me on it.

24 Q. Is it fair to say that one of Mr. Cacchione's concerns or  
25 overall concerns with the matter going back to the inquiry

1 and the terms of reference of the inquiry and the scope of  
2 the inquiry was that he basically was not particularly  
3 trusting of the government at that point in time?

4 A. Yes, Mr. Cacchione said to me several times that his client  
5 did not trust the government at all, yes. And I'm sure that  
6 that would have been related somehow also to the  
7 government setting up an inquiry, yes. That would have  
8 been viewed, I understood that, with a certain amount of  
9 suspicion on the part of Mr. Marshall.

10 Q. Can you give us a sense of what the attitude was in the  
11 Attorney General's Department amongst the senior officials,  
12 in particular Mr. Coles, towards Junior Marshall at this  
13 time?

14 A. I have had few discussions ever with anyone in our  
15 Department about Mr. Marshall beyond the kind of  
16 discussion that centered on the statement of the Court of  
17 Appeal. There is no doubt that I spoke to other people  
18 about that particular part of the decision of our Court of  
19 Appeal which said that Mr. Marshall had to carry some  
20 blame, but I had no specific discussions with Mr. Coles about  
21 Mr. Marshall as a person or his character or anything of the  
22 kind.

23 Q. What discussions did you have with him concerning those  
24 last two pages of the decision of the Court of Appeal?

25 A. Simply that he pointed that out to me, and I knew that

1 already, that the Court had taken the view that Mr. Marshall  
2 had to take some of the blame in this matter, in whatever  
3 resulted for him.

4 Q Was that a view to which Mr. Coles subscribed as far as you  
5 knew?

6 A I think he felt that way, yes.

7 Q Yes. And yourself.

8 A I adopted what the Court said and I accepted that.

9 COMMISSIONER EVANS

10 Even the one that there was no miscarriage of justice, that  
11 comment?

12 MR. ENDRES

13 Well, I really don't know what I thought of it. I'm not sure  
14 what I think of it now.

15 COMMISSIONER EVANS

16 That's probably not a fair question to put to you.

17 MR. ENDRES

18 It's a... I was not involved in the case in the reference.

19 COMMISSIONER EVANS

20 What I'm more concerned, rather than with your opinion,  
21 did that comment not give you a pretty strong basis of argument?  
22 Because your position was that there was no legal liability. That  
23 was a view you had of this.

24 MR. ENDRES

25 Yes.



MR. ENDRES, EXAM. BY COMMISSIONERSCOMMISSIONER EVANS

1  
2 And was that opinion reinforced by the comments of the  
3 Court of Appeal that there was no miscarriage of justice?

MR. ENDRES

4  
5 Yes, My Lord. I...what the Court of Appeal said did not hurt  
6 me in my negotiations. It gave me additional...

COMMISSIONER EVANS

7  
8 Support.

MR. ENDRES

9  
10 ...strength in my position. No question about that. But as I  
11 indicated before though, My Lord, the whole matter in the end  
12 really resolved...came down to a matter of dollars. It wasn't a  
13 questioning of balancing one strength against another. We were  
14 really just concerned about money.

COMMISSIONER EVANS

15  
16 The dollars and cents. However you...you have referred to  
17 this as an ex gratia payment being made. And during your other  
18 negotiations that you would have in tort actions if the government  
19 is a hundred percent wrong and you settle on that basis, or even if  
20 it's seventy-five percent wrong, do you still put in the release that  
21 that is an ex gratia payment?

MR. ENDRES

22  
23 Oh, yes. Yeah. The payment would be ex gratia even if we  
24 were a hundred percent wrong, which is something I would not  
25 conclude in any case because I really, with respect.

1 COMMISSIONER EVANS

2 That would indicate that the government is never wrong.

3 MR. ENDRES

4 No, I would... the approach I'd take, My Lord, is that unless  
5 the Court says that the Crown has done wrong we haven't done  
6 wrong, quite right. If, of course, the defendant in an intended  
7 proceeding can convince us, the Attorney General's Department or  
8 government, that there is a grave risk of liability then we would  
9 be more tempted and more persuaded to settle. But it's not a  
10 question of right or wrong, in my view, until the Court says so.

11 COMMISSIONER EVANS

12 But you always put in ex gratia in any settlement.

13 MR. ENDRES

14 Always. And I don't mean to create the impression that I've  
15 negotiated a whole lot of settlements. They're very far in  
16 between. We do not negotiate a great number of settlements. But  
17 if we do invariably they are always, they would be ex gratia on  
18 the basis that we do not accept liability again, as well, and so as  
19 not to create a precedent and for what other reasons.

20 COMMISSIONER EVANS

21 All right.

22 MR. SPICER

23 What...

24 MR. CHAIRMAN

25 I don't suppose any lawyer has ever admitted that his client

1 was wrong in negotiating a settlement.

2 MR. ENDRES

3 I'd rather think it would make negotiations difficult if I  
4 went in and said, well, "Look I appreciate we did wrong and we're  
5 prepared to pay so let's see if we can settle." I'd be in a very  
6 difficult spot to negotiate a figure which I would want to  
7 recommend to my client in the end. And as far as it goes, even in  
8 the case of a tort claim, let's say an injury, a motor vehicle injury  
9 again, any settlement that we make does not necessarily  
10 compensate the intended plaintiff fully in accordance with what  
11 precedent might establish. Indeed, if that's the case, there's no  
12 reason to settle. If I have to pay \$40,000 for a lost arm in order  
13 to settle and if I know the Court is only going to award \$40,000  
14 then I'll probably go to Court, at least I'd recommend to my client  
15 to go to Court.

16 MR. CHAIRMAN

17 To save costs.

18 MR. ENDRES

19 That's usually the best place to go at any rate to determine  
20 liability.

21 COMMISSIONER EVANS

22 A lot of people don't share that view I don't think today.  
23 But you say if you...if the maximum you were going to have to pay  
24 was \$40,000 you would always go to Court.

25

1 MR. ENDRES

2 Well, what I'm suggesting is that if negotiations bring me to  
3 the point where I have nothing to gain on the part of my client  
4 then I will probably close off the negotiations. Naturally the  
5 recommendation is that...the decision is up to my superior, but my  
6 recommendation would be invariably we have nothing to gain so  
7 why not go to Court. I don't know what kind of defence might  
8 develop in the course of a proceeding.

9 COMMISSIONER EVANS

10 But you have...are costs not awarded to the successful  
11 plaintiff.

12 MR. ENDRES

13 Yes, costs is always a risk that you take, yeah, yeah.

14 MR. CHAIRMAN

15 We're just learning of negotiating tactics. You and I have  
16 been away from it for a long time. They're coming back to me  
17 very quickly. But so we don't get way off the track here, your  
18 position, I take it, was not one of the policy-maker. You were  
19 simply acting in the capacity of a solicitor with instructions from  
20 your client to negotiate a settlement.

21 MR. ENDRES

22 Quite right, My Lord.

23 MR. CHAIRMAN

24 Questions of policy would be for someone else.  
25

MR. ENDRES, EXAM. BY COMMISSIONERS

1 MR. ENDRES

2 Yes, I have no consideration of policy. My purpose was to  
3 arrange a settlement at a bottom figure, that is the lowest figure  
4 that we could agree upon.

5 MR. CHAIRMAN

6 On the other side of the coin, I presume if you finally agreed  
7 with Mr. Cacchione on a figure you would be...it would be  
8 incumbent upon you, as a...in your professional capacity, to satisfy  
9 your client that the amount that you had agreed to was a  
10 satisfactory one and they should pay it.

11 MR. ENDRES

12 That the amount was not excessive. I would certainly want  
13 to satisfy my client in that respect.

14 MR. CHAIRMAN

15 Okay.

16 MR. SPICER

17 Q. What bargaining power, in your view, did Mr. Cacchione  
18 have on behalf of Mr. Marshall?

19 A. Well, the strength of Mr. Cacchione's case, amongst other  
20 things, was really in the degree to which the public had  
21 supported Mr. Marshall at that point in time. There was a  
22 tremendous amount of public pressure on government in  
23 1984 to do something to compensate Mr. Marshall. I saw  
24 letters that came in from citizens, uncalled for letters,  
25 unsolicited naturally, that said...

- 1 Q. Unsolicited more than uncalled for.
- 2 A. ..."Please, please, pay this man..." I'm sorry.
- 3 Q. You said "uncalled for". I was just wondering what you  
4 were getting at there?
- 5 A. "Please pay this man a million dollars," there were all sorts  
6 of letters like that that came in. At any rate, I don't think  
7 there's any question that there was a certain amount of  
8 public pressure on government to do something and to do it  
9 quickly to put some money in Mr. Marshall's pocket, and  
10 that I think is the reason the Campbell Commission was set  
11 up. So that must have been, in my view, that was a very  
12 strong bargaining element which I dealt with. There were  
13 other concerns, of course, but they seemed to have escaped  
14 me at the moment. I...certainly the biggest selling factor  
15 that they had was this tremendous support that was  
16 undoubtedly in place at that time which favoured Mr.  
17 Marshall and which did not favour the government.
- 18 Q. But in the preceding months, certainly in the months  
19 subsequent to the rendering of the decision by the appeal  
20 court, the Attorney General at the time was taking the  
21 position that Mr. Marshall had, to some extent, been the  
22 author of his own misfortune and that that publicly was  
23 being stated as a factor that had to be taken into account in  
24 determining compensation. Did you have any...did you have  
25 any discussions with the then Attorney General about that

1 as to whether or not that was a factor that you ought to take  
2 into account?

3 A. I was never told or given any specific instructions about  
4 factors that I was to employ or use in the course of  
5 negotiations, no.

6 Q. What instructions did you receive?

7 A. Very few indeed, very few instructions, and that's not  
8 unusual. Invariably I would get instructions only because I  
9 asked for them. We would have a meeting, that is I would  
10 have a meeting with Mr. Cacchione, certain things would  
11 develop, and I would go back to report, and then I would try  
12 and feel out the Deputy Attorney General, and subsequently  
13 the Minister, as to just how far they are prepared to go, and  
14 we did that a few times and I remember at one time I went  
15 specifically to get a range of dollars to which I could go in  
16 the course of negotiations before I have to come back to ask  
17 for more instructions. But it was not a matter of me  
18 obtaining a briefing book or a written list of instructions or  
19 even a verbal list of instructions to go and negotiate. My  
20 simple instruction was try and make a deal.

21 Q. Was...was there any notion that a settlement, because of the  
22 circumstances of the case, that is because of Mr. Marshall's  
23 wrongful conviction and imprisonment that the settlement  
24 should be fair?

25 A. That was not a consideration in my mind particularly, no, no.

1 Not fair in a sense of the dollars being fair.

2 Q. Yes.

3 A. But certainly I was concerned about the fairness of the way  
4 in which the money was going to be determined, the dollars  
5 would be determined.

6 Q. The fairness of the process but...

7 A. Procedure.

8 Q. ...not the fairness of the result.

9 A. I was certainly concerned about the fairness of the  
10 procedure, but I was not concerned whether, ultimately, the  
11 figure would be a fair figure, no.

12 Q. Did you have any...did you have any discussions with Mr.  
13 Coles as to whether or not he thought that it was important  
14 that the final figure should be fair?

15 A. No, not at all.

16 Q. With Mr. Giffin?

17 A. No.

18 Q. With anybody?

19 A. Yes, Mr. Cacchione had originally made a statement to the  
20 effect that, well, I think you'll find it in his first written  
21 letter to me where he sets out the proposal for \$550,000. It  
22 was something to the effect that that seemed...that that  
23 would be a fair figure, and that that would be acceptable to  
24 the public generally. That was the tone of that particular  
25 statement. So the only one that spoke about fairness in



MR. ENDRES, EXAM. BY MR. SPICER

1 terms of the dollars that I recall was Mr. Cacchione.

2 Q. Did you have any sense that the public pressure that you  
3 referred to would have any affect on the figure that you  
4 would arrive at? That is, the public would not accept a  
5 figure below a certain amount as being proper.

6 A. No. No. I felt that any figure that we could agree upon  
7 would probably find acceptance in general.

COMMISSIONER EVANS

8  
9 Excuse me. You were then isolated, in fact, from this public  
10 pressure. The public pressure was on the politicians or on the  
11 government.

MR. ENDRES

12  
13 Yes.

COMMISSIONER EVANS

14  
15 But you were...that was not your problem. You were in there  
16 to negotiate a settlement on the best terms that you could get for  
17 your client, the government.

MR. ENDRES

18  
19 That's quite right, My Lord, yes.

MR. CHAIRMAN

20  
21 There was...there is a slight difference in the kind...in the  
22 negotiations that you were involved in, and I'm not saying this in  
23 any way in the critical sense of your work in that regard. But  
24 ordinarily when a...in a tort action it's really the question of  
25 liability and the extent of the claimant's damages that you're

MR. ENDRES, EXAM. BY CHAIRMAN

1 concerned about. The liability, we'll say for want of a better word,  
2 of the defendant and the extent of the damages.

MR. ENDRES

4 Uh-hum.

MR. CHAIRMAN

6 In this case the question of legal liability really was not of  
7 much concern, was it, because you had satisfied yourself from a  
8 purely legal point of view, at least based on the grounds of  
9 malicious prosecution that you would be able to present a fairly  
10 strong case in the event it went to trial. So, you...the...you could  
11 almost exclude liability and say this case is being settled because  
12 public pressure had indicated to the government that in the  
13 opinion of the people of Nova Scotia, Donald Marshall, Jr. should be  
14 compensated for his years of incarceration regardless of fault.

15 3:27 p.m.

16 A. Um-hmm. You're quite right. The element of liability did not  
17 exist in the course of the negotiations in my mind at least, it  
18 did not. It was not a prevalent consideration when we  
19 compare that to the ordinary tort case. On the other hand, in  
20 the ordinary tort case one does not have, usually, the kind of  
21 public support and, indeed, public pressure that Mr. Marshall  
22 was able to bring to the bargaining table. So the two balanced  
23 each other out in a way. Both of them, of course, go to the  
24 strength of the party's case, or Mr. Marshall's case in this  
25 particular course of negotiations. In the normal tort case a

MR. ENDRES, EXAM. BY CHAIRMAN

1 lawyer comes and says, "Well, look you know as well as I do  
2 that the Crown is liable." Well that's a position of strength  
3 from which they negotiate and I try to deal with that but Mr.  
4 Marshall did not have that option. He didn't do that because  
5 we didn't talk about liability we talked about ex gratia  
6 payments. But yet, they did come to me, or to the bargaining  
7 table and said, "Well you know that the public is behind Mr.  
8 Marshall and you know that they want something done and  
9 they want it done quickly and they want it substantial. They  
10 want a substantial amount of money to my client." So you're  
11 quite right that this was a little different from a tort case, an  
12 ordinary tort case. But on the other hand the element that  
13 you do normally have in a tort case was substituted in this  
14 case by this new public element.

15 Q. You had very little help from Canadian precedents as to what  
16 amount you were to...

17 A. I was unable to find any reported Canadian case dealing with  
18 compensating a person who had been wrongfully imprisoned  
19 and, in fact, other cases that we did come across, some other  
20 jurisdictions such as the ones I mentioned, the one in England  
21 for example, I don't know which one of the three came to us  
22 in four tightly printed volumes which was...

MR. SPICER

24 Hunter.

25 A. Hunter. It was a huge report. And I, frankly, did not read

MR. ENDRES, EXAM. BY CHAIRMAN

1 most of it. I only read a part of it. No, precedent was not, I  
2 did not have much support in that respect.

MR. SPICER

3  
4 Q. If there was no liability, if you thought that there was no  
5 liability on the part of the Crown, was Mr. Cacchione doing  
6 anything more than trying to negotiate a donation from the  
7 Crown?

8 A. Our negotiations were premised on there being no liability.  
9 That is not to say, and I know that isn't the case, that Mr.  
10 Cacchione did not feel otherwise. At times he expressed to  
11 me that, "Look, we always have this prospect of suing the  
12 Crown," and I said, "Yes, you do and do it."

13 Q. Was the public pressure not alleviated to some degree by the  
14 setting up of the Campbell Commission?

15 A. Yeah, but too, the Campbell Commission hadn't been set up,  
16 again, was a position of strength for Mr. Cacchione because he  
17 would say to me, as he probably did, that,

18  
19 Look, the Government has made a commitment,  
20 publicly, to pay Mr. Marshall monies, it's only a  
21 question of how much. So why don't you just  
22 agree and pay us (whatever the figure was at  
the time) and save the expense of the Campbell  
inquiry and everyone would be happy.

23 I considered that to be an argument of strength on their side.

CHAIRMAN

24  
25 It's Thursday afternoon and I, we have to adjourn half an

1 hour earlier and we will adjourn until Monday next at 9:30.

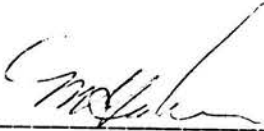
2           There's just one comment I would like to make. It's been  
3 brought to our attention that there may have been some  
4 untoward events or occurrences in the corridor yesterday  
5 following the testimony of one of the witnesses. That disappoints  
6 me because we've had an extremely, I think, not only rapport but  
7 satisfactory atmosphere within the confines of this room but  
8 people have to realize that any witness who comes to this  
9 commission comes either as a result of a subpoena or a request  
10 and one of the freedoms we have is the absolute freedom to  
11 remain silent. And I'm sure that, on sober reflection, that's not  
12 likely to occur again.

13 3:32 p.m. - ADJOURNED TO 6 JUNE 1988 - 9:30 a.m.

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## REPORTER'S CERTIFICATE

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

  
\_\_\_\_\_  
Margaret E. Graham

DATED THIS 2 day of June

19 88 at Dartmouth, Nova Scotia