

1 November in not advising them of the Jimmy MacNeil  
2 statement in the R.C.M.P. investigations. Now with all of that,  
3 how can one be suggesting that Marshall is the author of his  
4 own misfortune?

5 A. I don't know that I suggested he was the author of his own  
6 misfortune so much as indicating that there was still that  
7 view prevalent. The police certainly held the view that if he  
8 had been more forthcoming at the beginning in his  
9 statements, that the investigation would have taken a  
10 different turn. But I also seem to feel that his statement  
11 saying that he was in the Park to commit a robbery would  
12 have caused the investigators to deal with it differently. That  
13 his defence counsel, that if he had at least told them the  
14 complete story, which they didn't, I understood them to think  
15 that he had not, that they might have well made inquiries  
16 that would have resulted in a different approach.

17 12:10 p.m.

18 Q. And just to confirm again, you are telling us what the...some  
19 members of the RCMP believed, not anything that John  
20 MacIntyre told you.

21 A. You're asking me questions about a meeting that I recall  
22 certain facts from. I don't recall the full extent of what was  
23 said at the meeting. The meeting sticks out in my mind  
24 because of the fact that two statements were shown to me  
25 that I hadn't seen before. I can't tell you whether the

1 meeting took place in the morning or the afternoon. You  
2 asked me how long, I say thirty minutes. It could have been  
3 forty-five, I don't know. I can't...I got the impression that  
4 Chief MacIntyre felt that Marshall was guilty, that perhaps  
5 the RCMP were making assumptions that they shouldn't on  
6 the matter. But I can only recall it in impressions. I can't  
7 recall exactly what was said at this meeting or what issues  
8 may have been raised.

9 Q. Let me deal with one impression. It was your impression  
10 that Chief MacIntyre believed still that Donald Marshall had  
11 killed Sandy Seale.

12 A. Yes, I had that impression.

13 Q. And you had that impression by the time you left, didn't  
14 you?

15 A. Yes.

16 Q. So, he throughout that meeting, was under the view or you  
17 had the impression he believed that he had the correct man  
18 when he did the original investigation.

19 A. Yes.

20 Q. And I'm merely suggesting to you in those circumstances  
21 there can't be any possibility that he would have been  
22 saying, "If Marshall had told me this story in the beginning I  
23 would have done my investigation differently."

24 A. No, I don't think there was any suggestion of that from him  
25 whatsoever. And you've asked about this being the author

1 of his own misfortunes, and I said I don't know whether it  
2 was raised or it wasn't raised, but since I was talking to him  
3 and I had been made aware of it by the RCMP I might have  
4 mentioned it to him. That's all I can say. I don't know  
5 whether it was or it wasn't.

6 Q. You said you were concerned that you were now getting  
7 statements that you hadn't learned of before and you were  
8 going to check that out with Frank Edwards whether he  
9 knew of them.

10 A. Well, I was going to check it out with both he and the RCMP.

11 Q. And did you?

12 A. Yes.

13 Q. And what did you learn?

14 A. I was told that neither knew about them.

15 Q. Let me take you to Frank Edwards' notes again in Volume  
16 17 on page 8. On that page Mr. Edwards recorded his view  
17 that he thought Chief MacIntyre had been less than  
18 forthright with him and, in fact, had been manipulative. Did  
19 Mr. Edwards ever express that view to you?

20 A. I can't recall him having expressed it. He may have  
21 indicated that he thought this but I have no  
22 rec...independent recollection of it.

23 Q. Okay. Did he tell you that he had been pressing the RCMP to  
24 go and obtain the full file from Chief MacIntyre and the  
25 RCMP were reluctant to do so?

1 A. Well, I understood that his pressing of the RCMP to get the  
2 full file from Chief MacIntyre was after I had asked the  
3 question about the statements and they said they didn't  
4 have them and didn't know about them, and they hadn't  
5 gotten the full file. That's when I understand him to be  
6 pressing the RCMP to go and get it.

7 Q. After that time.

8 A. Yes.

9 Q. All right. Did he make any mention to you at all of an  
10 incident where Chief MacIntyre is alleged to have put some  
11 papers underneath the table and try and keep them from  
12 the RCMP?

13 A. No, no.

14 MR. CHAIRMAN

15 Not mentioned by whom?

16 MR. MacDONALD

17 By Frank Edwards.

18 Q. That was never mentioned to you.

19 A. No, it was not mentioned to me.

20 Q. Have you ever met with Sergeant Wheaton?

21 A. No, I have never met with him.

22 Q. Your meetings were with who in the RCMP?

23 A. With the CIB officer, and at that time it was Superintendent  
24 Christen. It may have been the assistant CIB officer a very  
25 limited number of times when Superintendent Christen was



1 out of town.

2 Q. Did either of those people ever advise you that Chief  
3 MacIntyre was supposed to have deliberately hidden...

4 A. No.

5 Q. ...try to...

6 A. No, they did not.

7 Q. ...conceal papers?

8 A. No, they did not.

9 Q. If you had been told that, that Chief MacIntyre had  
10 deliberately attempted to conceal relevant information or  
11 relevant evidence from the RCMP what recommendation, if  
12 any, would you have made?

13 A. Well, I would have gone into it in a little further detail to get  
14 their view of what was done, if it was a deliberate matter  
15 then I think consideration would then have to be given to  
16 either a proceeding under the Police Act or a Criminal Code  
17 charge for obstruction.

18 Q. You ultimately, in fact, several days after meeting with Mr.  
19 or with Chief MacIntyre had a letter written by the  
20 Attorney General directing the police to turn over their files,  
21 is that correct, it was April the 20th?

22 A. Yes, I had the meeting with Chief MacIntyre on the 15th and  
23 we had discussions on the 16th, which was a Friday, the  
24 19th I guess there are some more discussions and, yes, I  
25 arranged to have a letter prepared under the Police Act and

1 it...two letters, one to the chairman of the Board of Police  
2 Commissioners of the Municipality of Sydney and the other  
3 to Chief MacIntyre directing that he turn the file over.

4 Q. You say you had discussions on the Monday, which would be  
5 the 19th. Would those be with the RCMP?

6 A. Yes, I would have had discussions with them then, too.

7 Q. Was there any indication given to you why the RCMP hadn't  
8 just asked Chief MacIntyre for his full file, why it was  
9 necessary to have this direction from the Attorney General?

10 A. The RCMP took the tack with me that they were simply  
11 reinvestigating this matter at the request of Chief  
12 MacIntyre, that the file remained...the case, the case  
13 remained that of the Sydney Police Department. That they  
14 had assumed, I recall, that they had gotten everything that  
15 was pertinent to the reinvestigation but as an assistance  
16 case they didn't feel that they could go in and necessarily  
17 demand everything. They brought up issues of police  
18 protocol and about their continuing relationship with police  
19 departments and the fact that they would have to continue  
20 to work with the Sydney Police. I think they were looking  
21 for somebody else to make the absolute decision on it, and  
22 certainly there was a lot of poor feeling between municipal  
23 police and the RCMP during that period of time because at  
24 every municipal police strike the RCMP were directed in to  
25 assume the policing of the municipality during the strike. I

1 suggested that since they were...did not seem to think that  
2 the files was theirs, or they had some problem with that,  
3 that the simplest way of dealing with that would be to have  
4 the order of the Attorney General made under the Police Act  
5 and they thought that that was a good idea and that there  
6 would be, in their view, no problem with having Chief  
7 MacIntyre turn over the file because they had the view, and  
8 I did too, that Chief MacIntyre would comply with an order  
9 given to him.

10 Q. But did you have the view that he wouldn't require...comply  
11 if you just went up and asked him for the file?

12 A. No, I did not have that view but the RCMP kept trying to  
13 make this distinction between an assistance case and one  
14 that was...in which they had the full jurisdiction. I thought  
15 that to get that problem over with that the simplest way  
16 was to deal with it under the Police Act.

17 Q. Did you consider this to be an assistance case where the  
18 RCMP are just assisting the Sydney Police or was it  
19 something they were doing for the Attorney General's  
20 office?

21 A. Well, we had not originally asked them to do it. We didn't  
22 know anything about the matter I think for some three  
23 weeks after it had commenced. As I recall, the  
24 correspondence seems to indicate that the RCMP were  
25 approached by the Sydney Police Department around the

1 3rd of February.

2 Q. But Frank Edwards was in from the beginning.

3 A. Yes, he was in from the beginning but I hadn't made any  
4 nice distinctions at that point in time. As far as I was  
5 concerned the RCMP were reinvestigating the matter,  
6 whether at Chief MacIntyre's request or whoever. That  
7 didn't seem to me to make a great deal of difference at that  
8 point in time. It just seemed that when this issue came  
9 about about getting the full file that a lot of questions about  
10 police protocol were raised and the distinctions that were  
11 being drawn as to whether it was an assistance case or it  
12 was their case. It seemed to me that the primary need was  
13 to make it the RCMP case if they had any doubts about that  
14 and then they, having done that, under that the logical step  
15 under subsection 2 was to have the Attorney General direct  
16 an order to Chief MacIntyre telling him to turn the file over.  
17 The first letter was to the chairman of the Board of Police  
18 Commissioners telling them that the case had been  
19 withdrawn from the Sydney Police Department.

20 Q. Back in Frank Edwards' note, I'll just read this to you. It's  
21 on February 21st, it's on page 3, this is recorded... just down  
22 from the top under Harry Wheaton. "Harry said there had  
23 been new developments and that he and Scott had decided  
24 there would be no further communication until report for  
25 Attorney General was ready." There doesn't seem to be

1 much doubt there what Wheaton thought he was doing. He  
2 was preparing a report to the Attorney General. And that's,  
3 in fact, what happened, isn't it?

4 A. Yes, that's what happened. I can only relate to you the  
5 concerns that were expressed to me by Superintendent  
6 Christen...

7 Q. Were they walking...

8 A. ...on the 16th and 19th of April.

9 Q. Was it just they were walking very gingerly because there  
10 was another police force involved? Police were being  
11 treated differently than anyone else would be treated.

12 A. Well, I don't know if they were treating them...that may  
13 have been part of it. I don't know that to be a fact. I was  
14 faced with these arguments about it being an assistance case  
15 and they would have to get along and continue to work with  
16 the Sydney Police Department and they seemed to be  
17 looking for something to...the proverbial magic wand from  
18 the Attorney General to look after things.

19 Q. Okay. Let's go to page 10 of Mr. Edwards' notes. There's one  
20 other point I want to refer you to. It's under the notation  
21 opposite "April 19th," and it's a discussion of a telephone call  
22 with you and Martin Herschorn and it's recorded, "That  
23 suggested that investigation should now focus on the City  
24 police." Do you recall that suggestion from Frank Edwards?

25 A. I recall Mr. Edwards indicating that perhaps the Sydney

1 Police should be asked some questions about matters at that  
2 time, yes.

3 Q. And what did you understand him to mean by an  
4 "investigation focusing on the Sydney Police"?

5 A. I understood him to mean going and getting a statement  
6 from Chief MacIntyre and perhaps Detective Urquhart and  
7 perhaps anybody else that may have been involved with the  
8 matter that they had not already gotten statements from.

9 Q. All right, if we go, did you...what was your response to Mr.  
10 Edwards?

11 A. Well, my response to Mr. Edwards was that I didn't see the  
12 point at that...right then and there of doing that. I thought  
13 that the best thing was that we had made the decision that  
14 we would ask the Attorney General to sign the order under  
15 the Police Act, that I expected that that would be signed. It,  
16 in fact, was prepared the next day and it may have been  
17 prepared on the 19th and dated the 20th on the basis that  
18 the Attorney General was available on the 20th to sign, and  
19 that I thought that that should be executed and they should  
20 get the whole of the file and look at it to see what was in it  
21 that they didn't know about and then after that they could  
22 go back and ask any questions at all. But it seemed to me to  
23 be a pointless effort to ask questions without seeing what  
24 was the whole of the file, because it might raise things that  
25 they...other things that they were not aware of or it may ...it

1 would at least allow them to zero in and give some thought  
2 as to what questions they did want to ask.

3 Q. Did you tell him to hold it in abeyance? "Don't worry about  
4 an investigation of the Sydney Police now."

5 A. Well, I may have said to hold it in abeyance until they get  
6 the file and...from the Sydney Police and review it.

7 Q. Well, was it ever your intention to say there was not going  
8 to be any investigation of the Sydney Police until the  
9 Attorney General's office authorizes it?

10 A. No, it was not my intention to say that whatsoever.

11 Q. Do you consider..

12 A. I just thought it was silly to go ahead with asking questions  
13 without seeing the whole of the file and seeing what...what  
14 might arise from that.

15 Q. Do you consider the RCMP would be authorized if they  
16 considered a municipal force, or a member of a municipal  
17 police force, had conducted some criminal activity that they  
18 could go in and do an investigation?

19 A. Yes.

20 Q. And would they require the consent of the Attorney General  
21 to do so?

22 A. No, they would not require the consent of the Attorney  
23 General, especially not in the situation where they were  
24 reinvestigating a case and if there had been some criminal  
25 offence in relation to that case, then I would not expect

1           them to look for any type of consent from us.

2 LUNCH BREAK - 12:28 p.m.

3 \*2:06 p.m.

4 Q. Mr. Gale, I want to talk now about the reference and how the  
5 procedure that was followed to finally get to the reference.  
6 You met with Mr. Rutherford, I understand?

7 A. Yes, I did, also with Mr. Edwards, was at the meeting.

8 Q. Yes, and initially, or at the conclusion of that meeting, it was  
9 the view of all of you that the best way to proceed would be  
10 Subsection (c) of Section 617.

11 A. Yes, that's correct.

12 Q. And, in that way, you were only asking the opinion of the  
13 court as opposed to letting the court make a final  
14 determination.

15 A. That's correct.

16 Q. And was it also your view that, at that time... If you  
17 proceeded in that manner, it would be possible to have a  
18 complete hearing of all of the issues, including why the  
19 recanting witnesses had lied at trial.

20 A. Yes, it was my feeling that, and we all agreed that it would  
21 give us that type of forum in which we could call the police  
22 witnesses, as well as the witnesses who had recanted and get  
23 the full details of what had happened and why they had  
24 changed.

25 Q. Mr. Rutherford told us that at the time the questions were



1 being drafted, the questions that were going to be submitted  
2 to the court, he had prepared one which would have had the  
3 court look at the issue of compensation as well, but that it was  
4 your request that that not be done. Can you comment on  
5 that?

6 A. I was following directions that the Department did not wish to  
7 have the issue of compensation dealt with by the court, that it  
8 preferred to have that dealt with in another forum, if it was  
9 raised.

10 Q. And who gave you those directions?

11 A. Well, it was either Mr. Coles or... I think it was Mr. Coles. I  
12 think the Attorney General may have been at the, present at  
13 the time, too.

14 Q. Was any reason advanced why the Department did not want  
15 the issue of compensation considered by the courts?

16 A. I can't recall any particular reasons except they thought that  
17 this was not the forum in which to raise that issue of  
18 compensation and, in fact, they wished to deal with that only  
19 if it was raised.

20 Q. When you learned that the reference, indeed, was going  
21 under Subsection (b), did it occur to you that that would  
22 restrict very much what was going to happen?

23 A. It seemed to me, yes, that it could well restrict what was  
24 going to happen because on it... A reference by way of an  
25 appeal, as if it were an appeal by Donald Marshall against

1 conviction. However, I looked at the provisions on the, for an  
2 appeal and it seemed to me that the court could hear fresh  
3 evidence and that, in fact, the case law was such that, in those  
4 circumstances, an argument could be made for the court to  
5 accept fresh evidence more readily than it might in other  
6 circumstances. The basis for fresh evidence, as I recall, is that  
7 it was not known or could not have been known to the parties  
8 beforehand. But the case law that I looked at indicated that  
9 the court could deal with that quite liberally, if it wished to  
10 do so, and I thought that Mr. Aronson, working together with  
11 Mr. Edwards, would bring forth the evidence of, in regard to  
12 the police actions.

13 Q. You thought he would be bringing that forward?

14 A. Well, I thought he would. I thought it would be in his interest  
15 to try and establish why the testimony had been changed.

16 Q. And you would appreciate that the decision to go under  
17 Subsection (b) meant that Aronson, in effect, had to carry the  
18 ball.

19 A. Yes.

20 Q. The burden would be his.

21 A. Yes.

22 Q. And you would appreciate that that would be a fairly  
23 substantial burden on him, wouldn't it?

24 A. Yes, it is a substantial burden on him. However, while we had  
25 hoped to be able to deal with it on an adversarial testing

1 basis, at the same time, we did not plan to be adversaries all  
2 the way through. We had hoped that our joint effort would  
3 be the same--to bring forth as much as evidence as possible  
4 so that the court could make a fit and proper determination  
5 on these matters and also so that Mr. Marshall would have  
6 the benefit of having, I suppose, a suspicion raised from it.

7 Q. Any discussion with Mr. Rutherford concerning the fees to be  
8 paid to Aronson?

9 A. I don't recall any discussion with Mr. Rutherford on that  
10 matter. If there was, it was simply a matter that it was not  
11 within my hands and it was a matter to be dealt with by the  
12 Deputy.

13 Q. Other than what you told us this morning that you referred it  
14 to the Deputy with your comment, did you have any  
15 involvement in the debate as to what fees to pay Aronson?

16 A. No, I did not.

17 Q. You are aware, are you, that the Deputy suggested he should  
18 go to Legal Aid and see what could happen there?

19 A. Yes, I'm aware of that.

20 Q. And you're aware that the maximum amount Legal Aid would  
21 pay for the conduct of a serious case is \$1500, is that correct?

22 A. That is my understanding of what the tariff was at that time.

23 Q. And that's not \$1500 a day, is it?

24 A. No.

25 Q. That's total.

1 A. Unfortunately, no. It's \$1500 for the complete case. I'm also  
2 aware that Legal Aid, the counsel for Legal Aid, their board,  
3 whatever, would, from time to time, authorize additional  
4 payments to people.

5 Q. The fact that Mr. Aronson would now have to bear that  
6 burden of carrying the case, was it your understanding that  
7 he should be given now all of the information in the  
8 possession of the Attorney General's office?

9 A. Yes, Mr. Edwards had called me and asked about making  
10 reports available to him, as well as statements. And I said,  
11 "Well, yes, let him see the reports so he can follow through on  
12 the thing and prepare his case. Because he's got the carriage  
13 of it now and we want to see it conducted well."

14 Q. And so he was to get the report as well as the statements.

15 A. Well, he was to get the reports, so long as they, I suppose,  
16 they were factual. I really didn't put any limits on him but I  
17 think it was understood that if it was just purely conjecture  
18 on somebody's part, that that might not go with it. But, as far  
19 as I know, the reports were factual and, as I understood it, it  
20 was primarily the so-called red book. But I understood Frank  
21 to have received reports from the R.C.M.P. similar to the ones  
22 I had received, too.

23 Q. This red book that you referred to on a couple of occasions,  
24 that was just a booklet prepared by the R.C.M.P. with red  
25 cover on it?

1 A. Yes.

2 Q. Containing all of the reports they had prepared up to the end  
3 of, was it, May or June of 1982?

4 A. Yes.

5 Q. It's actually Exhibit 21, My Lords. Volume 21 in tis hearing is  
6 the so-called red book. You don't have it, Mr. Gale, but it's  
7 previously been identified.

8 A. Yes.

9 Q. Do I understand, then, that your advice to Mr. Edwards and  
10 your expectation was that Mr. Aronson would be given the  
11 red book?

12 A. Well, he certainly would be given the red book and anything  
13 else that Mr. Edwards really felt that he should have that  
14 would better enable him to prepare for the appeal and  
15 present it.

16 Q. Were you kept aware of the various court applications as they  
17 occurred?

18 A. No, I was not. Once the decision was made that it would go by  
19 a reference, it was understood that Mr. Edwards would deal  
20 with the matter from there on in. I have always made it a  
21 policy not to interfere with a lawyer who is handling a case.  
22 Because unless I'm working side by side with him, I can't  
23 really second- guess him. I'm available if he wants  
24 consultation or assistance, but I felt that Mr. Edwards was  
25 fully competent to be able to deal with this matter and he

1 went ahead with it. I did hear later, generally through Martin  
2 Herschorn, that applications had been made, because Mr.  
3 Herschorn was in charge of prosecutions at that stage and  
4 dealing with prosecutors. And in talking to Mr. Edwards on  
5 other matters, he would also find out from him the fact that  
6 Mr. Edwards had been up and an application was going to be  
7 made or something of this nature. But, generally, that would  
8 be several days after the event that I would know about it.

9 Q. But, at this stage, Mr. Edwards going to the Appeal Court to  
10 argue something as if it was an appeal, that is, in your  
11 bailiwick, isn't it?

12 A. Yes, it's in my bailiwick, but I felt that this is a case that  
13 needed somebody who could spend the bulk of their time on  
14 it and I had every confidence that if Mr. Edwards needed  
15 any assistance or advice, that he would contact myself or  
16 someone else in the matter.

17 2:18 p.m.

18 Q. Would you have been given copies of the various briefs that  
19 were filed by Mr. Edwards with the Court?

20 A. I don't recall seeing any of those briefs until quite late in  
21 the, in fact, the only one that I really saw, I think, was his  
22 factum, and that was fairly late in the process.

23 Q. You did see his factum.

24 A. I have a recollection of having seen it at a point in time,  
25 which I suppose you will get to, Mr. Coles and Mr. Edwards

1 had their discussion about the matter.

2 Q. Yes. Okay. But from the time you stopped your...or was  
3 determined that the reference would go under subsection  
4 (b), from that point on you had no involvement...you didn't  
5 keep a hands-on involvement or even keep yourself aware  
6 of what was going on, is that correct?

7 A. I didn't keep a hands-on involvement and I found that  
8 generally I was finding out from Mr. Herschorn what was  
9 going on on the matter because Mr. Edwards and Mr.  
10 Herschorn would be talking often about other matters and  
11 this would be raised during the course of it.

12 Q. Were you aware that the Court limited the number of  
13 witnesses..

14 A. Yes, I was aware of that, yes.

15 Q. And did that give you...cause you any concern?

16 A. Yes. I was disappointed that that had happened because I  
17 had always hoped that the police witnesses would be  
18 brought into the matter and that their evidence would be  
19 given and tested in our adversarial process.

20 Q. Were any instructions given by you or Mr. Herschorn, to  
21 your knowledge, to Edwards concerning how he was to  
22 conduct the reference?

23 A. Well, I think we initially found out it was under subsection  
24 (b) of section 617, but at that time I...after looking at the  
25 matter and still being of the opinion that the police evidence

1           could be called that at that time I spoke to Mr. Edwards and  
2           suggested to him that we continue as much as possible with  
3           the game plan, I guess you might call it, to see that that  
4           police evidence was brought in and to try and test the  
5           evidence of...

6           Q.    What did you understand the Court was being asked to  
7           consider?  What was the issue before the Court?

8           A.    Well, it's as if it were an appeal by Donald Marshall, so that  
9           they would raise questions, I would suppose, as to whether  
10          or not he...there was sufficient evidence to warrant an  
11          acquittal or sufficient evidence against him to maintain the  
12          conviction or the possibility that the Court may say, "Well,  
13          there's a lot of doubt here, that all we can do is order an  
14          new trial on the matter."  I had hoped that, as did occur, that  
15          they entered an acquittal.

16          Q.    You talked about a...I'm sorry.  Were you aware of a visit  
17          made by Mr. Whalley to the Attorney General's office where  
18          he spoke to Mr. Coles I believe?

19          A.    No, I'm not aware of any visit by Mr. Whalley.  I think I had  
20          conversation once with Mr. Whalley and I don't know  
21          whether it was in person or by phone, but I can remember  
22          that he was concerned about the publicity being given to the  
23          matter and I told him that there was nothing we could do  
24          about that.  I didn't know where the information was  
25          necessarily coming from and he'd have to look to the



1 remedies through civil law if he thought there was some  
2 basis there on that.

3 Q. Specifically, I think it was in the...I think it was in the  
4 summer in July of 1982 when it was reported that  
5 Mr.Whalley had attended on the Deputy complaining that  
6 the Crown was not approaching this whole matter  
7 objectively. That was not told to you?

8 A. No, it was not told to me.

9 Q. So, you've only learned of his visit...or how did you learn of  
10 his visit?

11 A. Well, in reviewing the matter, I'm not sure whether I've  
12 seen it in somebody's testimony here or whether it's been  
13 something that's been given in the press. I've read so much  
14 recently I can't really tell you where anything is.

15 Q. Okay. All right. But you certainly weren't told about it at  
16 the time?

17 A. No, I have no recollection of being told about it at the time.

18 Q. Was it left then entirely to Frank Edwards how the  
19 reference...once he was assigned he...it was entirely to him  
20 how he would act in the reference, what evidence he would  
21 try to get before the Court, what cross-examinations would  
22 be done, this sort of thing.

23 A. Yes. I knew that he would have to apply to the Court or get  
24 some type of hearing so that they could get some directions  
25 as to how the Court wanted to deal with this particular

1 matter. I know that I wanted...the only instruction I had  
2 given him, and I'm not sure it's an instruction, but the hope  
3 that even as an appeal if we could still get all the evidence  
4 in that we had hoped to before, that hopefully he and Mr.  
5 Aronson would work together closely on that. I thought it  
6 would be to the benefit of both the Attorney General and  
7 Mr. Marshall to get all that evidence in.

8 Q. Were you aware that Mr. Edwards intended to cross-  
9 examine Donald Marshall, Jr., and in particular to confront  
10 him with a statement he had made at the, Dorchester to  
11 Staff Sergeant Wheaton?

12 A. No, I had not gotten into those details with him. I assumed  
13 that Donald Marshall, Jr., would probably have to give  
14 evidence because of the statement that he had given to the  
15 RCMP in '82, I guess, was different than his testimony in '71.

16 Q. Do you have Volume 39? And, on page 179. That is the  
17 brief that was filed by the Crown on the application to call  
18 fresh evidence. Have you ever had the opportunity to look  
19 at that brief?

20 A. No, I have not.

21 Q. Let me just direct you to a couple of points and see if I can  
22 get your comment, please. On page 185 where it's  
23 submitted that both Chant and Harriss cited police pressure  
24 as a factor in influencing their testimony and it would be  
25 appropriate that the Crown have the opportunity of cross-

1 examining them on their affidavits, and equally appropriate  
2 that the Crown be permitted to call the police evidence.

3 "Indeed, it is difficult to understand how the credibility of  
4 these witnesses could be assessed unless the Court heard  
5 both sides." Did you agree with that?

6 A. Yes, I do agree with it.

7 Q. And you did say you were surprised when the Court elected  
8 not to hear the evidence of the police.

9 A. Yes, I was surprised when they elected not to hear the  
10 evidence of the police. I thought there would be a far  
11 greater number of witnesses in this matter.

12 Q. On page 189, with respect to Donald Marshall's statement,  
13 the last sentence, "This statement would, of course, meet all  
14 the prerequisites for the admissibility of fresh evidence and  
15 would be subject to a voir dire to prove its voluntariness."  
16 Do you agree that that would be the proper procedure to  
17 follow?

18 A. Yes, I agree that would be the proper procedure.

19 Q. Would you be surprised to know that there wasn't any voir  
20 dire before that statement was present...was put to Donald  
21 Marshall?

22 A. Yes, I would be surprised to know that there was not a voir  
23 dire.

24 Q. Have you ever had the opportunity to read the reference  
25 transcript?

1 A. No, I have not read the reference transcript.

2 Q. Just so I understand, so I can take the benefit of your  
3 experience as criminal counsel, I would understand a voir  
4 dire to prove the voluntariness of that statement would  
5 require getting evidence from Wheaton and Carroll who  
6 were present when it was taken and Donald Marshall?

7 A. Yes, it certainly would require getting the evidence from the  
8 police witnesses that were there as to what they did or said  
9 at the time.

10 Q. And that was my understanding, and the evidence of  
11 Wheaton and Carroll was not called at the appeal, at the  
12 reference hearing with respect to that statement, you would  
13 expect that it would have been.

14 A. I would expect it would have been, yes.

15 Q. Thank you. Did you get any reports from Mr. Edwards,  
16 either directly or through others, following the hearing of  
17 the evidence in the reference, that was in early December of  
18 '82?

19 A. No, I knew that the police had not been called and I knew  
20 that there were a limited number of witnesses called. I  
21 didn't get any report as to what had occurred on the matter.

22 Q. Were you aware of the constitution of the Court? Who  
23 comprised the panel?

24 A. No, I hadn't made enquiries as to who comprised the panel  
25 of the Court at this time. I knew that Chief Justice MacKeigan

1 was on it, but other than that I really hadn't questioned as  
2 to who was on the panel.

3 Q. Would you have been surprised to learn that Mr. Justice  
4 Pace was on the panel?

5 A. I suppose I would have been. I'm not sure that Mr. Justice  
6 Pace knew anything about the original matter, but the fact  
7 that he was Attorney General at the time might lead one to  
8 believe that just to prevent any appearance of conflict that  
9 he would not sit on that case.

10 2:30 p.m.

11 Q. You knew he was Attorney General at the time.

12 A. Well, I know he was Attorney General in 1971, yes.

13 Q. If you had known that Mr. Justice Pace was on the panel,  
14 would you have given any advice to Frank Edwards of what  
15 position to take?

16 A. I'd like to think I probably would. I don't know what stance I  
17 would have taken at that time. I think I would have asked  
18 questions about his being on the panel and whether Mr....  
19 Well, Mr. Justice Pace was aware of the fact that he had been  
20 Attorney General at the time.

21 MR. CHAIRMAN

22 Mr. Gale, based on your experience in the Court of Appeal,  
23 what would you have done if you, if when the Court of Appeal  
24 assembled you saw Mr. Justice Pace sitting there and you were  
25

1 counsel for the Crown?

2 MR. GALE

3 Well, I think, at that time, I would have suggested to the  
4 court that Mr. Justice Pace had been Attorney General at that  
5 particular time and that this may be a case that he would wish to  
6 withdraw from. I've never been faced with the situation of  
7 having a previous Attorney General on the court before.

8 MR. MACDONALD

9 Q. Following the hearing of that appeal Mr. Edwards wrote to Mr.  
10 Herschorn in January of 1983, and that's found on page 126  
11 of Volume 31.

12 A. Yes, I have it.

13 Q. And you saw that letter at the time?

14 A. I suspect I did see the letter at the time. I don't have any  
15 independent recollection of having seen this particular letter.

16 Q. Isn't this the letter that prompted Mr. Edwards to be  
17 summoned to Halifax to meet with the Deputy and yourself  
18 and Martin Herschorn?

19 A. Yes, I think it is the letter that resulted in that, but I'm not  
20 sure whether I saw it before... Mr. Herschorn may have given  
21 it to the Deputy.

22 Q. But you saw it before you met with Frank Edwards.

23 A. Yes.

24 Q. Was there anything in that letter that was... What was it that  
25 was giving the Deputy concern?

1 A. Well, as I understand the Deputy's position, the Crown should  
2 not make any recommendation, that it should simply put in a  
3 factum that argued pros and cons of matters but not take a  
4 position on it. I understood him to believe that the Crown  
5 should just simply not take a position and force the court to  
6 make the decision itself rather than the Crown making a  
7 recommendation.

8 Q. That was something that you had never seen in your years of  
9 experience as an appellate counsel?

10 A. No, I have not seen it on an appeal.

11 Q. And was Mr. Coles able to convince you that that was the  
12 position that should be adopted on behalf of the Attorney  
13 General?

14 A. No, I was not comfortable with that position because we had  
15 concluded in our own minds that Donald Marshall should be  
16 acquitted. We felt that there was sufficient evidence to  
17 charge Mr. Ebsary and that such a charge would be laid as  
18 soon as possible following Mr. Marshall's acquittal as we  
19 could.

20 Q. And you had also, earlier that year, you told me this morning,  
21 agreed with the position of Frank Edwards that there had ben  
22 a miscarriage of justice and that the best result would be an  
23 acquittal on that ground.

24 A. Yes, a miscarriage and that he had been wrongfully convicted  
25 and that's my view of a miscarriage.

1 Q. Now Mr. Edwards was proposing, I suggest, a complete  
2 reversal of that in January of 1983. He was, in effect, saying  
3 that there had been no miscarriage of justice, isn't that  
4 correct?

5 A. Yes, it's my understanding that he was now, was going to take  
6 that position.

7 Q. And what reasoning did he give you for that?

8 A. I don't recall any great reasoning on his part. I recall rather  
9 heated discussions between he and the Deputy concerning the  
10 matter. I had suggested the matter might well be resolved by  
11 saying that if the court accepts this evidence, then the  
12 Crown's position is that an acquittal should be entered, which  
13 I thought was well within the usual appellate practice.

14 Q. Let me go back to this letter, though, Exhibit 126... I'm sorry,  
15 page 126 in Volume 31, in the paragraph one where it says:

16  
17 The Appellant must bear considerable  
18 responsibility for the predicament in which he  
19 finds himself.

20 And that is one of the points Mr. Edwards says should be  
21 emphasized. Would you agree with that?

22 A. I didn't see why we had to particularly lay the blame at the  
23 feet of anyone. I thought that the main thing was to try and  
24 get the acquittal. I can see the point that Mr. Edwards was  
25 trying to get across is that it's back to this whole point again  
that had Mr. Marshall told everything at the beginning or if



1 he had told his counsel fully what had happened, or if he had  
2 not been in the Park, presumably, for an illegal purpose, then  
3 he would not have been in this position. But I really see no  
4 great reason to argue that.

5 Q. But Mr. Edwards said that's what he was going to emphasize.

6 A. Yes, but as I told you, I did not follow the case closely at all.

7 It was turned over to Mr. Edwards at the time of the appeal  
8 and I was not going to second guess him on the matter.

9 Q. Forgetting that, if you will, at a meeting attended by the  
10 senior people of the Department and Mr. Edwards, he was  
11 telling you he was going to emphasize that particular point.

12 Was he told not to?

13 A. I don't recall him being told not to.

14 Q. Do you think it's being fair to Marshall to emphasize that  
15 particular point?

16 A. I don't think it really has any great bearing on the acquittal  
17 or whether there should or should not be an acquittal.

18 Q. Why wouldn't you emphasize the fact that the Crown  
19 Prosecutor did not disclose the initial statements, which in  
20 your understanding, if I understand you said this morning,  
21 would be an injustice. Why wouldn't that be emphasized?

22 A. Well, at the meeting, which was Mr. Coles, Mr. Edwards, Mr.  
23 Herschorn and myself, the dialogue back and forth was  
24 primarily between Mr. Edwards and Mr. Coles and they were  
25 hashing it out between them on the matter and I'm not sure

1 that one could necessarily get very many opinions across, or  
2 even get them to listen to you at that point in time.

3 Q. Was there any consideration given to emphasizing to the  
4 court that, in fact, the Crown had not discharged its  
5 obligations by way of disclosure?

6 A. I can't tell you whether there was at that meeting or not.  
7 There was vociferous argument and strong argument between  
8 Mr. Coles and Mr. Edwards on it, on his approach to the case.

9 Q. Wasn't the argument that Coles wanted Edwards to take no  
10 position and Edwards wanted to take a position that there  
11 must be an acquittal?

12 A. Yes.

13 Q. That's what the argument was about.

14 A. That was the argument.

15 Q. But was there any discussion, any argument over the Crown  
16 taking the position that there was no miscarriage of justice?

17 A. I don't particularly recall it. The argument and the whole  
18 meeting seemed to be over his taking the position of  
19 recommending an acquittal as opposed to taking no position  
20 on the matter.

21 Q. Wouldn't you be concerned as the man, in effect, the direct  
22 supervisor or boss of Edwards, that he was taking a position  
23 that there was no miscarriage of justice when you, in fact,  
24 believed there was, and when he told in April, that there was.

25 A. Well, I suppose, on hindsight, one... There are many things

1 that one would do differently. At that particular time, the  
2 dialogue going on was so limited to this question of taking a  
3 position as opposed to taking no position that I don't think  
4 that other matters really came into account.

5 Q. How was it left at that meeting? That meeting, I understand,  
6 took a couple of hours and it was, as you said, it was heated,  
7 was it?

8 A. Yes, it was heated. They both are people with strong opinions  
9 and they, neither of them give way easily or gracefully. The  
10 meeting was left at the basis that Mr. Edwards would do as he  
11 had said he would do and that was it.

12 Q. Prior to the meeting, had you suggested to Mr. Edwards that  
13 there's probably some compromise that can be worked out  
14 here?

15 A. Yes, I had just mentioned that a few moments ago that it  
16 might be phrased in terms that if the court accepts certain  
17 evidence, then the Crown's position is that an acquittal be  
18 granted.

19 Q. Did you and Mr. Herschorn participate in that meeting or  
20 were you just sitting there listening to the other two strong-  
21 willed people argue?

22 A. We had the position mainly of being spectators. I don't think  
23 I said anything more than to suggest that they might reach  
24 that compromise. Mr. Herschorn may have had a few more  
25 things to say, but the dialogue was completely mained

1 between Mr. Coles and Mr. Edwards.

2 Q. And at the end of the day Edwards was told, "Do what you  
3 want."

4 A. Well, do as you, yes, do what you want.

5 Q. And were you comfortable with that?

6 A. At that point in time I was, yes.

7 Q. You said that you did see Mr. Edwards' factum?

8 A. I have some recollection of seeing it some time, I thought  
9 prior to this, but I may be wrong.

10 Q. And you don't have Volume 4 there, do you, Mr. Gale?

11 A. No, I do not.

12 Q. Page 39 of Volume 4. This is the factum that was filed on  
13 behalf of the Crown by Mr. Edwards.

14 A. Yes, and I suppose to answer your previous question, I note  
15 that the factum is dated the 4th day of February, so I would  
16 not have seen it prior to that meeting.

17 Q. Prior to the meeting. But can I assume that you saw it prior  
18 to the argument? That is, the argument submitted to the  
19 Appeal Court?

20 A. At this point in time, I would not say that I necessarily saw it  
21 before he made his argument to the Appeal Court, quite  
22 frankly. I may have read it subsequent to that.

23 Q. Did you ever discuss it with Frank Edwards and take issue  
24 with any of the contents of this factum?

25 A. No, because it further enforces my view that perhaps I saw it

1 subsequent, that there would no point in taking any issue  
2 with the matter. It had already been argued.

3 Q. Let me refer you to some of the points on page 39, the third  
4 paragraph.

5  
6 The Respondent (that's the Crown) disagrees  
7 with counsel for Marshall who argues that the  
8 aforementioned order could issue on the basis  
9 that there had been a miscarriage of justice. It is  
10 submitted that the latter phrase connotes some  
11 fault in the criminal justice system or some  
12 wrongdoing on the part of some person or  
13 institution involved in that system. The  
14 Respondent contends that such was not the case.

15 Is that your belief?

16 A. It's hard to answer. My view is that if a person is wrongfully  
17 convicted then there is a miscarriage. I don't know that you,  
18 that it necessarily denotes a fault with some individual. My  
19 view is that our system of law is not perfect but it's as good  
20 or better than any other system that's been developed so far.  
21 So that it's always possible that somewhere along the way,  
22 something can go awry.

23 Q. You believe there was a miscarriage of justice in this case.  
24 You believed that in April of 1982.

25 A. Given my term of a miscarriage of justice.

Q. Yeah.

A. Yes.

Q. You believed it in December of 1982.

1 A. Yes, I believed it then.

2 Q. And today.

3 A. And I believe it today, yes.

4 Q. So where the Crown advanced a submission to the court that  
5 the order could be, disagreeing that the order could issue on  
6 the basis that there had been a miscarriage of justice, that  
7 would be a position contrary to your belief.

8 A. Yes, it's a position contrary to my belief, but I do know that  
9 on appeals that I have taken at times myself, that there are  
10 times when you become involved in a matter where you  
11 argue exactly opposite what the other side is, just to try and  
12 get the court to address the point completely.

13 Q. Do you know if anyone in your Department believed that  
14 there had not been a miscarriage of justice in this case? Did  
15 you ever hear that view expressed, other than what Mr.  
16 Edwards put in his factum?

17 A. No, I had not heard anybody say that there was not a  
18 miscarriage of justice in the general terms that... But  
19 something went wrong and that person was convicted who  
20 should not have been convicted.

21 Q. On page 40 of that factum, on the bottom, Mr. Edwards said:

22  
23 For the above reasons, it is respectfully  
24 submitted that the Court should make it clear  
25 that what happened in this case was not the  
fault of the criminal justice system or anybody  
in it including the police, the lawyers, the

members of the jury, or the Court itself.

1 Do you accept that as a correct statement?

2 A. With the qualification that I have never been satisfied that  
3 anybody went out and deliberately tried to do anything to see  
4 that Donald Marshall got convicted. People made mistakes,  
5 but I don't think any of them did it with deliberate malice,  
6 did it deliberately. But certainly I think mistakes were made  
7 and I think some people have to bear the responsibility for  
8 that.

9 Q. Would you accept a statement somewhat similar to this?

10 The Court should make it clear that what happened here was  
11 the result of mistakes made by certain people, including the  
12 police and the prosecutors?

13 A. Well, that might be one way of putting it. I don't really know  
14 exactly what mistakes were made by the prosecutor. The  
15 man is dead and not able to speak for himself. I don't really  
16 know what he did or didn't do.

17 Q. Well, you know he didn't give the inconsistent statements of  
18 Chant and Pratico.

19 A. I don't know if he had them. I'm not certain that he had  
20 them. I haven't looked at the file in that regard to determine  
21 whether he had them or not. I don't know if...

22 Q. Lou Matheson said he did.

23 A. Well, if Mr. Matheson said he did, then perhaps he did, but I  
24 have no...  
25

MR. GALE, EXAM. BY MR. MacDONALD

1 Q. If you assume he did, that was a mistake?

2 A. If you assume that he had them, then that was a mistake not  
3 to give them, yes.

4 Q. And you know it was a mistake not to advise the defence in  
5 November when Jimmy MacNeil came forward and said he  
6 had seen Ebsary stab MacNeil... or stab Seale.

7 A. Yes.

8 Q. And you know it was a mistake when the R.C.M.P.  
9 reinvestigated in 1971 and did nothing other than two  
10 polygraph tests and spoke to no one. That's a mistake.

11 2:52 p.m.

12 A. Yes, it certainly is in hindsight. I think that at that time the  
13 polygraph had an aura of mysticism and authority about it  
14 that it certainly does not have nowadays.

15 Q. We're talking hindsight here though, Mr. Gale. We're trying  
16 to find out why a man spent eleven years in jail for  
17 something he didn't do and yet the Attorney General, the  
18 Crown, advanced the position to the Court that the only one  
19 that should be blamed is Marshall.

20 A. Well, certainly it was not done at my directions. I don't  
21 know if anybody else told Mr. Edwards to do such. It wasn't  
22 done at my direction. That I can tell you. I don't really see  
23 the purpose and point of putting in these sort of matters in  
24 the factum because if it's an appeal these really have got  
25 nothing to do with it. It's a question of law as to whether or



1 not the evidence was admissible, was not admissible, should  
2 have been given, shouldn't have been given, but it's...I don't  
3 really think it's a question to be raised in a factum to  
4 absolve or blame one side or another and it is simply the  
5 fact that it didn't occur and because of that the conviction  
6 should not be sustained and, in fact, was a wrongful  
7 conviction in the first place.

8 Q. Have you heard Frank Edwards' explanation for why he did  
9 this?

10 A. No, I have not talked to Mr. Edwards on the matter. I've  
11 read...

12 Q. Have you read his evidence before this inquiry?

13 A. I've read his evidence before this inquiry, yes.

14 Q. His evidence was, as I recall, that he put these statements in  
15 the factum because of his belief that if he didn't do that he  
16 wouldn't get an acquittal at all. That unless he could let the  
17 Court blame Marshall he would not get an acquittal. That's  
18 what he's testified here. Did he ever at any time express  
19 that to you?

20 A. No, he did not express that to me.

21 Q. Would you be concerned that the Crown would have to take  
22 a position such as that? The only way to get an acquittal in  
23 this case is to let the Court blame the man who spent all that  
24 time in jail.

25 A. Oh, I would be concerned if the matter had come down to

1 that point where his reading of the Court was that that is the  
2 only way that he could get an acquittal. I would rather that  
3 he...the Court had ordered a new trial on the matter than  
4 necessarily having to bring it to adopt this stance.

5 Q. And you know, don't you, that as a result of the submissions  
6 made to the Court that the Court come down with its final  
7 three pages of its decision or, in effect, said Donald Marshall  
8 is the author of his own misfortune?

9 A. Yes, I know that. I know that the Court came down with  
10 those...

11 Q. Yeah.

12 A. ...pages, yes.

13 Q. And that is the result that was urged upon the Court by the  
14 Crown.

15 A. So it would appear from this, yes, that's it's...

16 Q. And that finding of the Court was used by the Crown in its  
17 negotiations with Marshall to deny him the compensation  
18 that he was seeking.

19 A. Well, we have Mr. Endres' evidence on it. I have nothing to  
20 do with the compensation. I was not involved in it in any  
21 way, shape or form. I was not kept advised as to what was  
22 occurring in it.

23 Q. You've read the decision of the Appeal Division.

24 A. Yes, I've read it, but not recently.

25 Q. In the reference. Were you surprised by the findings of the

MR. GALE, EXAM. BY MR. MacDONALD

1 Appeal Division on that reference?

2 A. I was somewhat surprised, yes, by their findings on that  
3 particular part, but again I had not known what the  
4 arguments were that were submitted to them, quite frankly.

5 Q. Well, you knew what the arguments were going to be. You  
6 attended the meeting with Coles, Gale, Herschorn and  
7 Edwards, you knew the Court was...it was going to be  
8 emphasized to the Court that Marshall must bear  
9 considerable responsibility for what happened to him.

10 A. Well, I guess I perhaps knew that but that meeting was so  
11 taken up with the fact that Mr. Edwards and Mr. Coles were  
12 arguing over the position of the Crown as to whether the  
13 Crown was taking any position, that...that I...the other points  
14 just were not brought out in the meeting.

MR. CHAIRMAN

15  
16 I have a problem with that meeting. Maybe you can help  
17 me, if I may interrupt.

MR. MacDONALD

18  
19 Please.

MR. CHAIRMAN

20  
21 Q. The meeting of January the 25th, according to the testimony  
22 of Mr. Edwards and his notes, was called at your suggestion.  
23 Do you remember his notes?

24 A. Yes.

25 Q. And, and that the purpose of the meeting was that the four

1 of you wanted to discuss Mr. Edwards' letter of January the  
2 18th. This is...

3 A. The Deputy Attorney General had indicated to me some  
4 dissatisfaction with the position that Mr. Edwards was  
5 taking on his final recommendation that he would be  
6 making. I had called Mr. Edwards. At that point in time I  
7 wasn't really fully aware of what the Deputy was thinking  
8 on the matter. I suggested to Mr. Edwards that I really  
9 didn't have any desire to argue with him about it on the  
10 phone, that the best thing to do would be for him to come  
11 into Halifax and Gordon Coles could sit down with him and  
12 express to him directly what his concerns were. He said he  
13 would be in the next morning and I advised Mr. Coles to ask  
14 that Mr. Herschorn and myself sit in on that meeting.

15 Q. Well, Mr. Edwards' note reads, referring to you, "Had  
16 initially told me that he, Martin and Coles had discussed my  
17 letter. Not sure that he," that's you, "He and Martin agree  
18 with me. Feels that a reasonable compromise could be taken  
19 and told him I would fly up the next day," which he did. I'm  
20 having difficulty understanding why, if the purpose of  
21 bringing Mr. Edwards to Halifax was to discuss the content  
22 of his letter and where you and Mr. Herschorn had indicated  
23 your disagreement with some of the proposals contained  
24 therein, that the discussion would degenerate into an  
25 argument, according to your testimony, between Edwards

1 and Coles on one simple position, whether the Crown should  
2 say nothing or whether Mr. Edwards should be allowed to  
3 ask for an acquittal, while these other points that were in  
4 contention were not raised by you and Mr. Herschorn.

5 A. Well, Mr. Coles is the Deputy and he's our boss, he and Mr.  
6 Edwards soon seemed to get into a position of strong conflict  
7 of wills on it, and accusations went back and forth. Mr.  
8 Edwards questioning whether he was trying to make him  
9 compromise his position, was he ordering him to do so.  
10 The...that seemed to take up the bulk of the time and quite  
11 frankly I know I, for one, was glad when the meeting was  
12 over and I was out of the place. It was not a...

13 Q. So the intended...

14 A. It seemed to me to be such a long meeting over whether or  
15 not somebody was asked...being asked to compromise his  
16 principles, so that we really had not gotten into the whole  
17 matter.

18 Q. So the intended purpose of the meeting never came to pass  
19 because the intended purpose of the meeting, according to  
20 Mr. Edwards, was that you had suggested that he come to  
21 Halifax so that "the four of us could talk about it". That  
22 obviously never happened.

23 A. No, it really didn't happen. It got carried away on a battle of  
24 wills between Mr. Edwards and Mr. Coles.

25 Q. Over a very important issue. Very vital issue, I would think.

MR. GALE, EXAM. BY COMMISSIONERS

1 A. Oh a very vital issue, but, ah...

2 Q. At any time during your meeting with the four of you  
3 present did you and Mr. Herschorn ever support the position  
4 put by Frank Edwards?

5 A. I supported his position to the extent that I couldn't see how  
6 we could not take a position on the matter, that our view  
7 was that Mr. Marshall should be acquitted and as soon as  
8 that had occurred then Mr. Ebsary would be charged.

9 Q. But did you come out of the meeting when Mr. Edwards, a  
10 relatively junior prosecutor in the...insofar as the totem pole  
11 is concerned, was being admonished by the Deputy Minister  
12 not to take a position? Did you and Mr. Herschorn, who  
13 were his superiors, at that time speak out and say to the  
14 Deputy Minister "We're on Mr. Edwards' side."

15 A. Well, to that extent that I have just said I told the Deputy  
16 that I was on Frank's side but...

17 Q. At that meeting.

18 A. At that meeting, yes.

MR. CHAIRMAN

20 All right. Okay.

COMMISSIONER EVANS

21 Q. When Mr. Coles threatened to take Frank Edwards off the  
22 case because he wouldn't take the position that Mr. Coles  
23 was advocating did you support Mr. Coles or did you support  
24 Mr. Edwards or did you support anyone?  
25

1 A. I had a horrible cold shiver go down my spine when he  
2 threatened to do that because I wanted this thing to go on  
3 and be dealt with as expeditiously as possible and I didn't  
4 know who we could possibly get into it that had the  
5 knowledge of the matter that Mr. Edwards did to be able to  
6 proceed in any...at the time of the appeal and certainly  
7 within any reasonable time. But then it became so I had  
8 to...indicated to Mr. Coles at that time that, "Come on, Gordon,  
9 who are we going to get to take Frank's place on this? It  
10 just is not possible. " We don't have the luxury of somebody  
11 that can...even if they could be pulled free of everything else  
12 to get themselves in a position to argue the appeal within  
13 that time. And I guess Mr. Coles must have accepted that  
14 because it concluded with him leaving Mr. Edwards on it and  
15 saying that "We're in your hands."

16 Q. Well, didn't he leave him on it because he was really pushed  
17 into adopting the position that Mr. Coles was advocating?  
18 Isn't that the only reason he left him on the case, and isn't  
19 that the only reason that Mr. Edwards finally adopted Mr.  
20 Coles' position, because he was really hammered into it. I  
21 mean take the position, we have the Deputy and we have a  
22 prosecutor who has not too many years' experience in there,  
23 but who has his principles and he's fighting hard to maintain  
24 that position and those principles, and he has the Deputy  
25 Minister telling him that he should not take any position,

1 and you as a counsel who appeared many times in the Court  
2 of Appeal, you know that that is not the position normally  
3 adopted by counsel for the Crown.

4 A. Yes.

5 Q. And isn't it a fact that it was hardly an equal debate  
6 between Mr. Coles and Mr. Edwards in the sense of seniority.

7 A. No, it was not an equal debate as far as seniority.

8 Q. Arguing from their positions.

9 A. But Mr. Edwards seemed to be quite a match for Mr. Coles as  
10 far as debating him on the matter. He was not prepared to  
11 back down one iota.

12 Q. But in the final result what happened? Was there not a  
13 backing down from the position that he had advocated so  
14 strongly? When this factum came in, I realize you may not  
15 have seen it before the argument, but isn't that a backing  
16 away from the position which he had maintained for two  
17 and a half hours?

18 A. Yes, it is.

19 Q. And it's an adoption of the position advocated by Mr. Coles.

20 A. It would appear to be, but you know I don't know why Mr.  
21 Edwards did it, and I can only refer you to whatever his  
22 testimony is on it.

23 Q. I realize you don't know why he did it, but the fact is it was  
24 done. Is that correct?

25 A. Yes, it would appear that he went a long ways to meeting



MR. GALE, EXAM. BY COMMISSIONERS

1           what Mr. Coles was advocating.

2           COMMISSIONER EVANS

3           Thank you.

4           MR. MacDONALD

5           Q     Do I understand...

6           MR. CHAIRMAN

7           Q     But I want to come back to that again, Mr. Gale.

8           COMMISSIONER EVANS [To Mr. MacDonald]

9           We'll give you a chance later.

10          MR. CHAIRMAN

11          Q     I'm getting the impression that your intervention when Mr.  
12                Coles threatened to pull Frank Edwards off the appeal was  
13                that there was no one else in the Department of the  
14                Attorney General who could be sufficiently briefed to carry  
15                the appeal in that short notice.

16          A.    Yes, that was my concern at that point in time.

17          Q     I'm more concerned as to your position with respect to the  
18                principle that was being argued and advanced and promoted  
19                by Mr. Edwards. It seems to me if Mr. Edwards had been  
20                pulled off you would have been in a very untenable  
21                position, both you and Mr. Herschorn as his superiors, if you  
22                agreed with the position put by Frank Edwards. Your  
23                position would be very untenable in the Department then,  
24                wouldn't it?

25          A.    Well, it may have been. I have not given any consideration

MR. GALE, EXAM. BY COMMISSIONERS

1 to that.

2 Q Now, yes, go ahead. I get the uncomfortable position that  
3 Mr. Edwards was being hung out to dry. This is what's  
4 concerning me.

5 A. Well, I did not feel that he was hung out to dry.

6 Q When you're his superior, Mr. Herschorn is his superior. You  
7 have an obligation to protect him and he is there being  
8 chastised by the permanent head of the Department and  
9 nobody is coming to his rescue.

10 A. Well, the way the matter went along, My Lord, perhaps we  
11 should have done more than we did. That did not seem at  
12 that point in time that there was more that we could have  
13 done right then. Perhaps in reflection there is more that we  
14 could have done, but I think you would have had to be at  
15 the meeting to feel the...

16 Q Tension.

17 A. The atmosphere at the time.

MR. CHAIRMAN

18 All right. Mr. MacDonald, I promise I won't intervene.

MR. MacDONALD

20 Getting my exercise.

COMMISSIONER POITRAS

22 I hate to get involved in this. But I just...I note in Volume 4  
23 in the submission, the factum of the respondent, at page 39,  
24 where the Crown says, "It is respectfully submitted that the  
25

MR. GALE, EXAM. BY COMMISSIONERS

1 appeal should be allowed, the conviction should be quashed and a  
2 direction made that a verdict of acquittal be entered." If that is  
3 the case, it seems to me, that Mr. Edwards was able to hold onto  
4 his initial position, notwithstanding instructions to the contrary  
5 from Mr. Coles. There's no doubt in my mind that Mr. Edwards'  
6 opinion remained unchanged, as indeed is indicated in the further  
7 correspondence exchanged between himself and Mr. Coles. I'm  
8 just saying that for the record. I think it has to be said.

MR. MacDONALD

9  
10 Q. That's my understanding, as well, Mr. Gale. The position at  
11 the meeting was Frank Edwards saying "I want to take the  
12 position and advise the Court that an acquittal should be  
13 entered."

14 A. Yes.

15 Q. Mr. Coles was saying, "I do not want you to take any such  
16 position."

17 A. That's correct.

18 Q. "You are to take no position."

19 A. That's correct.

20 Q. And in the end, according to the factum and according to  
21 what happened, Mr. Edwards did exactly what he said he  
22 was going to do.

23 A. In his submissions, yes, he did exactly what he said he was  
24 going to do, yes.

25 Q. But do I understand from your discussion with Mr. Justice

1 Evans that when Mr. Coles said "I threaten to take Mr.  
2 Edwards off the case," that you would have gone along with  
3 that if you had had another warm body there to put in with  
4 some knowledge?

5 A. No, I would not have gone along with that, but if Mr. Coles  
6 decided to take him off, regardless of what I said, then I  
7 would have no option on the matter.

8 Q. Okay, but I take it...I took it your only concern expressed to  
9 Mr. Coles was, "Who else are we going to get?"

10 A. Well, that was one concern. I think to be fair to me and to  
11 be fair to everybody, I think it was quite obvious that I was  
12 of the opinion that the Crown had to make a  
13 recommendation. I don't think that was in question  
14 whatsoever.

15 Q. Oh.

16 A. So it was known that I supported that view. But then if Mr.  
17 Coles, as Deputy, wanted to take Mr. Edwards off regardless  
18 of anything else, because he didn't think he was handling  
19 the matter properly, then that's his prerogative as Deputy. I  
20 can't tell him not to...I can say "I don't agree with that," but  
21 that is not going to carry the day, quite frankly.

22 Q. You have told us this morning that there have been  
23 occasions, more than one, where you in an Appeal Court  
24 have supported the position being put forth by an accused.

25 A. Yes, I have.

1 Q. And the position being put forward by the accused in this  
2 case was that there should be an acquittal on the basis that  
3 there is no evidence which would support a conviction and  
4 also that there has been a miscarriage of justice.

5 A. Well, I accept what you say. I haven't looked at the...his  
6 factum.

7 Q. Now if you just accept that why...and given the fact that you  
8 were of the belief that there had been a miscarriage of  
9 justice and that there was no evidence to support a  
10 conviction, why wouldn't you just say to Frank "Go in and  
11 support the accused"?

12 A. When would I say this to him?  
13 3:14 p.m.

14 Q. At the meeting? I mean you've got, as I understand it, a  
15 pretty acrimonious discussion going on here.

16 A. Yes, it's an acrimonious discussion going on. I had thought I  
17 made it clear that we, in fact, that I supported his opinion  
18 that the Crown make a recommendation. I thought that to  
19 avoid the acrimony, that it might be phrased a little  
20 differently and both he and Mr. Coles might agree to that.  
21 Other than that, I don't know what else I could have done on  
22 the matter.

23 Q. Let me go back to one other thing you said a few moments  
24 ago, I believe you said, and correct me if I'm wrong. I believe  
25 you said in the factum that was filed on behalf of the Crown,

1           there really shouldn't be reference at all to blame. Blame  
2           shouldn't have been, entered into it at all. The only question  
3           should be legal. Is there enough evidence there to support a  
4           conviction or not? Am I summarizing accurately what you  
5           said?

6       A. Yes, that was my view.

7       Q. And would you agree with me that, similarly, the question of  
8           blame should not have been dealt with in the decision,  
9           shouldn't have been dealt with by the court at all. No need of  
10          the court dealing with that issue.

11      A. In my view, there is no need of them dealing with it because  
12          it was an appeal and it was not a matter of trying to  
13          determine compensation. So there was really no point of  
14          dealing with blame.

15      Q. And if...

16      A. But the court seemed to see fit to deal with that and I have no  
17          explanation for that.

18      Q. Well, the explanation, surely, Mr. Coles, is that the Crown...

19      A. Mr. Gale.

20      Q. Urged them... I knew I would do that. I warned you. You  
21          know why the court did it, because they were urged by the  
22          Crown.

23      MR. PINK

24          With respect, My Lord, how could he know why the court  
25          did what they did?

MR. GALE, EXAM. BY MR. MacDONALD

1 MR. MACDONALD

2 That's getting pretty...

3 MR. CHAIRMAN

4 I think we could... There's some logic to that, but it may be  
5 somewhat speculative. Carry on.

6 MR. MACDONALD

7 The minds that were... I guess we're not allowed to get into  
8 those minds?

9 MR. CHAIRMAN

10 Pardon?

11 MR. MACDONALD

12 We're not allowed to get into those minds.

13 COMMISSIONER EVANS

14 Not yet.

15 MR. MACDONALD

16 Are you going to take an afternoon break?

17 COMMISSIONER EVANS

18 I would like to ask him one question. Looking at the factum  
19 and I want to be fair to you on this, would it not have been more  
20 appropriate if the factum had stopped at 82, Paragraph 82, and  
21 never mind getting into what the... I'm sorry, page 39, Paragraph  
22 82, and not get into this submission with respect to the role of the  
23 court and also that paragraph 83?

24 MR. GALE

25 Yes, if I had prepared the factum, I'd... Without specific

MR. GALE, EXAM. BY COMMISSIONERS

1 direction, I would not have put in Paragraph 83.

COMMISSIONER EVANS

2  
3 Would you have put in the succeeding paragraphs, 84 and so  
4 forth?

MR. GALE

5  
6 Well, I see nothing in itself inherently wrong with 84. I  
7 don't see the necessity for 85. I would not have put that in  
8 myself. Or 86.

COMMISSIONER EVANS

9  
10 These are philosophical discussions, aren't they?

MR. GALE

11  
12 Those are not matters that I, myself, would put into a  
13 factum.

COMMISSIONER EVANS

14  
15 Then I'll come back to the question I want to get at. If 82,  
16 or even 83 was the appropriate end to it, Mr. Edwards, in 81 and  
17 82, had put his position, the one that he had always held, but then  
18 he gets into 83 and subsequent ones, which sets out somewhat the  
19 position taken by Mr. Coles and really waters down the position  
20 that Mr. Edwards had always adopted and had adopted here in 81  
21 and 82.

MR. GALE

22  
23 Well, I frankly do not see the necessity for submissions re  
24 the court's role in the matter. If I had handled the appeal and  
25 done the factum. The conclusions, they're very simple, submitted



MR. GALE, EXAM. BY COMMISSIONERS

1 that the courts find this...

2 COMMISSIONER EVANS

3 Acquit.

4 MR. GALE

5 Acquit, and in the alternative it does not do that, then this  
6 should be the result.

7 COMMISSIONER EVANS

8 And that's the end of it.

9 MR. GALE

10 And that's the end, and respectfully submitted and signed.

11 COMMISSIONER POITRAS

12 Mr. Gale, just a question. Is it possible that at this meeting  
13 of January 25th, 1983, the only issue that came up was whether  
14 or not Mr. Edwards was to recommend an acquittal or not.

15 MR. GALE

16 That was the issue that was dealt with and that seemed to  
17 be the whole of the argument.

18 COMMISSIONER POITRAS

19 I don't believe, and correct me if I'm wrong, that the matter  
20 as to whether Marshall should bear the brunt of some  
21 responsibility, came up at that meeting at all.

22 MR. GALE

23 I don't recall it, because all I can really recall of that  
24 meeting is a vociferous argument over whether the Crown should  
25 make any recommendation or make none at all.

MR. GALE, EXAM. BY COMMISSIONERSCOMMISSIONER POITRAS

1  
2 Yet, at that meeting, you were of the mind that Marshall had  
3 no responsibility for the predicament in which he found himself.  
4 But this didn't come up at that meeting.

MR. GALE

5  
6 It didn't come up at that meeting.

COMMISSIONER POITRAS

7  
8 Thank you.

MR. CHAIRMAN

9  
10 But that was the first point in the letter that Mr... That the  
11 meeting was called to consider, that the appellant must bear  
12 considerable responsibility for the predicament in which he finds  
13 himself. That was the purpose of the meeting, wasn't it?

MR. GALE

14  
15 As far as I'm aware, the purpose of the meeting was the fact  
16 that, number one, I didn't fully understand Mr. Coles' position on  
17 it and I thought it would be much better if we all just sat down  
18 about it and the meeting seemed to concentrate on whether Frank  
19 Edwards was going to take a position or take no position and how  
20 dare you tell me what to take and how dare you not follow what  
21 I'm telling you to do.

COMMISSIONER EVANS

22  
23 And that went on for two and a half hours.

MR. GALE

24  
25 Well, I'm not sure it was necessarily two and a half hours.

MR. GALE, EXAM. BY COMMISSIONERS

1 It was lengthy. It may have been seemed longer than it was.

2 BREAK - 3:23 p.m. - 3:41 p.m.

3 MR. MACDONALD

4 Q. To your knowledge, Mr. Gale, did Mr. Coles have any  
5 experience as a Crown Prosecutor?

6 A. No, he had no experience as a Crown Prosecutor.

7 Q. During your time in the Department, has he gone to court?

8 A. No.

9 Q. Was he a trial lawyer?

10 A. I understood his practice to be one of civil law, mainly. He  
11 may have had an odd criminal case from time to time, but  
12 nothing that I can recall was of any significance, and I think a  
13 good deal of his practice was in the corporate/commercial  
14 area.

15 Q. Why was he... Or what reason was he advancing in support of  
16 his position that no Crown position should be taken before the  
17 Appeal Division? What's the reasoning behind it?

18 A. The only reasoning that I could understand at the time was  
19 that he felt that although this was an appeal, that it was  
20 really a reference and that the, that the burden should be cast  
21 directly on the court to make a decision and that the Crown  
22 should not do anything more than make arguments, but not  
23 take a position on it.

24 Q. Surely, that can't be the position, or that can't be the role of  
25 Crown at any time, to go before the court and sort of throw up

1 your hands?

2 A. No, you cannot go before the court and throw up your hands.

3 I happened to come across a case where I can do that.

4 Q. And you didn't support Coles in this case, either, did you?

5 A. What? His view that there be no...

6 Q. Yes.

7 A. No, I did not support him on it.

8 Q. From your years of experience before the courts, and  
9 particularly before the Appeal Court, can you comment on Mr.  
10 Edwards' view that he could sort of read the court what they  
11 were looking for? Have you had those experiences yourself  
12 and sort of read...

13 A. Yes, I've had that experience where I could read, or thought  
14 I knew where the court was going. Sometimes I've been  
15 greatly mistaken, though. Or sometimes I thought they  
16 were completely for or against me and the decision turned  
17 out completely the opposite.

18 3:45 p.m

19 COMMISSIONER EVANS

20 That's usually when they're reserved, was it?

21 MR. GALE

22 Yes, My Lord.

23 MR. CHAIRMAN

24 That's part of the mystique of the Bench.  
25

1 MR. MacDONALD

2 Q After the decision of the Appeal Division was rendered Mr.  
3 Edwards was asked to prepare a memorandum whether  
4 charges of perjury should be laid against various people.  
5 Were you aware of that?

6 A. Yes, I was aware of that.

7 Q The memo is found in Volume 32, page 152 and following.  
8 Was there a discussion at the...in your Department on these  
9 topics that there should now be consideration given to  
10 whether perjury charges or other charges should be laid?

11 A. Yes, there was.

12 Q And who participated in those discussions?

13 A. Well, I think at various times Mr. Herschorn, myself, the  
14 Deputy Attorney General and the Attorney General  
15 participated in those discussions.

16 Q Now Mr. Edwards gave his opinion dated May the 16th,  
17 1983, that's on page 154. Would you have reviewed that  
18 decision at the time it came in?

19 A. I would have read it, yes, at that time, yes.

20 Q And would you have agreed with it?

21 A. Yes, I agreed with it.

22 Q In that opinion on page 157 when referring to the evidence  
23 of Maynard Chant, Mr. Edwards concluded, "That in the  
24 circumstances Chant likely saw no alternative to telling the  
25 police what he believed they wanted to hear." Do you see

1 that? That's just before the final paragraph on page 157.

2 A. Yes, I see it, it's the last sentence on that.

3 Q. And on top of the next page with respect to Patricia Harriss,  
4 just toward the end of that paragraph it says, "It is probable  
5 that after such extensive questioning she, like Chant, told  
6 police what she believed they wanted to hear." Do you see  
7 that?

8 A. Yes, I see that.

9 Q. And the conclusion is with respect to both Chant and Harriss,

10  
11 It is the opinion of the undersigned that neither  
12 have the criminal intent necessary to support a  
13 conviction for perjury, in other words they  
14 probably did not have the intent to mislead  
15 because they believed they were telling the  
16 Court what the police were convinced was the  
17 correct version.

18 And then you would have saw that at the time.

19 A. Yes, I would have saw...seen that at the time.

20 Q. Now is it your view that somebody can take the witness  
21 stand and tell something that they didn't see, and because  
22 they believe someone else thinks it's correct that that's not  
23 perjury?

24 A. Well, my view on the thing, I'm not sure I necessarily  
25 associate myself with all of Mr. Edwards' legal views on it,  
but my view was that these were young people at the time  
that this had happened, some eleven or twelve years

1           beforehand, that in the passage of time that perhaps they  
2           had had enough reason to regret what they did or didn't do  
3           on this matter, and that there was no useful purpose to be  
4           served by prosecuting.

5       Q.   Well do you understand that it's because of the evidence of  
6           those three people, Chant, Harriss and Pratico, that Donald  
7           Marshall was convicted?

8       A.   Yes, I understand that. But you asked me my personal view.  
9           I found it not one that I thought was...had any good reason  
10          to it at this point in time. They had recanted. He had gained  
11          his freedom. There was no useful purpose at this point in  
12          time to going after them for something that they did as  
13          teenagers.

14      Q.   Did you ever ask for an opinion from anyone whether  
15          charges should be laid against anyone else and, in particular,  
16          members of the police who convinced, according to Mr.  
17          Edwards, Harriss and Chant to give evidence that the police  
18          believed to be correct?

19      A.   After the appeal decision had come down I asked the...Mr.  
20          Edwards to review the matter and advise us of any other  
21          outstanding matters or any charges that he thought should  
22          be proceeded with.

23      Q.   Well, can I take you back to page 152? Are those the  
24          instructions that were given to Mr. Edwards? Is that what  
25          he was asked to do?

1 A. No. The request that I made of him, and I think it was oral,  
2 because I haven't been able to see the letter of it anywhere,  
3 was that he review the case and advise us as to whether  
4 there were any other matters that needed to be dealt with,  
5 whether there were any other charges that he was  
6 recommending or that needed to be dealt with on the  
7 matter.

8 Q. I see. When...

9 A. That was the general question.

10 Q. When did you ask Mr. Gale, or Mr. Edwards that?

11 A. It would have been probably within a month or so of the  
12 decision coming down, less than that I would think.

13 Q. Now the decision came down on May the 10th of '83. It was  
14 after that, was it?

15 A. Yes.

16 Q. Mr. Herschorn asked him on May the 13th to look at  
17 whether the evidence would support charges of perjury or  
18 attempted robbery against Donald Marshall or  
19 recommendations as to whether any such charges should be  
20 proceeded with? And you asked him something in addition.

21 A. Yes, orally.

22 Q. Okay.

23 A. I can recall asking him to look at the whole matter, review it  
24 and tell me whether there were other charges that needed  
25 to be proceeded with or whether there were any other



1 matters that should be dealt with because...

2 Q. Did you ever get a response?

3 A. I can't actually say that I did. I'm under the impression that  
4 I was told that these things that he was reporting to Mr.  
5 Herschorn were the matters that he thought had to be dealt  
6 with.

7 Q. But surely you can see that all he was doing with Mr.  
8 Herschorn is responding to his request given...

9 A. Yes. And I think Mr. Herschorn asked these because he was,  
10 in turn, asked by either the Minister or the Deputy as to  
11 whether charges of perjury should be laid or an attempted  
12 charge of robbery and I think some of that may have come  
13 out of the decision of the Appeal Division also.

14 COMMISSIONER POITRAS

15 Page 159, perhaps.

16 MR. MacDONALD

17 159, My Lord, thank you.

18 Q. 159, Mr. Gale, is a memorandum from the Attorney General  
19 to the Deputy asking for certain things to be done, the third  
20 being:

21 We should be looking into the question of the  
22 performance of the police and the Crown in the  
23 prosecution of Donald Marshall originally.  
24 Finally, we must make a decision as to whether  
25 he or any of the other witnesses at the trial...

That's, "he" is Donald Marshall, isn't it?

1 A. Yes, I would take it...

2 Q. "Or any other witness at the trial who allegedly committed  
3 perjury ought to be charged." Specifically, was any...anyone  
4 on your staff ever asked to look at the question whether  
5 charges should be laid against the police?

6 A. No, no one was specifically asked if charges should be laid  
7 against the police, because I asked the general question  
8 whether there were any other charges. I had been under  
9 the impression that the actions of the police, while they  
10 might be considered improper, there was nothing there that  
11 gave rise to charges, and that that...the consideration that  
12 was being vetted in the department was that there would be  
13 some type of an inquiry, the possibility of an inquiry, either  
14 under the Police Act, or if that was not legally possible  
15 because this occurred before the Police Act had come into  
16 effect, then under the Public Inquiries Act that's set up in a  
17 similar manner and dealt with perhaps by the Police  
18 Commission.

19 Q. In May of 1983 you're being advised by Frank Edwards that  
20 Maynard Chant and Patricia Harriss both gave evidence that  
21 was incorrect, that was a lie, because they were telling the  
22 Court what the police were convinced was the correct  
23 version. They had been somehow convinced to give  
24 evidence that...of what the police believed, rather than what  
25 they believed, and which was, in fact, a lie. That's what you

1           were told in May of 1983.

2       A.    Yes, that's what Mr. Edwards states.

3       Q.    Now, wouldn't that, at least, prompt you to ask Edwards or  
4           someone else, well, is there any grounds for laying a charge  
5           against the police for something like counselling perjury?

6       A.    Well, perhaps it should have required, brought that to mind.  
7           I had been acting under the impression that, while the  
8           police questioning was forceful, long, that nobody was  
9           saying that there was anything that they had done that was  
10          illegal in the sense that it was a criminal offence. It may be  
11          improper without being illegal. But I had understood from  
12          anyone that I had talked to on the matter that the  
13          questioning was intense, and it was certainly one where the  
14          officer asking the questions might say, "I don't believe you  
15          and this is what happened," but that that in my view didn't  
16          lead me to believe that there is any type of criminal offence  
17          being committed, and I didn't have that impression that  
18          anyone else thought there was a criminal offence that had  
19          been committed.

20       Q.    Who did you talk to?

21       A.    Well, I had some conversations with Frank Edwards. I'm  
22          certain on that particular point. I know that originally when  
23          the whole matter of...came in with the RCMP reports that I  
24          have the recollection of asking Superintendent Christen  
25          what they meant by "pressure" and that these people were

1           pressured on this. And I was...it's from those and it's hard  
2           to say that...exactly who I can attribute it to, but I know that  
3           I would have been discussing those matters with Mr.  
4           Edwards and with Superintendent Christen and I had the  
5           impression that, yes, there was very vigorous questioning of  
6           these people but there was nothing there that was more  
7           than that. There was not any suggestion made to me ever,  
8           and nothing to cause me to stop and think that this is a  
9           criminal activity. And we all...I also had in my mind that  
10          this should be the subject of an inquiry, and where you  
11          would inquire into the police actions and if possible the  
12          prosecutor's actions at the time, as to what occurred. I just  
13          did not have the feeling that there was a criminal offence  
14          being committed. It wasn't a matter of trying to cover the  
15          matter, it was my feeling that there should be an inquiry  
16          into that aspect of it so that that would come out as to what  
17          had happened then and how that sort of thing could be  
18          avoided in the future.

19          \*4:00 p.m.

20          Q. I'm just trying to get your understanding. We have two young  
21          people here, Chant and Pratico, who don't know each other.  
22          Twenty-two miles apart, they live. And they both testify that  
23          they saw Donald Marshall stab Sandy Seale and they both say,  
24          "I never saw that at all." And Frank Edwards says, "They  
25          were only telling the court what the police were convinced

1 was the correct version." And do you take from that the  
2 police somehow told them that Donald Marshall stabbed  
3 Sandy Seale?

4 A. Well, I took from that that there was a vigorous examination  
5 of them by the police and that every time they said  
6 something else, the police, for one reason or the other, had the  
7 view that this was the way it happened and would perhaps  
8 say, "I don't believe you." Keep saying that that couldn't have  
9 happened that way. I may be legally wrong. I didn't  
10 consider it counselling, and I still don't.

11 Q. How far can a policeman go? If he believes something, if he  
12 believes that a crime was committed a particular way. How  
13 far can he go without crossing that line into criminal activity?

14 A. Well, I'm not sure how far he can go. I'll tell you that there  
15 are very few cases on the point and it's not an easily defined  
16 point.

17 Q. But, in this case...

18 A. But I think he has to do something positive by saying, you  
19 know, you are to tell this story, no matter what. You don't  
20 think the mere fact that he says "I don't believe you" is  
21 counselling.

22 Q. Did you ever direct your mind to how two totally unconnected  
23 kids could come up with the same story that never  
24 happened?

25 A. Only to the extent that I assumed that the police kept saying

MR. GALE, EXAM. BY MR. MacDONALD

1 "I don't believe you on this." That such and such, "Donald  
2 must have stabbed Sandy," or something of this nature.

3 Q. That's fine, that Donald must have stabbed Sandy. Let's stay  
4 with that. Is that proper? Is that legal police tactics to get a  
5 witness, a kid, under vigorous cross-examination, keep saying,  
6 "Donald must have stabbed Sandy," until they say it.

MR. PUGSLEY

7  
8 Excuse me. My Lords, I object to this form of questioning.  
9 There is absolutely no evidence at all that this occurred. If my  
10 friend wants to put theoretical positions to this witness, I really  
11 can't see how it's relevant or how it assists this Commission in  
12 coming to its conclusions. But there's certainly no evidence at all  
13 of what my friend suggested this witness as having...

MR. MACDONALD

14  
15 I haven't been giving any evidence, My Lord. The evidence  
16 has been coming out of the witness's mouth, not out of mine.

MR. CHAIRMAN

17  
18 I'm... And I think we're interested in hearing, and it is  
19 helpful, the opinion of Mr. Gale, as a senior Crown prosecutor, on  
20 what he considers to constitute, the evidence necessary to  
21 constitute grounds for laying a charge of counselling perjury.  
22 We can do that without accepting his evidence, the suggestion that  
23 there was, in fact, the statement now being put to this witness  
24 attributable to any of the investigating officers at that time. And  
25 that's as far as I see it going at this point in time. And with that

MR. GALE, EXAM. BY MR. MacDONALD

1 in mind, I see nothing wrong with the asking Mr. Gale to answer  
2 the question. As Mr. MacDonald says, he is the one who has  
3 suggested it.

MR. MACDONALD

4 Thank you, My Lord.

BY MR. MACDONALD

5  
6  
7 Q. If I can go back to the question, Mr. Gale. If the statement is  
8 made in the course of vigorous examination, the questioning  
9 of a youngster, "Donald must have stabbed Sandy," and  
10 eventually the witness says that, are you saying that that is  
11 legal activity by a policeman?

COMMISSIONER EVANS

12 It's improper, but it's not illegal.

MR. GALE

13  
14  
15 A. I'm not saying it's illegal activity. I'm saying it's improper  
16 activity by the policeman.

17 Q. But it would not be illegal.

18 A. It may or may not be. I have not given that portion of it a  
19 great deal of thought. You are leading me on to questions that  
20 are very hypothetical, Mr. MacDonald. You have asked me  
21 what sort of thing I might consider. I have indicated what  
22 sort of thing I might consider. I have told you that I have  
23 found very few cases that really deal with counselling of  
24 perjury and I find it very difficult to tell you exactly what  
25 counselling of perjury will consist of or what is needed to

1 constitute the charge. I have told you that I think it requires  
2 something active on the part of the officer or anyone to say,  
3 "You are to tell this and no other story. This is the story you  
4 are to tell." I think that's counselling. I think vigorous  
5 examination, there may be a possibility that it's counselling. I  
6 think it would be very difficult to convince a court that that,  
7 in fact, is counselling. I may be completely wet and off base,  
8 but that's my opinion and I really don't know how I can assist  
9 you further on that particular point, with all deference.

10 Q. Did you ever direct your attention to that? Have you ever  
11 had anyone look at the authority to determine whether the  
12 facts of this case, as you understand them or as your  
13 Department understood them, may have supported a charge  
14 of counselling perjury?

15 A. No, I have not had anybody else look at it. I have looked at  
16 perjury. I had looked a bit at counselling. But I was under  
17 the impression, mistaken as it might be, that the views that I  
18 was given is that the type of thing that went on there was not  
19 such that it would attract criminal liability. It was hard,  
20 heavy-handed police questioning and it was not of a type that  
21 was not unknown at that time.

22 Q. And just, this will be my last point on it, but that's with your  
23 understanding as you were told by Frank Edwards, that what  
24 the witnesses were telling the court is what the police were  
25 convinced was the correct version.



1 A. Yes, even with that, because the difficulty you have there is  
2 you have one person saying, "I told this because the police  
3 told me this." That person has already said that I recanted on  
4 the statement before. It does not give a great case to take  
5 before the court, quite frankly. But I also had in mind that  
6 we were hopefully going to go into some type of inquiry and,  
7 but a lot of these questions might be better answered in that  
8 forum.

9 Q. I've already directed you to page 159 of Volume 32, in the  
10 third paragraph where Mr. How said to Mr. Coles: "We should  
11 be looking into the question of the performance of the police  
12 and the Crown in the prosecution of Donald Marshall  
13 originally." Now you asked the R.C.M.P., did you not, to  
14 review the files and comment on the procedures adopted by  
15 the, or followed by the police in this investigation.

16 A. Yes, I did.

17 Q. And do you have Exhibit 20... Or Volume 20? I don't believe  
18 you do.

19 A. I don't think so.

20 COMMISSIONER EVANS

21 Before you leave the counselling for perjury, I would just  
22 like to ask the witness, in order to convict a person of counselling  
23 to commit perjury, do you not have to have a conviction for  
24 perjury first?  
25

1 MR. GALE

2 Well, I would assume that one has to have the offence  
3 committed before...

4 COMMISSIONER EVANS

5 Counselling comes into it?

6 MR. GALE

7 Before counselling can be properly charged.

8 MR. MACDONALD

9 Thank you, My Lord.

10 BY MR. MACDONALD

11 Q. Now, if you want to turn to page four of Volume 20, Mr.  
12 Gale, that's a good copy of your letter of May 13th of 1983 to  
13 the R.C.M.P. And in the final paragraph of that letter, you say:

14  
15 There remains the question as to whether there  
16 should be any inquiry into the handling of the  
17 original investigation and the prosecution of it.  
18 Accordingly, I request that you have your files  
19 reviewed to determine whether there are, in  
20 your opinion, any instances of improper police  
21 practices or procedures in regards to the  
22 investigation by the Sydney Police Department.

23 Now was that... Was it your intention to restrict the R.C.M.P. to  
24 looking at what was in their files at this stage?

25 A. No, there was no intention of restricting them to looking at  
what was in their files. I guess I fell victim to using a word  
that I find that they use when they refer to a case. They talk  
about their "file". I suppose I fell victim to using the word

1       which I understood to have a certain meaning which I  
2       thought they would know or normally understand to have a  
3       meaning.

4       Q. You knew at this stage, I assume, that there had never been  
5       an investigation carried out by the R.C.M.P. of the role played  
6       by the Sydney Police in the investigation, isn't that correct?

7       A. I suppose I knew at this stage. I would not have expected  
8       them to have an investigation as to the role of the Sydney  
9       Police per se, but of the officers that were actually involved in  
10      the original investigation.

11      Q. You knew, at this stage, that there had never been interviews  
12      or questioning of John MacIntyre or William Urquhart by the  
13      R.C.M.P.?

14      A. Well, there certainly was nothing that had ever appeared in  
15      the reports to show that they had been interviewed,  
16      statements taken from them.

17      Q. Was it your intention that they should conduct such  
18      interviews?

19      A. If they felt that was necessary to give us an opinion as to  
20      whether or not there be an inquiry into the matter.

21      Q. And, specifically, did you consider your instruction to Frank  
22      Edwards approximately a year earlier "to hold things in  
23      abeyance," that that was still in effect and that there should  
24      not be any interviews of the Sydney Police?

25      A. No, I, you know, I regret that it was ever taken in that

1 context. It was never stated in that context. Mr. Edwards had  
2 talked in terms of talking to the police immediately. I had  
3 suggested that they hold that until they got the order of the  
4 Attorney General. It was served. They got the file. Looked  
5 at it. And then went and, if they wanted to question the  
6 Sydney Police, particular members, do so. But it was never  
7 anything more than that. There was nothing sinister in it. It  
8 just didn't seem to me to make any common sense to go talk  
9 to them when you still had the problem of not knowing if you  
10 had the complete file and let's get it, take a look, have the  
11 police take a look at it, see what issues arose from that, then  
12 follow those through. If that meant talking to Chief  
13 MacIntyre, Inspector Urquhart, or whoever, do so.

14 Q. All right, now the reply that you received is signed by  
15 Superintendent Christen and it's found on page 26 of Volume  
16 20. And attached to that letter were reports prepared by  
17 Inspector Scott and Staff Sergeant Wheaton, and you would  
18 have had those at the time, is that correct?

19 A. That's correct.  
20 4:15 p.m.

21 Q. And did you review those reports?

22 A. Yes, I read them through. They indicated improper activity.  
23 There is no... They were saying that it's not the type of  
24 activity that would be countenanced today. There is no  
25 indication to me there that there is anything more than

1 procedures which would not be considered proper by today's  
2 police or by the police in 1983 and may not even have been  
3 considered proper in '71 by some of these police.

4 Q. You were only given the reports from Scott and Wheaton. Let  
5 me ask you to look at page 14 of that volume, which is a  
6 report from Corporal Carroll and ask you if you've ever seen  
7 that before?

8 A. I don't recall receiving that at that time. Yes, I've seen it  
9 before, but I mean in looking through these volumes for this.

10 Q. It certainly wasn't indicated as being enclosed with the  
11 documents you had, unless it's an attachment to one of the  
12 other reports, I don't know. But the second paragraph of that  
13 letter from Carroll where it says:

14  
15 Chant stated when first interviewed by Wheaton  
16 and myself at Louisbourg that he was threatened  
17 by MacIntyre and Urquhart with perjury if he  
18 didn't tell them what they wanted and the  
19 penalty would be Dorchester Penitentiary.

20 Would you consider, if that happened, if it did, would that be  
21 the type of conduct that would support a charge of  
22 counselling?

23 A. Well, it's possible that it might. But, again, you know, if the  
24 police felt that there's a charge there, I'm not there to, at this  
25 point in time, to tell them to charge or not to charge. If they  
felt there was a charge, then they should have laid the charge  
or discussed it with the prosecuting officer and gotten his

1 opinion at that particular time.

2 Q. I'm sorry, are you saying that the R.C.M.P. should have, at that  
3 stage, discussed with the prosecutor whether to lay  
4 counselling charges?

5 A. If they felt that there was a charge of that nature, then they  
6 should have discussed it... They should have either laid the  
7 charge or discussed it with the prosecutor as to whether there  
8 was sufficient basis on which to lay it.

9 COMMISSIONER POITRAS

10 Mr. MacDonald, just as you're running through the pages of  
11 Volume 20, we come to page 34.

12 MR. MACDONALD

13 34, My Lord? Thank you.

14 COMMISSIONER POITRAS

15 Paragraph 14.

16 MR. MACDONALD

17 14?

18 COMMISSIONER POITRAS

19 14.

20 MR. MACDONALD

21 Patricia Harriss, yes.

22 COMMISSIONER POITRAS

23 And then about two-thirds down:

24 In reviewing the City Police file after the order  
25

MR. GALE, EXAM. BY MR. MacDONALD

1 had been made by the Attorney General that  
2 they turn over all documents, I found a partially  
3 completed statement...

4 As if the writer had stumbled across the statement. I just  
5 draw that to your attention, although it's not in context today,  
6 but it might be of some interest at some other time.

MR. MACDONALD

7 Yes, My Lord, in fact, I was going to point that out to Mr.  
8 Gale and ask this.

BY MR. MACDONALD

9  
10 Q. If... Given the request that you made of the R.C.M.P. here, if a  
11 member of the police and, in fact... And, in particular, Staff  
12 Sergeant Wheaton, if he had experienced the situation where  
13 Chief MacIntyre had deliberately attempted to hide  
14 information from him, specifically Patricia Harriss's statement,  
15 and deliberately tried to hide it, would you expect that that  
16 would be pointed out to you by Mr. Wheaton at this time?

17 A. Yes, I would think that it's a serious enough matter that it  
18 should be pointed out. His report is to his superior but his  
19 superior has chosen to attach all the reports and send them to  
20 me. But I would certainly expect him to point it out to his  
21 superior and if he thought it was, that happened and he  
22 thought... I don't know why he didn't report it.

23 Q. And, in fact, is...

24 A. I don't know why he didn't take action on it.

25 Q. As Mr. Justice Poitras just pointed out in Paragraph 14 of

1 Wheaton's Report. That's found on page 34, among other  
2 places, Staff Sergeant Wheaton says that in reviewing the  
3 Sydney Police file after the order had been made by the  
4 Attorney General. I take it that's the order to turn over the  
5 files?

6 A. I would assume that's what he is referring to.

7 Q. Yes, in fact, that's what it says "the order of the Attorney  
8 General that they turn over all documentation, I found a  
9 partially completed statement." An indication that the  
10 statement was in the file as turned over. Now I again put it  
11 to you that if, in fact, something had occurred at that time  
12 that Chief MacIntyre had tried to retain that document, would  
13 you expect Wheaton to have pointed that out to you at this  
14 time?

15 A. Well, if he had any reason to believe that Chief MacIntyre  
16 was doing it for any improper motive, if it was anything more  
17 than an accident, then I think it should have been pointed  
18 out.

19 Q. Having received this report from Christen, did you take any  
20 further action at that stage, or what was done?

21 A. This report was then given to the Deputy Attorney General,  
22 for him to review and I presume to discuss with the Attorney  
23 General or form a basis on which he could indicate, answer  
24 the question which the Attorney General had been posing  
25 perhaps earlier than his memo had indicated what type of



1 inquiry or whether there should be an inquiry into the  
2 matter.

3 Q. Were you participating in those discussions as to whether  
4 there should be an inquiry?

5 A. Not that I can recall with the Attorney General. I had  
6 indicated to Mr. Coles that I thought that there should be an  
7 inquiry into the matter. Whether it was raised with the  
8 Attorney General or not, I know that at various times, Mr.  
9 Coles, or myself, or Martin, or a combination of us would  
10 discuss the matter with the Attorney General and answer any  
11 questions he had and make any recommendations, comments  
12 that we wanted to make. I can't tell you a given time, place  
13 that a comment was necessarily made or wasn't. All I can tell  
14 you is that there was an exchange of views but whether each  
15 and every person was hooked into that at the same time, I  
16 don't know. I can't, I just can't tell you.

17 Q. Did you understand that what the R.C.M.P. were telling you  
18 that the practices followed by the Sydney Police in this case  
19 were improper and should not be condoned?

20 A. I understood them to be saying that this was lousy police  
21 practice and it shouldn't be allowed. But more than that, I  
22 didn't understand from it.

23 Q. And I'm trying to find out is having been told that, where  
24 were you going to go from there? Where was the Attorney  
25 General's Department going to go? Was he just going to stop

1 or was he going to ask for an inquiry or did it ask for an  
2 inquiry?

3 A. Well, I can only tell you my recommendation was for an  
4 inquiry into the matter.

5 Q. And that was to Mr. Coles?

6 A. That was to Mr. Coles and I may well have also mentioned it  
7 to Mr. How at some stage because Mr. How is one who would  
8 call you in and ask you about this and that and between two  
9 or three interruptions of telephone calls while you were in  
10 there.

11 Q. Did you understand that there was going to, that they were  
12 going to accept your recommendation?

13 A. I understood that it was under serious consideration, but I  
14 had thought that the decision had basically been made that  
15 there would be such, but that they did not want to have one  
16 until all aspects of the matter were dealt with through the  
17 courts. That being the Ebsary matter, the civil suit against, I  
18 believe the City of Sydney and Chief MacIntyre. I think in  
19 latter days, Chief MacIntyre's civil suit against the C.B.C.

20 Q. You were also, or at least Mr. How asked Coles, and you refer  
21 to it in your letter to the R.C.M.P., that you should look into  
22 the question of performance of the Crown in the prosecution  
23 of Donald Marshall originally.

24 Was it your intention that the R.C.M.P. review the activities of  
25 the prosecutor?

1 A. Well, to the extent that they could tell us anything more or  
2 point out to us anything that they thought might have  
3 happened or the fact that the Crown had documents at a  
4 certain stage or may have, and not divulged them to the  
5 defence, if they had come across anything like that in their  
6 investigation. We were dealing with a prosecutor who was  
7 deceased. There was one, the assistant was still alive and still  
8 is, and both defence counsel were alive at that time. I had  
9 hoped that the R.C.M.P. might be able to make some comment  
10 as to what they had understood or found or thought during  
11 the process.

12 Q. Mr. How asked Coles, he said:

13  
14 In addition, we should be looking into the  
15 question of the performance of the Crown in the  
16 prosecution of Donald Marshall.

17 That was in Volume 32 at 159. We referred to that earlier.  
18 What answer was given to Mr. How? What assessment was  
19 done of the performance of the Crown in the prosecution?

20 A. I think at that point in time our only answer to Mr. How was  
21 that Mr. MacNeil was dead. We didn't really know what he  
22 had knowledge of or didn't have knowledge of. That it was  
23 very difficult to come to any conclusion as to what the  
24 Crown's performance was at that particular time.

25 Q. Did you not interview Lou Matheson?

A. Well, I would not have interviewed Lou Matheson.

1 Q. No, he could have. He could have been interviewed.

2 A. Undoubtedly, he could have been interviewed. Whether he  
3 was or not, I don't know. I did not.

4 Q. Well, was anyone...

5 A. And I would not have.

6 Q. Was anyone assigned the responsibility of looking into the  
7 performance of the Crown in the prosecution of Donald  
8 Marshall?

9 A. I'm not aware of any particular individual being assigned the  
10 responsibility. It was just comments of how do we know  
11 what Donald Marshall had at the time? It didn't seem to be  
12 something that was going to be followed up other than...

13 Q. How do we know what Donald MacNeil had at the time, you  
14 mean?

15 A. Or Donald MacNeil, I'm sorry. I had assumed that it would be  
16 something, in the way I envisaged matters, it would be dealt  
17 with by an inquiry as to how the witnesses were dealt with  
18 and what the Crown might have known or did at that  
19 particular time.

20 MR. MACDONALD

21 Thank you. That's fine, My Lord.

22  
23 EXAMINATION BY THE CHAIRMAN

24 Q. Before we adjourn, that memorandum from the Attorney  
25 General, presumably... To the Deputy, he would, the Attorney

1 General would be entitled to, it would be acted upon  
2 forthwith, wouldn't he? That looks like an edict to me or an  
3 order, directive.

4 A. Well, these are questions that he was asking and, yes, they  
5 would be acted on as...

6 Q. The police, the performance of the police is referred to the  
7 R.C.M.P. for review.

8 A. Well, that had been referred earlier to that.

9 Q. The performance of the Crown in his prosecutorial role, I  
10 would suggest, could be better handled by some lawyer in the  
11 Department of the Attorney General, don't you think?

12 A. Well, that's quite possible. The only...

13 Q. No, I realize Donald...

14 A. Reason...

15 Q. MacNeil was dead, but...

16 A. The only reason I asked that particular question was in case  
17 the police had something that they could, that they had come  
18 across that they could point us to, that's all.

19 Q. But there would have... There was nothing to preclude or  
20 nothing improper, or was there? Or would there be, if one of  
21 the lawyers working with your Department was asked to  
22 interview, say, Judge Matheson and the two defence counsel.

23 A. No, there would be nothing improper to talk to them.

24 Q. And if the evidence or the information that we have received,  
25 and that we all have now, including yourself, had been

MR. GALE, EXAM. BY THE CHAIRMAN

1 furnished by these three people, wouldn't that not enable  
2 someone in your Department to give to the Attorney General  
3 the opinion that he sought with respect to the role of the  
4 Crown in the prosecution of Donald Marshall?

5 A. I presume it would. I was asked to contact the R.C.M.P. and I  
6 raised the issue also if there was anything they could tell us  
7 about the conduct of the prosecutors. That was what was  
8 asked of me by Mr. Coles. I'm not trying to avoid  
9 responsibility but, at the same time, at this particular point in  
10 time, Mr. Herschorn was dealing with prosecutors on a day-  
11 to-day basis.

MR. CHAIRMAN

12  
13 Okay, we'll adjourn until 9:30.

14 4:32 p.m. INQUIRY ADJOURNED UNTIL 9:30 A.M. JUNE 8TH.  
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17  
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25

## REPORTER'S CERTIFICATE

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



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

DATED THIS 7 day of June

19 88 at Dartmouth, Nova Scotia