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#2

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

**Volume 74**

Held: June 6, 1988, in the World Trade and Convention  
Center, Halifax, Nova Scotia

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

Counsel: Messrs. George MacDonald, Q.C., Wylie Spicer, and David  
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Mr. Ronald N. Pugsley, Q.C.: Counsel for Mr. John F. MacIntyre

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

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

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

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

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

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

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

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

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

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

Court Reporting: Margaret E. Graham, OCR, RPR

**MEDIA POOL COPY**

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# 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 8, 1988

Re: Daily Transcripts

Please add pages 13121 to 13125 to the beginning of Volume 74.

I apologize for any inconvenience this may have caused.

A handwritten signature in black ink, appearing to read 'MEG', with a long, sweeping horizontal stroke extending to the right.

Margaret E. Graham

MR. ENDRES, EXAM. BY MR. SPICER

JUNE 6, 1988 - 9:30 a.m.

1 MR. SPICER

2 Thank-you, My Lord.

3 MR. REINHOLD ENDRES, previously sworn, testified as follows:

4 EXAMINATION BY MR. SPICER [Cont'd.]

5 Q. When we left off at the end of the week we were just about  
6 at the point where you commenced the negotiations with  
7 Mr. Cacchione. Perhaps if you could turn to page 457 of  
8 Volume 33.

9 A. Yes.

10 Q. That's the proposal made by Mr. Cacchione as a result of  
11 your initial discussions with him.

12 A. Right.

13 Q. Okay. Did you review this letter with Mr. Coles?

14 A. It was addressed to Mr. Coles. So it went to him in the first  
15 instance and he returned it to me together with some notes  
16 that he had put in the margins.

17 Q. Okay.

18 A. And then we spoke about that in person, yes.

19 Q. The handwritten notes then are Mr. Coles', are they?

20 A. Yes.

21 Q. Did you have any sense as to whether or not the suggested  
22 figure of \$550,000 was a reasonable proposal on the part of  
23 Mr. Cacchione?

24 A. I rather looked at the figure of \$550,000 as a  
25

MR. ENDRES, EXAM. BY MR. SPICER

1 commencement for negotiations rather than in terms of  
2 whether the figure was reasonable or unreasonable.

3 Q. Did you have any discussions or did you give any thought  
4 yourself as to whether or not it was reasonable, recognizing  
5 that it might have been the opening shot? Did it seem like a  
6 reasonable opening shot to you?

7 A. If, ah, no, I would have thought he was too high, frankly, if I  
8 had looked at it in those terms.

9 Q. Okay. On the basis of what would you have considered it to  
10 have been too high?

11 A. Primarily gut feeling, but beyond that I think the  
12 precedents that were available, that I mentioned on  
13 Thursday, there were compensation awards as low as  
14 \$100,000 for similar cases. So, of course, there was also one  
15 that was extremely high, much higher, but half a million  
16 certainly was in the range, but it was in the high range.

17 Q. I see. Did you discuss the reasonableness or lack of it of that  
18 figure with Mr. Coles?

19 A. I don't recall that we discussed it in terms of reasonableness  
20 per se, but we certainly discussed the figure, and the way I  
21 approached it was simply to see how far we could come  
22 down from that figure.

23 Q. Did you give any consideration as to whether or not the  
24 matters listed on page 458 by Mr. Cacchione were sensible,  
25 in other words, that those were factors that you thought

MR. ENDRES, EXAM. BY MR. SPICER

1 should be taken into account?

2 A. Generally speaking, all the factors that are listed in Mr.  
3 Cacchione's letter were appropriate factors, in my  
4 consideration, and, yes, they were sensible in that sense.

5 Q. I just want to draw your attention to the handwritten note  
6 beside number 11 at the bottom of 458, which I think  
7 is...reads "Probably the opposite," opposite adverse effects  
8 on future advancement. Did you have any discussion with  
9 Mr. Coles about that note?

10 A. No, I don't recall and I'm not sure what he would have  
11 meant by that.

12 Q. Okay. Did you have any discussion with Mr. Coles about his  
13 note on page 459 with respect to the outrage point where  
14 he's written "Public also outraged about Marshall's alleged  
15 activities on the night in question."

16 A. We probably did. In that respect I do recall that Mr. Coles  
17 was very concerned about Mr. Marshall's involvement in  
18 the...at the park on the night in question. His...what he was  
19 doing there, in other words. And, I know that that played  
20 some role in his mind. So, I'm sure we discussed that factor.

21 Q. Can you tell us any more of the discussion? How did he  
22 articulate that concern?

23 A. No more than simply to convey to me that...which I knew  
24 already from the decision of the Court of Appeal, to convey  
25 to me the...his feeling that Mr. Marshall had some role to

MR. ENDRES, EXAM. BY MR. SPICER

1 play in his...in the...in this whole matter and that he did not  
2 find himself in the position in which he ended up without  
3 any involvement of his own.

4 Q. You respond to that letter of Mr. Cacchione's at page 467 on  
5 June 13th. On page 468 in dealing with the non-pecuniary  
6 damages issue, you suggest the figure of \$40,000 as being  
7 appropriate and reasonable. Can you tell us how you  
8 arrived at that figure?

9 A. That's just really a guess on my part, but the...it's in the  
10 range of the maximum award of \$100,000 which the  
11 Supreme Court in a number of key cases in tort law  
12 determined a few years back. \$100,000 the Supreme Court  
13 said in the past is the maximum damage award for non-  
14 pecuniary losses and that award, the maximum figure was  
15 derived in a very serious case of a young person who was  
16 quadraplegic and basically had no room left to enjoy life at  
17 all. So, I thought if that's the worst case where \$100,000 is  
18 appropriate, then I would think Mr. Marshall can get on  
19 with it in his life and half, roughly, of the maximum would  
20 be an appropriate figure. But again, it was somewhat  
21 guessing.

22 Q. It was your feeling, I take it then, that the...I think it's the  
23 Andrews case that you're referring to, ah, that was a perfect  
24 analogy to a case of somebody who had been imprisoned for  
25 eleven years.

MR. ENDRES, EXAM. BY MR. SPICER

1 A. I'm sorry, now the...

2 Q. That there was an analogy that you could...you could draw a  
3 direct analogy between the non-pecuniary loss or non-  
4 pecuniary damages awarded in that type of tort case, you  
5 could take that model and apply it directly to compensation  
6 for wrongful conviction.

7 A. Not directly, not one hundred percent. I subsequently, as I  
8 went along in this process, I became uncomfortable with the  
9 application of tort law principles myself. But to start with I  
10 thought it would be a good way to get some structure into  
11 our...into the terms on which we were negotiating. I felt, as  
12 we went along, that tort principles were not totally  
13 applicable, did not give us the guidance that we really  
14 needed in every respect. But to start with when we were  
15 looking at deprivation of freedom, deprivation of the ability  
16 to enjoy life on the outside, I thought that that was  
17 comparable in some measure to a young person who was  
18 isolated in hospital, for example.

19 Q. In your next paragraph referring to the question of fees,  
20 you're suggesting Legal Aid scale. Then you go on to say  
21 "There's no authority for the provision of legal aid services,  
22 or payment of legal fees, otherwise." What does that mean?

23 A. To start with, the matter of the legal aid fees for Mr.  
24 Aronson's account came...was in our minds, that is in my  
25 mind and of the Deputy Attorney General, very early on.

MR. ENDRES, EXAM. BY MR. SPICER

1 And the foundation for that was, of course, that Mr. Marshall  
2 had been offered Legal Aid counsel for the purpose of the  
3 hearing in the Court of Appeal to establish, as it turned out,  
4 his innocence. The reason I said there was no authority for  
5 the provision of legal aid services otherwise, or legal fees to  
6 be paid otherwise, is that the only room for the government  
7 to compensate persons who obtain legal advice or legal  
8 services through government is through the Legal Aid plan.  
9 There is no other forum for the payment of legal services for  
10 private parties.

11 Q. There certainly is discretion though on the government to  
12 authorize the payment, as they just did in the Brenda  
13 Thompson case not too long ago.

14 A. There is always discretion in government to honour any  
15 account whatsoever, sure. But formally speaking and from  
16 the structure that we have in place, the Legal Aid plan is the  
17 only source of funding for counsel for private parties.

18 Q. Did you have any discussion with Mr. Coles as to whether or  
19 not the government might wish to exercise its discretion and  
20 pay legal fees of Mr. Aronson?

21 A. We did at some point, and as it turns out that is exactly  
22 what we did do. We included the Aronson account in the  
23 award itself, in the ex gratia payment.

24 Q. Apart from that, did you have any discussions with Mr.  
25 Coles as to whether or not he was prepared to pay Mr.

MR. ENDRES, EXAM. BY MR. SPICER

1 Aronson's account separate and apart from the  
2 compensation award?

3 A. That came up, yes, and you will see in my notes at some  
4 stage that I was instructed to come back with a final total  
5 figure that would be all-encompassing, including the account  
6 from Mr. Aronson.

7 Q. Did Mr. Coles have any inclination to ask the government to  
8 exercise its discretion to pay the fees other than as part of  
9 the compensation package?

10 A. No.

11 Q. You go on to say in the next paragraph that you don't  
12 consider "Pre-judgment interest a proper claim in the  
13 context of an ex gratia payment." Why not?

14 A. Well, pre-judgement interest is awarded by the courts in  
15 damage awards and it arises out of a legal responsibility  
16 that the defendant has been determined to carry. There is  
17 no reason to, in my view, to pay pre-judgement interest  
18 when we start to negotiate on the basis that there is no legal  
19 liability anyway. We are simply making a compensatory  
20 award without recognition of any liability, and in that  
21 context I don't see any room for pre-judgement interest.

22 Q. But you told us last week that you start all your negotiations  
23 on the basis that there's no liability.

24 A. Quite right. But if we end up in Court and a judgement is  
25 awarded against a Crown then, of course, pre-judgement



MR. ENDRES, EXAM. BY MR. SPICER

1 interest is automatic and it arises out of the finding of fault  
2 or the finding of, ah, against the defendant.

3 Q. In a normal tort case if you settle it prior to going to Court,  
4 do you take into...have you ever taken into account an  
5 amount to represent interest?

6 A. We have, I think, and I have in the past. It really depends  
7 on the way the negotiations go. If, for example, the opposite  
8 side is very insistent on interest payments of some sort,  
9 then I can see that, and I think there is a case I recall where  
10 I've done that, I may say, "All right, we'll pay you a certain  
11 amount on account of interest, but I will keep that in mind  
12 then in determining the figure for the settlement," so...

13 Q. At the end of the day...

14 A. Either way...

15 Q. At the end of the day then is it fair to say that all you're  
16 really looking at is how much are we going to pay altogether  
17 and how you break it up really doesn't make too much  
18 difference?

19 A. Yes.

20 Q. Yeah. You don't in that letter suggest a counter to Mr.  
21 Cacchione's suggestion. Why is that? You don't go back...

22 A. The reason primarily is that I was not entirely clear in my  
23 own mind what figure I should use. I did not at that point  
24 have sufficient information that I felt comfortable with that  
25 would allow me to come with a figure. In other words, I did

MR. ENDRES, EXAM. BY MR. SPICER

1 not want to be in a position where I proposed a figure that  
2 might have been higher than what I could have settled for.  
3 I just did not have enough information at this point to  
4 counter. I wanted to leave my options open.

5 Q. On June 21st, page 471, is that your handwriting?

6 A. That is my writing.

7 Q. All right. That's a note of a meeting between yourself, Felix  
8 and Mike Lambert.

9 A. Yes.

10 Q. What...what does this note reflect in terms of the comings  
11 and goings of the money?

12 A. Well, this is where I started to become...where I started to  
13 gain a little more information as to the parameters in which  
14 we were dealing. That is, in terms of the money side as to  
15 how far we might be able to go down from the \$550,000 and  
16 still have a settlement. So, you see on the left-hand part  
17 of...on the left-hand margin of the page 471 there are  
18 four...three figures. 400, 350, 275,000, plus 25,000. So,  
19 what that indicates is that I spoke to both counsel for Mr.  
20 Marshall and I tried to push, if I may use that language, I  
21 tried to see just how far down we might be able to go. And  
22 I...we talked in terms of 400 and I saw room to go down  
23 further. So, we talked about 350 and 275 and I realized at  
24 that point, I think, that 275 was really a line of resistance.  
25 There was no sense in talking less. So, that note indicates

MR. ENDRES, EXAM. BY MR. SPICER

1           that I was trying to feel my way through to see just where  
2           we might go in actual...in terms of numbers.

3       Q.    Trying to get it...trying to get it down as far as you can  
4           before you run into a wall, is that...

5       A.    That's right.

6       Q.    Okay. And when you have "Bottom Line: \$275,000".

7       A.    That indicated to me when I...that note reflects that it...that I  
8           had the impression in my conversation with counsel that  
9           there would be no sense in suggesting anything under  
10          \$275,000.

11      Q.    But that does not, your note number 3 does not include  
12          Aronson's bill, is that correct?

13      A.    It in...under 1 there was some room to play with the  
14          prepayment that had been made. Mr. Cacchione's bill was  
15          included but the 275,000, you're quite right, did not include  
16          Mr. Aronson's account.

17      Q.    Which at that point was about \$80,000.

18      A.    Right.

19      Q.    And is your note there, "His can be put through Legal Aid  
20          Plan or scaled on Legal Aid Scale," was that your suggestion  
21          or was that...was that a point that Mr. Cacchione...

22      A.    That was a mutual understanding at that time. I know  
23          quite...I do recall quite well that Mr. Cacchione would have  
24          been prepared and content to have Mr. Aronson's account  
25          put through the Legal Aid plan for whatever that would

MR. ENDRES, EXAM. BY MR. SPICER

1 have done for Mr. Aronson. And certainly I tried that. I  
2 thought that was the way to do it, that we should leave  
3 Aronson's account altogether aside and deal with it as a  
4 separate claim, because it really did not benefit Mr. Marshall  
5 at all. So, yes, it was...

6 Q. In what way did...

7 A. ...thought in those terms.

8 Q. In what way did Mr. Aronson's account not benefit Mr.  
9 Marshall?

10 A. Well, it wasn't a payment that Mr. Marshall would have any  
11 use for. He would not retain that money, so I was saying  
12 at...in the course of our negotiations that "Why do you care  
13 about Mr. Aronson's account anyway? What's it to you?  
14 Really. We'll settle it somehow. It will be settled somehow."  
15 Plus, of course, at that time in the course of negotiations I  
16 was exposed to the attempt by Mr. Cacchione to collect from  
17 the Federal Government the Aronson account. So that  
18 account really did not play a great role at that point in time.

19 Q. What is the total cost calculation that you've got...what do  
20 those figures represent, 250, 60?

21 A. Yeah, I have to reflect on that for a moment. I'm not quite  
22 sure really. I don't know if I can answer the question. I'm  
23 not sure what I put down here.

COMMISSIONER EVANS

24  
25 Could that refer to some public monies that were collected?

MR. ENDRES, EXAM. BY MR. SPICERMR. ENDRES

1  
2 I don't believe, no, I don't believe. I don't think I had that  
3 figure of 60 in that, no. The public monies that had been  
4 collected, I recall them as being in the area of \$40,000.

COMMISSIONER EVANS

5  
6 40,000.

MR. ENDRES

7  
8 So, that was not the figure that I had in mind. I may be able  
9 to answer that later. I have to just think about that.

MR. SPICER

10  
11 Okay.

12 Q. And at the bottom of the note you say "We should offer to  
13 pay a further \$200,000.00, and take care of Aronson's  
14 account in the manner discussed." Would that be 200 taking  
15 into account the pre-payment of \$25,000?

16 A. Yes, that was my counter position at that point, sensing that  
17 there was a resistance at \$275,000, perhaps 300, depending  
18 on what would be done with the pre-payment. I thought we  
19 would go back and offer 200,000 and see how we make out.

20 Q. Wouldn't Mr. Aronson's account have some bearing on Mr.  
21 Marshall in the sense that if Mr. Marshall was going to be  
22 fair and reasonable himself about everything, he would  
23 have had to pay Mr. Aronson's account out of the money  
24 that he received? Surely in that way it would directly have  
25 an effect on Mr. Marshall.

MR. ENDRES, EXAM. BY MR. SPICER

1 A. Yes, but there were the other options available and I was, at  
2 that point, really quite hopeful that we could tax Mr.  
3 Aronson's account. \$80,000 I thought was a substantial  
4 amount and there would be...it would be much better to  
5 have it taxed so that we'd know exactly where we stand  
6 with that. Plus there was a great expectation at that time  
7 from Mr. Marshall's counsel that the Federal Government  
8 would pay that account anyway. So, we kind of left that  
9 account on the side for the time being. As you know, and as  
10 it transpired later on, it was included in the award.

11 Q. Your note deals with the fees again says "Legal Aid scale or  
12 taxed." Did you mean taxed just as a normal solicitor-client  
13 bill?

14 A. Taxing it, yes, before the Taxing Master.

15 Q. Not on the Legal Aid scale?

16 A. Not at that, no. That was another option that we discussed  
17 and I had discussed with the Deputy Attorney General at  
18 one point, why don't we just go and tax the account, and pay  
19 it. But that did not work in the end.

20 Q. What was the Deputy Attorney General's attitude to that?

21 A. He was receptive at first to that, but as it transpired later,  
22 the more and more we looked at the numbers, it was  
23 everyone's wish, including my own, that we have just one  
24 figure, one cheque and close the account completely.

25 Q. Why would that have been? As I understand your

1 testimony, you didn't...there wasn't any real concern about  
2 the quantum at the outset on the part certainly of the  
3 Attorney General.

4 A. Uh-hum.

5 Q. And why would you then be concerned about the quantum  
6 of Aronson's account?

7 A. Well, we could have ended up in some dispute about the  
8 Aronson account which was really something that I wanted  
9 to avoid. I wanted to avoid having any open questions  
10 after the settlement, after the money was paid. If we had  
11 made a payment to Mr. Marshall and left the Aronson  
12 account, that would have, again, given rise to all sorts of  
13 difficulties as to how we would settle that and I wanted to  
14 avoid that if we could.

15 9:52 a.m.

16 CHAIRMAN

17 Is it the practice of the Department of the Attorney General to  
18 insist that most accounts, or all accounts for legal fees  
19 presented to the Government be taxed?

20 A. My recommendation always is to have it taxed. Yes. I  
21 understand that there are a number of accounts that are not  
22 taxed. A number of legal bills that are not taxed.

23 Q. So in this case if you had agreed with Mr. Cacchione to settle  
24 Marshall's claim and to exclude Aronson's claim for fees and,  
25 say, and agreed to pay them as taxed, in the unlikely event

1 that the Government of Canada would assume responsibility  
2 for it, surely they would have no objection, or no quarrel with  
3 the fact that the bill was taxed, would they?

4 A. I wouldn't think so, no. That's the proper way to go in my  
5 view. When you have it taxed then you leave no doubt as to  
6 the propriety of the bill in the first place. All items are  
7 examined and finally determined.

8 Q. The only reason why I ask is that I was left with the  
9 impression from your testimony a few moments ago that you  
10 were conscious of the efforts of Mr. Cacchione or Mr. Aronson  
11 or both, to have the Aronson fee paid by the Government of  
12 Canada, and you didn't want to presumably prejudice these  
13 negotiations.

14 A. It would have been quite nice if we could have left it outside  
15 of our discussion altogether and let the Federal Government  
16 address that. But it also became clear, My Lord, as we went  
17 along in the negotiations that the Federal Crown was not  
18 receptive. They were not going to pay it so, as we went along  
19 it really, that issue was eliminated by my being made aware  
20 that the Federal Government was not paying.

21 Q. So you knew, in effect, you were negotiating a settlement to  
22 be paid, the agreed amount to be paid in full by the  
23 Government of Nova Scotia?

24 A. Yes.

25 Q. I'm still having difficulty following that as a reason to exclude



1 the Aronson fees. Could you not have, and I'm not faulting  
2 you because you have your professional obligations to  
3 discharge to your client, but was there any reason why the  
4 Government of Nova Scotia couldn't have simply said, "We  
5 will pay the Aronson legal fee as a separate claim or a  
6 separate account." This was a past indebtedness of Junior  
7 Marshall. Your negotiations were primarily to try and  
8 compensate him for, in a manner that would help him re-  
9 establish himself in the future.

10 A. Um-hmm. There was no reason why the government couldn't  
11 have done that, no. No reason. But I would not have  
12 recommended that sort of procedure because, for one, I can  
13 see some difficulty arising if, for example, the Aronson bill  
14 had stood aside. After the settlement we would have gone to  
15 tax it either before the Taxing Master or tax it in the context  
16 of the Legal Aid plan. It may well be that the amount would  
17 have been less. It likely would have been less than what Mr.  
18 Aronson was claiming, certainly on a Legal Aid plan, it would  
19 have been considerably less. And in that case Mr. Aronson  
20 may have wanted to go back to Mr. Marshall, for example,  
21 and said, "Look, you still owe me 'X' number of dollars over  
22 and above what the government has already paid," and we  
23 really wanted to put to end to any sort of discussion about  
24 money.

25 Q. But all of these things can be taken care of in the release,

1 can't they.

2 A. Yes, they could have been taken care of that way. You're  
3 quite right.

4 MR. SPICER

5 Q. Insofar as the taxing point is concerned, it would have been  
6 within the discretion of the Government to pay that account  
7 of Aronson's without taxing it as they have done in other  
8 cases?

9 A. Yes.

10 Q. Indeed, isn't that the procedure they adopted in connection  
11 with the Brenda Thompson matter a while ago? That bill  
12 wasn't taxed.

13 A. I think that's the way it went, yes.

14 Q. On the next page, 472, just a continuation, I take it, of the  
15 notes of the same meeting?

16 A. Yes.

17 Q. And your thoughts as to what you should offer. And there  
18 you've got Aronson's account included at \$30,000.  
19 Did you know what the quantum of his account was at that  
20 point?

21 A. Yes, I knew it was in the area of, or in the vicinity of \$80,000.

22 Q. Did you put the figure of 255 to Mr. Cacchione?

23 A. Yes.

24 Q. Did you put it to him on the basis of that breakdown or just...

25 A. No, I think that is just a breakdown that I used myself. I used

1 the \$200,000 which you see on the previous page as saying  
2 why don't, we should offer \$200,000, and thought of this as  
3 being a bottom figure for Mr. Marshall himself. And then  
4 adding some amount into that for Mr. Aron-, on account of  
5 Mr. Aronson's account but not, of course, the total amount.  
6 And the reason I would have done that is, again, because at  
7 the relevant time Legal Aid was made available to Mr.  
8 Marshall and he could have easily availed himself of that as  
9 most people do, as invariably everyone does, who is in that  
10 situation. And we know from the tariff, the Legal Aid tariff,  
11 that the account would not have been anywhere near  
12 \$80,000.

13 Q. Would it be your view that there is provision in the Legal Aid  
14 tariff for the types of services that were rendered by Mr.  
15 Aronson for Mr. Marshall?

16 A. I don't see any difficulty in having Mr. Aronson's account  
17 taxed on a Legal Aid tariff, no. All of the services he  
18 rendered could have been taxed on that account, no problem.

19 Q. You indicated on 472 also that you're looking for a release  
20 from Junior Marshall's parents.

21 A. Yes.

22 Q. Why would that be the case?

23 A. There was indication during my talk with Mr. Cacchione,  
24 during my talks, that the parents of Mr. Marshall had  
25 contemplated to sue the government for being deprived of

MR. ENDRES, EXAM. BY MR. SPICER

1 their son for 11 years and that is why I contemplated at that  
2 point that we ought to have a release from Mr. Marshall's  
3 parents as well.

4 Q. Was there any consideration in your mind when you were  
5 looking at that figure of \$200,000 for Marshall, that any of  
6 that would have gone to his parents?

7 A. No.

8 Q. And if that were the case then, if none of it was going to Mr.  
9 Marshall's parents, why would Mr. Marshall's parents be  
10 contemplating signing a release?

11 A. Well, as it turns out, it was an unrealistic expectation. They  
12 did not sign a release.

13 Q. No, my question was why would you ask for it in the first  
14 place if they weren't getting anything?

15 A. Just to see if I could get it, really. To end the threat. Which  
16 was not a very big threat at the time but to end the threat of  
17 a further proceeding.

18 Q. Then on 473, are those your notes?

19 A. Yes.

20 Q. Is that a meeting between yourself, Mr. Giffin...

21 CHAIRMAN

22 Before you leave that, Mr. Spicer, 472. At the very bottom.  
23 There's a notation there. "Subrogated claim."

24 A. Yes.

25

MR. ENDRES, EXAM. BY MR. SPICERCHAIRMAN

1 Your claim would be subrogated to whom or do you recall?

2  
3 A. I looked at that before I came and, quite frankly, I'm not sure  
4 why I said that on page 472. I can understand the vicarious  
5 liability heading but a subrogated claim, I tried to think  
6 myself why, who would have a subrogated claim in that  
7 context and, frankly, I can't think of it anymore as to where it  
8 would come from.

CHAIRMAN

9  
10 I can't either.

11 A. I was concerned at that time that the release should release  
12 the Crown from any proceedings whatsoever including  
13 vicarious liabilities such as through the prosecutor, that's  
14 clear. And then I was thinking in terms of subrogated claims  
15 and I'm not sure why I thought of that at the time. I can't  
16 really picture it right now.

CHAIRMAN

17  
18 It would hardly be against Mr. Ebsary. Certainly the  
19 amount, the likelihood of recovery.

20 A. Yeah. I really don't think there was a situation of a  
21 subrogated claim here at all.

MR. SPICER

22  
23 Q. And with respect to the vicarious liability aspect of it, you  
24 mentioned the prosecutor. Was it, did you have any other  
25 concern?

MR. ENDRES, EXAM. BY MR. SPICER

1 A. No. Strictly speaking, that would have been where if any  
2 liability there had been where it would have come from,  
3 through the Crown Prosecutor.

4 Q. And that liability would have arisen, would it not, in respect  
5 of matters that occurred prior to conviction and  
6 incarceration?

7 A. Quite right.

8 Q. Or would it also include the failure to disclose or the possible  
9 failure to disclose the information that came forward ten days  
10 after Mr. Marshall was convicted?

11 A. It might have.

12 Q. Do you remember whether or not in your mind it did?

13 A. I was not aware of that information.

14 Q. So at the time the vicarious liability note refers only to the  
15 activities of the original prosecutor's at the trial.

16 A. Just the employee's actions, yes. At any stage.

17 Q. And that would have been in respect of a period of time for  
18 which you weren't planning on paying compensation in any  
19 event.

20 A. Quite right.

21 Q. 47-...

COMMISSIONER EVANS

22  
23 Before you leave that again, were you considering at that time  
24 a possible claim over against the Federal Government?

25 A. I never contemplated a claim against the Federal Government,

MR. ENDRES, EXAM. BY MR. SPICER

1 no. That was not part of my role in attempting a settlement,  
2 in attempting to achieve a settlement.

3 MR. SPICER

4 Q. Perhaps if we could go to 473. Is that yourself, Mr. Coles and  
5 the Attorney General?

6 A. Yes.

7 Q. So "dpt" is Deputy, is it?

8 A. That's right.

9 Q. Can you tell us what happened at that meeting?

10 A. I would have arranged that meeting to inform the Minister,  
11 having already informed the Deputy before that, of the status  
12 of our negotiations on the possible settlement, and I would  
13 have mentioned to him in accordance with my note that  
14 \$275,000 plus Mr. Aronson's account may be something that  
15 would settle the case and the Minister would have indicated,  
16 again, reflected in my note, that that's, that that did not sound  
17 unreasonable to him. That that was in, so to speak, the  
18 ballpark.

19 Q. Would that ballpark have been 275 then plus 80?

20 A. That's right.

21 Q. So we're talking 350, more than that.

22 A. Yes.

23 Q. Would that have been your authority at that point, without  
24 having to come back?

25 A. No. No, no. No. I, quite to the contrary. I had no authority to

MR. ENDRES, EXAM. BY MR. SPICER

1           commit myself or the government to any dollars at that point.  
2           As you can see, as the note continues, and that may well be  
3           my own view as opposed to an instruction, that I would start,  
4           after that meeting, I would start to offer \$250,000 which  
5           would be all inclusive and take out of that the \$25,000 pre-  
6           payment, so for a total of \$225,000.

7           Q. Was it the case, though, at the end of this meeting that you  
8           had authority to go to \$325,000?

9           A. Yes, that much I understood that I could have negotiated it up  
10          to \$325,000. I don't think I ever felt that I had the right or  
11          the authority to commit the Government at any point for any  
12          dollars without specific instructions, but for the negotiations,  
13          per se, yes, I was under the impression then that I could have  
14          gone as high as \$325,000 all inclusive.

15          Q. You could have said something to Mr. Cacchione like, "I'm  
16          prepared to recommend 325."

17          A. That's right. I would have had to say him to "I'm prepared to  
18          go back with that figure." And that, according to the Minister,  
19          was not an unreasonable figure.

COMMISSIONER POITRAS

21          This would be 325 plus the Aronson account, is that it?

22          A. I thought \$325,000 maximum included everything. No other  
23          payments. So that would have included the Aronson account.

COMMISSIONER POITRAS

24          Because 275 plus the 80,000 would give you 355.  
25



MR. ENDRES, EXAM. BY MR. SPICER

1 A. Yes. No, I never had any conversation with the Minister, and  
2 certainly never felt that I had the authority to even speak in  
3 terms of \$350,000. Well that's not really putting it the right  
4 way. I did not feel that I was limited in talking in terms of  
5 any amount, as far as it goes. But without actually obtaining  
6 some more definitive instructions, certainly by June 26th, I  
7 would not have gone beyond \$325,000, including the Aronson  
8 account.

MR. SPICER

9  
10 Q. The Attorney General at the time, Mr. Giffin, when he gave  
11 testimony, when he was referred to this particular note,  
12 indicated that you did have 325 at that point in time of  
13 authority.

14 A. As arranged for, as I understood it, as arranged for  
15 negotiation, yes. But not to commit the government. It was a  
16 matter of going back for particular instructions on that point.  
17 And that's the way I'd like to have it at any rate in most  
18 cases. I'd rather have that understanding from the start that  
19 I'm not able to commit myself at all because that allows me to  
20 negotiate much more freely than if, on the other hand, I had  
21 already a figure that I was allowed to spend. I'd much rather  
22 go to negotiations not having that definitive instruction.

23 Q. And you think if you had a figure that you had specific  
24 authority to spend you just might go spend it?

25 A. I may have. That's right. I may have depending on how

MR. ENDRES, EXAM. BY MR. SPICER

1 negotiations developed.

2 Q. On the next page, is that your note?

3 A. Yes.

4 Q. Perhaps you could take us through that because the copy we  
5 have is, can't read very well. I don't know whether you can  
6 decipher your writing.

7 A. No, it's poor writing but some of these notes were done at the  
8 time. Some of them were done subsequently so...

9 Q. Was this one done at the time?

10 A. I doubt very much that I would have made notes in the  
11 presence of Mr. Cacchione but it may have been done  
12 immediately after, just quickly, so I wouldn't forget. But the  
13 note simply says that I met with Mr. Cacchione. It says, "Felix  
14 made it clear that any figures I brought would be subject to  
15 approval by Cabinet and that I knew nothing about how  
16 Cabinet was looking at this."

17 Q. Was that true?

18 A. Yes. In other words, Cabinet was the ultimate approving  
19 authority and I had never any instructions from Cabinet at  
20 all. I said that subject to Cabinet's approval we should agree  
21 to pay further, this is what I would have said to Mr.  
22 Cacchione, a further \$225,000 plus \$10,000 for Mr.  
23 Cacchione's legal fees for a total payment of \$235,000 which  
24 with the \$25,000 paid in advance, I can't really make the rest  
25 out myself, something about \$260,000. So the total figure

MR. ENDRES, EXAM. BY MR. SPICER

1 would have been \$260,000 at that point which is all inclusive  
2 bracket (including Aronson's account of...) I can't read the rest  
3 myself on that copy. Then it continues that we should like to  
4 see Aronson's agreement with the settlement of his account if  
5 possible. And finally, a release from Mr. Marshall, Jr. and  
6 family to be completed, to be a complete release but not  
7 releasing the police. That's the complete note.

8 Q. And you then put to Mr. Cacchione, did you, 260 for  
9 everything?

10 A. That was at June 26th we would have, I was prepared to  
11 recommend \$260,000 inclusive, everything. But again here  
12 and, My Lords, this is what I was saying before in response to  
13 your question. Again, here, I was looking to obtain Mr.  
14 Aronson's approval of the figure because, really, I did not  
15 want to make a payment of any amount and then have either  
16 Mr. Marshall's parents or Mr. Aronson or someone else come  
17 forward and say, "By the way, I'm owed money as well." So  
18 we would have had to reopen this again and try to make  
19 arrangements perhaps with the other parties. I rather would  
20 have preferred if all parties that had a possibility of a claim  
21 were content with the settlement. It's just a precaution. And  
22 not, by the way, that we had any demand, to my knowledge  
23 at least, that there was any demand made to government to  
24 pay Mr. Aronson's account by Mr. Aronson himself. He may  
25 have done that but not through me. I had no idea about that.

CHAIRMAN

1  
2 Q. You were simply following that I suspect is the usual  
3 approach in negotiating settlement. That once the amount is  
4 arrived at, you try and get an all embracive release as you  
5 possibly can.

6 A. Quite right, yes.

7 Q. To ensure that there can be no further claims arising out of  
8 this particular cause of action or whatever...

9 A. Yes.

10 Q. The claim is based on. Yeah. No matter what the settlement  
11 be and even if the Attorney General authorizes and said to  
12 you, yes, I approve of the amount you recommend, I assume  
13 he would still have to go to Cabinet?

14 A. Oh, yes.

15 Q. For approval.

16 A. The Attorney General left no doubt about that that he would  
17 want his colleagues to approve that deal.

18 Q. It couldn't be paid otherwise, could it?

19 A. Well, the Attorney General has the right under the Provincial  
20 Finance Act to settle any civil claim, and he does that in  
21 ordinary litigation. The Attorney General makes that  
22 decision and I don't believe, I do not believe that he goes to  
23 Cabinet for any approval in this cases.

24 Q. Where would the funds come from unless they're voted in the  
25 estimates?

1 A. They come from general, as this one did, from general  
2 accounts of finance from, there is a term for it, I quite don't  
3 remember the term but there is a general revenue account  
4 from which all settlement figures are taken, all monies come  
5 out of that. They are not in the hands of the Attorney  
6 General, they are in the Minister of Finance's control. But all  
7 it takes under the provincial Finance Act is for the Attorney  
8 General to make a decision to settle which he has the right to  
9 do, a claim against the Crown, and then he will instruct the  
10 Minister of Finance to pay the account. And that has  
11 happened many times over.

12 Q. Well, such being the case, why would it be necessary to go to  
13 Cabinet to...

14 A. I think in this case it was unusual and the route that my  
15 Minister wanted to take through Cabinet would have been  
16 quite understandable in my way of thinking because at this  
17 point Cabinet had decided to set up the Campbell inquiry and  
18 with that had delineated the way for Mr. Marshall to make  
19 his claim for compensation. This negotiation had developed in  
20 the course of the initial discussion about the inquiry but not  
21 with the sanction of Cabinet. So at some point Cabinet would  
22 have, had to come in in order to approve the whole process.  
23 And then ultimately, of course, to approve the figure, too,  
24 because even the Campbell inquiry recommendation was  
25 subject to approval by Cabinet so if the Campbell inquiry had

1 arrived at a figure of compensation, that itself would have gone to  
2 Cabinet too. So in this particular case, My Lord, I did not see  
3 anything unusual. Indeed, I thought that was the only way to  
4 go.

5 Q. I'm not, I just want to, that's right. The Campbell Commission  
6 clearly would have, their recommendation would have to be  
7 dealt with by Cabinet.

8 A. Oh yes. It is set out in the terms of reference for the  
9 Campbell inquiry that the Campbell inquiry could have made  
10 recommendation to Cabinet, I believe.

11 Q. So that if you were going to settle a claim, the purpose of  
12 which the, to adjudicate which the Campbell Commission had  
13 been set up, then your feeling is that it should go to Cabinet  
14 for approval to settle?

15 A. Yes.

16 MR. SPICER

17 Q. At this point if you put the figure of 260 to Mr. Cacchione,  
18 where was he at that point in terms of those figures?

19 A. Semi-receptive. Semi-receptive. Not particularly thrilled,  
20 not particularly happy. But not totally, he did not totally  
21 reject that either. He did look at it as a basis for further  
22 talk.

23 10:14 a.m.

24 Q. Did he give you a figure on June 26th?

25 A. His figure always returned to the \$550,000 really. Again

1 and again we went to that \$550,000 and I remember at  
2 some point I would have talked...I would have said to him  
3 there is just no point in talking about that any more.

4 Q. Would you have said that to him at this point, but June  
5 26th?

6 A. Probably. I probably would have done that, because I don't  
7 have any doubt that, ah, particularly on reflection, that Mr.  
8 Cacchione's figure of five hundred and some thousand  
9 dollars may have been his bottom figure, particularly when  
10 I consider the amount that they were claiming on account of  
11 lost wages alone, which they had totalled up to three  
12 hundred and twenty-some thousand dollars.

13 Q. On 476 you have a note of a meeting with the Attorney  
14 General and the Deputy.

15 A. Yes.

16 Q. You...can you take us through that, what happened at that  
17 meeting?

18 A. This was after my meeting with Mr. Cacchione where I  
19 spoke in terms of \$260,000 and I informed the Minister and  
20 the Deputy Attorney General of that. You can see under  
21 number 1 the breakdown. The Minister is prepared to  
22 recommend to Cabinet \$235,000 in addition to the \$25,000  
23 which would have made that \$260,000 to that, more or less  
24 that I had spoken to, to Mr.Cacchione about.

25 Q. That would have included Aronson's account?

1 A. This would have been in full settlement under number 2, in  
2 full settlement including Aronson's fee. And then point 3,  
3 that I would require before making any payments, that's  
4 just a note really, and an explanation to the Minister, from  
5 Junior, as I say, and this is what Mr. Cacchione used to call  
6 Mr. Marshall was Junior, from Junior and his parents, for  
7 the Crown, but not the police. In other words, I wanted it  
8 clearly understood by the Minister and the Deputy Attorney  
9 General that I would not be at all requiring any  
10 undertakings or releases as relates to the Sydney Police.  
11 Then the sentence underneath that is somewhat difficult to  
12 read in the copy. It says, "They should be quiet about suing  
13 anybody for the next few weeks." That just refers, again, to  
14 action or renewed action against the City of Sydney Police,  
15 and the Chief of Police. I asked him in other words to be  
16 quiet about this for a little while until we get these  
17 negotiations over with, and then they could do as they  
18 pleased.

19 Q. Had Mr. Cacchione indicated that he was prepared to  
20 recommend 260?

21 A. Well, he...in the previous note on the previous document,  
22 page 475, which followed our meeting, Mr. Cacchione and  
23 myself, where I spoke in terms of 260, you'll see from his  
24 letter to Mr. Marshall dated June 29, '84, which says simply,  
25 "Contact my office upon receipt. It is of the utmost



1 importance," and so on, "...regarding a proposal which has  
2 been put to us by the Attorney General." So, I'm not sure if  
3 "recommend" is the right language. But certainly Mr.  
4 Cacchione was not unreceptive to the figure of \$260,000 by  
5 June 26th when he asked his client to speak to him about it.  
6 To go on with my note on page 476, the point number 4  
7 says, it's a note to me to prepare releases and get  
8 everything ready. Obviously, well, perhaps to indicate at  
9 that time I was feeling that we were getting close to the end  
10 of the negotiations. Point number 5, that the Minister would  
11 be away until June 16th, and of course that was important  
12 to me, in that it would have been the Minister and no one  
13 else that would take any recommendation to Cabinet.

14 Q. It must be July, presumably, would it?

15 A. Oh, yes, that had to be July. Quite right. That number 6,  
16 "Minister suggested that a joint press statement might be  
17 arranged." That really was a housekeeping matter, simply  
18 to inform the public as to what had transpired, and Mr.  
19 Cacchione, and I put later on a notation there, after having  
20 informed Mr. Cacchione to that effect, and he thought he  
21 wanted to think about that. Point number 7, "No statements  
22 before that and terms are to be kept confidential." In other  
23 words, no one was to speak about the negotiations before  
24 any official press release would be offered and the  
25 particular terms of the settlement, the intention was to keep

1 those confidential. Finally, point number 8, "I should  
2 prepare outline for press release starting with..." and the  
3 rest is gone, as I say it's at the original.

4 Q. I think we have problems with the second page of that. I'm  
5 not sure if ever...ever dug it out.

6 A. It was probably something to the effect starting with the  
7 terms of, ah, that the imprisonment.

8 Q. Right.

9 A. I expect that's what it was, and that would have been just to  
10 assist the Minister in preparing a statement, which I think I  
11 did subsequently.

12 Q. There's a note on 481, July the 11th. Is that a note of a  
13 meeting or a telephone conversation?

14 A. If it's a telephone I usually say so, but this does not indicate  
15 it, so I expect we met at which time Mr. Cacchione returned  
16 with a figure of 300,000 or \$325,000 plus Mr. Aronson's  
17 account. So apparently we were not finished in negotiating,  
18 indicating that Mr. Marshall was prepared to accept  
19 that...that would have then, of course, taken us to roughly  
20 the area of \$400,000 and the note on June 11th, July 11th  
21 also indicates that Mr. Marshall or his counsel were hoping  
22 that Ottawa would pay Aronson's account but they hadn't  
23 come through and he's...he asked me to...if we would work  
24 on Ottawa to see if Ottawa would pay the Aronson account.  
25 He asked...Mr. Cacchione asked me, as well, to improve our

1 offer and get back to him and we...he will work on his client.  
2 Now, that's language that I use. I don't think that that is  
3 necessarily the language that he would have used.

4 Q. Um-hm.

5 A. And my note of that, at the end of that would have been  
6 that perhaps we should offer another \$10,000 to bring us up  
7 to 270 as opposed to the roughly \$400,000 figure that Mr.  
8 Cacchione was suggesting.

9 Q. There's a note on 482, I believe it's a note of Mr.Cacchione's.  
10 and he's...the point I wanted to draw to your attention was  
11 the notation, "Deputy AG not prepared to talk to Ottawa re  
12 cost sharing." Would you have given that message to...

13 A. I would have returned to him at that point and said to him  
14 we were not prepared to get involved in...in trying to push  
15 Ottawa to pay any amount. Aronson's account was the one  
16 that I had in mind at that time.

17 Q. Did you have a discussion with the Deputy Attorney General  
18 about that?

19 A. Oh, I think so, yes. Yes, I would have had discussion with  
20 him about that and according to my recollection he just told  
21 me that he was not prepared to go to Ottawa to fight on  
22 behalf of Mr. Marshall for the Aronson account.

23 Q. Did he indicate to you why?

24 A. No.

25 Q. Then on 483, and 483 and 484 both seem to relate to July

1 the 18th.

2 A. Yes.

3 Q. I take it that the first note, the meeting with the Deputy  
4 occurred before you spoke to Mr. Cacchione, is that correct?

5 A. That's right.

6 Q. Okay. Tell us what happened then at the meeting with Mr.  
7 Coles?

8 A. Yes.

9 Q. Felix's new position was what?

10 A. That would have been at the bottom of that paragraph, the  
11 300 or \$325,000 plus Aronson's account. That was the new  
12 position of Mr. Cacchione at that stage.

13 Q. And I take it from your note that your sense of it was that  
14 you shouldn't move substantially.

15 A. Right.

16 Q. From your position which was 260 at that point.

17 A. That's right.

18 Q. And where it says "Deputy says add another 15,000 for total  
19 of \$275,000 minus the \$25,000 paid on account." Was that  
20 an instruction as to what you were to tell Mr. Cacchione at  
21 that point?

22 A. Not an instruction, no. He was just saying, "Why don't you  
23 add another \$15,000 into it." Once we saw...once I explained  
24 to him why I had at left at \$260,000 they would return at  
25 about \$400,000 and the Deputy would simply say, well,

1 after I told him that I would not move substantially that  
2 was my recommendation, he would have simply said, why  
3 don't you add another \$15,000. But he also, according to  
4 that note, and I don't specifically recollect that now, of  
5 course, he did say minus the \$25,000, which is interesting  
6 because that would have put me below the \$260,000 that I  
7 had already spoken about. So, that was not much of a...of an  
8 offer for me to return to Mr. Cacchione with.

9 Q. How did you interpret that instruction? Because that would  
10 have put you below where you already were.

11 A. I don't think that was the intention of the Deputy Attorney  
12 General, no. What he would have wanted to say to me is  
13 this, "Why don't you just give them another \$15,000, if that  
14 takes it, well, then that's it."

15 Q. Okay.

16 A. After I told him that we ought not to move substantially.

17 Q. Then on 484, is that a note of a meeting or conversation?

18 A. Probably a meeting again. We had a number of meetings,  
19 some negotiations went over the telephone, but this is  
20 probably a meeting, I would expect. I was trying to do as  
21 much as possible...I was trying to have meetings as much as  
22 possible rather than doing negotiations over the telephone.  
23 So, the note on July 18 simply records my conversation with  
24 Mr. Cacchione and I told him at that point that we cannot go  
25 that far. In other words, we cannot go to meet him at the

1 \$400,000 level.

2 Q. That's 300, 325 plus the Aronson account.

3 A. Right.

4 Q. Yeah. And then you go on to say, "I spoke to my people and  
5 subject to approval by Cabinet I was authorized to offer an  
6 additional 10 for a total of 270 minus 25."

7 A. Yeah.

8 Q. 245.

9 A. All right. Now, that refreshes my memory, and that is  
10 consistent with the previous note on July 18 where I just  
11 said the Deputy said "Minus the 25." What I obviously did  
12 at that point is this, and I do recall it now, sensing that Mr.  
13 Cacchione was shooting high again, if I can use that  
14 language, that is he was going to \$400,000, I thought the  
15 best way to deal with that is to go below what I had already  
16 spoken to him about, to drop my figures below what I had  
17 already more or less discussed with him as being a rational  
18 figure, the 260. And what I wanted to do there is to convey  
19 that if they would not come down from the \$400,000 level I  
20 would likely be staying at less than 260. So, it was a kind of  
21 a bargaining move really.

22 Q. Were you, in effect, withdrawing?

23 A. There was never anything to withdraw, you see. At that  
24 point we were just kind of talking about figures in fairly  
25 loose terms and the \$260,000 figure was not a commitment

1 of any kind. It was just something that I had indicated I  
2 might be prepared to recommend. But as I indicated, when  
3 I saw the figures going way above that into the \$400,000  
4 range then I thought the best thing to do with that is to go  
5 below what I had talked about to see if we could come to  
6 some terms on that...on that ground.

7 Q. Did Mr. Cacchione express any surprise that the new figure  
8 was less than the earlier figure?

9 A. Yes, that's right, and the more I think about it the more I do  
10 recall that he was quite surprised. He was quite upset  
11 actually that I would go below what we had already talked.

12 Q. Would that be something that you would normally do,  
13 suggest that you're prepared to recommend a figure then go  
14 back with a lower figure?

15 A. It depends. If I see sense in it, I do, yes. If I feel that that  
16 may permit me to get to a level where I would...or a range  
17 where I would feel comfortable I would do that, yes, as long  
18 as I hadn't made any commitment before.

19 Q. Did you indicate to Mr. Cacchione at that meeting that the  
20 extent of your authorization was \$245,000?

21 A. No, I would have said to him that the extent of the \$245,000  
22 was a figure that I was prepared to recommend.

23 Q. So the note that says "I was authorized to offer..." would not  
24 be actually what you said to him.

25 A. Authorized to offer an additional \$10,000.

1 Q. Um. Would you have conveyed to Mr. Cacchione at the time  
2 that you did not have authority beyond that amount?

3 A. I may have said that, yeah. I may have said to him that I  
4 do not have authority to go beyond \$270,000 minus the  
5 \$25,000.

6 Q. And would that have been true?

7 A. True in a sense, yes. Not true in a sense that as we looked  
8 at before that the Minister had already indicated to me,  
9 quite a while before that, that \$325,000 was a figure that he  
10 was not uncomfortable with, and that I could speak in those  
11 terms if I had to. But true in a sense that I was trying to get  
12 a settlement at a basement or bottom figure, and certainly  
13 true in the sense that I speak in the course of negotiations  
14 that I do not go to negotiations to say, well look, I have been  
15 authorized to spend \$335,000, now let's see if we can settle  
16 at \$260,000. I would not think that that would give me  
17 much of a...much room to bargain.

18 Q. No, but how is it true to say "I don't have authority beyond  
19 270 minus 245 [sic]" when you, in fact, did?

20 A. No, the note doesn't say that I did not have authority. What  
21 the notes says is that I was authorized to offer an additional  
22 \$10,000 for a total of 270 minus the 245. That's not to say  
23 that I was no authorized to speak in terms of a greater  
24 figure.

25 Q. Well, let me just understand your testimony correctly,



1 because I thought you just told me a minute or two ago that  
2 you might have said to him that you didn't have authority to  
3 go beyond a certain point.

4 A. Oh, that's the \$400,000. Oh, yes, no question. I told him  
5 that, ah, I think that's reflected in one of my notes, yeah,  
6 "We cannot go that far," that is the four hundred-some  
7 thousand dollars. That's the 325 plus the 400. I had never  
8 spoken to my...to my Minister or to the Deputy Attorney  
9 General about a possible settlement in that range. So that  
10 note is quite right and correct. We cannot go that far  
11 meaning that I'm not prepared to go that far. I'm not  
12 prepared to recommend anything of the kind.

13 Q. And just so that I'm sure of this, you would not have  
14 indicated to him that you did not have authority to go  
15 beyond 245.

16 A. I probably wouldn't say that like that, but then again I'm  
17 not sure. No, I don't recall saying that I do not have  
18 authority to go beyond 245 or 270,000. What I may have  
19 said is something to the effect that I'm not prepared to  
20 recommend anything higher than \$270,000.

21 Q. And I take it that throughout this whole procedure really  
22 the only...the motivating factor in your own mind was to try  
23 and settle for as little as you could.

24 A. Quite right.

25 Q. Let me just ask you about that for a minute. Your notion

1           that you're...Do I take it that your notion was that your job  
2           was to settle for as little as you could?

3       A.    Yes.

4       Q.    Okay.  And that would be what you would do in a normal set  
5           of negotiations in a civil case?

6       A.    Yes.

7       Q.    Right.  You worked as a prosecutor for a period of time, as  
8           well.

9       A.    Yes.

10      Q.    Okay.  And if I understand, and you correct me if I'm wrong,  
11           that the prosecutors often say there are no winners and no  
12           losers.

13      A.    Some people say that, yes.  Some prosecutors say that.

14      Q.    Are you about to tell me that you wouldn't say that?

15      A.    I'm not sure if I understand the whole term.

16      Q.    All right.  It's that the obligation of the prosecutor is to see  
17           that that justice is done essentially.

18      A.    Sure.

19      Q.    Okay.  And did you conceive your role in negotiating this  
20           matter with Mr. Cacchione as being different than the role  
21           you would assume as a prosecutor?

22      A.    Oh, yes.  We're into civil law.  There's a different role  
23           altogether.

24      Q.    And any notion of wanting to see that justice was done that  
25           you might assume as a prosecutor was totally absent in your

1 negotiations in this particular case--different job.

2 A. My concern was not that justice be done to Mr. Marshall, no.  
3 My concern was that there would be an appropriate forum,  
4 a fair forum, for determining an amount for compensation.

5 Q. Did you have any sense that Mr. Coles was concerned that  
6 justice be done to Mr. Marshall?

7 A. Not particularly, no.

8 Q. What about the Attorney General, Mr. Giffin?

9 A. He may have been more concerned about it. I don't really  
10 know. But what I can say about it is that Mr. Giffin, the  
11 Attorney General, seemed to be more prepared to spend  
12 money than either I was or that the Deputy Attorney  
13 General was. And, fairness was not really a subject matter  
14 that we talked about.

15 Q. Was Mr. Giffin aware, to your knowledge, of your attitude  
16 with respect to these negotiations, that is that wanted to get  
17 out as cheaply as you could?

18 A. Yes.

19 Q. And did he support that view?

20 A. Not entirely, frankly. Towards the end, and that is the only  
21 indication that I had that he may not have been totally  
22 supportive of my approach in a sense, towards the end  
23 when the figure had been determined and I went to report  
24 finally to the Attorney General that we had agreed on the  
25 figure of \$270,000, I think it was, and I more or less told

1 him that that was the figure that we could all live with, so  
2 that he could take it to Cabinet, he did not indicate any...he  
3 did not convey to me that he was particularly happy about  
4 it, if I can put it that way. It's just a feeling I had at the  
5 time when I reported to him that, frankly, I felt that if I had  
6 given them more money he might have been happier. But it  
7 is, it was not articulated by him or by myself.

8 Q. Did you have any sense at that meeting that you just  
9 referred to with Mr.Giffin that, then that you could have  
10 given Mr. Marshall, sorry, could have given Mr.Cacchione  
11 more money for Mr. Marshall?

12 A. I had that feeling at the end, yes, that I could have spent  
13 more money and without any cause for concern.

14 Q. Having that sense, did you have any notion that perhaps you  
15 had done the wrong thing?

16 A. No. No. Because I felt that it was for me to obtain the best  
17 settlement possible and if my principals want me to act  
18 otherwise they have to tell me that.

19 Q. Do I understand you then to be saying that you would have  
20 operated in a certain way unless you were directed to the  
21 contrary?

22 A. That's right.

23 Q. And you don't see that the, either the Deputy Attorney  
24 General or the Attorney General should give you positive  
25 instructions to act in a certain way?

1 A. Well, they can if they wish, but they did not in this case.

2 Q. Okay. And did you go to them and say, "Look, this is an  
3 unusual case, what am I supposed to do here?"

4 A. No.

5 Q. This would be unusual for you, would it not, in the sense  
6 that you were not reporting to Mr. Conrad in this particular  
7 case.

8 A. That's quite right.

9 Q. And normally in a civil case you would be reporting to Mr.  
10 Conrad?

11 A. Not in those terms; not in the sense that I would speak to  
12 Mr. Conrad about actual figures or things. I rather report to  
13 Mr. Conrad at the end.

14 Q. Mr. Conrad was out of this altogether, wasn't he?

15 A. He was not involved in the negotiation, to my knowledge.

16 Q. Did you ever receive any positive instructions from either  
17 the Deputy Attorney General or the Attorney General as to  
18 the specific manner in which you were to conduct these  
19 negotiations?

20 A. There were instructions from the Deputy Attorney General  
21 as to the kind...the elements, the factors that we ought to  
22 look at, at the very beginning, and they were derived at by  
23 the Deputy and myself working together and we were  
24 together looking at the tort principles and so on as factors or  
25 elements for determining an appropriate amount. But

1 beyond that, no. It was only at the initial stage before we  
2 actually spoke, before I actually spoke to Mr. Cacchione a  
3 great deal, that there was any discussion at all as to the  
4 kinds of elements we might look at.

5 Q. At the outset when you did have discussion about the  
6 elements with Mr. Coles, what sorts of things were you  
7 talking about?

8 10:37 a.m.

9 A. We were talking about deprivation of freedom, pain and  
10 suffering, being deprived of livelihood, essentially. being set  
11 back in lifestyle and being set back in all sorts of things. And  
12 to balance it off, we also spoke about negative, if I may call  
13 them that, negative elements, which as you already know, one  
14 included the criticism, the observation of the Court of Appeal  
15 to the effect that Mr. Marshall had some blame in this matter.  
16 We talked about prospects for education, training, jobs and so  
17 on for Mr. Marshall. So, in other words, it was not an abstract  
18 consideration which was all on the positive side. To say that  
19 if Mr. Marshal had been, had not been incarcerated he would  
20 have been working as a journeyman plumber which is the  
21 proposal that was made to us, he would have earned "x"  
22 number of dollars. I probably would have been the first one  
23 to come back and say, "Well, how do I know he would have  
24 been able to get a job anyway." So we talked about things  
25 like that.

1 Q. What sorts of things would you have thought would have  
2 militated against him getting a job?

3 A. Well, just the fact that there a lot of young people that are  
4 unemployed. Unemployment is severe in this country, has  
5 been for many years, it was then. And unfortunately, young  
6 people are the worst, suffer the worst consequence in that  
7 environment. Plus the, what I knew from Mr. Marshall's  
8 educational background, it was not particularly promising for  
9 employment in that he did not have any formal training. Of  
10 course, he couldn't have, he was still school-aged basically at  
11 the time and he did not finish school and so on which was not  
12 very promising.

13 Q. Did you have any discussion with Mr. Coles about whether or  
14 not he might find himself in jail in any event?

15 A. If anybody would have said that, frankly, and I, you know, I  
16 might have said that sort of thing. I don't think Mr. Coles  
17 would have said that. Well, he may have, I don't recall. I  
18 might have said that, yes. Because I knew that Mr. Marshall  
19 had been in difficulties with the law before and, of course, I  
20 knew too that at the night of the event in Sydney he was in  
21 the park for not a very good reason. So I may have well said  
22 that, goodness, he might have gone to jail anyway, yes. But  
23 that's not the kind of language I would have used when I  
24 spoke to Mr. Cacchione because I know he would not have  
25 stood for that. He would not have...

1 Q. But it was a thought in the back of your mind.

2 A. Yes.

3 Q. On...

4 A. It's a problem that you run into, if you don't mind if I explain  
5 that. After prosecuting for two and a half years, one does  
6 tend to get a very slanted view on segments of society and  
7 that was one of the elements, one of the reasons I considered  
8 shifting into civil law. What I'm conveying is this, that having  
9 been in the Prosecutor's court for two and a half years about  
10 roughly eight out of ten people I saw were repeaters, even  
11 after two and a half years. I would see the same faces, the  
12 same people coming in for yet another offence. It was always  
13 the same thing around. They always have a very good  
14 explanation or an excuse, but yet, you know, I had some  
15 people in three, four times in a matter of two and a half  
16 years. Very few new faces. And it did give me a very  
17 slanted view on certain people. And I, at that time  
18 particularly, I used to freely talk in those terms, to friends  
19 and colleagues that, you know, people, there's just no hope for  
20 some of these people. Once they get involved in criminal  
21 activity it goes on and on until they retire basically. And  
22 that's the reason I suggest I may have said in the context of  
23 Mr. Marshall who had exposed himself to that kind of thing  
24 that he might have been in jail anyway. It's not a very nice  
25 thing to say but it's something that I acquired while I was



1 prosecuting.

2 Q. And wouldn't that sort of attitude, if an effective factor in  
3 your mind in terms of the kind of money that you were  
4 prepared to talk about with Junior Marshall, would that not,  
5 in a sense, have a catch-22 effect on Mr. Marshall? He was  
6 being damned for something he didn't do.

7 A. Yeah, well, subconsciously in my mind it might have been but  
8 it was never something that was articulated so it was not a  
9 factor that was on the table, unlike some of the other factors  
10 we talked about.

11 Q. Sure. But is it not the case that sometimes people operate on  
12 factors other than the ones that they articulate?

13 A. Yes, quite. But you might give me more credit than I deserve  
14 in that respect in that, as I indicated before, when I went to  
15 negotiate I was testing Mr. Cacchione just to see how far down  
16 he might possibly go. And that really did not depend on any  
17 particular factors that I had in mind myself or factors that I  
18 had even articulated. It was just a matter of saying, "You  
19 start at 550, let's see how far we can go." And we did get to  
20 the point of \$275,000 where I felt a definitive limit. And that  
21 is what dictated the further and the future communications.  
22 And that is what set the stage. It's not, it was not the  
23 individual elements of where I might put blame or the  
24 strength of my case even that ultimately determined the  
25 outcome of the negotiations.

1 Q. Are you confident that if Mr. Marshall had been a white  
2 middle-class kid who wasn't in the park arguably to attempt  
3 a robbery that you would have dealt with these negotiations  
4 in exactly the same fashion that you did?

5 A. The outcome would have been the same, I'm sure.

6 Q. Would you have approached them in the same way?

7 A. Not with the same frame of mind, no. Especially when it  
8 comes to the purpose of being in the park on the night in  
9 question. I don't believe that it would have made much  
10 difference in my thinking as to whether the person is Indian  
11 or black or white or whatever. Although...

12 Q. Would it have made any difference in terms of your view  
13 about Mr. Marshall's job prospects?

14 A. Not really, no, because I was not particularly, well, it might  
15 have been. It might have been a factor. Not in my own mind  
16 because through prosecuting, too, I was aware that the Indian  
17 population particularly suffered a much more serious  
18 problem with unemployment than the white population, the  
19 Caucasian population. Again, that's something that I had in  
20 mind, just general information, not based on any particular  
21 statistics that I had at the time or now, but I don't think that  
22 one should take that as being, as constituting a factor, that  
23 would have contributed to the outcome of the negotiations. It  
24 would not have been that.

25 Q. Is there not, though, a mindset that you bring to the

1 negotiations, you bring to the negotiations the fact that you, in  
2 your own mind, are dealing with somebody who was in the  
3 park to attempt a robbery and who is, perhaps hasn't got the  
4 greatest prospects of employment. There's a whole package  
5 of factors that would have influenced the way that you dealt  
6 with it.

7 A. Well, it is an element at some point in time, yes. And it was  
8 an element at the point in time of the original written  
9 proposal of Mr. Cacchione where he came back to us and he  
10 proposed a figure of \$550,000, part of which was  
11 substantiated by his, by Mr. Cacchione's claim, that there  
12 were...just a second...

13 Q. 457.

14 A. 457? Part of which he substantiated the figure of \$550,000  
15 by the loss of \$324,000, if I remember that figure correctly,  
16 on the first page, 457, on account of loss of income. Certainly  
17 that startled me quite. And at that point, if I reflected on  
18 that, which I'm sure I did, I would have probably gone  
19 through that thought process and said, "Well, look here, you  
20 have a young person, Indian. We know that young Indian  
21 people have a tremendous problem getting jobs, particularly  
22 getting good, well-paid jobs." And here we are looking at a  
23 proposal for \$324,000 on account of lost wages. That was  
24 only one factor. The other things that would have gone  
25 through in my own mind would have been, "Well, even if he

1 had earned that kind of money," and I did not exclude that as  
2 a prospect, as a possibility, "even if he had earned that much,  
3 well how much would he have saved?" And I did address  
4 that later in my letter to Mr. Cacchione. How much could he  
5 have possibly retained out of that total earnings?

6 Q. What were you suggesting he was going to do with it?

7 A. With the earnings?

8 Q. Yeah.

9 A. I expect that a great proportion, as is the case in my case,  
10 would have gone towards the cost of living, just to maintain...

11 Q. And that was a cost he didn't have to incur because he was in  
12 jail.

13 A. That's right.

14 Q. Do you know whether or not from any conversations you  
15 might have had with Mr. Coles whether or not he shared the  
16 view that these factors that we've spoken of were something  
17 that ought to be taken into account in negotiating settlement  
18 with Mr. Cacchione?

19 A. I don't really recall that I, that we deliberated on that.  
20 Especially the last particular items. The one about the  
21 prospects of employment. Those are things that I don't recall  
22 we talked about at all. It was just something I had in my own  
23 mind.

24 Q. Did you not get the feeling from Mr. Coles' note on page 458  
25 of Mr. Cacchione's letter to Mr. Coles dealing specifically with

1 adverse effects on future advancement, employment...

2 A. Well sure, there was that note by Mr. Coles but that's all it  
3 was. It was a note that he made and I looked at it. And,  
4 which one is it in particular?

5 Q. Number 11.

6 A. Probably the opposite I think it says.

7 Q. Yes.

8 A. Adverse effect on future advancement. I think, you know,  
9 what he was probably, on this particular note what he was  
10 talking about was the fact that Mr. Cacchione, Mr. Marshall  
11 had during the period of his incarceration received some  
12 initial job training and I believe that that was in the area of  
13 the plumbing trade, so that note, I would not consider that as  
14 a negative comment at all. What the Deputy was probably  
15 indicating here, and I was aware of that to some degree, was  
16 that Mr. Marshall had, indeed, advanced his educational  
17 qualification while he was incarcerated. So in a sense, only in  
18 one sense, the incarceration would have actually been of  
19 benefit to him and that is, I think, what the note is...I would  
20 not take that note, or any other of the notes on these three or  
21 four pages as indicating that the Deputy Attorney General  
22 shared my view about the prospects of employment and so  
23 on.

24 Q. To what extent were you in the driver's seat in terms of  
25 arriving at a figure, at a final figure?

1 A. I felt fairly unencumbered by my instructions. I thought  
2 that I was fairly free to negotiate an amount and that upon  
3 that my recommendation would be accepted.

4 Q. You say at page 488...again, is that your writing?

5 A. Yes.

6 Q. Okay, that's a note of July 26th. "Having spoke with the  
7 Minister..." Would that be a meeting with him or...

8 A. That is meeting with the Minister, yes.

9 Q. Okay. Can you take us through that note?

10 A. I'm just noting here that I spoke to the Attorney General on  
11 the 26th of July. That I told him that we offered a total of  
12 \$270,000. That I had added \$10,000 to the original offer of,  
13 which was 260, to give Mr. Cacchione something to go back  
14 with. In other words, I've improved, I improved our offer to  
15 some degree so that there would be, well, room to, for Mr.  
16 Cacchione to go back to his client. It goes on to say that I  
17 advised the Minister that we should hold the line, that if they  
18 settle they would take this, that is the \$270,000, and if they  
19 do not, it would be because of other pressures, not the  
20 adequacy of the offer, per se. The Minister agreed.

21 Q. Can you tell us what that means?

22 A. What I meant by "other pressures"?

23 Q. Yes.

24 A. The one thing that I do recall about other pressures is that  
25 Mr. Cacchione conveyed to me repeatedly that there were a

1 lot of people, especially in the Indian community, leaders,  
2 Indian leaders, who were pressuring Mr. Marshall to get on  
3 with a full public inquiry. That they were not happy and not  
4 content with Mr. Marshall settling simply for compensation.  
5 That it was in their own interest, as an Indian community, to  
6 press on and have a full inquiry. That I understood to be a  
7 very extreme pressure on Mr. Marshall which made him  
8 somewhat reluctant to negotiate a settlement because, of  
9 course, our understanding was that the settlement would end  
10 all discussion. That is really the only element that I recall  
11 about pressures. There may have been others, I don't recall  
12 those now.

13 Q. You say, "Minister agreed." Is he agreeing with your views...

14 A. The Minister was agreeing to holding the line.

15 Q. Holding the line.

16 A. Oh, yes.

17 Q. Did you get any sense at that meeting that the Minister  
18 thought the figure of \$270,000 was not enough.

19 A. Not really. No.

20 Q. Or that he would have been prepared to offer more.

21 A. No, I did not. I only got that later on when I actually came  
22 back to recommend settlement.

23 Q. Then on August the 9th which is on page 493, it's a little hard  
24 to see because the numbering gets lost in the darkness at the  
25 top of the page. It's the one, "August 9 - Met with Minister

1 and Deputy."

2 A. Yes.

3 Q. What's happening at this point?

4 A. At this point I would have had a figure pretty much agreed  
5 upon with Mr. Cacchione at \$270,000. And I informed the  
6 Minister of that. And he told me that he was prepared to  
7 take that proposal to Cabinet and get back to me on the same  
8 day.

9 Q. Would that have the meeting at which you sensed that Mr.  
10 Giffin would have been prepared to offer more or would that  
11 have been later?

12 A. I think it was later after everything was said and done. After  
13 the Minister, I know it was later. It was after the Minister  
14 came back with Cabinet approval. The note on August the 9th  
15 continues then that, to record that we should try to, this is  
16 just a note to myself, undoubtedly the subject of discussion  
17 between the Minister and the Deputy and myself, that we  
18 should try to get a release from Mr. Marshall's parents but if  
19 we cannot we should go ahead and that would have been  
20 based on my advice to them that the release, the parents'  
21 claim was not a great threat. It was only an indication that  
22 they might sue to begin with and...sorry.

23 Q. Would you, at that point in time, have explained to the  
24 Minister or the Deputy, that the figure of 270 was a figure  
25 that related to a period commencing with the incarceration



1 following conviction?

2 A. Yes, there would have been no doubt about that. Everyone  
3 understood that, in my office, that the compensation was to  
4 be for the period of incarceration.

5 Q. Did Mr. Cacchione understand that?

6 A. I would hope so because, I think so, yes. As far back as June,  
7 I recall a note in June of 1984 where I made a point of saying  
8 we need a complete and final release of some sort. I don't  
9 recall the actual date but, yeah, well, on page 471 I speak of a  
10 release for the Crown. That is not the note I'm looking for.  
11 Let's see if I can find it in here. Actually my note of the  
12 initial meeting where Mr. MacIntosh participated....

13 Q. 437?

14 A. Yes. It discloses, there is mention there of a final release or  
15 something that I...

16 Q. A complete and final release at the bottom of page 437.  
17 That's your meeting...

18 A. That's right. So we would have been talking about that very  
19 early on I would have said that a complete and final release is  
20 something that we would want...

21 MR. PINK

22 But you should also look at 474.

23 A. That's right. That's the note I was looking for. June 26th.  
24 Where I recorded a meeting with Mr. Cacchione and at the  
25 very bottom I spoke of a release for Marshall, Jr., and family

1 to be a complete release but not releasing the police. No, I  
2 don't think there could have been any doubt in Mr.  
3 Cacchione's mind, certainly there was none in mine, that the  
4 release would have to release the Crown from any and all  
5 claims. And that's a normal thing.

6 Q. Did you discuss with the Minister, at that meeting on the 9th,  
7 what was now to be done with the Campbell Commission?  
8 Your note seems to mention a file.

9 A. There is an anticipation there, exactly. There is an  
10 anticipation there as to what we might do if we do settle the  
11 whole compensation issue. What is to be done with the  
12 Campbell Commission and my note is that, and this was just  
13 recording a discussion that the three of us had that we could  
14 do, what we could do is inform Hugh MacIntosh, who was  
15 counsel to the Campbell inquiry of the fact of the settlement,  
16 the terms thereof, and invite the commissioner to make his  
17 report stating, amongst other things, that the commissioner  
18 supported and encouraged the negotiations or the efforts that  
19 went into the settlement and he was pleased to report that  
20 the settlement has been reached and then I trailed off. What I  
21 had in mind there is that he was preparing to recommend  
22 that to the Crown or to the Government as the appropriate  
23 way to finalize and end the Campbell inquiry.

24 CHAIRMAN

25 Why would that be necessary if you settled the, I mean how

1 does that differ from an action that's instituted in the courts  
2 for damages and subsequently before trial it's settled? Unless  
3 there are minors involved you don't go back, you don't go to,  
4 you don't ask the judge then to...

5 A. No, of course not. No, the difference here, My Lord, would  
6 have been that the Government had determined at some  
7 point that there be a public inquiry into the compensation  
8 issue. And just altogether separate from that and on a  
9 collateral, parallel, perhaps, track, we negotiated with the, and  
10 that is important, with the support, perhaps is not the right  
11 language, but with the forbearance of counsel for the  
12 Campbell inquiry we negotiated a settlement. It was very  
13 clear to us, Mr. Cacchione and myself, that we were under  
14 considerable pressure, time pressure, because Mr. Campbell  
15 wanted to get on with the inquiry, His Lordship wanted to get  
16 on with the inquiry that he had been asked to conduct.  
17 So all the moves that we made, not the terms thereof, but  
18 every step that we took, I took the time and reported back to  
19 Mr. MacIntosh continuously, we're at this point, we are far  
20 apart or not so far apart, we're talking, it looks as though we  
21 can settle. Those are the things that I would have conveyed  
22 to Mr. MacIntosh as we went along. So, first of all, then I kept  
23 counsel for the Campbell Inquiry up to date as to where we  
24 were going with the negotiations. So they were still involved  
25 in it. Of course, the reason I did that is because we had been

MR. ENDRES, EXAM. BY CHAIRMAN

1 told that if we did not arrange for a settlement by a certain  
2 date, the Campbell Inquiry would go ahead. I had, at one  
3 point, asked Mr. MacIntosh to extend that date. I know there  
4 was a deadline which came and went and we had asked for  
5 an extension of the date on which the Campbell Inquiry was  
6 to commence. So, altogether then, there was the Campbell  
7 Inquiry, through its solicitor, was somewhat involved in our  
8 negotiations in the sense that they made it possible for us to  
9 negotiate.

10 10:57 a.m.

MR. CHAIRMAN

12 In the sense that they undertook to hold in abeyance any  
13 further work toward setting up the Commission and getting it  
14 operative and to allow you time to negotiate that...

MR. ENDRES

16 A. The Commission was just about all set up at that point. They  
17 had facilities. They had staff. They had furniture. They had it all  
18 in place. They were ready to go on short notice and they wanted  
19 to get going; that is, the Campbell Inquiry, counsel told us that in  
20 no uncertain terms. But they gave us the time, which was a short  
21 time, relatively speaking, in which we could try to negotiate. So  
22 that was the link into, for one, that's only one of the factors why  
23 we would want to go back to the Campbell Inquiry and say, "Look,  
24 now we've got the deal, what do we do with the Campbell  
25 Commission?" Well, we didn't want to, I certainly didn't think it

MR. ENDRES, EXAM. BY CHAIRMAN

1 would be appropriate to ignore the Campbell Inquiry because we  
2 kept, we were negotiating on the time table set by the Inquiry,  
3 basically. And I had considerable correspondence and telephone  
4 conversations with Mr. MacIntosh on it.

MR. CHAIRMAN

6 You told us on Thursday, and I think from the evidence  
7 before it's a well known fact, that there was considerable public  
8 pressure on the government of the day to provide adequate and  
9 fair compensation to Donald Marshall, Jr. for his period of  
10 incarceration, et cetera.

MR. ENDRES

12 Yes.

MR. CHAIRMAN

14 Was the decision to go back to the Campbell Inquiry and  
15 seek the approval of Mr. Justice Campbell of the settlement a  
16 method of allaying public concern in that period?

MR. ENDRES

18 It may have been, yes. It depends on who you ask that  
19 question. Now, in my view...

MR. CHAIRMAN

21 That may not be a fair question to ask you.

MR. ENDRES

23 It's a difficult question for me because I did not become  
24 involved subsequently when the actual terms of reference were  
25 drafted for the Campbell Inquiry to incorporate the arrangement.

MR. ENDRES, EXAM. BY CHAIRMAN

1 But there's no question. My reading at the time was that there  
2 was a lot of public pressure for government to compensate Mr.  
3 Marshall, no question in my mind. And then the government took  
4 the step of setting up the Campbell Inquiry and no question,  
5 either that from my perspective, to have the Campbell  
6 Commission recommend to government a settlement of the kind  
7 that we negotiated and even incorporate the figure. That would  
8 have lent the whole exercise more credibility. It would have  
9 made it more official or whatever. But it would have added to the  
10 credibility of the exercise that I was involved in with Mr.  
11 Cacchione. But that probably was not the major consideration.

12 The major factor, undoubtedly, was that the Campbell  
13 Commission was set up. It had allowed us directly to negotiate a  
14 settlement and I certainly felt that there was a need to come back  
15 to the Campbell Inquiry, once we had that settlement, and say,  
16 "Look, here, we did it. You gave us the time and the room to do it.  
17 We think that this is an appropriate settlement, so why don't you  
18 make your report on that basis to the government and say, 'We've  
19 permitted these negotiations to go on, a deal has been made, and  
20 I'm satisfied that the deal made is a proper deal, acceptable by all  
21 parties.'"

MR. CHAIRMAN

23 Did you have the releases signed by then?

MR. ENDRES

24 No, the releases were late in coming. There were problems  
25

MR. ENDRES, EXAM. BY CHAIRMAN

1 in getting the signatures on the releases. They were not signed at  
2 that time.

MR. CHAIRMAN

3  
4 Supposing Mr. Justice Campbell had come back and said,  
5 "After reviewing the files," he didn't have any evidence before  
6 him, but the files," in my view the settlement is not satisfactory?

MR. ENDRES

7  
8 Yeah, that was a great concern in my mind and that is why I  
9 withheld. I'm sorry?

MR. CHAIRMAN

10  
11 What would you have done then?

MR. ENDRES

12  
13 Well, there would have been a great difficulty, but it was  
14 not a prospect in this case because I had communication with  
15 counsel for the Campbell Inquiry and I had obtained, in fact, the  
16 Campbell Report and held onto it for a few days until I got the  
17 releases. Because I could not see the report going anywhere,  
18 that's the first thing, before the releases were in hand. But to  
19 answer your question directly, I did not communicate a  
20 settlement to Mr. MacIntosh, counsel for the Inquiry, until I had  
21 the releases. I had a letter, for example, that had been signed by  
22 myself. It was addressed to Mr. MacIntosh which was to  
23 communicate the fact that a settlement had been arranged. That  
24 letter I wanted signed by Mr. Cacchione, as well. And until I had  
25 that, I did not tell anyone in the Campbell Inquiry that we had a

MR. ENDRES, EXAM. BY CHAIRMAN

1 settlement. I simply said that we were working towards it. So I  
2 did not communicate the fact of a settlement until I had the  
3 release. And that really held the matter up by two or three  
4 weeks. But I certainly did not want to be in exactly that position  
5 where I would have let know, made it known that a settlement  
6 was there, that it would not, in the end, have been acceptable by  
7 the Campbell Inquiry because, for example, there was no release.  
8 But after the release, it would have been very difficult for anyone,  
9 Mr. Cacchione or Mr. Marshall, to go to the Campbell Inquiry, and  
10 that was, of course, the point that I had in mind, that it would  
11 have been very difficult for them to go to the Campbell Inquiry  
12 and say, "Yes, we settled for 270, but we didn't consider this, we  
13 didn't consider that, and I'm not happy with it, anyway. So why  
14 don't we have an inquiry?"

MR. CHAIRMAN

15  
16 So... You've lost me there, I think.

MR. ENDRES

17  
18 Yeah, I'm sorry, I was...

MR. CHAIRMAN

19  
20 After you had concluded a settlement with Mr. Cacchione,  
21 the two of you had arrived at a final figure.

MR. ENDRES

22  
23 Yes.

MR. CHAIRMAN

24  
25 You then went to the Campbell Commission.



MR. ENDRES, EXAM. BY CHAIRMAN

1 MR. ENDRES

2 No. No, that's the point I was trying to make, and I  
3 apologize for...

4 MR. CHAIRMAN

5 Because I asked you earlier whether releases had been  
6 signed.

7 MR. ENDRES

8 No, the releases were not in hand and I did not go to the  
9 Campbell Commission at that time to advise them, no. I first  
10 obtained the releases and I first obtained a letter with the  
11 signature of myself and Mr. Cacchione on it, and then I advised  
12 the Campbell Inquiry that we had a settlement.

13 MR. CHAIRMAN

14 And then you said to Mr. Justice Campbell, will you please  
15 prepare your report and indicate whether or not you approve the  
16 settlement we have concluded?

17 MR. ENDRES

18 That's right. I spoke to Mr. MacIntosh. I never spoke to Mr.  
19 Justice Campbell.

20 MR. CHAIRMAN

21 Well, all right.

22 MR. ENDRES

23 I spoke to Mr. MacIntosh and indicated to him, "Now that we  
24 have a settlement, we would like you to contemplate..." There is a  
25 note in my file, in these materials to that effect, "We would like

MR. ENDRES, EXAM. BY CHAIRMAN

1 you to think about incorporating the settlement into the  
2 Commissioner's Report to finalize the Commission."

MR. CHAIRMAN

3  
4 Why did the Commissioner have to report at all? You've  
5 settled the claim. Why wouldn't he simply say, "I've now been  
6 advised by both parties that the satisfactory settlement has been  
7 concluded and I return my Commission to the Lieutenant-  
8 Governor-in-Council.

MR. ENDRES

9  
10 That could have been, yes, I have no question. But beyond  
11 that, you see, my involvement, as far as incorporating the report,  
12 or the settlement with the report, was only at the initial stage in  
13 the contact that I had with Mr. MacIntosh and it was only on one  
14 occasion that I said to him to contemplate that prospect. The  
15 Deputy Attorney General took over later and had communication,  
16 I understand, directly with Mr. Justice Campbell and then, of  
17 course, also prepared the actual draft for the report. That was  
18 beyond my involvement, really.

MR. CHAIRMAN

19  
20 We can take it, then, that you were not involved in the  
21 drafting of the Campbell Report.

MR. ENDRES

22  
23 I did not draft it. The Deputy Attorney General showed it to  
24 me and asked for my comments on it, and also asked me to send it  
25 to Mr. Cacchione and get his comments on it, which I did. And it

MR. ENDRES, EXAM. BY MR. SPICER

1 came back with one small note. So Mr. Cacchione approved the  
2 Campbell Report before it was issued.

3 MR. CHAIRMAN

4 Fine.

5 11:07 a.m. INQUIRY RECESSED UNTIL 11:35 a.m. BY MR. SPICER

6 Q. Was Mr. Cacchione advised that the tentative settlement of  
7 \$270,000 was subject to, at the point that the deal was made,  
8 told that it was subject to Cabinet approval?

9 A. Yes, I would have told him that several times over.

10 Q. And would he also have been told that it was subject to the  
11 approval of the Campbell Commission at the time it was  
12 made?

13 A. Originally, it was not my understanding that the deal,  
14 whatever deal, would have been subject to the Campbell  
15 Inquiry approving it. That was an idea that came about a  
16 little bit later after we had our original meeting.

17 Q. The "original meeting" being?

18 A. The one in May of '84 with Mr. MacIntosh present.

19 Q. At the time a settlement with Mr. Cacchione was made, were  
20 you aware at that point of the psychological condition of Mr.  
21 Marshall?

22 A. I was not aware of any details of psychological state.

23 Q. Was it a factor in your mind at all in settling the matter that  
24 because of Mr. Marshall's condition, you could effect the  
25 settlement at the point in time you did?

1 A. It was a factor insofar that I recognized that Mr. Marshall  
2 wanted money, to be compensated for the time in, of  
3 imprisonment, but not beyond that, no. No, I recognized that  
4 Mr. Marshall wanted money and that was certainly a factor  
5 that I would have played with, if I can use that language.

6 Q. Did you have any sense that Mr. Marshall was unable to cope  
7 with the stress of the settlement negotiations?

8 A. No, I did not have that sense. I knew that... I understood that  
9 he was having difficulties, psychologically, but I did not think  
10 it was a matter of a breaking point.

11 Q. On page 494, there's a note from Mr. Giffin to Mr. Coles on  
12 which you are copied. Did you discuss this, the substance of  
13 this note with Mr. Coles?

14 A. Not that particular note at that point in time. I did discuss  
15 with Mr. Coles subsequently the prospect of incorporating the  
16 settlement into the Campbell report. And I also had  
17 discussions with Mr. Coles and with Mr., with the Minister  
18 prior to that note about the prospects of incorporating the  
19 settlement.

20 11:27

21 Q. And with respect to that incorporation, if you just turn to 498,  
22 there's a note from Mr. Coles to yourself dated the following  
23 date, August 10.

24 A. Yes.

25 Q. Did you discuss the substance of this note with Mr. Coles?

1 A. I certainly discussed with him the report, yes. That was part  
2 of that note.

3 Q. Mr. Coles' note, starting the fourth line, the sentence that  
4 begins at the end, "However, I think the important position  
5 for us to take is that since he [Campbell] agreed to our  
6 attempting to negotiate a settlement, now that we have done  
7 so procedurally, we should be able to report this as a fait  
8 accompli, and he, in effect, report and recommended to His  
9 Honour in wrapping up his mandate. This, I suggest, should  
10 be presented to Mr. MacIntosh."

11 A. Yes, I understood that.

12 Q. Was it your sense that the Campbell Commission was being  
13 told, "This is the deal we made, would you please now report."  
14 Or were they being, to put it in the context, or were they  
15 being asked, "This is the deal we've made, do you approve of  
16 it?"

17 A. My understanding was that the, that my principals would  
18 have very much liked to see the negotiated settlement  
19 included in the report, or form the basis of the report. But it  
20 was not a matter of dictating terms to the Commission, not  
21 from my position.

22 Q. Was it your sense, then, that the Campbell Commission was  
23 being asked to make a value judgement as to the adequacy of  
24 the settlement that had been reached?

25 A. In a sense, yes. And that is why I had prepared a draft letter

1 for the signature of myself and Mr. Cacchione which would  
2 have reported to Mr. Justice Campbell that the settlement was  
3 appropriate in both of our views. That is, that we were both  
4 content with the arrangements that had been made. So in  
5 that sense, yes, I think we were asking the Commission to  
6 look at the merits but not beyond that.

7 Q. How would you have expected the Commission to assess the  
8 adequacy of the settlement that they had, that His Lordship  
9 mentioned a few minutes ago, no evidence before them or  
10 any other material?

11 A. Only in the sense that the Commission would have been made  
12 aware that here are lawyers representing both parties, a  
13 lawyer for the Attorney General, two lawyers, one at some  
14 time or sometimes two, representing Mr. Marshall, and they  
15 together came to terms which are acceptable to both parties.  
16 And I think that would have been sufficient for Mr. Justice  
17 Campbell. As it turned out it was, to say, "Yes, I will, I'm  
18 pleased to incorporate that" or "I will incorporate that in my  
19 report."

20 Q. So is it your notion then that they were not being asked to  
21 make a value judgement as to the adequacy of that  
22 settlement but merely to confirm their agreement with the  
23 settlement already reached by the solicitors?

24 A. A value judgement insofar as there were lawyers  
25 representing both parties and both parties having accepted

1 the arrangement, yes, but not beyond that.

2 Q So they weren't being asked to look into the fairness of the  
3 outcome.

4 A. No, only insofar, again, only insofar as that lawyers for both  
5 parties negotiated an arrangement that seems to be  
6 acceptable to them so why isn't it to us. That kind of  
7 thinking.

8 Q Was that Mr. Coles' attitude as expressed to you.

9 A. That's what I understood his position to be.

10 Q And is that what you understand the substance of his note on  
11 page 498 to convey?

12 A. Yes.

13 Q Did he express to you any view as to why it was important or  
14 why it was necessary for the Campbell Commission to report  
15 at all?

16 A. I did not understand it to be a necessity and, again, that's in  
17 response to what My Lord asked me before. It was not a  
18 necessity that the Campbell Commission would have  
19 incorporated a settlement but it was a good administrative  
20 way to deal with the existing commission to start with and to  
21 lend force in a way, too, to the settlement beyond the interest  
22 of the parties that had negotiated it. But the answer to your  
23 question is really in Mr. Coles' memorandum to me where he  
24 says, the part that you read, that our attempting to negotiate  
25 a settlement, "Now that we have done so procedurally we

1 should be able to report this as a fait accompli." And what his  
2 view would have been, to my recollection at the time, was  
3 that we've made the arrangement, we've made a deal which  
4 was facilitated by the commission in the sense that the  
5 Commission adjourned the possible hearing dates which had  
6 been set before. And now that we have made, the deal has  
7 borne fruit and we've made our agreement, why don't you  
8 incorporate it in your report and why, that should be the end  
9 of the matter.

10 Q. Did you have any involvement in the drafting of the report  
11 that was forwarded to Mr. Justice Campbell?

12 A. Only in the sense that I had discussions with the Deputy  
13 Attorney General, both before and after he drafted the  
14 document which is on pages 499 and 500.

15 Q. What was the nature of that discussion?

16 A. Just a format of how to word the report to, again, to indicate  
17 that while the Government had set up the Commission of  
18 Inquiry that at the preliminary stages it became, it was  
19 apparent that there was room for negotiation and that the  
20 Commission was pleased to allow this kind of negotiation to  
21 proceed to determine if a settlement could be arranged  
22 between the parties and, that having been done, and a  
23 settlement having been arranged, the Commission would be, it  
24 was kind of, the language that I'm comfortable with that I  
25 offered to the Deputy and a lot of that is found in that report.



1 Q. Did you prepare a draft prior to the one that we see on 499?

2 A. I did not, no.

3 Q. So it just would have been in discussions with Mr. Coles.

4 A. Yes.

5 Q. Did you have any discussions with Mr. MacIntosh, counsel to  
6 the inquiry, as to the adequacy of the \$270,000 figure?

7 A. Not on the figure.

8 Q. What did you talk to him about?

9 A. Merely on the progress of the negotiations without the actual  
10 figures. And subsequently, I asked him to contemplate the  
11 prospect of incorporating a settlement that we might have,  
12 that we might have into the Commissioner's report.

13 Q. And if we follow the documents correctly what then  
14 happened was that a draft was also sent to Mr. Cacchione.

15 A. That's right. I forwarded a draft report which was to be  
16 signed by Commissioner Campbell to Mr. Cacchione for his  
17 examination and comment and he sent it back to me.

18 Q. And then you forwarded the release to Mr. Cacchione on  
19 August the 14th on page 505.

20 A. That's right.

21 Q. Right. And as you said earlier, it took some time for that  
22 document to be executed by Mr. Marshall, Jr.

23 A. Yes. At that time, too, we were still looking for a release from  
24 the parents as well so I knew it would take a few days to get  
25 three signatures but as it turned out it took a lot longer and

1 we only got one signature.

2 Q. And then the letter that you refer to, to Mr. MacIntosh, is on  
3 page 513, and you have a note to yourself on page 512 that  
4 that letter was not to be released until you were in receipt of  
5 the releases.

6 A. That's quite right and this what I tried to communicate  
7 before, that it took some time to get the releases but before I  
8 had the release in my hand, properly executed, I did not feel  
9 comfortable, one, in conveying to Mr. MacIntosh that we had  
10 a settlement; and (b), I certainly did not feel comfortable in  
11 releasing or letting anyone know about a report that was to  
12 incorporate that settlement. So I held back on both of these  
13 things.

14 Q. And then on August the 15th, on page 515, you wrote to Mr.  
15 MacIntosh enclosing a copy of the Order-in-Council, the  
16 earlier one referring to the \$25,000 payment. I just wanted to  
17 ask you about the second paragraph of that letter. You say, "I  
18 understand your concern with respect to a specific  
19 recommendation by the Commissioner of the figure that we  
20 apparently agreed upon. However, we would definitely want  
21 the Commissioner to endorse the settlement." Why was that  
22 important?

23 A. When I spoke to Mr. MacIntosh about the prospect of  
24 incorporating the settlement into the Commissioner's report  
25 he did raise the question with me, and he did raise the matter

1 to the effect that we would not feel comfortable or we would  
2 not necessarily want to incorporate a figure of settlement.  
3 And I understood him to have the same concerns that you  
4 have already raised with me, "Well we don't have any  
5 particular information to support that figure." And at that  
6 point I told him that the figure wasn't really essential. That  
7 as long as the Commissioner would report and incorporate the  
8 fact that there was a settlement, we could deal with the figure  
9 ourselves.

10 Q. Is that what your letter says? Doesn't it say, "However, we  
11 would definitely want the Commission to endorse the  
12 settlement"?

13 A> Yes, to endorse the settlement in a sense of incorporating the  
14 fact that there was a settlement in the report.

15 Q. Without actually mentioning the figure?

16 A. Without mentioning the \$270,000.

17 Q. A bit of a sleight-of-hand, though, isn't it? What's the  
18 difference between endorsing the settlement and not  
19 mentioning the figure if you know what the figure is?

20 A. Well, it's a compromise. It's, if he wanted the report to  
21 contain the settlement and since Mr. MacIntosh particularly  
22 raised the question of figures, I said, "Well, the figure isn't  
23 really the point. The point is that you report, that you  
24 endorse the settlement." If I recall correctly the figure was  
25 mentioned, yes, it was, finally, mentioned anyway.

1 Q. In the document that was actually forwarded by Mr. Justice  
2 Campbell on page 520, the figure of \$270,000 is referred to  
3 on page two, on page 521.

4 A. Yes. And that was the Deputy Attorney General did that.

5 Q. The Deputy Attorney General, sorry, did what?

6 A. He put the figure into the draft report and it ended up in Mr.  
7 Justice Campbell's report as well.

8 Q. And he obviously acceded to the request that the 270 be  
9 included.

10 A. Yes. Yes, it was signed by Mr. Justice Campbell. But to be fair  
11 to, again, to be fair and to elaborate on your question, on the  
12 answer I gave to your question, somewhat, I did not  
13 understand that Mr. Justice Campbell was saying that he was  
14 content that \$270,000 was an appropriate figure. I  
15 understand his report, if I recall this correctly, at least that is  
16 my recollection, that he was simply saying that he's pleased  
17 to incorporate in his report the settlement which he  
18 understands to be \$270,000, if I can paraphrase it that way. I  
19 did not understand Mr. Justice Campbell saying that he  
20 accepted that figure as being an appropriate figure or a fair  
21 figure or whatever.

22 Q. What did you understand him to be saying, then, if you look  
23 at page 521, in the first paragraph where he refers to the  
24 settlement and the total sum of 270 paid by the Province and  
25 then goes on in the next paragraph, in the last sentence to

1 say, "Accordingly, I recommend acceptance and  
2 implementation of the said agreement in concluding this  
3 matter."

4 A. Yes. I think Mr. Justice Campbell was really saying that, in his  
5 report, that is what it says to me now and that's what it said  
6 to me then, that I am pleased to incorporate the negotiated  
7 settlement in my report. I'm content that it was negotiated  
8 properly or that it was arrived at in an appropriate fashion.  
9 And that I'm pleased, therefore, to endorse the settlement.  
10 But it's not a comment, in a view, on the propriety of that  
11 particular figure.

12 Q. Did you have any discussions with Mr. Coles as to whether or  
13 not he wanted Mr. Justice Campbell to recommend acceptance  
14 and implementation of the agreement?

15 A. Oh yes, Mr. Justice, Deputy Coles certainly wanted Mr. Justice  
16 Campbell to incorporate the settlement.

17 Q. Well let's use the word that's used in the report though which  
18 is "recommend" not incorporate, did you have the sense that  
19 Mr. Coles wanted Mr. Justice Campbell to recommend the  
20 acceptance and implementation of the agreement?

21 A. Not much turns on that word "recommend", I don't think,  
22 because the only reason you would find that word on page  
23 521 on the last paragraph is because the Campbell  
24 Commission was charged with an inquiry and also with the  
25 duty to come back and recommend something to the

1 Government. So the language is just following through from  
2 the draft of the charge itself, that is, the Campbell  
3 Commission, where the Commissioner was required, or was  
4 asked to recommend something.

5 11:50 a.m.

6 Q. Was Mr. Coles of the view that it was important that Mr.  
7 Campbell recommend acceptance of the \$270,000 figure?

8 A. I don't think it was important, in a sense, no. No, it was just,  
9 in my view as well, a good neat way to finally close up the  
10 Campbell Commission.

11 Q. Was there any discussion between yourself and Mr. Coles as  
12 to other ways in which the Campbell Commission might be  
13 wound up?

14 A. Not really, no, but there were some obvious ways, some  
15 obvious ones.

16 Q. What were those?

17 A. Well, the government, for one, could have simply ended the  
18 Commission, could have simply passed an Order-in-Council  
19 ending it. And I assume there would have been little  
20 complaint about that.

21 Q. Did you have any other involvement, other than the  
22 discussions you've mentioned with Mr. Coles, concerning the  
23 Campbell Report?

24 A. With Mr. Coles?

25 Q. With Mr. Coles?

- 1 A. I don't recall any other discussions about that.
- 2 Q. With Mr. MacIntosh?
- 3 A. No, only initially where I phoned, I was on the phone with  
4 him and where I asked him to think about that prospect. But,  
5 beyond that, I had no involvement in the report.
- 6 Q. Did you have any discussions with the Attorney General?
- 7 A. About the report?
- 8 Q. Yes.
- 9 A. No.
- 10 Q. With anybody else in the Attorney General's Department?
- 11 A. No.
- 12 Q. Subsequent to the final settlement of the compensation  
13 matter, did you have any involvement, directly, with the  
14 Junior Marshall matter?
- 15 A. After the releases were, or the release was obtained, the  
16 money was exchanged, that was pretty much the end of my  
17 involvement with Mr. Marshall's case.
- 18 Q. On page 536, there's a note from yourself to Mr. Coles  
19 indicating you have a release but it hasn't been signed by Mr.  
20 Marshall's parents. You then take the opportunity to attach a  
21 newspaper clipping indicating that Mr. Marshall had been  
22 arrested? Did you think that that was something that would  
23 have been of interest to Mr. Coles?
- 24 A. Well, yes and no. It was of no consequence at the time  
25 because we had made an arrangement already. A settlement

1 had been agreed upon and it was just a news item, simply,  
2 and I just didn't know if he had read the papers, so I sent him  
3 a copy of the clipping, which was in large capital letters,  
4 "DONALD MARSHALL ARRESTED, ASSAULT ON COP ALLEGED."  
5 It had no bearing at all. It was just something I had noted in  
6 the newspaper and I wanted to convey that.

7 Q. And it's finally on September 25th on page 540 that you send  
8 along to Mr. MacIntosh that letter you'd been holding dated  
9 August 15th.

10 A. That's right. That's when I would have had the release in my  
11 hands by that point.

12 Q. Did you have any involvement at all in the preparation of the  
13 press release on page 543?

14 A. I did, yes. I was originally asked by the Minister to give  
15 thought to drafting something and I do recall roughing  
16 something out to that effect.

17 Q. The last full paragraph of the press release says: "The  
18 Government's approval of Mr. Justice Campbell's final  
19 recommendation completes the work of the Commission."  
20 Was that phrase included in your draft?

21 A. I don't recall it.

22 Q. was the sense of that included in what...

23 A. It would have been my sense, yes. That is the kind of  
24 language that I'm comfortable with and it may well have  
25 been my sentence that the "final recommendation completes



1 the work of the Commission."

2 Q. And does that not convey the feeling that, indeed, the  
3 Campbell Commission is approving or recommending... Sorry,  
4 that the government is approving the recommendation of the  
5 Campbell Commission?

6 A. Well, what it conveyed to me, what it should convey is that  
7 with the final recommendation of the Commission, the  
8 Commission is finished. It's over with and that was only to  
9 address someone's question that may have well come about  
10 and that is to say now, well, you've negotiated a settlement  
11 and Mr. Justice Campbell had said something or not about it,  
12 but isn't there some other aspect or some other element of  
13 the Campbell Commission that's still around. What I think we  
14 wanted to communicate was that that was the end of the  
15 Campbell Inquiry.

16 Q. Did you intend to convey in your drafting of the press release  
17 that the government was, in fact, approving a  
18 recommendation of a figure given to the government by the  
19 Campbell Commission?

20 A. Well, technically, that is the way, yes, that's the way it reads  
21 and that is something that is fair to draw from that. The  
22 Campbell Commission makes a recommendation, as it was  
23 supposed to, pursuant to the terms of its Charter, and the  
24 government then either chooses to accept or not to accept the  
25 recommendation. And, in that case, it did accept the

1 recommendation. It just painted the scenario in a different  
2 light. Not at all incorrect, in the correct light, surely. But it  
3 took the focus away from the fact that the arrangements had  
4 been accomplished by negotiations as opposed to the Inquiry.

5 Q. Yes, and conveyed the impression that the... Would it be fair  
6 to say conveyed the impression that the Campbell Commission  
7 was happy with the figure?

8 A. That I wouldn't agree with, no. I don't think that's the  
9 message but it certainly conveyed the impression that the  
10 Campbell Commission was prepared to recommend that  
11 government act on the figure.

12 Q. Subsequent to the preparation of this press release around  
13 the third week or so of September, did you have any  
14 subsequent involvement directly with the Donald Marshall  
15 matter?

16 A. I don't recall.

17 Q. You don't recall that you did.

18 A. That's right, I don't recall that I had any subsequent  
19 involvement.

20 MR. CHAIRMAN

21 Press release, was it released?

22 MR. ENDRES

23 Yes.

24 MR. CHAIRMAN

25 This is...

MR. ENDRES, EXAM. BY MR. SPICER

1 MR. ENDRES

2 Yeah, it's the next, I think it's the next page.

3 MR. CHAIRMAN

4 It says "For Release at 12:15 on September 26th."

5 BY MR. SPICER

6 Q. Did the Deputy Attorney General have any involvement in the  
7 preparation of that press release, to your knowledge?

8 A. Oh, undoubtedly, he would have, yes. But he would not share  
9 that with me, necessarily.

10 Q. If I could just take you now to Exhibits 157 and 158, Mr.  
11 Endres. 157 is the federal/provin... Well, sorry, 157 is the  
12 "Federal/Provincial Task Force Report on Compensation of  
13 Wrongfully Convicted Imprisoned Persons." And 158 are the  
14 Federal/Provincial Guidelines."

15 A. Uh-huh.

16 EXHIBIT 157 - FEDERAL/PROVINCIAL TASK FORCE REPORT ON  
17 COMPENSATION OF WRONGFULLY CONVICTED IMPRISONED  
18 PERSONS

19 EXHIBIT 158 - FEDERAL/PROVINCIAL GUIDELINES.

20 Q. Do I understand correctly that you were the Nova Scotia  
21 representative on the Federal/Provincial Task Force; that is,  
22 Exhibit 157?

23 A. I was, yes.

24 Q. Okay. What was your role on this task force, Mr. Endres?

25 A. The task force was made up of a number of representatives

1 from various jurisdictions across the country, chaired by the  
2 federal representative, and we all had a, except for the  
3 chairperson, of course, Mr. St. Denis, we had the same kind of  
4 role and that is to make contributions towards the final  
5 report. And the contributions varied from person to person  
6 in accordance with assignments that we accepted.

7 Q. What was the assignment that you accepted?

8 A. My particular assignment, in part at least, as far as I recall,  
9 related to the question of alternate remedies. That is,  
10 remedies beyond compensatory systems, such as civil suits,  
11 ex gratia negotiations, and that kind of thing. There were  
12 other things I did. I don't recall that right now.

13 Q. Were you then the person who was responsible for looking at  
14 the question what's a good process to deal with this question  
15 of compensation?

16 A. That was, in part, my role, but not my exclusive role. Other  
17 members would have participated in that. I would do some  
18 research, come back to the meeting, and deliver on the  
19 research and then there would be discussions and new issues  
20 would be developed and then we'd split those up again and  
21 we'd carry on with our research.

22 Q. Were you receiving any direction in respect of your  
23 representations from anybody in the Attorney General's  
24 Department?

25 A. Not beyond making myself available to participate in the

1 examination of the issues.

2 Q. So you weren't receiving any instruction or direction from the  
3 Deputy Attorney General or the Attorney General?

4 A. No.

5 Q. You were on your own?

6 A. That's right. I was on my own once I became a member of  
7 that task force.

8 Q. How much time do you think you would have spent yourself?

9 A. On that task force?

10 Q. Yes.

11 A. The hours are not clear but we had approximately five  
12 meetings of all of the members.

13 Q. During that period of time? '86? '85? '87? Where are we?

14 A. The whole project took about a year and a half. My  
15 involvement was roughly a year and a half, in the course of  
16 which we would have had five, perhaps six meetings, across  
17 different parts of the country, where everyone participated  
18 and then we'd have some telephone conferences, which would  
19 have started in Ottawa, usually, to keep track of progress and  
20 to address specific issues that had arisen. It was a fairly  
21 time-consuming task. It was not just something I could have  
22 addressed in a matter of a few hours.

23 Q. When would your involvement have started? Do you  
24 remember when it would have been?

25 A. No, I don't recall that but it was certainly a considerable time

1 after my involvement with the Marshall matter.

2 Q. It was set up following a meeting in November of 1984, that  
3 that letter at the outset of the report would seem to indicate.  
4 Do you remember when your involvement terminated?

5 A. Yeah, around the end of 19... towards the end of 1985.

6 Q. During the course of your meetings, did you become familiar  
7 with the most of the matter... Well, with the matters that are,  
8 in fact, covered by the report other than the one for which  
9 you particularly directed your attention?

10 A. Sure, we all shared interests in all the matters that are  
11 covered by the report.

12 Q. And looking back now on the manner in which the settlement  
13 was negotiated with Mr. Marshall and taking into account  
14 what you subsequently learned about other methods of  
15 dealing with it, what do you say as to whether or not you  
16 think the method of two lawyers sitting down and trying to  
17 negotiate a settlement the way you did, whether that's an  
18 appropriate method for dealing with compensation?

19 A. I don't see anything inappropriate about that method of  
20 coming to a conclusion on an issue like that. I think it is a  
21 good way to resolve a compensation question, a compensation  
22 claim. It's not the only way, of course. There are other  
23 means of coming to terms with a claim for compensation. But  
24 when you have one party or both parties represented by  
25 lawyers who will use the tools available to them to come to

1 their terms and get the best deal for the two clients, then I  
2 think that is a good way to do it. But the question that  
3 concerned me at that time, you see, in the course of the task  
4 force was really not so much what's a good way to do it, but  
5 what's the right way to do it, in accordance with the  
6 international commitments that Canada had entered into.

7 Q. What do you think is the right way?

8 A. Well, one of the conclusions we came to that I do recall, early  
9 on we came to that conclusion, is that Canada's commitment  
10 under the international covenant required Canada somehow  
11 to have a legislative scheme, a law, in other words, that would  
12 provide a means for compensation for those who have been  
13 innocently imprisoned.

14 Q. As a federal obligation.

15 A. Canada is the signatory to the treaty, yes, so I expect it is a  
16 federal obligation.

17 Q. Was that your conclusion?

18 A. Well, that's certainly something we mentioned in the report.  
19 It's not a conclusion that we drew because we were aware  
20 that it was not our mandate to make any specific  
21 recommendation. That is, we were not supposed to come and  
22 say, "This is how you're supposed to do it."

23 Q. If you had been asked to make that recommendation, do I  
24 take it from what you're saying, though, that that would have  
25 been where you would have headed?

MR. ENDRES, EXAM. BY MR. SPICER

1 A. I just flipped through that a few minutes ago, the report on  
2 page two, I think you can see from page two of the report,  
3 which is not a recommendation. It's a preliminary statement  
4 of what our role was to be. But on page two, we comment  
5 immediately following a statement of what the international  
6 covenant states, in the middle of the page:

7  
8 That the expression "shall be compensated  
9 according to law" would appear to lead to the  
10 conclusion that entitlement to compensation  
11 should be based on a statute.

12 And that was my understanding throughout.

13 Q. Right.

14 A. That in full discharge of the obligations, there ought to be  
15 some legal means for persons to seek redress for  
16 compensation in this kind of situation.

17 12:10 p.m.

18 COMMISSIONER EVANS

19 Considering then a Dominion Statute, a Federal Statute?

20 A. I would have thought the federal government is the one to  
21 legislate in that respect.

22 COMMISSIONER EVANS

23 To decide...

24 A. Yes.

25 MR. SPICER

Q. Having said that, did you give any thought to what the



1 content of that legislation might be? For instance, the  
2 methodology by which the issue would then be dealt with?

3 A. The report does not deal with the elements of any particular  
4 legislation because again that was not the mandate that we  
5 had. It addresses areas of concern that legislation would  
6 obviously have to address, such as, for example, the question  
7 of who determines innocence. In our early examination of  
8 what the treaty purports to accomplish, we came to the  
9 conclusion that only the innocently imprisoned should have a  
10 right to compensation. And one of the very greatest, biggest  
11 issues up front and of course it was, who determines  
12 innocence, since our system of criminal justice does not really  
13 get into questions of innocence. And that would be one  
14 aspect. For example, now that should have been addressed  
15 by legislation if there were legislation.

16 Q. Exhibit 158, the Federal/Provincial guidelines in respect of  
17 compensation, did you have any involvement at all in those?

18 A. Only in the sense of pursuing them when they were drafted  
19 first by Paul St. Denis from Ottawa.

20 Q. And who is Paul St. Denis?

21 A. He was the chairman of the task force. He had drafted a set  
22 of guidelines that looks very much like this Exhibit 158. I  
23 don't know if it's identical, but it's very much the same layout  
24 and the same kind of language. He had drafted that and it  
25 was circulated to all the task force members for comment.

1 And I offered some comments on that to our Deputy Minister  
2 since it was circulated actually not to the members, but to the  
3 deputies.

4 Q. What sorts of comments did you have in respect of these  
5 guidelines?

6 A. I have some notes on that in files at the Department and I  
7 recall this much. I was saying, which is in the same vein as I  
8 mentioned before, that guidelines may well be a step in the  
9 right direction but I did not see that as being in any way  
10 sufficient to address the problem which was how do we  
11 discharge our international obligations. The guidelines, in  
12 effect, the way I saw them is the exact opposite of a legislated  
13 scheme because guidelines, of course, can be changed, they  
14 can be amended and in fact they can be dropped overnight  
15 and nobody would have any recourse.

16 Q. So you're back to your original point that you're really looking  
17 for a federal statute?

18 A. Yes.

19 Q. On the substance of those guidelines, if I can just ask you to  
20 look at (b)(4) for a second. As a condition precedent to  
21 compensation, there must be a free pardon granted under  
22 683, et cetera, or a verdict of acquittal entered by an  
23 appellate court pursuant to a referral made by the Minister of  
24 Justice under 617(b). In the event that Mr. Marshall's case  
25 had been sent back by the appel court for a new trial and

1 he'd subsequently been acquitted, would he have been  
2 eligible for compensation under that scheme or would he fall  
3 between the chairs there?

4 A. I'm not sure if I can answer that question now. Certainly it  
5 wouldn't have been a free pardon situation, so that's clear, the  
6 first one. Or a verdict of acquittal entered by an appellant  
7 pursuant to a referral made by the Minister of Justice. Well,  
8 all right, no, that's the reference back. So if it had simply  
9 been an acquittal in the course of a criminal appeal, he would  
10 not have qualified under that criteria.

11 Q. Or even if under 617(b), if it had been sent back for a new  
12 trial, he wouldn't have qualified either way?

13 A. That's right and that's not a startling now on reflection  
14 because the system for compensation was never intended nor  
15 is the international covenant geared in a direction of  
16 compensating those who have merely been acquitted in the  
17 course of the regular application of the criminal justice  
18 system. So if someone is convicted in the first instance of a  
19 crime and subsequently...and he might spend some time in  
20 jail after that and subsequently is acquitted, then the  
21 administration of justice has worked. It has allowed the  
22 system to operate properly and an acquittal was issued  
23 finally. And the international obligation that Canada entered  
24 into was never addressed to that kind of a situation, that is,  
25 where the system of administration of justice has actually

1 worked. It hasn't worked very well, naturally, for the person  
2 concerned, but it has ultimately worked in the sense that an  
3 acquittal was issued.

4 Q. Surely there's some question about whether or not it's  
5 worked if the person spent 11 years in jail in the meantime.

6 A. I agree and that's, of course, another situation altogether.  
7 We're not in that context, in the context of Mr. Marshall,  
8 talking about a person who was first convicted and  
9 subsequently in the regular process, as the Criminal Code  
10 prescribes, acquitted. No one has ever, to my knowledge,  
11 really seriously addressed the question of compensating all  
12 those who are ultimately acquitted in the course of the  
13 administration of justice. Some people naturally have to go to  
14 the Supreme Court of Canada before they can achieve an  
15 acquittal and they may well spend a good long time in jail  
16 until...but there has never been any proposal that I know of  
17 that would allow that kind of person to seek compensation.

18 COMMISSIONER EVANS

19 On the next page, though, is, under the guidelines for eligibility, if  
20 you have (b) there on the next page, would that not cover the  
21 Marshall case?

22 A. The reference made by the Minister of Justice, yes. Which is  
23 something that is extraordinary, it's out of the ordinary  
24 process of the Criminal Code. It's something that is  
25 discretionary.

MR. ENDRES, EXAM. BY MR. SPICERMR. SPICER

Under 617(c).

COMMISSIONER EVANS

The difference being is acquittal isn't good enough. It's got to be a finding of not guilty.

A. That's right. And that's where I see the guidelines being really somewhat deficient in that I don't see, I really haven't read them all that carefully. I just glanced at them. I don't see any attempt here to address the question of innocence, for example.

MR. SPICER

Q. Did you have a sense, Mr. Endres, when you were reviewing the legislation and the situations referred to in Exhibit 157, that is the schemes in other countries, that the figure that, of \$270,000 that was settled on in Mr. Marshall's case, was reasonable having regard to legislation in schemes in other countries.

A. Well, when we look at England, for example, where they have a system to compensate those who have been unlawfully imprisoned, we can see such a range of awards. I indicated on Thursday of the three cases I am aware of from England, one we did not have a figure of an award at all. I'm not sure if an award was ever made. But of the two that we did have the figures, one was for 17 and a half thousand pounds for several years of imprisonment, innocent imprisonment, and

1 the other figure was for \$100,000 for several years of  
2 imprisonment. We look at other countries, in the United  
3 States, we did not have any actual reports of compensation.  
4 Overall, I mentioned the Japanese case of a 34-year  
5 imprisonment where \$320,000-some was awarded as  
6 compensation and, of course, we have that New Zealand  
7 award of over, in excess of \$1-million. All of these  
8 jurisdictions would have had various systems of addressing  
9 the compensation question, some more formal than others.  
10 And within that context, yes, the answer to your question is  
11 that I think the settlement that was achieved in this case was  
12 a reasonable settlement looking at those factors because it  
13 was certainly within the ballpark of a spread between a  
14 17,000 pounds and 1.2-million.

15 Q. You said to me a few minutes ago that one, what you were  
16 looking to do was to get the best deal for both sides. If you  
17 had received directions from the Deputy Attorney General, or  
18 the Attorney General, to the effect, look, we want you to be as  
19 fair and reasonable as possible with Mr. Marshall, and we  
20 don't want you to negotiate this in the way that you would  
21 negotiate a normal civil case, you would have responded to  
22 those requests?

23 A. Oh sure, I would have responded to instructions although I'm  
24 not sure if I had been given the instructions you just  
25 mentioned if they, by themselves, would have made me

MR. ENDRES, EXAM. BY MR. SPICER

1 approach the situation differently.

2 Q. All right, well why not?

3 A. Well, I think we did approach it in a fair and reasonable, I  
4 did, I believe, approach it in a fair and a reasonable manner.  
5 I was quite comfortable in leaving the matter of what is best  
6 for Mr. Marshall to his lawyers. And I certainly had no  
7 discomfort at all in the way they were negotiating. So, no, in  
8 order for me to offer more, I think somebody would have had  
9 to tell me what you've offered is not enough. Give him more.

10 Q. All right. And certainly, if I understand you correctly, that if  
11 that had been done, you wouldn't have had any trouble  
12 complying with those instructions.

13 A. Oh, no. No.

MR. SPICER

14 Thank you very much.

EXAMINATION BY MS. EDWARDH

15  
16  
17 Q. Mr. Endres, before we deal with some of the specific matters  
18 that you have discussed I would like to take you back, sir, to  
19 your experience as a prosecutor, both in your capacity when  
20 you worked the trial courts and then subsequently when you  
21 worked as an appellate counsel. I take it from some of your  
22 answers to questions posed by Mr. Spicer that between the  
23 years 1976 and 1978, you were aware of, you were not aware  
24 that there existed any direction or guideline of any kind with  
25 respect to disclosure and your obligations.

1 A. That's quite right. I was not aware of any.

2 Q. And I take it you were not aware that there had even been  
3 any informal promulgation of the Attorney General's views,  
4 the Attorney General of the day, of his views with respect to  
5 disclosure.?

6 A. I was not aware.

7 Q. Now was there, at least, a general consensus in the  
8 community of prosecutors that you knew, that that would be,  
9 then, a matter for your own discretion? You were entitled to  
10 do what you wished.

11 A. I was under the impression that I was at liberty to do what I  
12 thought was appropriate. Now of course that is not to say  
13 that I would have felt totally on my own on this because if  
14 you want a working relationship with defence counsel, you  
15 have to come across. And that's certainly something I  
16 wanted. Because it facilitates my work.

17 Q. But other than the practical or strategic advantage in having  
18 that working relationship, I take it you felt that you could  
19 choose to exercise your discretion as you saw fit?

20 A. Well, not totally. Although I was never really told to do one  
21 thing or another, I always felt obliged to disclose to defence  
22 counsel the Crown sheet, not to necessarily show the Crown  
23 sheet or copy it, but to at least tell defence counsel what is in  
24 the Crown sheet. Now that would not necessarily be the case  
25 with statements that were separate from it.



1 Q Let me deal with each of those individual items. I had thought  
2 you had said the other day that although it was rare, that  
3 there were, in fact, cases where you had not even disclosed  
4 the contents of the Crown sheet, is that correct?

5 A. Yes. There would have been cases like that and the obvious  
6 case is where counsel did not ask for it. I would not  
7 volunteer it.

8 Q And in cases where counsel did ask, did you ever have  
9 occasion not to at least disclose orally the contents of the  
10 Crown sheet?

11 A. I don't recall that but it is possible that I said to one or the  
12 other counsel "I'm not telling you anything" because of my  
13 experience with that defence lawyer. It's conceivable. I don't  
14 recall a case right now where it happened.

15 Q Would that, in your view, today be consistent with the  
16 discharge of your obligations as Crown counsel?

17 A. Today?

18 Q. Yes.

19 A. Oh no, no. Today I think it's just the opposite. Today you  
20 make everything available to defence counsel regardless of  
21 how you feel about counsel and regardless of the experience  
22 that you had with that particular counsel.

23 Q And was it your view that in those years we've just discussed,  
24 '76 to '78, that other prosecutors took the view that oral  
25 disclosure of the Crown's summary was adequate disclosure

1 to defence?

2 A. I thought that that's what prosecutors were doing generally,  
3 that is, oral disclosure.

4 Q. And just so we know what the Crown sheet is, I take it, sir,  
5 it's simply a summary, usually written up by a police officer  
6 of what he understands to be the essence of the case.

7 A. Quite right.

8 Q. Was there any particular reason that defence counsel would  
9 not be permitted, for example, the opportunity to take a  
10 photostat of that? What was the reasoning behind that?

11 A. Well it's kind of holding back, I think is the reason. You make  
12 disclosure but you don't give copies because there may be  
13 words here and there, I suppose, that you could get hung up  
14 over later on. I don't know. The fact is, in my office in  
15 Dartmouth, there wasn't any way of copying anyway because  
16 there was no facility for copying these things so that was  
17 never a question that came up because we had no means to  
18 copy.

19 Q. No, but someone could come in with a Dictaphone and read it  
20 in.

21 A. A few have done that, yes. A few did that. I do recall that.  
22 But, no, I would have had no trouble with that in the usual  
23 case. If somebody wanted to go through that.

24 Q. I take it it would be primarily with a view to maintaining  
25 whatever strategic advantage was possible that you would

1 not have made a copy or invited someone to actually  
2 physically record...

3 A. Not making a copy was a physical limitation to start with but  
4 beyond that, I thought disclosing at that time, disclosing the  
5 essence of the Crown sheet so that defence would know what  
6 the case is in essence, was sufficient.

7 Q. Now did you ever prosecute, sir, during that time period a  
8 homicide case? A case involving murder?

9 A. No, I did not.

10 Q. Did you ever prosecute an attempted murder or a rape?

11 A. Yes.

12 Q. In the ordinary course would you have provided, for example,  
13 at the request of defence counsel, disclosure of forensic  
14 reports?

15 A. I should say, when I say not, the murder cases invariably  
16 ended up the Supreme Court and I would have done a  
17 preliminary in some, I would have done the preliminary  
18 inquiry.

19 Q. And including those, and we'll come to timely disclosure in a  
20 moment, but would you have disclosed forensic reports at the  
21 request of defence counsel?

22 A. Of sure, the forensic reports, yes, I would have given those  
23 out if they were asked for. Yes.

24 Q. Would you have disclosed to an accused person statements  
25 alleged to be made by him either orally, reduced to writing or

1 in written form?

2 A. Statements from the accused himself?

3 Q. Yes.

4 A. Not always, no.

5 Q. And on what principle would you not have done that, sir?

6 A. Well, in some cases, depending on the nature of the  
7 statement, I may have wanted to keep it back to use it for  
8 cross-examination of the accused.

9 Q. Did you extend to the defence the same luxury by providing  
10 them with statements of your witnesses called by the Crown  
11 so they could keep it back for the purpose of cross-  
12 examination?

13 A. I'm sorry, did I, can you repeat...

14 Q. Did you extend to the defence the same courtesy of providing  
15 them with statements of Crown witnesses so they could hold  
16 it for the purposes of cross-examination?

17 A. No, unless specifically asked for, and in that case I would use  
18 my discretion.

19 Q. Did you have occasion to be compelled by trial judges to  
20 produce statements made by the accused person to the  
21 accused?

22 A. I don't recall that, no.

23 Q. Were you ever faced with such an application?

24 A. No.

25 Q. Did you decide whether to give an accused counsel the

1 accused statement by... depending on who the defence lawyer  
2 was?

3 A. That probably is the basis on which I exercised my discretion,  
4 that it depended just on who was asking, yes. But, you know,  
5 as far as statements, earlier statements by accused persons,  
6 it's not really a problem, or even earlier statements by  
7 witnesses because those are things that are addressed in the  
8 preliminary inquiry, counsel would always ask those  
9 questions and they'd find out at the preliminary inquiry  
10 whether there were statements or not.

11 Q. And how do you suppose, sir, if the investigating officer is  
12 testifying and Crown counsel has chosen not to tender a  
13 statement that the defence would be able to get that  
14 statement at a preliminary inquiry? Under what rule of law...

15 A. No, it's just a matter of asking the question of the police  
16 officer. "Were there any statements taken by you of a certain  
17 person?"

18 Q. And if they officer said, yes, I took three or four.

19 A. Then presumably the lawyer would come to me subsequently  
20 and say, "I want the statement."

21 Q. And then you may or may not give him the statement.

22 A. I would probably give it once it's been made a point of, or an  
23 issue of, yeah.

24 Q. I take it that's still subject to your overriding view that you  
25 had a discretion to not give it.

- 1 A. Up to a point, yes.
- 2 Q. And with respect to statements of witnesses that you knew  
3 had been interviewed by the police that you did not intend to  
4 call as part of your case, would you, in the ordinary course  
5 have indicated to defence counsel that such witnesses were  
6 available?
- 7 A. No, I would not. Not normally.
- 8 Q. But what if those witnesses had something to assist the  
9 defence?
- 10 A. Well, if I felt, and I certainly felt very strongly about that, if  
11 the case was not an appropriate case to go to prosecution, it  
12 wouldn't have gone to court in the first place.
- 13 Q. No. No, no. I'm assuming it's an absolutely "proper" case to  
14 go before the courts for prosecution. But if there was a  
15 witness who had said something to the police that could be of  
16 even the smallest assistance to the defence, what was your  
17 obligation as you saw it?
- 18 A. Unless I as asked, say I was asked for it, I probably would not  
19 make that available and that is to say that I may not know  
20 about that anyway. Because the police...
- 21 Q. Assuming you knew, sir...
- 22 A. May not tell me about that either.
- 23 Q. Assuming you know about it.
- 24 A. If I knew it? I would not volunteer that necessarily. I would  
25 not necessarily go to defence counsel and say, "By the way,

1 Person X, whom I do not intend to call as a witness, made a  
2 statement that may be marginally relevant to your case." If it  
3 was something important, yes, I would. And that goes in the  
4 vein of saying that I would not prosecute unless I felt there  
5 was a good case to be made.

6 Q. I'm not concerned, sir, with your understanding of your own  
7 case. I'm just trying to understand whether it was your  
8 practice in this time period that even on material that you  
9 knew, or had some sense might be of some assistance to the  
10 defence, you, on certain occasions, would not go forward and  
11 tell defence counsel about that and that's...

12 A. It's an unrealistic question if I can answer it because the  
13 police does not come to you with a Crown sheet and, having  
14 all kinds of statements in there that assist the defence, the  
15 police just don't do that. They haven't done it when I was  
16 there. The statements that were a part of the Crown sheet  
17 were invariably statements that I was supposed to use in  
18 order to prosecute. It was not a basket of goodies on which I  
19 had to select those that were beneficial to the prosecution and  
20 those that were beneficial to the defence.

21 Q. In the course of your discussions with the investigating  
22 officer, I take it you would sit and learn from him whether  
23 there was any other information that may or may not be  
24 available as you put together the prosecution.

25 A. I rarely would sit with the policemen anyway except in a

1 very, very quick, unscheduled matter. In most cases you take  
2 your Crown material and you go into the court and you  
3 prosecute. You don't have the luxury of sitting down with a  
4 policeman to develop your case. That's only in a major case  
5 where you do that.

6 Q. Well let's talk about murder trials for a moment. If you were  
7 about to conduct a preliminary inquiry, I take it you would sit  
8 down with the investigating officer...

9 A. Um-hmm.

10 Q. You would discuss your brief that you had received from  
11 him...

12 A. Sure.

13 Q. And any other information he might have that would assist  
14 you.

15 A. Yes.

16 Q. And I take it because of the nature of the charge, you would  
17 expect to be provide whatever information the investigation  
18 had turned up that was remotely connected.

19 A. Yes. Yes, of course. Particularly if it's helpful in the  
20 prosecution. I'm not as comfortable in saying that the police  
21 would necessarily provide me with all other information  
22 which may be of marginal assistance to the defence.

23 Q. And if, in fact, I take it what you're saying is if you even  
24 became aware through those kinds of conversations or  
25 through reading your brief that there was information that



1           might be of assistance to the defence in resisting the  
2           allegations of the Crown, you would choose on occasion not to  
3           disclose that.

4       A. If it was a marginal thing I would perhaps just leave it where  
5           it is, yes.

6       Q. Now sir, let me just read you something and see whether or  
7           not it has any ring of familiarity to you and then I'll tell you  
8           where it comes from later. "It cannot be over-emphasized  
9           that the purpose of a criminal prosecution is not to obtain a  
10          conviction, it is to lay before a jury what the Crown considers  
11          to be credible evidence relevant to what is alleged to be a  
12          crime. Counsel have a duty to see that all available legal  
13          proof of the facts is presented. It should be done firmly and  
14          pressed with legitimate strength but it must be done fairly.  
15          The role of the prosecutor excludes any notion of winning or  
16          losing. His function is a matter of public duty in which in civil  
17          life there can be none charged with greater personal  
18          responsibility. It is to be efficiently performed with an  
19          ingrained sense of the dignity, the seriousness and the justice  
20          of judicial proceedings." Have you ever heard those words,  
21          sir?

22       A. Sure.

23       Q. Those words come, are spoken by Justice Rand in the 1955  
24          case of Regina and Boucher. And following those words there  
25          are other pronouncements in the Supreme Court and let me

1 just take you to one other, the case of Lizotte where Justice  
2 Cartwright made it very clear, and I combine this with the  
3 case of Lemay, that Crown counsel cannot, under any  
4 circumstances, suppress evidence that might be of assistance  
5 to the defence.

6 A. Um-hmm. I agree.

7 Q. Those are rules of law governing your conduct as Crown  
8 counsel.

9 A. Um-hmm. I've never suppressed evidence.

10 Q. Well, when you choose not to make evidence available that  
11 you know might be of assistance to that defence, isn't that the  
12 suppression of evidence?

13 A. No. No. If defence counsel ask me for it I'd say "I give it to  
14 you or I won't give it to you." There's no suppression in that.

15 Q. And if defence counsel is not in a position, because you, sir,  
16 have the power of the police behind you, to know about that  
17 kind of evidence...

18 A. Then defence probably hasn't done its job. They should know  
19 about it.

20 Q. Well, let's start from this assumption. If defence counsel, you  
21 must assume that defence do not have all the capacities of the  
22 police force.

23 A. They do. Why not? Sure they do.

24 Q. They do?

25 A. Yeah.

1 Q. They have the manpower...

2 A. Yeah.

3 Q. The forensic laboratories...

4 A. Um-hmm. They do use it, of course they do. We see that  
5 lately more than we used to in the earlier days but today,  
6 surely, defence counsel uses all these resources that are  
7 widely available to anybody.

8 Q. But how would defence counsel use the police force?

9 A. Well, they don't have to use the police force. They hire their  
10 own people, surely you've done that yourself.

11 \*12:30 p.m.

12 Q. When one is involved in a homicide investigation, surely, Mr.  
13 Endres, you would agree that the power of the state to  
14 conduct that investigation far exceeds what any individual  
15 defence lawyer can do, especially after the fact.

16 A. The power insofar as the Crown has the power to compel the  
17 defence is not, yeah, I agree. There is a greater power then.  
18 There's a compulsive power through the search warrant and  
19 warrant procedure. But, other than that, defence counsel, to  
20 my experience, they go to all extremes to hire private  
21 investigators, to hire all sorts of resource people from the  
22 community, specialists, detectives, private investigators, to do  
23 all kinds of research investigation in order to make the  
24 defence, and I'm used to that. That's not an unusual thing.  
25 They do that as the police would have done it.

1 Q. So when the police come into a homicide scene, for example,  
2 and cordon it off and take the exhibits and remove what they  
3 think is probative or relevant, you'll agree with me, first of  
4 all, that defence counsel can't do that.

5 A. Sure. Usually the defence wouldn't be there.

6 Q. Of course.

7 A. Yeah.

8 Q. And, in fact, they are expressly excluded from that, correct?

9 A. Uh-huh.

10 Q. And that one of the common things police officers do when  
11 they deal with witnesses who might be extremely important,  
12 is to make sure they understand that they don't have to  
13 speak to defence counsel.

14 A. Yes.

15 Q. Have you ever told witnesses that as well?

16 A. The witness doesn't have to speak to defence counsel?

17 Q. Yes.

18 A. On the contrary, no. A witness does whatever a witness  
19 wants to do.

20 Q. Yeah, and does not have to speak to defence counsel.

21 A. Well, yes, but I wouldn't put it that way, say you don't have  
22 to speak to defence counsel. You know, you speak to anyone  
23 you want to speak to. I may have said, too, you don't have to,  
24 I suppose, on reflection. I may well have said to a witness,  
25 "You do not to speak to defence counsel." But there's nothing

1           that I can do to stop the witness, you understand.

2       Q.   Of course.

3       A.   And why should a witness be so interested in following my  
4           advice? I mean it's really nothing to the witness.

5       Q.   Except, in part, all witnesses seek the protection and guidance  
6           of Crown counsel.

7       A.   Well, I don't know if that's true.

8       Q.   Many do.

9       A.   Some do, yes.

10      Q.   Let me then stop. With respect to the procedures as you  
11           understand them then for disclosure, is it your understanding  
12           that in the Province of Nova Scotia today, those rules that  
13           you've just described have been left aside completely?

14      A.   There is no question that at the time when I was prosecuting,  
15           we did not, I did not, I don't know what other people were  
16           doing, offer 100% disclosure. No question about that. I did  
17           not. But that's not the case today, I understand. That is quite  
18           different today.

19      Q.   Now during the course of time when you were prosecuting,  
20           would you have made disclosure if you were doing an appeal  
21           and the matter of fresh evidence arose? Or was defence  
22           counsel supposed to divine that?

23      A.   The only cases in appeal where fresh evidence came up that I  
24           ever had, and there were a number of those, were the cases  
25           where defence counsel came up with fresh evidence. It was

1 never for me to disclose. I never had an appeal that I recall  
2 where there was fresh evidence from the point of view of the  
3 Crown. And that would be unusual. It would be a very  
4 unusual case.

5 Q. If you had heard that there was fresh evidence pointing in  
6 the direction that indicated someone's innocence, or could be  
7 useful in establishing someone's innocence, at the appellate  
8 level, would you have disclosed that?

9 A. Of course, yes. In fact, I would have done something about it  
10 and I do recall a number of appeals that I was asked to do  
11 and I simply informed my superiors that I was not prepared  
12 to do them because I didn't think it was appropriate. I would  
13 do something about it, sure.

14 Q. For example?

15 A. Well, there were appeals on, two or three appeals where I  
16 was asked to go to the Appeal Court to... Let's see how, a  
17 particular case. Where I was going to appeal, instructed to  
18 appeal an acquittal and on the review of the records, and that  
19 happened at least three or four times, maybe more, on the  
20 review of the record, I satisfied myself that the acquittal was  
21 appropriate and that there was not an appropriate case for  
22 appeal and I said so and I did not go to the Appeal Court, in  
23 all of those cases.

24 Q. In each case was your decision respected?

25 A. Oh, yes, no question. And it should be, because I'm the only

1 person that has the information, having gone through the  
2 records.

3 Q. Sure, but it wasn't assigned to other counsel in the  
4 department.

5 A. No, never, never.

6 Q. With respect to complaints, you had said earlier that defence  
7 counsel had on occasion complained, and I don't know  
8 whether it was to you personally or to superiors when you  
9 had failed to produce a statement, or declined to produce a  
10 statement. Can you indicate to whom they complained and  
11 what the result was?

12 A. No, neither... I don't know. I don't know to whom they would  
13 have complained or what the result might have been. I do  
14 not recall any particular instance where I was told to release  
15 certain information to a certain person.

16 Q. Do you at any time or did you ever become aware of the  
17 circumstances where somebody exercising a discretion as  
18 Crown counsel could be ordered or would be ordered by the  
19 Attorney General's office to make disclosure in an appropriate  
20 case?

21 A. I know of no case, but it's certainly conceivable and I would  
22 not think it's foreign for the Attorney General to do that. But  
23 there's a chief prosecutor, too, for the County of Halifax, and  
24 he would have been the more likely person to get involved in  
25 the first instance.

MR. ENDRES, EXAM. BY MS. EDWARDH

1 Q. Have you ever heard of that kind of situation occurring where  
2 the chief prosecutor has taken on some supervisory role with  
3 respect to Crown counsel and disclosure?

4 A. I know of situations where it has been the case, but not when  
5 I was prosecuting. I have never had that direction from the  
6 chief prosecutor, for example, to make disclosure of a certain  
7 kind.

8 Q. And when you were prosecuting, I take it, the chief  
9 prosecutor at no time... I guess you were prosecuting outside  
10 the City of Halifax so...

11 A. Dartmouth.

12 Q. You would not have had a direct superior like the chief  
13 prosecutor, is that correct?

14 A. That's right. He was my superior, but he was in Halifax and I  
15 was in Dartmouth across the harbour.

16 Q. Now if I can just jump around then a little bit, you stated in  
17 answer to...

MR. CHAIRMAN

19 Yeah, if you're moving into another...

MS. EDWARDH

21 Yes, I am, My Lord.

MR. CHAIRMAN

23 Going to move into a different area, because it is now twenty  
24 to one.

25



MR. ENDRES, EXAM. BY MS. EDWARDH

1 MS. EDWARDH

2 It is a different area.

3 MR. CHAIRMAN

4 So we'll rise until 2:15.

5 12:40 p.m. INQUIRY RECESSED UNTIL 2:15 p.m.

6 MR. CHAIRMAN

7 Ms. Edwardh?

8 MS. EDWARDH

9 Thank you, My Lords.

10 BY MS. EDWARDH

11 Q. Mr. Endres, I'd just like to move around to a couple of  
12 different areas, if I could. You answered to a question posed  
13 by Mr. Spicer that Mr. Coles had not, in fact, instructed you  
14 with respect to these negotiations but rather you had had  
15 some preliminary discussions with him about the appropriate  
16 elements to consider. Is that a fair summary of your  
17 evidence, sir?

18 A. Yes.

19 Q. Well, if I could ask you to turn to page 483 of Volume 33. I'm  
20 going to suggest to you, sir, that, indeed, Mr. Coles did instruct  
21 you and, in fact, if I could characterize what was going on on  
22 July 18th when you put forward a reduced offer and were  
23 playing really hard ball with Mr. Cacchione, that Mr. Coles was  
24 behind that move. At 483, there is a notation:

25

MR. ENDRES, EXAM. BY MS. EDWARDH

Deputy says add another 15,000 for a total of  
\$275,000.00 minus the \$25,000 paid on account.

Do you see that?

A. Yes.

Q. And does that reflect a conversation that you had with Mr.  
Coles on that date?

A. Yes, of course.

Q. And, of course, I take it what he was saying to you was offer  
actually less than the 260 that you had put forward earlier.  
And that's, indeed, what you did, sir, isn't that correct?

A. Yes, I did go below the 260 that I originally talked about.

Q. And you did that and it was Mr. Coles who suggested that to  
you?

A. No, it was not his suggestion that I go below the figure that I  
had spoken of originally or previously. His, and this note only  
indicates this much, his only comment was that if another  
\$15,000 allows for the deal to be made, then add another  
\$15,000. That's the tone or the gist of what he was trying to  
say to me.

Q. Are you saying that on July 18th, he would not have been  
aware that you had offered 260?

A. Yes, he was aware of that.

Q. So if you read the whole note:

Deputy says add another 15,000. for a total of  
\$275,000.00 minus the \$25,000. paid on account.

1 Is it your evidence, sir, that Mr. Coles would not have been  
2 aware that that would be less than you had already offered?

3 A. Oh, he would have been, but I don't think that note is a total  
4 instruction of the Deputy. His instruction was to add another  
5 \$15,000, or his comment upon my appraising him of where  
6 we were at, was why don't you add another \$15,000. That's  
7 the note respecting the instruction. Now "minus the 25", I'm  
8 not sure today as to whether that was his idea or was my  
9 idea. I indicated before that another note of mine reflects  
10 that I did, indeed, go back to the negotiations. That's  
11 probably the next page. And I offered, indeed, I spoke in  
12 terms of much less, 245,000, than what I had spoken of  
13 originally. But my purpose was, and that was my idea, it was  
14 not Mr. Coles' idea, was to simply counter the attempts to  
15 push up towards and beyond the \$400,000 mark.

16 Q. So when one reads this notation at page 483, I take it it's your  
17 evidence then that it was not Mr. Coles' suggestion that you  
18 offer \$250,000.

19 A. Not necessarily.

20 Q. It may have been?

21 A. He could have said that, but I don't recall that he said that.

22 Q. Okay. So then in fairness to the notation and your  
23 recollection, it may have been an idea that came from him or  
24 it may not, and you can't recall today.  
25

- 1 A. I agree, that's the way to put it.
- 2 Q. So the next day, or later that day, you then have a  
3 conversation with Mr. Cacchione?
- 4 A. Yes.
- 5 Q. And the gist of that conversation is set out at page 484, is that  
6 correct?
- 7 A. Yes.
- 8 Q. And despite the Deputy's instructions to offer 15,000 more,  
9 you offer ten.
- 10 A. Correct.
- 11 Q. Why do you do that?
- 12 A. Well, I wanted to see if ten would do it. If 10,000 would  
13 carry the deal.
- 14 Q. Well, you had been instructed by your superior, had you not,  
15 sir, to offer 15,000 more?
- 16 A. No, no, you've misunderstood the note in that case then. The  
17 instruction that I was given is to the effect that why don't you  
18 add another \$15,000 or you can spend another \$15,000 or, if  
19 you have to, spend another \$15,000. That's the instruction.  
20 That was not a command or a direction for me to actually go  
21 and spend that money. Or certainly that's not the way I  
22 understood it.
- 23 Q. So whenever you had an instruction, for example, like that, it  
24 was your understanding that you were to add as little as  
25 possible.

1 A. Quite right, and that is what I did.

2 Q. And it would be your view that Mr. Coles was aware that you  
3 were interpreting his instruction to that effect, is that...

4 A. He must have ben aware of it, because every meeting I had  
5 with Mr. Cacchione, I would come back to him and report to  
6 him on the progress of meetings that I had and it was  
7 apparent to him in the end that, when I met with him and the  
8 Minister and when I said, "\$270,000 will probably do it. I  
9 can't be certain. We might yet go back to the Inquiry."  
10 Obviously, he knew that he had told me I could spend another  
11 five, at least, five thousand dollars. But they were content to  
12 live with that advice and to take the risk of the Inquiry. So  
13 there's no question in my mind that both the Deputy Minister  
14 and the Minister would have been aware that I was spending  
15 less than the range that they had provided.

16 Q. And I take it from what you've just said then, in the ordinary  
17 course, it was your custom after having any conversations  
18 pertaining to the negotiations, to take the result of those  
19 conversations back to Mr. Coles for his contribution in view of  
20 what was transpiring.

21 A. Yes.

22 Q. And I take it if he had directed you in any way during any of  
23 those conversations, you would have then followed through  
24 with his directions.

25 A. Yes, I always would, yeah.

1 Q. Is that a fair statement?

2 A. Yes.

3 Q. Now in terms of how you chose to handle the overall  
4 negotiations, when Mr. Coles had brought you in to discuss a  
5 possible role that you might have in the Campbell Inquiry, I  
6 take it from your evidence the other day that you viewed  
7 that task as being quite different. I think you described it as  
8 being "nonpartisan".

9 A. Uh-huh.

10 Q. "Nonadversarial", and your position would be to safeguard the  
11 public interest as opposed to the governmental interest.

12 A. That's right. Well, not as opposed...

13 Q. Recognizing it might be different.

14 A. No, I don't think that is the right way to put it either. It was  
15 a matter of representing the public interest, which I would  
16 equate with the government's interest.

17 Q. You would?

18 A. Yes.

19 Q. Don't you think that the notion of the public interest would  
20 also, indeed, sir, include an obligation to act in Mr. Marshall's  
21 interest as opposed to simply minimizing the amount of  
22 money?

23 A. Of course, and that was safeguarded by Mr. Marshall having  
24 counsel present at the Inquiry.

25 Q. But at a Commission, if you had been representing your client

1 with those instructions to be totally nonpartisan, that you  
2 might have taken a different view of your own mandate than  
3 the one you ultimately took at the negotiations.

4 A. No, I don't think so. No, I don't think my mandate, my view  
5 of the mandate would have changed any at all.

6 2:25 p.m.

7 Q. Now in terms of your style of negotiations, it's fair, is it not, to  
8 draw certain conclusions from the levers you used with Mr.  
9 Cacchione. And let me just outline what I understood them to  
10 be. First of all, I take it you did not hesitate to point out  
11 throughout your negotiations that as far as you were  
12 concerned on behalf of the government, that Mr. Marshall was  
13 the author of his own misfortune. That was certainly  
14 something the Court of Appeal had said.

15 A. Not quite in those terms perhaps, but something to the effect  
16 that Mr. Marshall had some blame on his... That he had to  
17 accept some blame himself for the position he found himself  
18 in in the end.

19 Q. And, in addition to that, I take it you also pressed the position  
20 that there was really no obligation on the Crown in the sense  
21 that the Crown was not to blame and that there was no  
22 miscarriage of justice.

23 A. Yes, I would have made the point that the Crown accepted no  
24 legal responsibility.

25 Q. And that there was no miscarriage of justice?

1 A. I don't recall that being, that I would have said that. I don't  
2 recall it coming up in those terms, "Miscarriage of justice." No,  
3 I really don't recall that.

4 Q. You recall, though, using the concept that the Crown had no  
5 obligation...

6 A. Oh, yes.

7 Q. And was not to blame.

8 A. Yes, certainly.

9 Q. I take it that you also recall informing Mr. Cacchione or  
10 reminding him that, and stressing with him that the  
11 government would not permit an examination of police  
12 misconduct prior to the conviction.

13 A. We understood, I certainly did, and Mr. Cacchione understood  
14 that in early, in the middle of May of 1984 in the course of  
15 our meeting with MacIntosh, that the police investigation and  
16 police conduct was outside the parameters.

17 Q. The parameters of the Commission.

18 A. Yes, and our discussion.

19 Q. And you, I take it, sir, underlined continuously that you  
20 wanted it outside of your negotiations as well.

21 A. Quite right, yeah.

22 Q. You had access, did you, sir, to the 1983 report done by  
23 Wheaton with respect to the criticisms of the Sydney Police?

24 A. I would have had access to it, but I don't think I read it. Sure,  
25 access, it's available in our office.



1 Q. You would know roughly what its contents were in the sense  
2 that it was critical of the police?

3 A. Not really, no. I don't think at that time I knew much about  
4 Staff Sergeant Wheaton at all.

5 Q. You knew that Mr. Cacchione was critical of the police.

6 A. I knew that.

7 Q. You knew that, in part, in any event, he pointed his finger at  
8 their conduct as causing or contributing to a wrongful  
9 conviction?

10 A. Of course, and I knew that, anyway, because Mr. Marshall,  
11 after all, had a civil proceeding in place against the Chief of  
12 Police.

13 Q. Now in your discussions with Mr. Cacchione, did you ever  
14 provide any information to him about police misconduct?

15 A. No.

16 Q. That could have enhanced his position in discussing the  
17 matter with you?

18 A. I did not provide him with any information about police  
19 misconduct.

20 Q. Did he ask or were you aware he had been trying to obtain  
21 the Wheaton report?

22 A. He did not ask me, no.

23 Q. Were you aware that an application had been brought under  
24 the Freedom of Information Act?

25 A. I'm aware of it now. Whether I was aware of it then, I'm not

1           sure. I do know now that that application had been made and  
2           I think it was denied, as well.

3           Q. Did you at any time during the negotiation process provide  
4           him with any information that you knew the department  
5           possessed that he did not?

6           A. No, I did not.

7           Q. And during your negotiations, as well, I take it you took the  
8           opportunity to remind him that the government might not  
9           accept the Commission of Inquiry's recommendations?

10          A. Yes.

11          Q. That was one of the levers, I suppose, that you had in your  
12          favour in the negotiations?

13          A. I used that.

14          Q. You've said, sir, on a number of occasions that you were not  
15          balancing principles, only money. Do you recall that  
16          statement?

17          A. Yes, I do.

18          Q. Would it be fair to say, then, that you brought to your  
19          negotiations no sense of moral responsibility on behalf of the  
20          government and no principle involving an obligation to be fair  
21          to Junior Marshall?

22          A. Certainly the latter part, I would agree with, that I was not  
23          concerned about the amount that we would ultimately agree  
24          on being fair in any, whatever fair would mean.

25          Q. And what do you disagree with then?

1 A. I'm sorry?

2 Q. I'm sorry, you said you agreed with the latter part.

3 A. I agreed with the part that you asked me about, fairness. I  
4 was not concerned about the award per se being fair.

5 Q. And you didn't bring any principles, in terms of a principled  
6 basis of negotiation, other than to get, or to give as little  
7 money as possible.

8 A. Oh, no, no. At the beginning, we were both, both sides were  
9 operating on very definitive principles. Mr. Cacchione had a  
10 whole list of principles and I had a list of principles, which I  
11 explained to him in my letter; that is, "Why don't we treat this  
12 as though it were tort case?" And, "Why don't we look at it in  
13 terms of damage awards? Look at pecuniary, nonpecuniary  
14 losses and we'll see if we can arrive at something." That, I  
15 think, was a principled approach, but as it turns out, it did not  
16 get us very far because whenever we met, the only thing we  
17 ever talked about was money, dollars.

18 Q. In fact, you did not sit down, if I understand your evidence  
19 correctly, and say: "Let's play this out as a tort case. Let's  
20 look at loss of income. Let's look at it as though it were a tort  
21 case and come up with some figure as though there had been  
22 a very serious car accident."

23 A. I started that but we did not carry through with that.

24 Q. And so the figure that you ultimately negotiated bore no  
25 relation to any principle or set of principles.

1 A. No, it is a negotiated agreement. It is not an agreement based  
2 on principle.

3 Q. And when you sought to reduce the amount from \$550,000  
4 towards 250 or 60 or 70, there was no clear principle, other  
5 than pay out as little as possible.

6 A. I agree.

7 Q. Now the advantages you've had in the negotiations, as you've  
8 described them as being, the government didn't have to  
9 accept, and other things that you've pointed out to Mr.  
10 Cacchione, do you, sir, have any difficulty with the position  
11 you took in light of the fact that you pressed these  
12 advantages and circumstances where Mr. Cacchione told you  
13 and you know that, I think you used these words, "That Mr.  
14 Marshall was 'cracking up'." In retrospect...

15 A. That did not trouble me at the time. In retrospect, when I  
16 look at it now, it seems like a hard line, but then again, I have  
17 a position to represent and I do that without becoming  
18 emotional about it.

19 Q. Now in terms of the "hard line" that you took, would it be fair  
20 to say that from the very beginning, you took only the  
21 position and the line that you understood Mr. Coles and the  
22 Attorney General wished you to take?

23 A. It was an understanding I had, yeah. It was not a clear  
24 expression of any kind of particular factor or principle.

25 Q. If you had been in any doubt about their view of the matter,

1 wouldn't it be obvious for you to simply walk in and say,  
2 "Ought I to negotiate this on a totally different set of  
3 principles?"

4 A. Oh, sure, I had no doubt.

5 Q. You had no doubt.

6 A. No.

7 Q. Do you recall ever having any discussions with Mr. Coles or  
8 anyone else as to whether or not you ought to take a more, I  
9 don't want to call it benign, but certainly a less hard line with  
10 respect to monies to be offered to Mr. Marshall?

11 A. No.

12 Q. I take it at all times it was your impression then that your  
13 superiors agreed with what you were doing?

14 A. Yes.

15 Q. Now in one of the letters, and let me take you to page 468, in  
16 your discussion about legal fees, and it's quite early on in...  
17 This is a letter you wrote, sir, on June 13th, 1984 to Mr.  
18 Cacchione. And if I could draw your attention to the fourth  
19 paragraph, it's a paragraph my friend referred you to. And  
20 what puzzles me is I understand that in the ordinary course,  
21 and I'm not a civil lawyer, but in the ordinary course, civil  
22 lawyers when they settle, whether they admit liability or not,  
23 often pay counsel fees for the other side. Is that true?

24 A. It really depends on the claim that is being put forward.  
25 Sometimes you do, sometimes you don't.

1 Q. But it's not unusual.

2 A. Oh, no.

3 Q. And over here where you say, for example, that you suggest  
4 that the legal aid scale be used within the context of the Nova  
5 Scotia Legal Aid Plan, Mr. Spicer put to you the question that,  
6 in fact, there was nothing in the plan that dealt with or had  
7 any tariff for this kind of retainer. Isn't that true?

8 A. No, it is not entirely true. The tariff is flexible enough to  
9 allow for compensation to counsel for any legal service  
10 provided. Now, of course, if counsel provides a service that is  
11 a nonlegal service, counselling or whatever it might be, which  
12 may be by some determined to be a nonlegal service, then  
13 maybe the tariff would not be adequate, I agree. But I had no  
14 difficulty with Mr. Aronson's account because it was rendered  
15 in the course of a court proceeding. It should have been very  
16 straightforward to tax that on the legal aid tariff.

17 Q. So, I take it, though, that the difficulty is that if one were to  
18 look at your tariff, one would learn that there is a limit to the  
19 number of hours of preparation, for example, that one would  
20 put in.

21 A. Of course.

22 Q. And that, in this case, having to go out and gather affidavits  
23 and interview people with respect to preparing for the  
24 reference, one had to go well beyond what would be the  
25 usual, I suppose, preparation time, and there were no

1 precedents for preparation time. So what were you  
2 suggesting?

3 A. Well, I was suggesting that the case ought to be treated, at  
4 that point, that the legal account ought to be treated as any  
5 other legal account and the legal aid plan, the little bit I know  
6 about it, has accommodated in the past, counsel, private  
7 counsel, who was acting at the choice of the accused in a  
8 major crime, such as murder, and where counsel expended  
9 many, many hours doing research and yet was compensated  
10 under the legal aid plan. There is room for that kind of thing.  
11 It's not a problem as long as the work performed is a legal  
12 service.

13 Q. Were you aware, sir, that the offer made to Mr. Aronson  
14 included a real limit on the number of hours of preparation?

15 A. There's no question that the amount taxed would have stood  
16 in a very sad proportion to the bill that Mr. Aronson prepared  
17 and presented.

18 Q. Not just the total, but the number of hours required.

19 A. I'm not familiar with the hours, no. That would surprise me,  
20 if that's the case. That should not be. I mean one just doesn't  
21 set hours for legal representation in advance. It doesn't seem  
22 right.

23 Q. Would you be surprised, sir, if I told you that in virtually all  
24 cases under the Legal Aid Act and regime in place in Nova  
25 Scotia, there are hours set for preparation?

1 A. Of course, there are, but what I'm saying is that there is  
2 enough leeway within the plan where counsel can go back to  
3 the Legal Aid Commission and get additional compensation.  
4 It's happened in the past, many times.

5 Q. Now let me just jump to another area. You were asked a  
6 question about cost-sharing and there's a notation at page  
7 482 where, I believe it's Mr. Coles is saying that he does not  
8 wish to have any discussions about cost-sharing with the  
9 Government of Canada. Do you know how it came to pass that  
10 the Government of Canada became involved in cost sharing  
11 the final settlement?

12 A. I do not know it, no. This was done after I was, after my  
13 involvement terminated. But I suspect the reason goes back  
14 to the federal task force on compensating victims of, or those  
15 who are innocently imprisoned. I think it has something to  
16 do with that.

17 Q. Do you have any knowledge of who in the department would  
18 have approached the Government of Canada with respect to  
19 this matter?

20 A. I don't know directly, no.

21 Q. Now you've indicated that, as far as you were concerned, the  
22 premise of your negotiations was that the Province of Nova  
23 Scotia bore no legal responsibility for the wrongful conviction  
24 of Mr. Marshall.

25 A. Yes.



1 Q. Did you, sir, prepare a legal opinion to that effect?

2 A. No, I did not.

3 Q. Did anyone under your direction or at your request prepare  
4 such an opinion for your use?

5 A. No.

6 Q. Was one prepared, to the best of your knowledge, in the  
7 department?

8 A. I don't believe. No, I don't think an opinion to that effect was  
9 prepared, no.

10 Q. So I take it, then, this was a conclusion you drew without...

11 A. It's an opinion I offered and I do that quite regularly,  
12 depending on how much time I have to react to a situation.

13 Q. And in this case, I take it you had ample time to react to the  
14 situation?

15 A. I had enough time to feel fairly comfortable in my opinion,  
16 that there was no great threat of a civil claim being  
17 established against the Crown.

18 Q. And did you do any thorough research in relation to perhaps  
19 the use of other forums, even international forums, in front of  
20 the United Nations and how that could be used, at least, to the  
21 political disadvantage of the Government of Nova Scotia?

22 A. No, I did not do that. The political side was not in my  
23 interest. It was not too long before that Marshall matter  
24 came up that I had a case in the courts on malicious  
25 prosecution and, at that time, this was a jury trial, I had a

1 good reason to do in-depth research on malicious prosecution  
2 and I really didn't need to update that. It was quite fresh in  
3 my mind at the time.

4 Q. And I take it it was your legal view, without any further  
5 research, that that would be the sole basis upon which any  
6 claim could be put forward.

7 A. That was the only one that I could think of, yes.

8 Q. And you didn't do any further research to see whether  
9 another basis was available.

10 A. I did not.

11 Q. You stated quite candidly in your evidence to questions posed  
12 by Mr. Spicer that perhaps your years as a prosecutor,  
13 although they were not many, in fact, may have left you  
14 feeling jaundiced about the accused who appeared in front of  
15 the criminal courts.

16 A. Yes.

17 Q. And that may have left you feeling, as well, that there was a  
18 hopelessness, or perhaps some other word is appropriate, in  
19 relation to certain segments of the community.

20 A. It appeared that way to me, yes.

21 Q. And, indeed, I take it you felt so strongly about that, sir, you  
22 chose to withdraw from the practice of criminal law.

23 A. Well, when the opportunity was offered, I decided that  
24 maybe I should get into civil law, yes... Or get out of the  
25 prosecutor's courtroom.

1 Q. And your feelings that were generated around, I suppose,  
2 what you've just described...

3 A. Yes.

4 Q. Were one of the reasons for getting out.

5 A. That was a consideration in my mind, that I was getting a  
6 slanted view on society.

7 Q. And when you say you were obtaining "a slanted view," I  
8 take it then what you're also saying is that you were  
9 developing attitudes towards the people who appeared in  
10 front of, appeared in the courts?

11 A. Yes.

12 Q. And you didn't like, personally, the attitudes you were  
13 acquiring?

14 A. I did not like the way I was looking at some people,  
15 particularly, yeah.

16 Q. And when you say "you didn't like it", would it be fair to say  
17 that you felt in your mind that you were developing a  
18 discriminatory attitude toward some of those people?

19 A. Not to that point, no. It was just, it was such a hopeless  
20 environment, really, and it seemed so futile to be a  
21 participant in that environment because whatever I did  
22 seemed to make no impression on anyone. We had people, I  
23 had people in the courts that were sentenced to a term of  
24 incarceration in the provincial jail, which would have been  
25 under two years, and they turned around and say to the

1 judge, "Can I have two years?" I had other people come to  
2 the courtroom on deliberate crimes so they could spend a few  
3 months in jail because it was cold outside. All kinds of  
4 strange things like that and after awhile, I just wondered  
5 what my role in this all was, what I was doing there.

6 Q. What was the attitude, though, that you had that you isolated  
7 in yourself that you didn't like?

8 A. Well, just the way I looked at people when they came before  
9 the judges. I just didn't like them a great deal because I, you  
10 know, I had seen them before on crimes or I suspected that  
11 they had been, or most of the time, had a criminal record, of  
12 course, in... I don't know what the percentage is, but I would  
13 suspect eight out of ten, without doing any calculations, of  
14 people in front of judges have records. So whenever I saw  
15 one of these people, and there would have been a number  
16 every day, I just thought, this is all very hopeless. We put  
17 them through the courts. We put them through the jails and  
18 they come right back.

19 Q. Now in terms of your contact with native people, would it be  
20 fair to say that you had no contact with native people outside  
21 the courtroom?

22 A. None whatsoever.

23 Q. You had contact inside the courtroom?

24 A. Yes, some.

25 Q. And would it be fair to say that the attitudes you've just

1 described would extend to also native people as well?

2 A. Yes.

3 Q. And, sir, when you sent... Let me turn you to page 536, when  
4 you sent this article on...

5 A. I'm sorry, what page?

6 Q. 536, 537. When you sent the newspaper clipping on to Mr.  
7 Coles about Mr. Marshall's arrest, isn't it fair to say that at  
8 least at that time, all you were really doing was pointing out  
9 to Mr. Coles that your view of people in the criminal justice  
10 system, including Mr. Marshall, was that they would just keep  
11 doing it again, and that's why you sent that article on?

12 A. No, that is not why I sent it. Now whether I share that view  
13 or not. The reason I sent that article was simply an  
14 informational piece that I happened to come across. It had no  
15 particular significance at the time, except that the key player  
16 in our effort to negotiate a settlement had been apprehended  
17 by the police, and I thought that that was a matter of interest.

18 Q. And did Mr. Coles share your view that you've described as  
19 having?

20 A. He never sent anything more back, so I don't know. He didn't  
21 respond to that.

22 Q. From your conversations that you held with him over the  
23 time period, your discussions about the Marshall case, the  
24 likelihood of recidivism, the difficulties with alcoholism, the  
25 likelihood of his employment. Isn't it true, sir, that he shared

1 your views, as you've described them?

2 A. He may well. I don't know in detail whether he shares them  
3 all.

4 Q. Generally, in general, he shared your views, isn't that not  
5 correct?

6 A. I'm not sure, frankly. I don't know if I had an opportunity to  
7 sit back with him to contemplate these issues. I really don't  
8 know if I could say that with comfort.

9 Q. And I'm going to suggest to you, sir, that the attitude with  
10 which you approached these discussions with Mr. Cacchione,  
11 and the fact that you were so willingly and able... or willingly  
12 capable of playing hard ball and taking whatever advantage  
13 you could out of the situation, indicates, to some extent, your  
14 disdain for Mr. Marshall.

15 A. It's unfortunate that you would see it that way. I don't think  
16 that's the way I feel about it.

17 Q. In searching your conscience, would you not agree with that?

18 A. I have no reason to disdain Mr. Marshall. I didn't have then.  
19 I never ever met Mr. Marshall. I never saw him in person.

20 Q. Let me rephrase it then and not talk about disdaining Mr.  
21 Marshall. To feel that as a native person...

22 A. Yes.

23 Q. That he was giving...given the social circumstances from  
24 which he came, that he was not deserving of any significant  
25 compensation because of his life circumstances.

1 A. No, I thought he was deserving of something. I certainly felt  
2 that he deserved something to allow him to get started again,  
3 to get a new start in his life.

4 Q. And would it be fair to say, though, as far as you're  
5 concerned, he got more than what was reasonable in the  
6 circumstance?

7 A. He got a lot of money. I felt, at the time, that \$270,000 was a  
8 lot of money, and I still feel that way.

9 Q. My friend took you to the guidelines that have been  
10 promulgated for...

11 A. Yes.

12 Q. Those individuals who would be considered wrongfully  
13 convicted. Can we at least start from the assumption when  
14 one discusses these guidelines, that it's generally agreed that  
15 this has not happened in Canada very frequently?

16 A. That is...

17 Q. Wrongful convictions, or conviction of...

18 A. There are only three cases that I know about. There's one in  
19 British Columbia, one in Alberta, and one in Nova Scotia.

20 Q. So when drafting the guidelines or considering the principles,  
21 one does not go at those principles by being afraid of  
22 floodgates.

23 A. We looked at that in the course of our task force examination  
24 and we were not convinced that this would be a floodgate  
25 situation.

1 Q. Right. In other words, that you would not govern the creation  
2 of the substantive principles by floodgate concerns.

3 A. Quite right, yes.

4 Q. So if starting from that assumption, if I may, and ask you a  
5 couple of questions, would you agree, sir, if I asked you to  
6 turn to (b) in the guidelines for eligibility, and particular (b) 2  
7 where it says:

8  
9 Compensation should only be available to the  
10 actual person who has been wrongfully  
11 convicted and imprisoned.

12 Would you agree, sir, that the children, spouses, and parents  
13 of those individuals wrongfully convicted cannot only be out  
14 of pocket actual money as a result of a wrongful conviction,  
15 but may also have suffered, substantially, as a result of that  
16 wrongful conviction?

17 2:50 p.m.

18 A. I would agree.

19 Q. And can you, leaving aside any substantive fear of the  
20 floodgates, can you put forward a principal basis upon which  
21 a careful examination of their claim ought not to be made?

22 A. I can see of, I can think of no reason why their claim should  
23 not be entertained, not at all. In the course of our task force,  
24 again, we did contemplate that matter, and at one point we  
25 certainly seemed all agreed that the relatives, immediate  
relatives, should at least be able to put forward a claim for



1 out-of-pocket expense, such as visitation in the jails and so  
2 on, whatever other out-of-pocket monies they suffered.

3 Q. I take it you would not, in light of the absence of a concern  
4 about a floodgate, have excluded other bases for a claim being  
5 put forward as well.

6 A. I would not, no.

7 Q. Now, as well, with respect to point 3, I take it, or can you  
8 assist us in identifying what principal basis is available to,  
9 say, people wrongfully convicted under a provincial statute  
10 and sentenced to six months in jail, ought not to receive some  
11 compensation.

12 A. There is none. The problem is the same. But, you see, this  
13 original draft came from the Federal Crown and it would not  
14 have been for the Federal Government to dictate to the  
15 provinces that the provinces should have a compensation  
16 system.

17 Q. In the discussion in your, in the report, and perhaps I've  
18 missed it, is there anything in the federal/provincial task  
19 force that indicates that you are addressing both provincial  
20 and federal incarceration?

21 A. We did address both.

22 Q. You did address both?

23 A. Yes.

24 Q. And I take it there is no principle basis to distinguish  
25 between them as far as you're concerned.

1 A> None on principle at all, no.

2 Q Then with respect the issue of proof of innocence which is  
3 perhaps one of the most troubling, you agreed with the  
4 suggestion put to you by Mr. Spicer that if Mr. Marshall had  
5 been convicted, had appealed to the Nova Scotia Court of  
6 Appeal and his appeal was dismissed, had further appealed to  
7 the Supreme Court of Canada and his appeal was dismissed,  
8 remained in jail for ten years, as a result of new evidence  
9 there was a reference and as a result of the reference a new  
10 trial ordered in which he was acquitted, in those circumstance  
11 is it your reading, then, of this document that no  
12 compensation would be available?

13 A. It is if I recall the wording of Section 683 and 617 of the Code  
14 correctly.

15 Q And would you agree with me that there would be no  
16 principal basis that compensation should not be available in  
17 those circumstances?

18 A. I would agree but, you see, we're getting now very close to  
19 the borderline as to the necessity for a division somewhere  
20 along the way because if the system is to compensate all  
21 those who have been wrongfully convicted and imprisoned  
22 for some time but who were, nevertheless, acquitted in the  
23 course of the regular process whether it's by new evidence or  
24 by just the Appeal Court eventually or the Supreme Court of  
25 Canada, then of course we do run into a, philosophically, a

1 whole different problem. The covenant, the international  
2 agreement that Canada subscribed to many years ago  
3 requires Canada to implement a system that compensates  
4 those who have been innocently imprisoned and have been  
5 found to be innocent subsequently. But only in the situation  
6 such as Mr. Marshall, not those that were, that went through  
7 the regular process through a regular Court of Appeal up to  
8 the Supreme Court of Canada and finally were acquitted.

9 Q. Isn't the problem also the fact that in the field of criminal law  
10 in Canada, we do not ever talk about proof of innocence. A  
11 person is "innocent" as a matter of law, if they are found to be  
12 not guilty.

13 A. That's quite right.

14 Q. The Crown has not discharged the burden that rests upon it or  
15 is not capable of discharging it on a review of the facts that  
16 person, for all intents and purposes, is innocent.

17 A. No, I wouldn't put it that way. I think the finding of the court  
18 is that the person is not guilty of the charge but that's not to  
19 say that the person is innocent. That's the whole problem of  
20 this compensation system.

21 Q. Well for the purposes of our law there is only one verdict in  
22 that sense.

23 A. Um-hmm.

24 Q. If you are found not guilty...

25 A. Yes. That does not mean innocent. I disagree with you. It

1 means that you're not guilty of the crime charged which  
2 means perhaps that evidence that was before the court was  
3 inadmissible. While it would normally have proved guilt it  
4 was inadmissible. The Crown just didn't make the right case  
5 so it didn't succeed in proving, it means nothing in the context  
6 of innocence. It's simply a finding of not guilty. And that is  
7 one of the real dilemmas of our system in that we are looking  
8 at people who were acquitted on the one hand of a crime and  
9 when we put them into the compensation system suddenly  
10 we require a finding of innocence. Because, of course, we do  
11 not want to, I would think as a society, we would not want to  
12 compensate those who may well have committed a crime or  
13 who did commit a crime and we can't prove it somehow  
14 because of inadmissibility of evidence.

15 Q. I'm going to suggest to you if the state can't prove it then the  
16 presumption of innocence prevails as a matter of law and that  
17 for legal purposes that person must be dealt with as though  
18 they are innocent.

19 A. Yes, but you know as well as I do in the criminal courts, you  
20 come across cases where a person has well committed a  
21 crime, everybody knows it, and it just cannot be established  
22 by evidence that is admissible before the court.

23 Q. Where I come from that means it's not guilty but I won't  
24 argue with you.

25 A. All right.

1 Q The...

2 A. But it's an interesting distinction, you see, because, it's a  
3 distinction that the covenant draws and makes a point of.

4 Q No, I understand that the covenant says it. I'm just not sure  
5 it's compatible with the legal system but let me leave that for  
6 argument and I have one or two last areas I'd like to address  
7 with you. The considerations for determining quantum that  
8 are outlined in this report deal with the effect of blame-  
9 worthy conduct on the part of the applicant or the person  
10 who is wrongfully convicted as being a way of, I suppose,  
11 limiting the damages or the losses that they can claim.

12 Correct?

13 A. That's in the guidelines?

14 Q Yes.

15 A. Maybe if you...

16 Q Take a look at page 3 of the guidelines...

17 CHAIRMAN

18 What page is that?

19 MS. EDWARDH

20 Page 27 of the report.

21 CHAIRMAN

22 It would be more significant.

23 MS. EDWARDH

24 Q You'll see at page 27 of the report...

25 A. Yes.

1 Q. Where there's a discussion of that topic. "If the claimant's  
2 conduct contributed or brought about his conviction there  
3 should be an adjustment of the award."

4 A. Yes, I see that.

5 Q. So awards, and let me just read this because I want to put  
6 some questions to you.

7  
8 Awards would take into account contributory  
9 acts by the applicant which might involve his  
10 own perjury or failure to disclose an alibi or  
11 facts or other evidence in his own defence that  
12 contributed, at least in part, to his conviction.

13 Now what I find troubling about this, and perhaps you can  
14 explain it to us, is why the conduct on the part of the  
15 applicant that was considered blame-worthy would be  
16 considered in reducing the settlement but the conduct or  
17 blame-worthy conduct on the part of the state, whether by  
18 way of police officers or Crown counsel, would not be  
19 considered as well in augmenting the situation or increasing  
20 the compensation that was properly payable.

21 A. Well presumably the police conduct or whatever person is  
22 involved in the prosecution of someone who is ultimately  
23 convicted innocently would set the stage for a claim for  
24 compensation to begin with. So I think the conduct in the  
25 prosecution stage is taken care of in that it works towards, it  
words in favour of a claim, otherwise there would be no  
claim.

1 Q. Well, let me just stop you. I would assume that in most cases  
2 one would not necessarily find misconduct they might well  
3 find, perhaps, some negligence or some avenue, or it may be  
4 just that a fact was not available to be found until after the  
5 conviction without any misconduct on anyone's part.

6 A. I agree. That's conceivable, too.

7 Q. So a claim would lie where there was no inappropriate or  
8 improper conduct by either Crown counsel or by any police  
9 officer.

10 A. Um-hmm. That's conceivable, yes.

11 Q. Now why shouldn't malfeasance on the part of either of those  
12 two increase and why would, and as I read both the report  
13 and also these guidelines, why wouldn't there be some  
14 recommendation that that be examined?

15 A. Well the reason why malfeasance of, by police or anyone else  
16 in the prosecutorial process is not a factor is because the  
17 compensation is restricted to the period of incarceration. It  
18 does not address what happens at the prosecution level. That  
19 may be something that could be dealt with in the courts aside  
20 altogether from any compensation system that we might have  
21 in the future.

22 Q. There is no...

23 A. The police conduct is not relevant to the compensation system  
24 because it takes a period of time, it deals with a period of  
25 time that is of no consequence when it comes to

MR. ENDRES, EXAM. BY MS. EDWARDH

1 compensation.

2 Q I find, and perhaps you can explain this. How on earth, the  
3 period of time, I'm sorry My Lord, you had a question...

4 CHAIRMAN

5 Well I guess it's the same one. You do take into account the  
6 claimant's conduct that contributed or brought on the conviction.

7 A. Yes.

8 CHAIRMAN

9 Which obviously had to occur prior to the conviction.

10 A. Yes. Yes. Yes. That's right. But that's the, I see a little diff-,  
11 mind you, see My Lord, these are things that the task force  
12 produced as a matter of full consideration...

13 CHAIRMAN

14 I appreciate that. This is a task, this is not binding on anyone.

15 A. By the principles it's not binding on anyone.

16 CHAIRMAN

17 But I presume...

18 A. But the consideration that I had in mind at that point, and I  
19 agreed with blame-worthy conduct being taken into account  
20 in reducing the damages otherwise, or the payment otherwise  
21 to be made, is this, that we are only trying to compensate  
22 those that are innocent. That were innocently sent to prison  
23 and if a person carries a certain amount of blame in that  
24 process that sent that person to prison then I think the  
25 person has to take, has to pay the price for that, too. And



1 that's to discourage people from lying, cheating and doing all  
2 sorts of things in order to frustrate the court's efforts because  
3 if it were otherwise there would be nothing to stop someone  
4 from developing and laying a great pack of lies on the court,  
5 get convicted because of his own fault and then he goes, gets  
6 acquitted subsequently when the true facts are made known  
7 and then, of course, he'd turn up at the door and say, "Now I  
8 want my compensation." My answer to him would be, "Look,  
9 you are to blame for your own problem." And that's what we  
10 went through.

11 Q. Given the frequency with which that's happened it's not a  
12 very probably scenario.

13 A. No, I agree.

14 Q. But His Lordship's comment, I think, is well taken that if you  
15 look at the conduct of the person prior to the conviction one  
16 might well say that the deterrent model you're using is better  
17 suited to police officers and prosecutors going about the daily  
18 work of prosecutions so that this will not happen again.

19 A. Um-hmm.

20 Q. And that there ought to be some real recognition that their  
21 malfeasance is affected, or is included in the award.

22 A. Yeah. I agree with you. I think there is an area, and there is  
23 room for considering malfeasance, if it is of the kind, by the  
24 police, by the prosecutors and so on, and there is a place for  
25 doing that. There is room for that. I mean we know that Mr.

1 Marshall was suing the chief of police for the...

2 Q. I'm talking about compensation...

3 A. Investigation period.

4 Q. I'd like...

5 A. Yes, well no system of compensation that I'm familiar with  
6 has ever gone that far as to compensate an innocently  
7 imprisoned person for the pre-incarceration period. If I  
8 recall correctly, is it always the period of imprisonment that  
9 is being compensated. Although, and I can say that, add that  
10 proviso, the covenant itself seems to go further. The  
11 international agreement seems to require somewhat more  
12 than just compensation for the period of incarceration.

13 Q. Well, Mr. Marshall was in custody...

14 A. Yes, of course.

15 Q. And commenced serving time, as a matter of the Canadian  
16 Criminal Code from the day he first went into custody prior to  
17 his conviction.

18 A. That's not unusual. A lot of people spend time in custody in  
19 the course of a criminal proceeding.

20 Q. But they don't serve sentence.

21 A. No. Quite right.

22 Q. So on a homicide, it's different.

23 A. It is not unusual for a person charged with a crime to serve a  
24 considerable amount of time until either innocence, and I'll  
25 use the term myself, until it's been established whether the

MR. ENDRES, EXAM. BY MS. EDWARDH

1 person has committed the crime and there is no room for  
2 compensation. There is no avenue for compensation for that.  
3 That is our system. And that's a good system because we  
4 need to be able to lock people up who are being charged with  
5 crimes, particularly serious crimes if there is a threat to  
6 society, there's nothing wrong with that. Even at the risk of  
7 subsequently having an innocent person in jail.

8 Q. Well, sir, I'm going to ask one, let me ask one further  
9 question. There is a principle of law that some of us hold  
10 dear that it is better to let ten guilty men go free than convict  
11 one innocent. Do you subscribe to that principle?

12 A. Yes.

13 Q. Are you sure?

14 A. Yes.

MS. EDWARDH

15  
16 Those are all my questions.

COMMISSIONER EVANS

17  
18 Q. Mr. Endres, the proposition made to you, or the offer made by  
19 Mr. Cacchione was for \$540,000. And you were of the view  
20 that Marshall had to accept some blame or responsibility  
21 because of his, this conduct as you've claimed. And you also  
22 felt that there, while there was no legal responsibility on the  
23 Crown, in your opinion, there nevertheless was considerable  
24 pressure on the government to compensate Mr. Marshall and  
25 you've said that he deserved something. So the question I'm

1 getting to is this, did you just decide that it was going to be  
2 50-50?

3 A. It seems that way.

4 Q. That's what it worked out and I wondering that because you  
5 were not prepared to go that extra 5000 that you had  
6 authority to do. And whether you were holding tight to that  
7 50-50 division of responsibility...

8 A. It certainly seems that way in looking at the figures now, but  
9 quite frankly, that was not a factor that I had in mind. What,  
10 if you look at my original note that I made of the first  
11 meeting I had with Mr. Cacchione, we were going through a  
12 number of figures and we ended up with a figure of  
13 \$270,000. And that just sort of stuck with me, that figure.

14 Q. And why I was curious was because you did have authority  
15 to go the extra 5.

16 A. Yes.

17 Q. But you hung tight to that...

18 A. No, the only reason I didn't go 15 is because I wanted to just  
19 see if it was necessary to spend the extra 5.

20 Q. Thank you.

21 A. But if I may explain why, I meant to do that when I was  
22 being asked by Mr. Spicer about this one note and I forgot  
23 what page number it was. I couldn't explain a certain figure  
24 at the bottom. I looked at that during the lunch hour and I'm  
25 quite sure I know what it meant.

1 MR. SPICER

2 471. Does that help you?

3 A. Yeah, that's it. Right. That's the, exactly the note, My Lord,  
4 that I spoke of where I've documented the figures at page  
5 471 of the first meeting with Mr. Cacchione. You can see  
6 there that I ran through figures with Mr. Cacchione. 400, 350,  
7 275. And that's, 275 just stuck around in my mind as being a  
8 figure on which we might ultimately settle but you see the  
9 box on the bottom of that page, what I was doing there is to  
10 roughly just calculate quickly the cost of settling the claim  
11 given that little bit of information that I had at this point.  
12 And what I was noting there was \$250,000 as a bottom figure  
13 for Mr. Marshall. \$60,000 in total for legal costs. I know that  
14 was less than Mr. Aronson asked for but I was also thinking,  
15 of course, that he would compromise somewhat as the results  
16 would be made known. And then I had the 25,000. So the  
17 maximum figure is 335 and when I see that now it gives me a  
18 signal. That's the same figure that the Attorney General had  
19 given me room to work towards, so I must have gone to him  
20 initially and said, "Look, 335 is a figure that may do it." And  
21 he said, "Well, that's all right with me." So those two match  
22 somewhat.

23 CHAIRMAN

24 Q. You indicated that you felt that the \$550,000 original offer of  
25 Mr. Cacchione was too high for several reasons and one I

1 gather from your evidence is that Mr. Marshall had, to use the  
2 words of the Court of Appeal of Nova Scotia, "authored his  
3 own misfortune." Supposing that there had been no  
4 suggestion of any untoward conduct on the part of Donald  
5 Marshall and that he simply spent 11 years in jail for an  
6 offence that he had not committed, would you have regarded  
7 \$550,000 as a satisfactory and fair settlement of his claim?

8 A. I have difficulty with that question, My Lord. I, if I can  
9 answer this way, if the Court of Appeal had not sent what is  
10 in the decision I would not have had that argument to make.  
11 And it is conceivable that we would have arrived at a higher  
12 figure without that particular element being present. But on  
13 my reflection of the negotiations I would say that that  
14 element did not play a very major role that would be  
15 determinable in terms of dollars. I rather think that this  
16 particular element, as many others, were pushed aside  
17 quickly as we entered into the negotiations in that it was a  
18 really a matter of how would hold out as we were  
19 approaching the Commission hearing, who would hold out  
20 longer or longest and that would then determine the figure.  
21 It's very difficult to say whether \$500,000 or a little more is a  
22 fair figure. Frankly, I don't think I would go to jail for two  
23 years or one year for that kind of money if I had the choice.  
24 On the other hand, when we look at precedents and the  
25 awards that I was aware of, certainly \$500,000 is as much in

1 the range as 300 or 200.

2 Q. The, I think at one point you said you felt that the creation of  
3 the Campbell Commission was a bargaining chip on your side  
4 of the fence.

5 A. It was, yes.

6 Q. It seems to me that that would be an even greater bargaining  
7 chip in the hands of Mr. Cacchione, would it not?

8 A. It was for him as well. It worked both ways. The way I saw  
9 it, and I explained that to Mr. Cacchione, that the best the  
10 Campbell Commission could do is make a recommendation to  
11 Government and I know Your Lordship was interested in that  
12 last Thursday. All that Mr. Justice Campbell could have done  
13 is make a report to Government and if the figure that was  
14 recommended by Mr. Justice Campbell was far too high, then  
15 Government could have simply ignored it. There would have  
16 been no legal...

17 Q. The odds against that are...

18 A. Responsibility.

19 Q. I would suggest, 99-to-1.

20 A. Politically it would have been a very difficult thing to do,  
21 you're quite right. But that was, nevertheless, a prospect and  
22 the difficulty may not have been so much the fact that  
23 Government might have said, "We'll ignore that report." The  
24 difficulty in Mr. Cacchione's mind was we go towards the  
25 inquiry, a lot of time would be spent on arguing about

MR. ENDRES, EXAM. BY MR. PINK

1 jurisdictional matters, just what the inquiry was supposed to  
2 look at, and a lot of time would expire, and here is Mr.  
3 Marshall and all he's got is \$25,000. So we could have, so to  
4 speak, been dragging on for quite a few years before the  
5 matter would have been resolved. And here was Mr.  
6 Cacchione in a situation where he could sense that there was  
7 money on the other side on the table and he was persuaded  
8 to accept the deal in that sense.

9 3:12 p.m.

10 CHAIRMAN

11 Mr. Pugsley?

12 MR. PUGSLEY

13 No questions, My Lord. Thank you.

14 MR. BARRETT

15 No questions, My Lord.

16 MR. PRINGLE

17 No questions, My Lord.

18 MR. GAY

19 No questions, My Lord.

20 CHAIRMAN

21 Mr. Wildsmith?

22 MR. WILDSMITH

23 No questions, My Lord.

24 CHAIRMAN

25 Mr. Pink?



EXAMINATION BY MR. PINK

1  
2  
3 Q. Just a few. Mr. Endres, you've been asked about negotiations  
4 and negotiations you went through with Mr. Cacchione. Over  
5 the years you've negotiated a number of settlements, whether  
6 in civil matters or other types of claims with lawyers?

7 A. Yes, I have.

8 Q. Can you give the Commission some sense of how Mr.  
9 Cacchione was to negotiate with in the sense of his  
10 competency.

11 A. I was not at all concerned about Mr. Cacchione's ability to  
12 negotiate with me. I think he did a very good job, frankly.  
13 I'm a little surprised that he wouldn't see it that way himself,  
14 I did read his transcript. I've known Mr. Cacchione from the  
15 days I prosecuted and I knew him to be a very competent  
16 criminal lawyer. I had no reason to believe that he was  
17 under any handicap when it came to negotiating this deal, not  
18 at all. But he wasn't alone either. He was with his partner  
19 during some of our exchanges and Mr. Lambert made his  
20 contribution towards the settlement.

21 Q. Can you recall how many times Mr. Lambert was present at  
22 your negotiating sessions?

23 A. At least two occasions. One I remember vividly outside of our  
24 offices and the other one was in the offices of Cacchione &  
25 Lambert.

1 Q. And what role did Mr. Lambert play?

2 A. He actually negotiated with me in the same way that Mr.  
3 Cacchione did. He had apparently as much information as Mr.  
4 Cacchione. He knew everything about the case and he  
5 participated fully at those two meetings.

6 Q. My friend ahead, made reference to some of the levers that  
7 were available to you in the course of the negotiations and  
8 the Chief Justice made reference to the public inquiry being  
9 an advantage for Mr. Cacchione. How was the fact of a public  
10 inquiry or that option an option for him or a lever that he  
11 would have available to him?

12 A. Oh, for Mr. Cacchione it was an important element because  
13 here was the Government having made a public statement  
14 and a public announcement to the effect that Mr. Marshall  
15 would be compensated, the question only was how much. So  
16 Mr. Cacchione said to us why not save the money for the  
17 inquiry. We were looking at the very commencement of the  
18 Campbell inquiry, we had a preliminary budget in excess of  
19 \$200,000 and he quite rightly pointed out to me, "Why don't  
20 you save yourself \$200,000 and give it to my client." So it  
21 was a very important thing from his point of view I would  
22 have thought.

23 Q. Was the spectre of the issues, the possible malfeasance at  
24 some level, discussed by Mr. Cacchione?

25 A. Yes, he certainly was always intent on going beyond the

1 terms of, the term of incarceration to get into the police  
2 conduct and that was left open by Mr. MacIntosh at this  
3 initial meeting that we had where the Deputy Attorney  
4 General quite clearly said, "As far as I'm concerned the terms  
5 of reference start with the incarceration following the  
6 conviction." And Mr. Cacchione said just the opposite. He  
7 wanted to get into the police conduct and, in his view, that  
8 was the only way to establish the reasonableness of any  
9 award and Mr. MacIntosh left the issue open. He was  
10 prepared to deal with it one way or the other. And I  
11 envisaged that if we could not resolve the matter between  
12 ourselves that ultimately argument would have to be made to  
13 the Commissioner. I see now the Deputy Attorney General  
14 looked at it differently. He thought he could get the  
15 Commissioner to state his position up front and I didn't think  
16 that was realistic.

17 Q. So you thought the matter would be argued before the  
18 Commissioner.

19 A. That's the way I saw it developing that we would argue  
20 before the Commission, first of all, what the parameters for  
21 the Commission would, might be and if the Commissioner had  
22 made a pronouncement saying that it includes the  
23 imprisonment period then we probably would have gone to  
24 court to challenge that. That's one scenario.

25

1 CHAIRMAN

2 But you could find that the parameters did not include that  
3 but recommend to Government, as a result of the hearing, that the  
4 terms of reference be amended to include them.

5 A. Yes.

6 CHAIRMAN

7 And that would be a very powerful weapon, wouldn't it.

8 A. That's quite right, especially, yes, if he had delivered that to  
9 Government it would have been very difficult for Government  
10 to ignore that.

11 MR. PINK

12 Q. You were asked about the principles that you brought to the  
13 negotiations and you indicated that it ultimately became a  
14 question of money and every time you went into a  
15 negotiating session you started, you ended up talking about  
16 money. Did Mr. Cacchione try to bring it back to a question of  
17 identifying heads of damages or something like that?

18 A. No. The one that he did work on very deliberately again and  
19 again was the actuarial report according to which Mr.  
20 Marshall suffered a loss of income of \$320,000-some. But an  
21 interesting thing, I never saw that report. I was never  
22 provided with it. I was never given a copy of the actuarial  
23 report and I saw it now in the materials.

24 COMMISSIONER EVANS

25 That report, I was wondering about disclosure.

1 A. No, I didn't ask for it because I didn't really want to see it.

2 MR. PINK

3 Q. Finally, Mr. Endres, we've had some discussion about the  
4 \$260,000 figure and then the Deputy's suggestion that you  
5 add another 15 and I'm a little bit confused myself and just  
6 perhaps you could clarify this. When did 260, as a total, first  
7 get mentioned? And I direct you to your note at page 474.

8 A. See even in, on June 21, which is quite early, this is actually  
9 the first meeting we had, on the second page...

10 Q. That's at page 472?

11 A. 472. Yes. I said in my note we should offer \$200,000 for  
12 Marshall, \$30,000 for Aronson and \$25,000 pre-payment for  
13 a total of 255. So on the very first meeting I was thinking in  
14 terms of 255, 260.

15 Q. And then on June 26th your note reflects a total of 260, if I  
16 can read the figures correctly. 225 plus 10 for Mr. Cacchione  
17 for 235, plus the 25 already paid?

18 A. Yes. Exactly.

19 Q. And is that the figure to which the \$15,000 was to be added  
20 that's referred to on page 483?

21 A. The \$15,000 was to be added to the \$260,000.

22 Q. Was to be added to he 260. And the 260 itself that's referred  
23 to on the 26th of June included the 25,000 which had already  
24 been paid.

25 A. Yes.

MR. ENDRES, EXAM. BY MR. PINK

1 Q. And so when the Deputy refers to the 275 to include the  
2 figure which has already been paid...

3 A. Yes.

4 Q. I don't understand how that would result in a reduction from  
5 the 260 that you had already offered. Can you explain that to  
6 me?

7 A. Well 275 minus 225 or 250, I had already offered or spoken  
8 in terms of 260...

9 Q. But the 260 included the 25 as well, didn't it?

10 A. Well yes, yes. Yes, it did. In a previous note we would only  
11 pay 225, yeah. Yeah, so you're probably right in that respect  
12 then. It was not an actual drop from the original discussion.

13 MR. PINK

14 Those are all my questions.

15 CHAIRMAN

16 That's all, thank you, Mr. Endres.

17 WITNESS WITHDREW

18 BREAK - 3:21 p.m.

19

20

21

22

23

24

25