

RG44
Vol. 256
#3

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

Volume 75

Held: June 7, 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
Orsborn: Commission counsel

Mr. Clayton Ruby, Ms. Marlys Edwardh, and Ms. A. Derrick:
Counsel for Donald Marshall, Jr.

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

June 7, 1988

A

INDEX - VOLUME 75

Mr. Gordon Gale

Examination by Mr. MacDonald	13306
9:52	13318
10:15	13331
10:37	13345
10:59	13356
11:50	13368
12:10	13378
2:18	13395
2:30	13402
2:52	13413
Examination by Commissioners	13416
Examination by Mr. MacDonald Cont'd.	13424
4:00	13441
4:15	13449
Examination by Chairman	13457

1 June 7, 1988 - 9:30 a.m.

2 MR. GORDON GALE, previously sworn, testified as follows:

3 EXAMINATION BY MR. MacDONALD

4 Q. Mr. Gale, I just want to spend a little time talking to you
5 about the relationship between your office and the people,
6 the Crown Prosecutors in the field. And, I want to talk...let's
7 restrict ourselves to talking about major offences, murders
8 and violent robberies, this sort of thing. What, if any,
9 consultations are held with people in...Crown Prosecutors
10 and your office in the course of carrying out their work
11 involving a major crime?

12 A. Well, any consultations are usually at the request of the
13 prosecutor asking us questions or seeking advice on a
14 matter. At times we may make an enquiry of a prosecutor
15 because a case has gained some notoriety and we want to
16 find out more about it, so that we're in a position to answer
17 any questions that the Attorney General may be posed, have
18 posed to him.

19 Q. Are there any direct...any directives given to the prosecutors
20 as to what positions they should take, what witnesses they
21 should or should not call, what representations they should
22 make with respect to sentencing, these sort of things?

23 A. There have been on occasions statements to prosecutors that
24 they should look for a certain range of sentencing on a
25 matter.

1 Q Is that dealing with a major crime now we're talking about?

2 A Yes.

3 Q Is there any particular reason that a case would require a
4 directive such as that from your office?

5 A Well, this is usually after the prosecutor has discussed the
6 matter with us and I don't know if it's a directive as such,
7 but on one occasion I know that we have communicated to
8 the prosecutor that in exchange for a guilty plea that the
9 Crown would...should take the position of asking for a
10 certain penalty.

11 Q That's only happened in one case that you can recall?

12 A Oh, I think it may...there's one case that I can recall, but I
13 think there may have been others where we have indicated
14 that...where the prosecutor has asked about a guilty plea
15 and we have indicated that we would think that a certain
16 range of sentencing would be appropriate.

17 Q Does the prosecutor have to come to your office in those
18 circumstances, where an accused is prepared to plea
19 bargain, "I'll give you a guilty plea in exchange for this
20 recommendation on sentencing." ?

21 A There is no directive on it, but I think there has been an
22 understanding that in major cases that if there's going to be
23 a guilty plea to a lesser offence that he should consult with
24 our office to determine whether the Crown is prepared to
25 accept that.

1 Q Where does the ultimate discretion lie in those
2 circumstances?

3 A. With the Attorney General.

4 Q I'm talking about a case where the prosecutor comes to you
5 and says, "I've worked out this bargain, this plea bargain."
6 If there's disagreement between what he wants to do and
7 what your office wants to do, who wins?

8 A. I suppose if there is disagreement then the Attorney
9 General would win. You keep saying "his office" and "our
10 office," we consider ourselves one as agents working under
11 the Attorney General, so it's a matter of going to the next
12 level to get access to him.

13 Q Are there occasions then when you've had to do that, the
14 prosecutor and the officials in the office have disagreed and
15 you had to go to the Attorney General to get a resolution?

16 A. I can't recall any offhand.

17 Q The one example you talked about where there was an
18 exchange for a guilty plea the recommendation of a fine, did
19 that get to the Attorney General?

20 A. Well, it came from the Attorney General.

21 Q It came from him, so it came from the top down.

22 A. Yes.

23 Q Okay. And has that only been one occasion that you saw
24 that procedure followed?

25 A. It's the only occasion that I can recall, yes.

1 Q. Thank-you. On appeals...perhaps I'll back up. Which
2 Attorney General was that?

3 A. Well, it was Mr. Giffin.

4 Q. Thank-you. On appeals, has it been your practise to advise
5 the lawyers who are actually doing the appeal what position
6 they are to take before the Appeal Division?

7 A. No, I don't advise them as to what position they are to take.
8 We get appeals in two ways. One the Crown Prosecutors
9 send in recommendations that are reviewed within the
10 Department, generally by myself and Martin Herschorn or
11 perhaps Mr. Fiske or in some cases, one recently, six of us
12 were involved in the matter to look at it. We also get
13 appeals by the accused. The appeals are simply set down,
14 they are assigned to a prosecutor and that's done by two
15 appeal counsel, and that's done by Mr. Fiske. If that counsel
16 has some problem with the appeal, if it be one that we have
17 taken, initiated, he will come and speak to me. I know in
18 this past thirty-day period I have agreed to the
19 abandonment of four or five appeals.

20 Q. Uh-hum.

21 A. We don't really know sometimes, without the transcript,
22 whether or not there really is a basis of law for us to go
23 ahead on.

24 Q. You've done yourself many appeals, argued many appeals.

25 A. Yes, I think from 1965 to about '75 I did a good many

1 appeals, certainly in the hundreds.

2 Q. And, in your position you've seen, overseen or been the
3 man in charge, I guess, of many more hundreds.

4 A. Yes.

5 Q. In any of those have you ever...you yourself ever gone
6 before the Appeal Court and not taken a position?

7 A. No. I've always taken a position, although the position may
8 be one of the alternatives that have...you make a certain
9 argument in your factum and you indicate the...what your
10 position is that the Court should adopt a certain position.
11 But then you say in the alternative and you...if the Court
12 does not accept that argument, you make another argument
13 on it, so the Court should follow this position.

14 Q. But that's a well-recognized procedure taken.

15 A. Yes, and I have also gone into Court in many cases and
16 agreed with the accused's appeal

17 Q. But that's taking a position as well.

18 A. Yes.

19 Q. Telling the Court what the position is of the Attorney
20 General.

21 A. That's correct.

22 Q. Thank-you. What sort of appraisal is carried out of your
23 employees, the prosecutors and your solicitors? Is it done
24 on sort of a regular basis?

25 A. There is no regular appraisal done. Fortunately we're under

MR. GALE, EXAM. BY MR. MacDONALD

1 a management compensation plan that has merit increases
2 each year. The government has seen fit to grant two of
3 those over the past seven or eight years, so as far as I can
4 recall we've only done two appraisals so far of employees
5 and that's...

MR. CHAIRMAN

7 Before we leave the appeal position, Mr.Gale.

MR. GALE

9 Yes, My Lord.

MR. CHAIRMAN

11 Supposing in an appeal by an accused person, counsel for
12 the accused does not raise a ground of appeal which would appear
13 to be readily ascertainable from reading the transcript of the trial.
14 Would counsel for the Crown, in your view, be under any
15 obligation, or not so much obligation, would it be more...would it
16 be part of his practise to draw to the attention of the Court of
17 Appeal a ground that had not been raised by counsel for the
18 accused, and suggest that it should be considered?

MR. GALE

20 There are some cases where our counsel draw the omission
21 to the attention of counsel for the accused. There are...he may
22 indicate for various reasons that he does not want to advance that.
23 Notwithstanding that, if we think that it's a matter that should be
24 advanced, then we draw it to the attention of the Court and we
25 are prepared to argue that issue and we have on numerous

MR. GALE, EXAM. BY MR. MacDONALD

1 occasions.

2 MR. CHAIRMAN

3 I take in the first instance it's the responsibility of counsel
4 for the appellant.

5 MR. GALE

6 Yes, it is.

7 MR. CHAIRMAN

8 And I understand you bring it to his attention and if he
9 deems...

10 MR. GALE

11 In most of those cases that I am aware of the counsel for the
12 appellant normally says, "Thank-you," and he does something
13 about it, and I think there have been some where he has indicated
14 that for one reason or another he does not wish to have that
15 matter brought before the Court. I think in some of those...I know
16 in some of those the...our counsel have, in fact, drawn that to the
17 attention of the Court.

18 MR. CHAIRMAN

19 Okay, thank-you.

20 MR. MacDONALD

21 Q Mr. Gale, you have Exhibit 149 placed in front of you, Mr.
22 Gale.

23 A. Yes.

24 Q That is a form which is known as a performance appraisal.

25 A. Correct.

1 Q. Do I understand from what you said that these, in fact, are
2 only done when the government indicates there is some
3 money available for merit pay?

4 A. That's correct.

5 Q. The only purpose then of carrying out a performance
6 appraisal is to determine whether someone is to be given
7 additional compensation, is that correct?

8 A. That's correct, yes.

9 Q. What about just to see how they are doing, you know, are
10 they performing properly, are they complying with your
11 policies, these sort of things. Is there any regular type of
12 monitoring of that?

13 A. There's no formal type of monitoring. It's a matter that I'm
14 in discussion with them, I suppose, I'm speaking to one of
15 them at least each day, if not more, that I'm aware of what
16 they're doing. We get feedback from time to time from other
17 counsel on matters. And in some cases we have...there is
18 some feedback from the Appeal Court itself.

19 Q. Are the prosecutors and solicitors given any sort of a quota
20 that they have to meet, so many prosecutions to get a year?

21 A. No.

22 Q. Is there any different method used in the department for
23 handling so-called sensitive cases?

24 A. I don't think there's any different method. There has been
25 one case where the Deputy Attorney General requested that,

1 although the police were to investigate it, that the reports
2 come to the Department and when we were ready to lay
3 charges, then a prosecutor would be assigned on the matter.

4 Q. Assigned by who?

5 A. By the department, I suppose the Deputy would make the
6 ultimate assignment. We undoubtedly would have found
7 somebody who was senior and who could be broken clear of
8 his other cases to do the matter.

9 Q. That's another one case situation, is it?

10 A. Yes.

11 Q. And, in that one case was it the Deputy or someone at that
12 level who requested the police to carry out the investigation
13 in the first place?

14 A. In that particular...that particular case I think the, I'm not
15 quite sure how it started. I think the police may have come
16 with some information on the matter and they were then
17 told to proceed with their investigation, but to forward all
18 their reports to the department and when they were ready
19 to lay a charge then we would arrange for a prosecutor to be
20 assigned.

21 Q. That would be a different procedure certainly than the
22 norm.

23 A. Yes.

24 Q. Normally the police consider that they have the right to go
25 and talk to a prosecutor of their choice to bounce things off

1 of him, isn't that correct?

2 A. Well, they have the right to go and talk to a prosecutor. It
3 may not necessarily be the one that they want to talk to.
4 But they will have to speak to the prosecuting officer in
5 charge of any particular area and he will assign a prosecutor
6 to talk to them on a matter.

7 Q. Okay. But he doesn't have to go to the Attorney General's
8 office, and I appreciate what you say, everyone is an agent
9 of the Attorney General, but he doesn't have to go to your
10 level to say "What prosecutor can I talk to?" or Martin
11 Herschorn's level.

12 A. No. But we have had the police come to us and say that they
13 have a complicated investigation that is spanning several
14 counties and they would like us to arrange to have a
15 prosecutor assigned to them that they can...that will be able
16 to handle the charges arising out of that even though they're
17 happening in two, three, four counties.

18 Q. Uh-hum. But the one case that you're talking about wasn't
19 that sort of thing, was it?

20 A. No, it wasn't.

21 Q. Have you ever had occasion where it was the...at your level
22 or above where the recommendations were made whether
23 charges should or should not be laid?

24 A. Yes, I think there have been cases where at my level or
25 above there have been recommendations as to whether or

1 not, I'm not sure of charges should be laid, but whether or
2 not the Crown would prosecute on the evidence that was
3 there.

4 Q. Was that before an information was laid by the police?

5 A. Usually, yes.

6 Q. And in those circumstances if your department considers
7 there is not sufficient evidence, what practise has been
8 followed?

9 A. Well, except in one case that I'm aware of, the practise has
10 been that there has been an agreement reached on it that
11 we have been able to reason it out and see each side's point
12 of view on the matter, but it's been dealt with strictly on
13 legal basis on our view as to whether or not the evidence
14 would, in fact, support a charge.

15 Q. Except in one case, are we getting back to that same case
16 you referred to earlier?

17 A. Yes.

18 Q. Yeah. My Lords, obviously I'm being very cautious dealing
19 with these one cases. You are aware that the intention is at
20 a later stage to deal with several other cases, and it may be,
21 in fact, I'm quite certain that these one cases will be in that
22 group. So, I don't propose to deal with them at this stage.

23 MR. CHAIRMAN

24 Well, nor is it appropriate to deal with them at this stage.
25 And, I appreciate the necessity of the part of this witness or any

MR. GALE, EXAM. BY MR. MacDONALD

1 witness not to involve persons who are not before this inquiry.

2 MR. MacDONALD

3 Just so you understand why I'm stopping the one question
4 short. I'm sure you did, but I wanted to...

5 MR. CHAIRMAN

6 Yes.

7 MR. MacDONALD

8 ...make that clear.

9 COMMISSIONER EVANS

10 We won't ask that one question.

11 MR. MacDONALD

12 Well, you may, My Lord, but I'm not.

13 Q. I do though want to talk to you, Mr. Gale, about one incident
14 that was referred to during the evidence of Mr. Edwards,
15 and that had to do with a shoplifting case in Sydney. You
16 are familiar with that case.

17 A. Yes, I am.

18 Q. Could you tell us your knowledge of that particular case,
19 please?

20 A. I was advised by the Deputy Attorney General that
21 representations had been made to him in this particular
22 case, by somebody not connected with it, that the individual
23 in that case had been charged, was within about two days to
24 move out of the country. That the individual may have had
25 some type of kleptomania problem. That he felt that for

1 humanitarian reasons there should not be any prosecution
2 on the matter. I had no difficulty with that because it
3 seemed to me a proper exercise of prosecutorial discretion
4 and one that a prosecutor might well exercise in the field.
5 As a result of that I called Mr. Edwards' office and, while I
6 had thought I had spoken to him, Mr. Edwards' evidence is
7 fairly comprehensive on the point, and I accept that, that I
8 spoke to his secretary and told...left a message that the
9 charge was to be withdrawn or stayed, whatever was
10 necessary, and that I received a call back asking if that was
11 a ...the Deputy Attorney General's order and I replied that it
12 was. I understand that the charge was withdrawn.

13 9:52 a.m.

14 Q. The Deputy Attorney General at the time was Mr. Coles?

15 A. Yes, it was.

16 Q. Do you know, or did Mr. Coles advise you, whether an
17 approach had been made to Mr. Edwards to exercise his
18 discretion?

19 A. No, I did not know and he did not advise.

20 Q. Would you expect that that normally would be the case?

21 A. Not necessarily. Some people have a tendency to go to the top
22 when they have a request and it gets channeled down rather
23 than starting at the bottom, we start at the top.

24 Q. Being a person yourself who is not at the top of the
25 organizational ladder, do you take any offence yourself if

1 someone goes above you and asks your boss to exercise some
2 discretion that normally would be yours?

3 A. No, I don't take offence at it. Sometimes one wonders why
4 they would go to that level, if it's a rather simple matter, why
5 they couldn't deal further down the ladder but I take no great
6 offence at it.

7 Q. In this particular case you know the individuals involved.

8 A. The ones that I'm told are involved, yes, I know them. I,
9 quite frankly, do not know the name of the accused in the
10 case.

11 Q. Were you able to satisfy yourself, or did you try to satisfy
12 yourself whether this was an exercise of discretion that was
13 being exercised because of political reason?

14 A. Well I had no reason to believe that it was being exercised
15 because of political reasons. The reasons for it seemed
16 straightforward and seemed, as I said before, ones that I
17 would have thought that the prosecutor at that level would
18 have entertained and would have stopped a prosecution on.

19 Q. Are you aware of cases where that has happened at the
20 prosecutorial level? That they have exercised their discretion
21 not to proceed on humanitarian grounds.

22 A. Yes, I'm aware of those cases.

23 Q. Do you consider this case, and this particular one that took
24 place in Sydney, to be any different than others you have
25 seen?

1 A. No, I don't consider it to be any different other than the fact
2 that the individual made contact with the Deputy and it came
3 down that way.

4 Q. Have you ever seen other circumstances where it had come
5 that way, down from the top as opposed to going directly to a
6 prosecutor.

7 A. I have seen other circumstances where the Minister or the
8 Deputy have been contacted and we've been asked to look
9 into the matter and we have and discussed it with the
10 Prosecutor. I haven't seen another one where, that I can
11 recall where I was told to have the charge dropped but in this
12 particular one, given the circumstances, it didn't seem
13 anything that would not be normal in the exercise of
14 prosecutorial discretion.

15 Q. I understood from Mr. Edwards' evidence that he was not in
16 agreement with the decision of the Deputy. Do you
17 understand that as well?

18 A. Yes, I understand that. Mr. Edwards was annoyed about the
19 matter because, I think we can say that it was a shoplifting
20 matter and he had adopted a certain stance in Sydney that
21 anybody charged with shoplifting would be prosecuted so
22 that there would not appear to be any favouritism exercised
23 for anyone.

24 Q. Now if you had, and appreciate this has to be hypothetical.
25 But if you had been able to get in touch with Mr. Edwards and

1 he had told you he did not agree, he believed that for good
2 policy reason, his reason, you should not drop that charge,
3 and you had Mr. Coles telling you it should be dropped, what
4 position would you have taken?

5 A. Well I simply would have told Frank that I'd go back to the
6 Deputy, Mr. Coles, and tell him Frank's side or ask Frank to
7 call Mr. Coles and explain his view to him.

8 Q. Okay. Is there any association of prosecutors in the province?

9 A. No, there is no association of prosecutors in the province
10 although I am advised...

11 Q. You hesitated. Is there something in the...

12 A. There's a movement afoot to create an association of
13 Government lawyers.

14 Q. I see. And that would encompass every lawyer in the
15 Government.

16 A. Yes.

17 Q. That's not in place today.

18 A. No, it's not an official organization. I think there may be some
19 planning on it but I have not been involved with it to date.

20 Q. Do the members of the criminal law staff, the prosecutors and
21 so on, do they participate in any type of national
22 organization?

23 A. There is no national organization that I'm aware of for
24 prosecutors, per se. Some of our staff make exchange visits
25 with groups or associations in other provinces. And we do

1 have prosecutors sent on, what I suppose what could be
2 called national courses. There's a series of courses run by the
3 Federation of Law Societies dealing with criminal law and
4 these generally have outstanding government and private
5 practitioners speaking in the course of, it lasts about a week.
6 And when we have funding we send the limited number that
7 we are able to send to it.

8 Q. Are the members of the Department, are they members of the
9 Canadian Bar Association?

10 A. Very few.

11 Q. There is a criminal law subsection of the Canadian Bar
12 Association.

13 A. Yes, there is.

14 Q. Is there any reason that only very few belong to the
15 association?

16 A. Oh, I think primarily because at one stage the Government
17 paid for the membership in the Canadian Bar Association and
18 then at a later stage the Government decided that, or at least
19 the Department decided that that money could be spent
20 better elsewhere and cancelled those memberships, not
21 cancelled them but would not renew them. Very few of us
22 elected to renew them. I, personally, did not find the criminal
23 law section of the Canadian Bar to be advantageous because I
24 found that with attending the Uniform Law Conference and
25 the, which has a special criminal section to it, that we were

1 usually at least a year or so in advance of what was being
2 discussed at the Canadian Bar.

3 Q. Let me move on to the relationship with the police and your
4 Department. You are the liaison man with the RCMP I believe.
5 At least you were.

6 A. Yes, that role has changed considerably since the Government
7 decided to create the Solicitor-General's Department.

8 Q. But up until the time of the Solicitor-General having been
9 created you were the person who had the regular liaison with
10 the RCMP.

11 A. Yes.

12 Q. And those, that included a regular meeting every Thursday,
13 did it?

14 A. Yes, it was scheduled for every Thursday and it was normally
15 held. But there were times it would not be because one or
16 other of us would be away or...

17 Q. What is the jurisdiction of the RCMP in Nova Scotia?

18 A. Well under the Police Act the RCMP are under contract to act
19 at the provincial police force. They have complete province-
20 wide jurisdiction over any, I suppose, the phrase in the act is
21 penal law of Canada or the province. So they have full police
22 powers throughout the province. They do not normally act
23 within a municipality having its own police force unless it's a
24 federal matter and that's other than the Criminal Code. Or if
25 they're requested by that police force to act or we request

1 them to act within that municipality. There are a number of
2 investigations that are done which, and I suppose I could
3 refer to the primary one as being welfare frauds that where
4 only the Province is suffering a loss for having paid out
5 money that the person may not be entitled to and those have
6 been directed to the RCMP regardless of where they occur,
7 whether they're in Halifax or an unincorporated area like
8 Hubbards.

9 Q. And you mentioned earlier complicated cases that may span
10 several jurisdictions, commercial fraud, for example.

11 A. Yes. And there are some of those that arise and may arise
12 within a municipal unit that has it's own police force but they
13 are also spanning other municipal units and to have
14 continuity in the investigation then we ask the RCMP to
15 handle that investigation in conjunction with municipal police
16 forces. But the RCMP would be the prime investigator.

17 Q. At these regular Thursday meetings, who attends?

18 A. Well it's normally the criminal investigation branch officer,
19 myself and over the last two or three years normally Mr.
20 Herschorn has been in attendance for part, if not all, of each
21 session, it depends on his schedule.

22 Q. There are no minutes taken of those meetings.

23 A. No, there are no minutes taken.

24 Q. Is there a report given by you to the Deputy as to what took
25 place in those meetings?

1 A. No, there's no report given to me, by me to the Deputy as to
2 what takes place in those meetings unless it's something that
3 requires some decision of the Department that should be
4 made at his level or at the Minister's level.

5 Q. Are there reports given to you from time to time to the
6 Minister as to what occurred at the meetings?

7 A. Well if a matter is raised at the meeting that requires his
8 involvement, yes, he's apprised of that. But normally there is
9 not a direct reporting of everything that goes on at these
10 meetings.

11 Q. We had evidence here from Milton Veniot who said that there
12 were files in the Attorney General's office that he called
13 politically sensitive, for politically-related reasons they were
14 not available to, generally, to lawyers in the Department, and
15 he called them the green-striped files. Do you have any
16 knowledge of such files?

17 A. No, I have no knowledge of any green-striped files. The
18 RCMP have a security classification on their, for sending
19 correspondence. They will send over, and it's at their, it's
20 their decision as to what classification goes on it, a letter that
21 will be marked "secret". Down the side of the letter there is a
22 stripe about a half-inch wide that's green. It has in white the
23 word "secret" about here on it. That may be a matter where
24 they are, could be any number of reasons. It may be one
25 where they want some type of identification for some

1 operative. It may be something dealing with a wire tap. It's
2 not anything that has any particular political significance to it.
3 It's an operational thing with them.

4 Q. Who decides whether to put it on a green-striped paper or
5 not?

6 A. Well the RCMP do. I don't understand their system and I'm at
7 least happy now that when send over these green-striped
8 letters that used to come in an envelope with heavy plastic
9 tape all over it which was almost impossible to open without
10 cutting the correspondence inside that they finally developed
11 a means of putting that on so that you can still use a letter
12 opener to open them.

13 Q. Well when you get one of these green-striped letters do you
14 treat it differently than some other letter you get?

15 A. No, it's not treated any differently.

16 Q. Does it just go right in the regular files?

17 A. Yes, it comes in an envelope and it would be marked to be
18 opened only by me. I open it and I look at it, do whatever
19 has to be done with it and give it to my secretary. And it
20 goes into the files.

21 Q. So you don't have green-striped files that correspond with the
22 letters.

23 A. No, there's no green-striped files. Our files have many stripes
24 on them but they're all bar coded and it's only simply an
25 indexing system.

1 Q. Okay. When a secret letter comes in that you just described,
2 is it generally available to anyone in the Department who
3 wants to go and look at the files?

4 A. There was an understanding in the Department that people
5 that are not in the Criminal section will not go and request a
6 file without first coming to myself or Martin to ask if we have
7 any objections to them seeing the file. But that's been
8 something of long-standing is simply to try and protect
9 innocent parties whose names appear in them, in the files.

10 Q. And are the files under the control of some sort of a filing
11 clerk or something?

12 A. Yes, there's a filing clerk or two or three filing clerks. There's
13 a large room and it's, each file has to be signed out and, there,
14 and accounted for and the room is locked at all times except
15 during normal office hours.

16 Q. Are those clerks advised that they are not to release criminal
17 files to anyone other than a lawyer who's in the Criminal
18 section?

19 A. I don't think they've been advised of recent times. Certainly
20 not by myself. The control of that filing system is, to a large
21 extent, within their hands and there's also a Miss Chisholm
22 who seems to have overall control of the matter.

23 Q. If you have a circumstance where an RCMP officer in the field
24 believes that an information should be laid and the
25 prosecutor he's talking with, for whatever reason, thinks that

1 there's not enough evidence or you should not proceed, how is
2 that conflict resolved?

3 A. It's resolved by the understanding that I've had with the CIB
4 officer over the years and I thought, and I think most
5 prosecutors are aware of it, that if there is such a conflict that
6 each side goes up through its own hierarchy and the CIB
7 officer will come over on Thursday to see me and we'll look at
8 the matter and discuss it, the pros and cons of it. I haven't
9 had any difficulty with those matters. There's some, I guess,
10 where we've told the prosecutor that, in our view, there's
11 sufficient basis there to prosecute and he should. There are
12 others where we've agreed with the prosecutor and the CIB
13 officer has agreed with us. That as much as you may know
14 that the person in your mind had committed the offence that
15 there is not that legal evidence there that is necessary to
16 make a prima facie case that will carry.

17 Q. And is that a direction going down to the prosecutor and the
18 policemen in the field then that either go or don't go.

19 A. Yes.

20 Q. The decision has been made at, between you and the CIB
21 officer.

22 A. Well we've talked it through and in the course of that I've
23 talked to the prosecutor on the matter. You know, I say it's
24 been hammered out at the Thursday meeting. It may not
25 have been, in fact, it may have been raised there. But there

1 may be some delay while I go to the prosecutor and find out
2 about the matter. At all times I haven't heard from the
3 prosecutor or something may have been raised that whereby
4 I want to go back to the prosecutor and find out more about it
5 or discuss it further with him.

6 Q. What I'm trying to determine Mr. Gale is what would happen
7 in a circumstance where you've had all the input you're going
8 to get and you and CIB officer decide, reach a consensus that
9 no prosecution should go, and the prosecutor in the field
10 doesn't accept that, what happens?

11 A. Well I guess he's told that if he doesn't accept it then he's free
12 to go to the Attorney General to make his points.

13 Q. He would go above you then. Is that it?

14 A. Yes.

15 Q. Now what if you and the CIB officer can't agree? Where do
16 you go then?

17 A. I suppose on my side it would go to the Attorney General, on
18 the side of the RCMP I suppose it would go to the
19 Commissioner in Ottawa.

20 Q. As the Nova Scotia police force is the RCMP under the
21 ultimate direction and control of the Attorney General?

22 A. No, they're under contract to form, to be the Nova Scotia
23 police but, perform that function, but the ultimate control of
24 the force is still with the Commissioner in Ottawa.

25 Q. And in your experience has there been any circumstances

1 where it got to that level? The Attorney General and the
2 Commissioner.

3 A. Well I'm aware of one circumstance where it got to the level
4 of the Deputy Attorney General and the Commissioner.

5 Q. And that's the one we've talked about earlier.

6 A. Yes.

7 Q. Do you consider that the Attorney General's office has any
8 authority to stop an investigation being carried out by the
9 RCMP?

10 A. No, we have no authority to stop an investigation.

11 Q. And has there ever been any attempt, in your knowledge, by
12 the Attorney General's office to stop an investigation?

13 A. No, I'm not aware of any attempt by our office to stop an
14 investigation.

15 Q. Does the RCMP force keep the Attorney General's office
16 advised of what investigations are being carried out in the
17 province?

18 A. They keep us advised of major ones that they think will be of
19 interest or will create interest that the Attorney General may
20 be asked about. Those are certainly, are ones that they keep
21 us advised of. But there are some normal routine reports that
22 come in, like, a fatal motor vehicle accidents. I guess every
23 one that they look at comes in for some reason. I'm not quite
24 sure.

25 Q. Are there, to your knowledge, any circumstances where the

MR. GALE, EXAM. BY MR. MacDONALD

1 RCMP require the consent of the Attorney General's office
2 before embarking on an investigation?

3 A. No, there are no cases where they require our consent before
4 embarking on a Criminal Code or provincial statute
5 investigation.

6 Q. Thank you.

CHAIRMAN

8 Mr. Gale, how do you prevent an overzealous police officer
9 from laying a charge where, in the opinion of the Crown
10 Prosecutor, based upon his expertise as a lawyer there's
11 insufficient grounds at law to warrant a charge being laid?

12 A. There's really no way, My Lord, to prevent such an officer
13 from laying a charge. Our remedy would be to elect not to
14 prosecute the charge or stay it.

CHAIRMAN

15 But the damage is done to the accused then, isn't it?
16 10:15 a.m.

MR. GALE

18 Yes, it is.

MR. CHAIRMAN

20 Another point, before I forget, in your telling us about the
21 practise with respect to criminal files or files that come over from
22 the RCMP marked "Secret", I was left with the impression that
23 despite that anyone on the Crown side, the criminal side, could go
24 and look in the...could read these files. I'm not quarreling with
25

1 that, but surely all files of criminal investigations have to be kept
2 confidential, don't they, unless...

3 MR. GALE

4 Oh, there's the understanding that they are confidential, but
5 I think the people working with me are fully aware of that and
6 that there is no restriction on them asking for a certain file if they
7 have a reason for it. And normally they understand that they
8 won't ask for the file unless they have reason for it. In fact, our
9 appeal people are so busy that, quite frankly, that they would
10 have no time to go looking for files that they weren't working on.

11 MR. CHAIRMAN

12 No, I was...no, I have no difficulty in assuming that your
13 Crown Prosecutors would not be wandering around reading all the
14 files. But a lot of criminal investigations, for want of sufficient
15 evidence, never get beyond the investigatory stage.

16 MR. GALE

17 Yes, that's correct.

18 MR. CHAIRMAN

19 How do you prevent confidential information in these files
20 becoming known to other departmental employees with the risk
21 of it becoming public knowledge?

22 MR. GALE

23 I suppose, My Lord, that there is that risk. We have never
24 experienced it occurring.

25

1 MR. CHAIRMAN

2 Okay, thank-you.

3 MR. MacDONALD

4 Q. What is the relationship between the Attorney General's
5 office and other police forces in the province?

6 A. Under the Police Act the Attorney General is stated to be the
7 chief law officer of the Crown, so that under that Act he
8 could direct the police force to police in an area, he could
9 direct an investigation be taken from one force and
10 transferred to another force. Other than that our
11 relationship with them was that we don't receive reports
12 from them unless it's a matter that has been brought to our
13 attention and we want to see something about it, in which
14 case we will ask for a report and normally receive it.
15 Basically municipal forces are dealt with by the Nova Scotia
16 Police Commission.

17 Q. And there is no sort of regular type of meeting such as you
18 have with the RCMP?

19 A. No, because they are not the...they are not our police force as
20 such.

21 Q. Let me move into the Donald Marshall matter, Mr. Gale.
22 What was your position with the department in May of
23 1971?

24 A. May of '71, I probably was senior solicitor at that time.

25 Q. And as I indicated to you yesterday, the evidence is that Mr.

1 Anderson was appointed to the County Court on December
2 the 16th of '71, and you would...you had told us that some
3 time the next year you were appointed to that position as
4 director of criminal retroactive to January 1st, '82?

5 A. Yes.

6 A. Yes.

7 Q. When Mr. Anderson left to take up his appointment to the
8 bench, was it understood that you were going to try to fill
9 his position until some formal appointment was made?

10 A. Well, I had discussions with the then Deputy Attorney
11 General, Mr. MacLeod, and he said, "Well, try and cope with
12 matters, do what you can and anything that you need
13 assistance with, refer it on to him," Mr. MacLeod.

14 Q. Was there any briefing process carried out by Mr. Anderson
15 before he left to advise and instruct someone what various
16 things he was looking after?

17 A. I had no briefing from him.

18 Q. Do you know if anyone else did?

19 A. I don't know if anyone else did or not. I certainly had no
20 briefing from him.

21 Q. How...in trying to carry on the job then, as best you could, at
22 that time and to the extent you did, how did you become
23 aware of what was ongoing?

24 A. I suppose simply the fact that various matters, calls or
25 correspondence would get routed to me and then I would

1 try and get the previous correspondence on it and find out
2 what had been happening and what was going on. At that
3 time all correspondence that came into the department went
4 into the Deputy's office and it was distributed from there.

5 Q. Prior to his appointment to the bench, did Mr. Anderson
6 have weekly meetings with the CIB officer of the RCMP?

7 A. Yes, Mr. Anderson, I think, created that Thursday meeting
8 with the RCMP.

9 Q. And after his appointment, did those meetings continue?

10 A. Well, they were in a state of hiatus for awhile because they
11 RCMP really didn't know who they should talk to and I
12 wasn't...I didn't know enough to really talk to them, nor did
13 I want to at that particular stage. It was trying...I think
14 they may have been held in hiatus for a two to three month
15 period before they really resumed again.

16 Q. And was there some meetings in the interim, just not
17 regular?

18 A. I don't...to the best of my knowledge there may have been
19 about a two-month period where maybe there was...might
20 have been one meeting, but I'm not even sure there was one
21 meeting during that time.

22 Q. Was Wardrop the CIB officer at that time?

23 A. As I recall he was, yes.

24 Q. Were you aware in November of 1971 that Jimmy MacNeil
25 had approached the Sydney Police and told them that he

1 had witnessed Roy Ebsary stab Sandy Seale?

2 A. No, I was not aware of it.

3 Q. Were you aware in November of 1971 that the Attorney
4 General's office asked the RCMP to go in and carry out the
5 reinvestigation?

6 A. No, I was not aware of that either.

7 Q. Were you aware of the Donald Marshall, Jr., case at all?

8 A. Not I was not aware of the Donald Marshall, Jr., case at all.

9 Q. It was under appeal at that stage. Would that have been...

10 A. Well, it may be in November, I'm not sure when the notice
11 of appeal was filed on the matter.

12 Q. I believe it's November 14th approximately.

13 A. Well, if the notice of appeal was filed, then...

14 Q. 16th, pardon me.

15 A. And we had received a copy of it, then I may have been
16 aware that there was an appeal on the matter, because I
17 would have to at that time write out to various officials
18 asking that the transcript be prepared or something of this
19 nature.

20 Q. Would it be your job at that time to assign whoever was to
21 handle the appeal?

22 A. Not really. I was responsible for going over on setting-down
23 days and setting down the...getting the dates for the appeals.
24 I would then sit down with Mr. Anderson and determine
25 which appeals he wanted to do and which ones I wanted to

1 do and who we would assign appeals to.

2 Q. So, there would be a consultation between you and Judge
3 Anderson as to who would be assigned a particular appeal,
4 whether it's you or him or someone else.

5 A. Yes, I recall at the time he had some interest in drinking and
6 driving cases.

7 Q. And this particular case of course would be murder. What
8 was the practise in the department as to who would be
9 assigned to those major type of cases?

10 A. The practise of the department primarily was who are we
11 going to be able to get to even cover the appeal term, quite
12 frankly, and which appeals did we think were going to
13 require the more elaborate legal arguments. I have handled
14 murder cases myself as far as the appeals go. But just
15 because it was a murder case didn't necessarily mean that I
16 was going to handle it or...as opposed to anybody else.

17 Q. If it was assigned to a very junior lawyer in the department,
18 would there be anything unusual about that?

19 A. I suppose it appears to be unusual, but it probably revolved
20 on the fact of how many appeals were set down for any
21 particular period and the perceived complexity of the
22 appeals.

23 Q. Would there be any consideration given to the identity of
24 the people involved? That is if there were an appeal from a
25 murder conviction of somebody who was, for want of a

1 better word, some prominent person, say the Mayor of
2 Sydney, would that be treated any differently?

3 A. Well, I would not have treated it any differently.

4 Q. You'd assign it to a junior lawyer?

5 A. Well, there were normally...we had great difficulty. There
6 were a number of people who did appeals but they also did
7 many of the other things, as I did myself at the time. It was
8 really a matter of personnel constraints as to who you could
9 have available to do the case at that particular date. So, I
10 don't think it really...there isn't...

11 Q. You don't think it would...

12 A. There was no dependence on who the individual was that
13 was the subject of the appeal. It was more one of logistics of
14 who could do it.

15 Q. And you don't think this particular one would have been
16 treated any differently had it been an appeal from a murder
17 conviction of the Mayor of Sydney compared to a...the
18 appeal of Donald Marshall, Jr.?

19 A. Well, I don't think I would have treated it any differently. I
20 don't know who assigned the case, quite frankly. If it was in
21 November that the notice of appeal came in I'm not even
22 sure at that time what the setting-down day would have
23 been because they are once a term in those days and now
24 they're every Thursday at Chambers. But...

25

MR. GALE, EXAM. BY MR. MacDONALD

1 MR. CHAIRMAN

2 Is the same practise...the same practise follows with respect
3 to arrangements in the Trial Division?

4 MR. GALE

5 Yes.

6 MR. CHAIRMAN

7 It's fixed dates. How many a month?

8 MR. GALE

9 I'm sorry, My Lord.

10 MR. CHAIRMAN

11 How often during the month?

12 MR. GALE

13 With the Trial Division?

14 MR. CHAIRMAN

15 Yes.

16 MR. GALE

17 I'm really not certain, My Lord.

18 MR. CHAIRMAN

19 I'm just looking for some knowledge. It's got nothing to do
20 with this case.

21 MR. MacDONALD

22 Q. Have you in your career ever been involved, other than the
23 Marshall case now, ever been involved in a circumstance
24 where the RCMP was asked to go in and reinvestigate
25 something that had been done by another police force?

1 A. I can't quite frankly think of one at the moment.

2 Q. And yet you weren't aware as a member of a fairly small
3 department at that time that the RCMP were doing a
4 reinvestigation of the Marshall matter in Sydney?

5 A. No, I was not. Mr. Anderson kept the Criminal Code matters
6 to himself. The only involvement I had with it was if it was
7 an appeal.

8 Q. You do know now though that in November of 1971 a
9 witness had come forth to the Sydney Police advising that
10 he had seen Ebsary commit this murder.

11 A. Yes, I know now from reading it, yes.

12 Q. And you do know that an investigation was carried out by
13 the RCM Police and a report prepared.

14 A. Yes.

15 Q. Are you able to say whether that report ever got into the
16 hands of the Attorney General's Department?

17 A. No, I'm not able to say that.

18 Q. Are you able to say that you expect it would have come to
19 the position or the possession of the Attorney General's
20 Department?

21 A. Yes, having...it having been the request of the Department to
22 go in on the matter, then the normal practise would be for
23 that report to come back to the department.

24 Q. The report is in Volume 18, correct, maybe I have it wrong.
25 Yes, at page 7.

13341 MR. GALE, EXAM. BY MR. MacDONALD

1 MR. CHAIRMAN

2 Did I understand you to say, Mr. Gale, that at that time all
3 correspondence coming into the Department of the Attorney
4 General went to the Deputy?

5 MR. GALE

6 Yes, it did, My Lord.

7 MR. CHAIRMAN

8 Who that time...at that time was...

9 MR. GALE

10 Innes MacLeod.

11 MR. CHAIRMAN

12 Innes MacLeod.

13 COMMISSIONER EVANS

14 How long did he continue as Deputy?

15 MR. CHAIRMAN

16 Yeah. When did he leave, do you...I know in the evidence
17 somewhere he told us, but...

18 MR. MacDONALD

19 September of '72, I believe.

20 MR. GALE

21 Yes, that would be correct.

22 MR. CHAIRMAN

23 So, under the heading of correspondence, would you also
24 include reports from the RCMP?

25

MR. GALE, EXAM. BY MR. MacDONALD

1 MR. GALE

2 Yes.

3 MR. CHAIRMAN

4 So, if the Inspector Marshall report came to the Attorney
5 General's Department under the normal course of things, it would
6 have gone to the...to Mr.MacLeod.

7 MR. GALE

8 It would have gone to his office and then they would have
9 been distributed to those that were dealing with the matters.

10 COMMISSIONER EVANS

11 Do you have Volume 40? I think it was 18.

12 MR. CHAIRMAN

13 18.

14 MR. MacDONALD

15 18 at page 7, My Lord.

16 COMMISSIONER EVANS

17 But these reports when they came in, they would be bound
18 up in the way that you have described, very difficult to get into.

19 MR. GALE

20 No, not unless they were marked with the "secret" marking,
21 otherwise they would just be in an envelope that was...

22 COMMISSIONER EVANS

23 A report from the RCMP on a investigation of a police force
24 or murder case, rather, would you expect that to come in as a
25 confidential document?

MR. GALE, EXAM. BY MR. MacDONALDMR. GALE

1
2 No, at that time, as I recall, the RCMP have their members
3 deliver the report from the headquarters and that came in a large
4 envelope that had a heavy piece of tape across it to seal it, that's
5 all.

COMMISSIONER EVANS

6
7 It wasn't...wouldn't be mailed then, it was delivered.

MR. GALE

8
9 Yes, they have drivers and they used to deliver them and
10 take our mail back to headquarters too.

MR. MacDONALD

11
12 Q Mr. Wardrop, or by December 21st Robert Anderson is gone.
13 He's gone to the Court because he was appointed on
14 December the 16th.

15 A. Yes.

16 Q Now, Mr. Wardrop testified here, this is on page 6761, that
17 it's his best recollection that when the report was given to
18 him, that's the Inspector Marshall report, he took it over and
19 handed it either to you or to Bob Anderson. We assume Bob
20 Anderson is not there any more when this report is
21 available.

22 A. Well...

23 Q Was it ever handed to you?

24 A. No, I, quite frankly, did not know of this report until 1982
25 when we started asking for documents that related to the

1 '71 investigation. So, it wasn't handed to me. I think it's
2 unusual enough that one would have some memory of it if
3 he had seen it or heard of it before.

4 Q. When...you went looking for it in 1982, did you say?

5 A. Well, when the RCMP were asked to reinvestigate the matter
6 by the Sydney Police, then at that stage we tried to find
7 what reports were available from the original investigation,
8 what we might have. We...I was advised that anything that
9 our department had was no longer in existence because
10 it...of the retention schedule in effect at that time, it had
11 been destroyed prior to '82. Eventually the RCMP came over
12 and provided us with copies of this.

13 Q. At which time you would have read the report?

14 A. Yes.

15 Q. And is that the first time you saw it?

16 A. That's the first time I saw it.

17 Q. If you go to page 10 of that volume, which is the final page
18 of the report, in the final sentence in the report it says, "Mr.
19 Donald MacNeil, Q.C., has been made aware of the results of
20 this investigation." Now, we have had evidence, Mr. Gale,
21 that Mr. MacNeil, in fact, called the Attorney General's office
22 to advise someone of the results of that investigation as
23 well. Now, at that stage what was the obligation on Donald
24 MacNeil as Crown Prosecutor, vis-a-vis, the defence?

25 A. Well, at that stage I think there was an obligation on him to

1 advise defence counsel that Jimmy McNeil had made such a
2 statement, that the RCMP had looked into it, here's the
3 results of it, of their inquiry into it, at least make him aware
4 of...make Mr. Rosenblum and Mr. Khattar aware of what had
5 occurred.

6 Q. And if he was assume...let's assume with me that the
7 Attorney General's office was also aware of the
8 investigation, what was the obligation on the office to make
9 certain the defence became aware of this information?

10 A. Well, I think there is an obligation on the Attorney General's
11 office, if it was also aware of it, to make inquiries and insure
12 that it was satisfied that the defence counsel were aware of
13 the matter.

14 10:37 a.m.

15 Q. And given the fact that at this stage we have an appeal in
16 process, the file having been transferred to Halifax, would
17 there be an obligation as well on the counsel handling the
18 appeal to advise defence counsel?

19 A. Well yes, if he knew of it, yes. There'd be an obligation to
20 ensure that they had been advised.

21 Q. Now if, again, you just accept if you would, Mr. Gale, that that
22 information was not given to the defence, would you agree
23 that that would be a breach of a fundamental obligation owed
24 by the Attorney General's office to see that justice was done?

25 A. In my opinion, yes.

1 Q. Thank you. Between, put it this way. Until 1982 you had no
2 knowledge of any kind about the Donald Marshall, Jr. matter,
3 is that correct.

4 A. That's correct. Because in 1982 it surprised me. I couldn't
5 even recall the matter. I couldn't even recall the appeal of
6 the matter quite frankly, and you know, it was after making
7 inquiries that I found the reference to it and who had
8 conducted the appeal. But other than that I have no
9 recollection of it. It was a, I suppose, what knowledge I have
10 at the time would have been it's another murder appeal.
11 Even then they weren't uncommon in Nova Scotia.

12 Q. How did you become...

13 A. A murder appeal by itself is not necessarily the most
14 interesting of appeals from a legal point of view.

15 Q. Let me ask you how you found out in 1982 that the matter
16 had reared its head again.

17 A. As I recall the matter I think Mr. Herschorn indicated to me
18 that he had been in conversation with Mr. Edwards and that
19 this matter was occurring and I think contemporaneously
20 with that I was advised by Superintendent Christen that, the
21 mere fact this is going on. But it, to my understanding,
22 recollection, they had been involved in it for a matter of two
23 or more weeks before I, maybe three weeks before I heard of
24 it.

25 Q. What did you understand what happening?

1 A. That the RCMP were commencing the re-investigation as an
2 original case. They were going through it from the beginning
3 on through to...

4 Q. When you first heard of it what stage had the investigation
5 reached?

6 A. I think it was the latter part of February when I first heard of
7 it and as I recall some of the witnesses may have been
8 interviewed at that time.

9 Q. Was there any expression being made to you of what was
10 being learned?

11 A. I think only from what I can recall, the police report and I'm
12 not sure if it was that one or one that was a little later which
13 it was indicated that there was considerable doubt that
14 Donald Marshall had, in fact, committed the offence.

15 Q. Had you been told by that time some of the key witnesses at
16 trial had recanted their stories?

17 A. Well it was early on, yes. I'm not sure it was in February or
18 in March. But certainly the reports will indicate what was
19 said at that time in them but there was some indication that,
20 by that time, yes, that witnesses had recanted on their stories.

21 Q. Were you kept advised as this investigation was carried on
22 during your regular Thursday meetings with Christen?

23 A. Yes, Superintendent Christen would indicate that there was a
24 report coming or that it might, it would be in certain terms or
25 he might indicate that, ask if I had received the report or tell

1 me if I hadn't that it was on its way and that the, in regard to
2 the matter.

3 Q. Were you briefing the Deputy as this investigation carried on?

4 A. I was keeping the Deputy apprised of basically what it was
5 about, yes.

6 Q. What about the Attorney General?

7 A. Yes, not, I suppose originally, yes. To tell him that it was
8 occurring. It may have been a little while later, some weeks
9 before we really got down to going through it in considerable
10 depth with him.

11 Q. You did, ultimately, get to the stage of going through it in
12 considerable depth with the Attorney General?

13 A. Yes.

14 Q. Now you did get the RCMP report as it, or reports, as they were
15 produced, is that correct?

16 A. That's correct.

17 Q. They would be delivered to you by Mr., or by Christen?

18 A. Well one or two may have been but I think normally they
19 just came in the mail to me and I don't really recall him
20 handing me any but that's not to say that one may not have
21 been ready when he was coming over and he brought it with
22 him.

23 Q. Would you discuss them with Christen?

24 A. Well in general terms. He would just give me a brief runover
25 of what was in it.

1 Q. I suggest to you that what you're being told here by the RCMP
2 is pretty dramatic stuff, isn't it?

3 A. Yes.

4 Q. And how were you reacting, how was the Department
5 reacting?

6 A. Well I suppose my reaction was that of the Department, and
7 my reaction was that this is very serious and that the prime
8 consideration is to have it investigated as quickly as possible
9 because it was more and more appearing that Donald
10 Marshall had been convicted and that that conviction would
11 not be sustainable at this point time, at that point in time.

12 Q. Were you trying to formulate some plan of action, something
13 that would be done?

14 A. Well I was trying to receive their reports and with the view
15 that if there was any question whatsoever then, in my view,
16 at that time an application would have to be made under
17 Section 617 to the Minister of Justice of Canada for an order
18 to, on this matter. And there had been calls from the
19 Department of Justice, there were also, which they had
20 indicated some consideration of a pardon and certainly that
21 was one of the considerations as to whether it would be a
22 pardon or whether it would be an application under Section
23 617 of the Criminal Code.

24 Q. Was the Attorney General advised when the report was
25 received from, the initial report from the RCMP. That's in

1 Volume 34 at page 9.

2 A. Well certainly the Deputy was advised of the matter at that
3 time and frankly I can't tell you whether the Attorney
4 General was advised immediately or shortly thereafter about
5 the matter.

6 Q. Having received the report, was it clear to you that you had a
7 situation now where an innocent man had been convicted of a
8 murder?

9 A. No, it wasn't clear to me that we had a situation where an
10 innocent man had been convicted murder. It was certainly a
11 situation that arose, raised considerable questions about the
12 validity of his conviction. And I suppose philosophically if a
13 person is presumed innocent until proven guilty then, at this
14 point in time, it appeared that it was not a case where Donald
15 Marshall could have been proven guilty of the offence.

16 Q. Let me put it another way. Was it clear to you that Donald
17 Marshall, Jr. had been convicted of a murder that he did not
18 commit?

19 A. Well at this particular time, no, it wasn't clear to me that he
20 had been convicted of a murder that he had not committed.
21 It was certainly clear that the people had changed their
22 stories considerably on the matter, and by the mere fact that
23 they had done that, in my view, did not raise questions about
24 whether one could even sustain the conviction any longer.
25 But I wondered why they had changed their stories.

1 Q. And you're talking about the people who gave evidence at
2 trial.

3 A. Yes.

4 Q. Let me just take you to the report. Without going through it
5 in detail, were you not being told that these witnesses
6 changed their story because, or gave incorrect evidence at
7 trial and incorrect statements because they had been
8 pressured to do so?

9 A. Well I haven't read the report through recently but, yes, I'm
10 not sure, yes, in this one. Yes, there is an indication there that
11 the witnesses felt pressured.

12 Q. And you did have a, on page 17 of that volume in the
13 transcript of a message given by Roy Ebsary where in part he
14 was asked, "Are you admitting to stabbing Seale?" And he
15 said, "Yes."

16 A. Yes, that's there.

17 Q. And you were aware that in November of 1971 Jimmy
18 MacNeil had come forward and told the police that very thing.

19 A. Well I may have been, yes, I suppose that's in this report.

20 Q. I don't want to, let me try and find it for you, Mr. Gale. I don't
21 want to...Page 13. Yes, that's where he's, yes, paragraph 15 on
22 page 13 is an indication that MacNeil had told the police about
23 that some time ago.

24 A. Yes, there's that indication there. I think it was subsequent to
25 that that...

1 Q. In fact...

2 A. We received the...

3 Q. I'm sorry, this is what I was looking for. On page 12,
4 paragraph 12, is attached a copy of Sub-Inspector Marshall's
5 report. And that's the report that was done in 1971. Do you
6 see that?

7 A. Do I see paragraph 12 on page 12?

8 Q. Yes.

9 A. It talks about Sub-Inspector Marshall's report, yes.

10 Q. And they conducted a polygraph test of, in 1971. What I'm
11 trying to determine is having read this report what is there
12 that you still have some doubt who stabbed Seale. Why
13 would you have any doubt based on what information is
14 given to you in March of 1982?

15 A. Well this report, as I recall, is dated February 25th of '82. I'm
16 not...

17 Q. It's actually...

18 A. I'm not sure.

19 Q. It starts them, Mr. Gale, but it's dated, it's done very strangely
20 but we know it's, there are some statements in there of
21 people taken, I think up to March 10th or something like that.
22 It was, is in the mid-March...

23 A. Right. Now I'm not sure exactly when I got this one because
24 it's, doesn't have our date stamp on it so I'm not, I don't really
25 know when I received it.

1 Q. If you look at page 18, down at the bottom under Mr.
2 Wheaton's signature, you see the officer in charge, CIB
3 forwarded March....

4 A. March.

5 Q. 12th.

6 A. 12th, yes.

7 Q. I just assume that's even forwarded to the CIB officer.

8 A. Well that would be to the CIB officer so I suppose this is...

9 Q. If you go over...

10 A. The latter part of March that I would have received it.

11 Q. If you go over on page 19, this is just an addition to the
12 report put on by Inspector Scott. I guess it's the fourth
13 paragraph where he says, "After reviewing this case I feel
14 that Marshall is innocent of the offence." Having read all this
15 yourself at the time, your impression was...

16 A. Well my impression...

17 Q. It's close but you're not quite sure.

18 A. Was that he appears to be innocent of the offence but I recall
19 in discussion, and I can only assume it was with
20 Superintendent Christen, asking what pressure the witnesses
21 had been under and being advised that it was heavy
22 questioning by the Sydney Police at the time. And that there
23 was nothing more than that with it.

24 Q. In fact, Mr. Gale, you don't have to look this up, but for the
25 record I'll note that in Volume 19 at page 43 there is a letter

1 directed to you from Christen which is, in fact, enclosing this
2 report. So that's when you would have got it, on or about that
3 date.

4 MR. PUGSLEY

5 What date is that?

6 MR. MacDONALD

7 It's dated the, March the 16th.

8 Q. You had a visit from Chief MacIntyre at some stage.

9 A. Yes.

10 Q. And I think it was on April the 18th of 1982 and I'm fixing
11 that date relying on what's in Frank Edwards' notes. So to the
12 extent that they are accurate that's the date he indicates.

13 A. I don't think it would have been April 18th as such because it
14 seems to me the dates I recall are the 16th and 19th.

15 Q. 15th. I'm sorry, the 15th.

16 A. Well it must have been the 15th because the 16th, as I recall,
17 was a Friday after looking it up.

18 Q. Frank Edwards' notes, which are in Volume 17 at page 7,
19 indicate that on Friday the 16th of April he called you to ask
20 about MacIntyre's visit.

21 A. Yes.

22 Q. Do you recall that visit with Chief MacIntyre?

23 A. I recall Chief MacIntyre coming into the office and discussing
24 the Marshall matter with me and pulling statements out of a
25 file on the matter.

1 Q. Were you aware that Chief MacIntyre was coming to see you?

2 A. No.

3 Q. Had you ever met with him before?

4 A. Not I had not met with him before. I may have seen him at
5 some function before but I certainly had not met with him on
6 any case before.

7 Q. Did he explain to you why he was coming to see you?

8 A. To the best of my recollection he had some concern as to
9 whether or not the RCMP were really getting the full
10 understanding of the Marshall case.

11 Q. What do you recall about the visit? Tell us as much detail as
12 you can.

13 A. I don't recall that much about the visit. I recall that there
14 were a couple of statements, maybe three, I'm not sure, that I
15 had not heard of before that after he left I called, as memory
16 serves me, the RCMP and I think also Frank Edwards to find
17 out, or certainly talk to Frank afterwards to find out if they
18 were aware of these statements. And I was advised that
19 neither the RCMP nor Frank Edwards had heard of those
20 statements before.

21 Q. Were you under the impression that Chief MacIntyre had
22 some concern about the completeness of the investigation
23 being carried out by the RCMP?

24 A. That's the, I'm not sure if it was the completeness, but the
25 conclusions that they were coming to.

1 Q. Did you have the understanding from talking with him that
2 Chief MacIntyre had made available to the RCMP all the
3 information in his possession?

4 A. Well he didn't say whether he had or he hadn't. He simply
5 was, would pull out a statement and start to say something
6 then say, "Well this statement says such and such" and during
7 the course of that he had pulled out at least two statements
8 that I had not heard of before.

9 Q. Did you have the impression that Chief MacIntyre was
10 trying to convince you that the RCMP had reached a wrong
11 conclusion?

12 10:59 a.m.

13 A. Well, I don't know if he was trying to convince me they had,
14 but I think he at least felt that somebody should be taking a
15 closer look at what conclusion the RCMP were reaching on
16 the matter.

17 Q. How was it left with him?

18 A. Well, simply that I...to the best of my recollection it was just
19 left that I would look at the reports or discuss the matter
20 with the prosecutor and with the police to see if there had
21 been any avenues that perhaps they were missing but at
22 that time it was in my mind that certainly I'm going to find
23 out if they knew of the statements that he was mentioning.

24 Q. How long was the meeting?

25 A. I don't really know. It wasn't a long meeting. I suppose it

1 was half hour range.

2 Q. And were you just basically listening and letting the Chief...

3 A. Yes.

4 Q. ...get things off his chest?

5 A. Yes.

6 Q. Did you walk around the table and put your arm on Chief's
7 shoulder and say, "That fellow was the author of his own
8 misfortune."?

9 A. Well, I have no recollection of ever having done so. I don't
10 usually...I don't walk around tables and put my arms on
11 people's shoulders. I don't like it done to me and I don't do
12 it to others.

13 Q. Did you...forgetting the arms around the shoulder, could you
14 have said to Chief MacIntyre, "Don't worry, that fellow is the
15 author of his own misfortune."?

16 A. No, I don't think I would have said that. It's not impossible
17 that author of his own misfortune may have arisen during
18 the discussion of it because there seemed to be some
19 impression at that time that Donald Marshall was the author
20 of his own misfortune. The police seemed to think that had
21 he told the story originally that he told to Staff Sergeant
22 Wheaton that events might have gone along quite
23 differently.

24 Q. Did Chief MacIntyre ever say that to you?

25 A. He may have, but I, you know, I have no independent

1 recollection of him saying that.

2 Q. Here was the...

3 A. But I think that...

4 Q. Here was the investigator sitting in front of you.

5 A. I think Chief MacIntyre was fully convinced in his own mind
6 that Donald Marshall had committed the offence.

7 Q. That's when he met with you.

8 A. Yes.

9 Q. And at that stage was he aware, to your knowledge, was he
10 aware of this statement that had been taken from Donald
11 Marshall in Dorchester where the suggestion of the robbery
12 is contained?

13 A. I don't recall whether he was aware of it. He...I would
14 assume he probably was. There didn't seem to be much in
15 the reinvestigation of the Marshall case that people weren't
16 aware of quite frankly.

17 Q. You were aware that Chief MacIntyre was being kept up-to-
18 date, were you not, as to the results of the investigation?

19 A. It was my understanding that he was being full apprised of
20 what was occurring in the matter.

21 Q. And he, at that stage, your impression was, still believed
22 that Marshall had committed the murder of Seale.

23 A. Yes.

24 Q. It wasn't him suggesting then that if Donald Marshall had
25 come forward early and told some different story that

1 he...the investigation may have taken a different path.

2 A. Oh no, that was a suggestion that was made by the RCMP.

3 Q. But did Chief MacIntyre have the RCMP report?

4 A. I don't recall him having the RCMP report. I think the type
5 of statement that he pulled out to me was...were ones from
6 his original investigation.

7 Q. If he didn't have that view then that he still believed
8 Marshall was guilty then I suggest that the only person that
9 could have raised the suggestion of Marshall being the
10 author of his own misfortune would be you.

11 A. Well, he believed Marshall to be guilty is my understanding
12 of it. I don't...he seemed to have a full knowledge of what
13 was going on with the reinvestigation. I know the Sydney
14 Police had said that in some ways they had thought that
15 Marshall...the RCMP in Sydney had indicated that they had
16 thought Marshall was the author of his own misfortune.

17 Q. But I'm only talking about the interview you had with Chief
18 MacIntyre. Clearly he didn't say that. He believed Marshall
19 had killed Seale. Now if that topic was raised during that
20 discussion it would have to be raised by you.

21 A. Well, I don't know if it was raised by me or it was not.
22 We're talking back and forth, but mainly I was listening. I
23 know at that time I was aware that the RC...some people in
24 the RCMP felt that Marshall was the author of his own
25 misfortune.

1 Q. Could it have come up that way?

2 A. I don't know.

3 Q. That you could have suggested to Chief MacIntyre, look,
4 there are certain people, some in the RCMP who believe
5 Marshall is the author of his own misfortune?

6 A. Well, it could have quite frankly, yes, it may have. I really
7 don't know.

8 Q. Who in the RCMP believed that?

9 A. Well, certainly as I recall it, it was an indication to me by
10 Superintendent Christen, I think, that if Donald Marshall had
11 been more forthcoming originally that this thing may not
12 have occurred, that if he hadn't been in the Park for an
13 illegal purpose then this would never have occurred.

14 BREAK - 11:07 to 11:36 a.m.

15 Q. I am going to be referring Mr. Gale to documents in Volume
16 31, and on page 13 is the first page, My Lord. There's a
17 request from Mr. Aronson directed to Mr. Herschorn asking
18 for a copy of the final RCMP report which was to be
19 delivered to the AG's Department in the next few days.
20 Were you made aware of this request, Mr. Gale?

21 A. Yes, I believe Mr. Herschorn sent the letter on to me.

22 Q. What would be your position concerning releasing such
23 report to Mr. Aronson?

24 A. We would not release the RCMP report itself to Mr. Aronson.
25 It's a policy of the Department that police reports

1 themselves not be released but that matters in them could
2 be released, statements. But certainly Mr. Aronson would
3 be made fully aware of what was going on, but the police
4 report itself would not be given to him and certainly not at
5 that stage.

6 Q. And did you so advise Mr. Herschorn?

7 A. Well, I would probably so advise Mr. Herschorn. I think I
8 may have also advised Mr. Aronson during one of the
9 conversations that I had with him.

10 Q. Okay. Was it the intention that he would be provided with
11 copies of all statements that the RCMP had obtained?

12 A. Once we got the final report on the matter, but...he would
13 certainly be provided with all statements.

14 Q. What do you mean by "the final report"? The one we've
15 looked at before, is that a final report?

16 A. No, that was not what I considered to be a final report on
17 the matter. I had suggested to the RCMP, to Superintendent
18 Christen that there should be a document put together
19 which put everything in order and as far as possible showed
20 whether or not there was physical evidence that would tend
21 to support or discredit any statement. I think that
22 document that I was looking for was what has since been
23 termed the so-called red book, but at this particular point in
24 time I think we were just...well, in March, I'm at...it would
25 have been later in March where the suggestion was made.

1 Q. Mr. Aronson went on to say he would like to have a meeting
2 arranged on a most urgent basis with your Department and
3 the purpose to discuss the report and to establish the best
4 course of action to follow. Was such a meeting arranged?

5 A. Well, I know that I met with Mr. Aronson more than once.
6 I'm not sure how many times. But I didn't feel at that point
7 in time that we had really gotten a final report because each
8 time I thought that the final report was coming in I was told
9 by the RCMP that they're making arrangements to interview
10 another witness.

11 Q. You certainly had statements, or were aware that
12 statements were being made by witnesses recanting
13 evidence given at trial, and the evidence on which Marshall
14 was convicted.

15 A. Yes.

16 Q. Turn to page 17, please.

17 A. 17?

18 Q. 17, yes. This is a letter from Mr. Aronson to the Minister of
19 Justice. It doesn't appear to be copied to you. But I'd like to
20 direct your attention... This is a couple of weeks after the
21 earlier letter we had just looked at. This is after you had
22 received that...the first report from the RCMP. In the fourth
23 paragraph Mr. Aronson says,

24
25 The Attorney General of Nova Scotia has the

MR. GALE, EXAM. BY MR. MacDONALD

1 report of the RCMP and has through his office
2 advised me that representations will be made to
3 you, although they have been otherwise most
4 uncooperative. As Mr. Marshall's solicitor I have
5 been given no copy of the report, although I am
6 aware of much of its contents through other
7 sources.

8 Is that an accurate reflection, do you think, of how you were
9 treating Mr. Aronson that said you'll be making your own
10 representations to the Minister of Justice but otherwise you
11 were not cooperating with him?

12 11:41 a.m.

13 A. Well I said when we got the final report of the RCMP that, in
14 my view, representations would be made to the Minister of
15 Justice because it appeared to be something that might be
16 dealt with either as a 617 application or if the Federal
17 Government chose, as a pardon. He seemed to be fully aware
18 of what was going on but he kept asking for the police report
19 and I told him that it was not our policy to give out police
20 reports. And I could not give him the police report and would
21 not at that particular time.

22 Q. What about the statements?

23 A. He didn't ask for statements at that time. He seemed to know
24 what was going on.

25 Q. Well would you not think, though, that he should be given
copies of those statements?

A. Well perhaps he could have been given copies of the

1 statements. He didn't ask for statements and my view was
2 that let's get the whole of the, the complete report by the
3 RCMP whenever that's made available and we have
4 determined what to do, what our position is going to be on it,
5 then he can have any of the real information portions, such as
6 the statements.

7 Q. Was Mr. Marshall still in jail?

8 A. Well early on I had checked and I had understood that he had
9 been released to the Carlton Centre quite early on in the
10 matter and I don't know, but I thought that he was out at the
11 Carlton Centre by this time.

12 Q. Would that have been a priority in your mind that doubt at
13 least having been passed on his conviction that, as a priority,
14 effort should be made to get him out of jail?

15 A. Yes, I thought that if Corrections Canada were not aware of it
16 they should certainly be made aware of it and what the
17 matter appeared to be shaping up as and that if he could be
18 dealt with in some fashion to release him or whatever that
19 they might consider that. But I had made inquiries and the
20 answer to the inquiry was, as I understood it, that he was
21 already at the Carlton Centre and my understanding of that is
22 it's a halfway house and it's a pre-release process where the
23 individual is gradually reintroduced into society or having,
24 been...

25 Q. Who did you make those inquiries of?

1 A. I think I may have made them through, I'm not sure whether
2 I called the national parole office here in Halifax or whether I
3 asked Mr. Crane of our Corrections Branch at that time to
4 make some inquiries on my behalf and find out where he
5 was.

6 Q. Can I summarize it like this, and tell me if I'm accurate. That
7 when you were convinced that there was at least doubt that
8 Marshall had been convicted, properly convicted, that you
9 considered at that time efforts should be made to get him out
10 of jail, you made inquiries and...

11 A. I made inquiries...

12 Q. Determined that he was already out.

13 A. And as I understood it, to the best of my recollection, he was
14 already in a...

15 Q. And had he not been you would have taken some steps...

16 A. Well then I would have gone directly to the Correction people
17 and advised them of what was going on.

18 Q. So I can assume from that, can I, that the fact that you didn't
19 take that latter step is that you were satisfied he was
20 released.

21 A. Well that he had been at least released to this Carlton Centre.

22 Q. Yes, I understand. Let's go to page 20 of Volume 31.

23 COMMISSIONER POITRAS

24 You've got page 16 if you take a look at it.

25

MR. GALE, EXAM. BY MR. MacDONALD

1 MR. MacDONALD

2 16, My Lord?

3 COMMISSIONER POITRAS

4 On March 16th he's still at Dorchester.

5 MR. MacDONALD

6 That's still his address. It appears to be.

7 MR. PINK

8 He was released on the 29th.

9 MR. MacDONALD

10 He was released on the 29th? And I'm advised he was
11 released from prison on the 29th of March.

12 Q. Page 20, Mr. Gale. These are notes in Mr. Aronson's
13 handwriting of a conversation with you. At least it's a
14 meeting with you I guess that's what it says up at the top.
15 Was that the first meeting you had with Mr. Aronson, do you
16 recall? March 31.

17 A. It may have been. I really haven't kept any notes so I'm not
18 sure if it was the first meeting. This may have been the first
19 one.

20 Q. You, yourself, don't keep a diary, do you?

21 A. No, I don't. I keep a book for a year which I have
22 appointments or hieroglyphic notes in but...

23 Q. Then you get rid of it after the year?

24 A. Well for, I'm on the '88 book now. I have the '87. As soon as
25 '88's completed I'll throw the '87 out.

1 Q. Okay. Good. At this stage had you been in touch with the
2 Department of Justice to consider what type of step was going
3 to be taken?

4 A. To my recollection, yes. And I don't know whether they had
5 contacted me or I had contacted them at that particular time.
6 I had also been in touch with one or two other people in
7 provincial departments across Canada where I thought they
8 might have a little advice to offer or something of this nature.

9 Q. Okay. Mr. Aronson notes that, the fourth line down, "The AG
10 is uncertain, but will have input into the decision 'never seen
11 such a collection of nuts.'" Do you recall making a comment
12 like that to Mr. Aronson?

13 A. I don't recall making the comment but I may have.

14 Q. And toward the bottom of that page it says, the note is made,
15 "RCMP and Gale believe that Junior did not commit the crime."
16 Would that be an accurate reflection of your view at that
17 time, March 31st, 1982?

18 A. Yes, I think that about that time I, my own mind was of the
19 view that he appeared not to have committed the crime and
20 that it appeared that Seale, I'm sorry, that Ebsary had, that
21 there was sufficient evidence might be available to charge
22 Ebsary on the matter.

23 Q. Now did you, let's go to the next page, 21. It's a covering
24 letter to you from Mr. Edwards forwarding a memorandum.
25 You asked Mr. Edwards, did you, for his comments?

1 A. Well I had discussed the matter on the telephone with him. I
2 don't, I think he volunteered to send in his comments in a
3 written form.

4 Q. Have you had the opportunity to review his memorandum of
5 April 5, 1982? Have you reviewed that recently?

6 A. Well I reviewed it sometime within the past six months.

7 Q. I want to direct your attention to certain things in that letter.
8 On page 23, top of that page it says,

9
10 The existence of written statements dated May
11 30th, 1971 by Chant and Pratico were obviously
12 not known to defence counsel. Both statements
13 are consistent with the theory advanced by the
14 defence and it is inconceivable that they would
15 not have been used had their existence been
16 known.

17 In your opinion, should those May 30, 1971 statements of
18 Chant and Pratico, their first statements so-called, have been
19 made known to defence counsel?

20 11:50 a.m.

21 A. Yes, in my view, if a witness gives a statement and you're
22 going to give the statements to defence counsel and they
23 should be... If you're going to use those witnesses, certainly all
24 statements that they made should be made available to
25 defence counsel.

Q. And the failure to make them available to defence counsel in
1971, particularly where they advanced, they contained

1 statements consistent with the theory advanced by the
2 defence, would you consider that to be breach of duty by a
3 Crown prosecutor?

4 A. I would on reflection. I'm not sure in 1971 that things were
5 dealt with as fully as they are now. At that particular time, I
6 think a lot of prosecutors may well have felt that if they gave
7 any statement at all to defence, it would only be the one that
8 they were going to use.

9 Q. Back to your definition of a Crown Prosecutor yesterday and
10 the duties of a Crown Prosecutor, to be fair. Can't you agree
11 with me that, certainly to be at least fair, to give to the
12 defence...

13 A. Yes.

14 Q. Inconsistent statements.

15 A. I agree with the proposition. I'm just pointing out that things
16 didn't have as much of a refined nicety to them in prosecution
17 in 1970 as they do now. And I'm not sure that all prosecutors
18 felt that they had to give anything more than the accused
19 statement than if they gave any other statements, it would
20 only be the ones that they were going to use.

21 Q. But surely the duty of a Crown Prosecutor hasn't changed. In
22 fact, I think Ms. Edwardh yesterday was reading to Mr.
23 Endres quotes from the fifties from the Supreme Court of
24 Canada, (Boucher?), I think was the case, well-known case.
25 You're familiar with that case?

1 A. Well, I don't know that I'm particularly familiar with the case
2 but the type of quote there, yes.

3 Q. And there was a duty expressed by the Supreme Court of
4 Canada to make available to the defence information such as
5 was withheld here.

6 A. Yes, and I'm not arguing with that.

7 Q. Okay.

8 A. I'm just telling you that, in practical terms, I'm not sure that
9 some of those niceties were necessarily observed by all
10 prosecutors. I think you must remember that in 1971, we
11 had few, if any, I don't think we had any full-time
12 prosecutors then and they were mostly people that were in
13 private practice and on a retainer to act as prosecuting
14 officers.

15 Q. And did Donnie MacNeil fall into that category?

16 A. Yes.

17 Q. Okay. Would you agree with... I'll preface it this way. My
18 understanding of evidence given by Frank Edwards a week or
19 so ago was that the failure to disclose those first statements of
20 Chant and Pratico, in his view, were very instrumental in
21 leading to the conviction of Marshall.

22 A. Well, I have no reason to take any issue with Mr. Edwards on
23 it. I have not gone through the case in the detail that he has
24 on it.

25 Q. And I'm not asking you to take issue on it. I was merely

1 going to say if you would accept that, then would you agree
2 with me that...

3 A. Yes, I can accept that, yes.

4 Q. And the failure to disclose those earlier statements by Chant
5 and Pratico would constitute a real injustice here, wouldn't
6 they?

7 A. Yes, I can agree that it would constitute an injustice.

8 Q. Thank you. Now continuing on with this report from Mr.
9 Edwards, on page 24 of Volume 31, at the top of that page,
10 Mr. Edwards is saying:

11 I submit that there is now no doubt Donald
12 Marshall did not murder Sandy Seale. Even a
13 complete sceptic would have to agree that had
14 the evidence which is now available been
15 available in November, 1971, the jury would
16 have had a reasonable doubt and acquitted.

16 Do you agree with that statement, or did you at the time?

17 A. I didn't have any difficulty with the statement at the time. It
18 seemed to me that the evidence that had been available in
19 '71, if it had been made available, would probably have led to
20 an acquittal.

21 Q. Let me take you down to the, couple of paragraphs down
22 where it starts out "If the Minister of Justice agrees..."

23 A. Uh-huh.

24 Q. ...then I submit that the most desirable result of
25 the reference would be a direction by the Appeal

MR. GALE, EXAM. BY MR. MACDONALD

1 Court that a verdict of acquittal be entered on
2 the basis that there had been a miscarriage of
3 justice.

4 Do you agree with that statement?

5 A. Yes.

6 Q. Now "a miscarriage of justice", Mr. Gale, can you give me your
7 definition of that phrase?

8 A. Well, a miscarriage of justice to me is if a person is convicted
9 and there, in fact, is not evidence to have warranted that
10 conviction.

11 Q. And let me ask you to go to page 36 then, please, of that
12 volume. That is a letter from Mr. Aronson to you on April the
13 13th. And I'm looking at the second paragraph where Mr.
14 Aronson is talking about possibility of a pardon and he says:

15 A free pardon is given only when the innocence
16 of the convicted person is established...

17 Is that your understanding of when a pardon is given?

18 A. I am not quite certain when a pardon is given. It's a
19 prerogative of the Crown that... I think the pardon that is a
20 prerogative is normally given when it's, you're satisfied that
21 the individual did not commit the crime. A pardon, as I am
22 aware, is simply is in terms that he's deemed never to have
23 committed or been convicted of the crime. But it's not one
24 that I have had a great deal of experience with. It's not one
25 that has been used in this country. On the pardons that I'm
most familiar with, are those under the Criminal Records Act

1 where if you, if you're a good person that hasn't done
2 anything for a certain period of time, then your conviction is
3 erased from the available records and can only be made
4 available if you're again convicted of some serious crime.

5 Q. Okay, let's go to page 37, in the third paragraph:

6 The Marshall family has requested that I seek
7 payment of my legal fees from your Department.

8 What did you do with that request?

9 A. That was conveyed to the Deputy Attorney General, Mr. Coles.
10 I have no control over finances within the Department and I
11 have no right or ability to say that we will pay or not pay
12 anything.

13 Q. Did you make any recommendations?

14 A. The only comment I can recall making is that if this is going
15 to go, then perhaps it might be treated in the same way as we
16 have dealt with certain appeals to the Supreme Court of
17 Canada where we wanted to take the appeal for reasons of
18 determining a question of law and we have, in fact, paid the
19 counsel to repr...that's representing the individual on some
20 mutually agreeable basis.

21 Q. Basis other than the normal legal aid basis.

22 A. Well, it might be legal aid. It may be some other basis. I
23 guess it depended on how good a bargain could be struck with
24 that, or how cheap you could get it done.

1 Q. But you did consider that this case was different than the
2 norm.

3 A. Yes, I considered it was and I indicated that that might be
4 considered. But I didn't presume to tell the Deputy how to
5 deal with it. I just offered that bit of advice and he dealt with
6 the matter.

7 Q. All right, and in the next paragraph, Mr. Aronson says:

8
9 Finally the matter of compensation for Mr.
10 Marshall must be addressed.

11 What did you do with that topic?

12 A. Well, the matter of compensation wasn't within my purview
13 whatsoever and that, along with the preceding matter, would
14 have been referred to the Deputy, simply by giving him a
15 letter and telling him, "Aronson wants to get paid and he's
16 also talking about compensation." So those are matters over
17 which I have no control and, "They're there. You'd better deal
18 with it."

19 Q. So you pushed that onto the Deputy as well.

20 A. Yes.

21 Q. Okay, thank you. The next letter starts on page 38. This is a
22 letter from Mr. Aronson to the Department of Justice, and I
23 don't want to... There's no notation that you received a copy
24 of this, but I did want to get your comments on a couple of
25 points. On page 40, in the third full paragraph, the last

1 sentence, it says:

2
3 Based on the information I have provided to you,
4 along with other facts contained in the R.C.M.P.
5 investigation, Staff Sergeant Harry Wheaton of
6 the R.C.M.P. and Gordon Gale, Deputy Attorney
7 General of Nova Scotia...

8 He's given you a position you don't have, I guess.

9 A. Yes, there's seems to be a great deal of confusion from time to
10 time because I'm called "Gordon" and Mr. Coles is called
11 "Gordon" and I guess, for some reason, they're confused.

12 Q. In any event, "...Gordon Gale had indicated to me that they
13 believed Marshall to be innocent of the murder of Sandy
14 Seale." Did you ever indicate that to Steve Aronson?

15 A. I don't think I've ever dealt with it in terms of innocence, as
16 such. I've dealt with it in terms of that I don't think there
17 was the evidence available to support the conviction at the
18 time. And, certainly, at this point in time, the evidence was
19 such that raised considerable doubt about the evidence at the
20 trial and that in all probability, in my view, that he would
21 never have been convicted had the evidence been known,
22 been all made available at the time of trial. And, certainly, at
23 this stage that we're at now in 1982, that one could not hope
24 to go back and retry the matter because your witnesses are
25 shot.

26 Q. But I thought you told me earlier you agreed with Frank
27 Edwards' statement that, "I submit there is now no doubt

1 Donald Marshall did not murder Sandy Seale."

2 A. There is no doubt... I suppose I have to divide myself off into
3 my own personal opinion that there wasn't any doubt in my
4 mind that he had not but I was trying to deal with it as much
5 as possible on legal considerations as to what was available or
6 what was not available. So I guess, in the back of my mind, I
7 may well have had the view that, you know, of not only was
8 he, should he not have been convicted, but that certainly
9 there was really no evidence to show that he had been at all
10 involved in the death of Mr. Seale.

11 Q. Yeah, I think that's a pretty key phrase, that there is no
12 evidence at this stage, no evidence to show that Marshall had
13 stabbed Seale, isn't that correct?

14 A. At this stage, there's no evidence to show that Marshall had
15 stabbed Seale.

16 Q. And there is evidence to show that Roy Ebsary did.

17 A. Yes.

18 Q. Well can't we just take it from there that Marshall is innocent
19 of the murder?

20 A. Yes, we can take it from there that he's innocent of the
21 murder.

22 Q. And is it likely that you would have told that to Mr. Aronson?

23 A. It's quite likely I would have expressed that opinion to him.

24 Q. Thank you. Now Mr. Edwards provided you an update, I
25 think, of that opinion we looked at a minute ago, and it's

1 found on page 29 of this volume. And there's an explanatory
2 letter, which is found at page 26, just describing...explaining
3 what the various numbers mean. And, again, I don't want to
4 take the time to go through this, I merely want to suggest to
5 you that at this time, as well, this is in early May of 1982,
6 having reviewed all the information, Mr. Edwards is still of
7 the view, or he hasn't changed his view, that the most
8 desirable result here would be that Marshall would be
9 acquitted on the basis that there had been a miscarriage of
10 justice. Do you accept that?

11 A. Yes.

12 Q. And you would have agreed with him at that time.

13 A. Yes, I think, at that time, I was agreeing with him that this
14 was...

15 Q. Thank you.

16 A. The best way to go.

17 Q. Now let me go back then, if I can. I was out of sequence
18 before we broke, and talk about that meeting that you had
19 with Chief MacIntyre. That meeting was on April the 15th
20 and I'd like, again, to understand why there would be any
21 suggestion at that time that Marshall might have been the
22 author of his own misfortune, given the fact that I understand
23 you to agree that there would be a breach of duty or an
24 injustice by the Crown prosecutor in not giving the initial
25 Chant and Pratico statements to defence. A further breach in