RG44
Vol. 256
#3

ROYAL COMMISSION ON THE DONALD MARSHALL, JR., PROSECUTION

Volume 75

Held: June 7, 1988, in the World Trade and Convention Center, Halifax, Nova Scotia

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

Counsel: Messrs. George MacDonald, Q.C., Wylie Spicer, and David Orsborn: Commission counsel

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

Mr. Ronald N. Pugsley, Q.C.: Counsel for Mr. John F. MacIntyre

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

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

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

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

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

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

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

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

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

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

Court Reporting: Margaret E. Graham, OCR, RPR

MEDIA POOL COPY

June 7, 1988

INDEX - VOLUME 75

Mr. Gordon Gale

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

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

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

EXAMINATION BY MR. MacDONALD

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

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

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

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

1 Q. Is that dealing with a major crime now we're talking about?
2 A. Yes.
3 Q. Is there any particular reason that a case would require a
4 directive such as that from your office?
5 A. Well, this is usually after the prosecutor has discussed the
6 matter with us and I don't know if it's a directive as such,
7 but on one occasion I know that we have communicated to
8 the prosecutor that in exchange for a guilty plea that the
9 Crown would...should take the position of asking for a
10 certain penalty.
11 Q. That's only happened in one case that you can recall?
12 A. Oh, I think it may...there's one case that I can recall, but I
13 think there may have been others where we have indicated
14 that...where the prosecutor has asked about a guilty plea
15 and we have indicated that we would think that a certain
16 range of sentencing would be appropriate.
17 Q. Does the prosecutor have to come to your office in those
18 circumstances, where an accused is prepared to plea
19 bargain, "I'll give you a guilty plea in exchange for this
20 recommendation on sentencing." ?
21 A. There is no directive on it, but I think there has been an
22 understanding that in major cases that if there's going to be
23 a guilty plea to a lesser offence that he should consult with
24 our office to determine whether the Crown is prepared to
25 accept that.

1 Q. Where does the ultimate discretion lie in those
2 circumstances?
3 A. With the Attorney General.
4 Q. I'm talking about a case where the prosecutor comes to you
5 and says, "I've worked out this bargain, this plea bargain."
6 If there's disagreement between what he wants to do and
7 what your office wants to do, who wins?
8 A. I suppose if there is disagreement then the Attorney
9 General would win. You keep saying "his office" and "our
10 office," we consider ourselves one as agents working under
11 the Attorney General, so it's a matter of going to the next
12 level to get access to him.
13 Q. Are there occasions then when you've had to do that, the
14 prosecutor and the officials in the office have disagreed and
15 you had to go to the Attorney General to get a resolution?
16 A. I can't recall any offhand.
17 Q. The one example you talked about where there was an
18 exchange for a guilty plea the recommendation of a fine, did
19 that get to the Attorney General?
20 A. Well, it came from the Attorney General.
21 Q. It came from him, so it came from the top down.
22 A. Yes.
23 Q. Okay. And has that only been one occasion that you saw
24 that procedure followed?
25 A. It's the only occasion that I can recall, yes.

1 Q. Thank-you. On appeals...perhaps I'll back up. Which
2 Attorney General was that?
3 A. Well, it was Mr. Giffin.
4 Q. Thank-you. On appeals, has it been your practise to advise
5 the lawyers who are actually doing the appeal what position
6 they are to take before the Appeal Division?
7 A. No, I don't advise them as to what position they are to take.
8 We get appeals in two ways. One the Crown Prosecutors
9 send in recommendations that are reviewed within the
10 Department, generally by myself and Martin Herschorn or
11 perhaps Mr. Fiske or in some cases, one recently, six of us
12 were involved in the matter to look at it. We also get
13 appeals by the accused. The appeals are simply set down,
14 they are assigned to a prosecutor and that's done by two
15 appeal counsel, and that's done by Mr. Fiske. If that counsel
16 has some problem with the appeal, if it be one that we have
17 taken, initiated, he will come and speak to me. I know in
18 this past thirty-day period I have agreed to the
19 abandonment of four or five appeals.
20 Q. Uh-hum.
21 A. We don't really know sometimes, without the transcript,
22 whether or not there really is a basis of law for us to go
23 ahead on.
24 Q. You've done yourself many appeals, argued many appeals.
25 A. Yes, I think from 1965 to about '75 I did a good many

1 appeals, certainly in the hundreds.
2 Q. And, in your position you've seen, overseen or been the
3 man in charge, I guess, of many more hundreds.
4 A. Yes.
5 Q. In any of those have you ever...you yourself ever gone
6 before the Appeal Court and not taken a position?
7 A. No. I've always taken a position, although the position may
8 be one of the alternatives that have...you make a certain
9 argument in your factum and you indicate the...what your
10 position is that the Court should adopt a certain position.
11 But then you say in the alternative and you...if the Court
12 does not accept that argument, you make another argument
13 on it, so the Court should follow this position.
14 Q. But that's a well-recognized procedure taken.
15 A. Yes, and I have also gone into Court in many cases and
16 agreed with the accused's appeal
17 Q. But that's taking a position as well.
18 A. Yes.
19 Q. Telling the Court what the position is of the Attorney
20 General.
21 A. That's correct.
22 Q. Thank-you. What sort of appraisal is carried out of your
23 employees, the prosecutors and your solicitors? Is it done
24 on sort of a regular basis?
25 A. There is no regular appraisal done. Fortunately we're under

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

MR. CHAIRMAN

Before we leave the appeal position, Mr.Gale.

MR. GALE

Yes, My Lord.

MR. CHAIRMAN

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

MR. GALE

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

1 occasions.

2 MR. CHAIRMAN

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

5 MR. GALE

6 Yes, it is.

7 MR. CHAIRMAN

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

10 MR. GALE

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

18 MR. CHAIRMAN

19 Okay, thank-you.

20 MR. MacDONALD

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

23 A. Yes.

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

25 A. Correct.

1 Q. Do I understand from what you said that these, in fact, are
2 only done when the government indicates there is some
3 money available for merit pay?
4 A. That's correct.
5 Q. The only purpose then of carrying out a performance
6 appraisal is to determine whether someone is to be given
7 additional compensation, is that correct?
8 A. That's correct, yes.
9 Q. What about just to see how they are doing, you know, are
10 they performing properly, are they complying with your
11 policies, these sort of things. Is there any regular type of
12 monitoring of that?
13 A. There's no formal type of monitoring. It's a matter that I'm
14 in discussion with them, I suppose, I'm speaking to one of
15 them at least each day, if not more, that I'm aware of what
16 they're doing. We get feedback from time to time from other
17 counsel on matters. And in some cases we have...there is
18 some feedback from the Appeal Court itself.
19 Q. Are the prosecutors and solicitors given any sort of a quota
20 that they have to meet, so many prosecutions to get a year?
21 A. No.
22 Q. Is there any different method used in the department for
23 handling so-called sensitive cases?
24 A. I don't think there's any different method. There has been
25 one case where the Deputy Attorney General requested that,

1 although the police were to investigate it, that the reports
2 come to the Department and when we were ready to lay
3 charges, then a prosecutor would be assigned on the matter.
4 Q. Assigned by who?
5 A. By the department, I suppose the Deputy would make the
6 ultimate assignment. We undoubtedly would have found
7 somebody who was senior and who could be broken clear of
8 his other cases to do the matter.
9 Q. That's another one case situation, is it?
10 A. Yes.
11 Q. And, in that one case was it the Deputy or someone at that
12 level who requested the police to carry out the investigation
13 in the first place?
14 A. In that particular...that particular case I think the, I'm not
15 quite sure how it started. I think the police may have come
16 with some information on the matter and they were then
17 told to proceed with their investigation, but to forward all
18 their reports to the department and when they were ready
19 to lay a charge then we would arrange for a prosecutor to be
20 assigned.
21 Q. That would be a different procedure certainly than the
22 norm.
23 A. Yes.
24 Q. Normally the police consider that they have the right to go
25 and talk to a prosecutor of their choice to bounce things off

1 of him, isn't that correct?
2 A. Well, they have the right to go and talk to a prosecutor. It
3 may not necessarily be the one that they want to talk to.
4 But they will have to speak to the prosecuting officer in
5 charge of any particular area and he will assign a prosecutor
6 to talk to them on a matter.
7 Q. Okay. But he doesn't have to go to the Attorney General's
8 office, and I appreciate what you say, everyone is an agent
9 of the Attorney General, but he doesn't have to go to your
10 level to say "What prosecutor can I talk to?" or Martin
11 Herschorn's level.
12 A. No. But we have had the police come to us and say that they
13 have a complicated investigation that is spanning several
14 counties and they would like us to arrange to have a
15 prosecutor assigned to them that they can...that will be able
16 to handle the charges arising out of that even though they're
17 happening in two, three, four counties.
18 Q. Uh-hum. But the one case that you're talking about wasn't
19 that sort of thing, was it?
20 A. No, it wasn't.
21 Q. Have you ever had occasion where it was the...at your level
22 or above where the recommendations were made whether
23 charges should or should not be laid?
24 A. Yes, I think there have been cases where at my level or
25 above there have been recommendations as to whether or

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

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

A. Usually, yes.

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

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

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

A. Yes.

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

MR. CHAIRMAN

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

1 witness not to involve persons who are not before this inquiry.
2 MR. MacDONALD
3 Just so you understand why I'm stopping the one question
4 short. I'm sure you did, but I wanted to...
5 MR. CHAIRMAN
6 Yes.
7 MR. MacDONALD
8 ...make that clear.
9 COMMISSIONER EVANS
10 We won't ask that one question.
11 MR. MacDONALD
12 Well, you may, My Lord, but I'm not.
13 Q. I do though want to talk to you, Mr. Gale, about one incident
14 that was referred to during the evidence of Mr. Edwards,
15 and that had to do with a shoplifting case in Sydney. You
16 are familiar with that case.
17 A. Yes, I am.
18 Q. Could you tell us your knowledge of that particular case,
19 please?
20 A. I was advised by the Deputy Attorney General that
21 representations had been made to him in this particular
22 case, by somebody not connected with it, that the individual
23 in that case had been charged, was within about two days to
24 move out of the country. That the individual may have had
25 some type of kleptomania problem. That he felt that for

1 humanitarian reasons there should not be any prosecution
2 on the matter. I had no difficulty with that because it
3 seemed to me a proper exercise of prosecutorial discretion
4 and one that a prosecutor might well exercise in the field.
5 As a result of that I called Mr. Edwards' office and, while I
6 had thought I had spoken to him, Mr. Edwards' evidence is
7 fairly comprehensive on the point, and I accept that, that I
8 spoke to his secretary and told...left a message that the
9 charge was to be withdrawn or stayed, whatever was
10 necessary, and that I received a call back asking if that was
11 a ...the Deputy Attorney General's order and I replied that it
12 was. I understand that the charge was withdrawn.
13 9:52 a.m.
14 Q. The Deputy Attorney General at the time was Mr. Coles?
15 A. Yes, it was.
16 Q. Do you know, or did Mr. Coles advise you, whether an
17 approach had been made to Mr. Edwards to exercise his
18 discretion?
19 A. No, I did not know and he did not advise.
20 Q. Would you expect that that normally would be the case?
21 A. Not necessarily. Some people have a tendency to go to the top
22 when they have a request and it gets channeled down rather
23 than starting at the bottom, we start at the top.
24 Q. Being a person yourself who is not at the top of the
25 organizational ladder, do you take any offence yourself if

1 someone goes above you and asks your boss to exercise some
2 discretion that normally would be yours?
3 A. No, I don't take offence at it. Sometimes one wonders why
4 they would go to that level, if it's a rather simple matter, why
5 they couldn't deal further down the ladder but I take no great
6 offence at it.
7 Q. In this particular case you know the individuals involved.
8 A. The ones that I'm told are involved, yes, I know them. I,
9 quite frankly, do not know the name of the accused in the
10 case.
11 Q. Were you able to satisfy yourself, or did you try to satisfy
12 yourself whether this was an exercise of discretion that was
13 being exercised because of political reason?
14 A. Well I had no reason to believe that it was being exercised
15 because of political reasons. The reasons for it seemed
16 straightforward and seemed, as I said before, ones that I
17 would have thought that the prosecutor at that level would
18 have entertained and would have stopped a prosecution on.
19 Q. Are you aware of cases where that has happened at the
20 prosecutorial level? That they have exercised their discretion
21 not to proceed on humanitarian grounds.
22 A. Yes, I'm aware of those cases.
23 Q. Do you consider this case, and this particular one that took
24 place in Sydney, to be any different than others you have
25 seen?

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

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

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

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

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

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

1 he had told you he did not agree, he believed that for good
2 policy reason, his reason, you should not drop that charge,
3 and you had Mr. Coles telling you it should be dropped, what
4 position would you have taken?
5 A. Well I simply would have told Frank that I'd go back to the
6 Deputy, Mr. Coles, and tell him Frank's side or ask Frank to
7 call Mr. Coles and explain his view to him.
8 Q. Okay. Is there any association of prosecutors in the province?
9 A. No, there is no association of prosecutors in the province
10 although I am advised...
11 Q. You hesitated. Is there something in the...
12 A. There's a movement afoot to create an association of
13 Government lawyers.
14 Q. I see. And that would encompass every lawyer in the
15 Government.
16 A. Yes.
17 Q. That's not in place today.
18 A. No, it's not an official organization. I think there may be some
19 planning on it but I have not been involved with it to date.
20 Q. Do the members of the criminal law staff, the prosecutors and
21 so on, do they participate in any type of national
22 organization?
23 A. There is no national organization that I'm aware of for
24 prosecutors, per se. Some of our staff make exchange visits
25 with groups or associations in other provinces. And we do

1 have prosecutors sent on, what I suppose what could be
2 called national courses. There's a series of courses run by the
3 Federation of Law Societies dealing with criminal law and
4 these generally have outstanding government and private
5 practitioners speaking in the course of, it lasts about a week.
6 And when we have funding we send the limited number that
7 we are able to send to it.
8 Q. Are the members of the Department, are they members of the
9 Canadian Bar Association?
10 A. Very few.
11 Q. There is a criminal law subsection of the Canadian Bar
12 Association.
13 A. Yes, there is.
14 Q. Is there any reason that only very few belong to the
15 association?
16 A. Oh, I think primarily because at one stage the Government
17 paid for the membership in the Canadian Bar Association and
18 then at a later stage the Government decided that, or at least
19 the Department decided that that money could be spent
20 better elsewhere and cancelled those memberships, not
21 cancelled them but would not renew them. Very few of us
22 elected to renew them. I, personally, did not find the criminal
23 law section of the Canadian Bar to be advantageous because I
24 found that with attending the Uniform Law Conference and
25 the, which has a special criminal section to it, that we were

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

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

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

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

A. Yes.

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

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

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

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

1 them to act within that municipality. There are a number of
2 investigations that are done which, and I suppose I could
3 refer to the primary one as being welfare frauds that where
4 only the Province is suffering a loss for having paid out
5 money that the person may not be entitled to and those have
6 been directed to the RCMP regardless of where they occur,
7 whether they're in Halifax or an unincorporated area like
8 Hubbards.
9 Q. And you mentioned earlier complicated cases that may span
10 several jurisdictions, commercial fraud, for example.
11 A. Yes. And there are some of those that arise and may arise
12 within a municipal unit that has it's own police force but they
13 are also spanning other municipal units and to have
14 continuity in the investigation then we ask the RCMP to
15 handle that investigation in conjunction with municipal police
16 forces. But the RCMP would be the prime investigator.
17 Q. At these regular Thursday meetings, who attends?
18 A. Well it's normally the criminal investigation branch officer,
19 myself and over the last two or three years normally Mr.
20 Herschorn has been in attendance for part, if not all, of each
21 session, it depends on his schedule.
22 Q. There are no minutes taken of those meetings.
23 A. No, there are no minutes taken.
24 Q. Is there a report given by you to the Deputy as to what took
25 place in those meetings?

1 A. No, there's no report given to me, by me to the Deputy as to
2 what takes place in those meetings unless it's something that
3 requires some decision of the Department that should be
4 made at his level or at the Minister's level.
5 Q. Are there reports given to you from time to time to the
6 Minister as to what occurred at the meetings?
7 A. Well if a matter is raised at the meeting that requires his
8 involvement, yes, he's apprised of that. But normally there is
9 not a direct reporting of everything that goes on at these
10 meetings.
11 Q. We had evidence here from Milton Veniot who said that there
12 were files in the Attorney General's office that he called
13 politically sensitive, for politically-related reasons they were
14 not available to, generally, to lawyers in the Department, and
15 he called them the green-striped files. Do you have any
16 knowledge of such files?
17 A. No, I have no knowledge of any green-striped files. The
18 RCMP have a security classification on their, for sending
19 correspondence. They will send over, and it's at their, it's
20 their decision as to what classification goes on it, a letter that
21 will be marked "secret". Down the side of the letter there is a
22 stripe about a half-inch wide that's green. It has in white the
23 word "secret" about here on it. That may be a matter where
24 they are, could be any number of reasons. It may be one
25 where they want some type of identification for some

1 operative. It may be something dealing with a wire tap. It's
2 not anything that has any particular political significance to it.
3 It's an operational thing with them.
4 Q. Who decides whether to put it on a green-striped paper or
5 not?
6 A. Well the RCMP do. I don't understand their system and I'm at
7 least happy now that when send over these green-striped
8 letters that used to come in an envelope with heavy plastic
9 tape all over it which was almost impossible to open without
10 cutting the correspondence inside that they finally developed
11 a means of putting that on so that you can still use a letter
12 opener to open them.
13 Q. Well when you get one of these green-striped letters do you
14 treat it differently than some other letter you get?
15 A. No, it's not treated any differently.
16 Q. Does it just go right in the regular files?
17 A. Yes, it comes in an envelope and it would be marked to be
18 opened only by me. I open it and I look at it, do whatever
19 has to be done with it and give it to my secretary. And it
20 goes into the files.
21 Q. So you don't have green-striped files that correspond with the
22 letters.
23 A. No, there's no green-striped files. Our files have many stripes
24 on them but they're all bar coded and it's only simply an
25 indexing system.

1 Q. Okay. When a secret letter comes in that you just described,
2 is it generally available to anyone in the Department who
3 wants to go and look at the files?
4 A. There was an understanding in the Department that people
5 that are not in the Criminal section will not go and request a
6 file without first coming to myself or Martin to ask if we have
7 any objections to them seeing the file. But that's been
8 something of long-standing is simply to try and protect
9 innocent parties whose names appear in them, in the files.
10 Q. And are the files under the control of some sort of a filing
11 clerk or something?
12 A. Yes, there's a filing clerk or two or three filing clerks. There's
13 a large room and it's, each file has to be signed out and, there,
14 and accounted for and the room is locked at all times except
15 during normal office hours.
16 Q. Are those clerks advised that they are not to release criminal
17 files to anyone other than a lawyer who's in the Criminal
18 section?
19 A. I don't think they've been advised of recent times. Certainly
20 not by myself. The control of that filing system is, to a large
21 extent, within their hands and there's also a Miss Chisholm
22 who seems to have overall control of the matter.
23 Q. If you have a circumstance where an RCMP officer in the field
24 believes that an information should be laid and the
25 prosecutor he's talking with, for whatever reason, thinks that

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

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

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

A. Yes.

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

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

1 may be some delay while I go to the prosecutor and find out
2 about the matter. At all times I haven't heard from the
3 prosecutor or something may have been raised that whereby
4 I want to go back to the prosecutor and find out more about it
5 or discuss it further with him.
6 Q. What I'm trying to determine Mr. Gale is what would happen
7 in a circumstance where you've had all the input you're going
8 to get and you and CIB officer decide, reach a consensus that
9 no prosecution should go, and the prosecutor in the field
10 doesn't accept that, what happens?
11 A. Well I guess he's told that if he doesn't accept it then he's free
12 to go to the Attorney General to make his points.
13 Q. He would go above you then. Is that it?
14 A. Yes.
15 Q. Now what if you and the CIB officer can't agree? Where do
16 you go then?
17 A. I suppose on my side it would go to the Attorney General, on
18 the side of the RCMP I suppose it would go to the
19 Commissioner in Ottawa.
20 Q. As the Nova Scotia police force is the RCMP under the
21 ultimate direction and control of the Attorney General?
22 A. No, they're under contract to form, to be the Nova Scotia
23 police but, perform that function, but the ultimate control of
24 the force is still with the Commissioner in Ottawa.
25 Q. And in your experience has there been any circumstances

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

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

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

A. Yes.

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

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

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

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

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

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

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

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

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

Q. Thank you.

CHAIRMAN

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

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

CHAIRMAN

But the damage is done to the accused then, isn't it?

10:15 a.m.

MR. GALE

Yes, it is.

MR. CHAIRMAN

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

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

MR. GALE

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

MR. CHAIRMAN

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

MR. GALE

Yes, that's correct.

MR. CHAIRMAN

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

MR. GALE

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

MR. CHAIRMAN

Okay, thank-you.

MR. MacDONALD

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

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

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

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

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

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

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

1 Anderson was appointed to the County Court on December
2 the 16th of '71, and you would...you had told us that some
3 time the next year you were appointed to that position as
4 director of criminal retroactive to January 1st, '82?
5 A. Yes.
6 A. Yes.
7 Q. When Mr. Anderson left to take up his appointment to the
8 bench, was it understood that you were going to try to fill
9 his position until some formal appointment was made?
10 A. Well, I had discussions with the then Deputy Attorney
11 General, Mr. MacLeod, and he said, "Well, try and cope with
12 matters, do what you can and anything that you need
13 assistance with, refer it on to him," Mr. MacLeod.
14 Q. Was there any briefing process carried out by Mr. Anderson
15 before he left to advise and instruct someone what various
16 things he was looking after?
17 A. I had no briefing from him.
18 Q. Do you know if anyone else did?
19 A. I don't know if anyone else did or not. I certainly had no
20 briefing from him.
21 Q. How...in trying to carry on the job then, as best you could, at
22 that time and to the extent you did, how did you become
23 aware of what was ongoing?
24 A. I suppose simply the fact that various matters, calls or
25 correspondence would get routed to me and then I would

1 try and get the previous correspondence on it and find out
2 what had been happening and what was going on. At that
3 time all correspondence that came into the department went
4 into the Deputy's office and it was distributed from there.
5 Q. Prior to his appointment to the bench, did Mr. Anderson
6 have weekly meetings with the CIB officer of the RCMP?
7 A. Yes, Mr. Anderson, I think, created that Thursday meeting
8 with the RCMP.
9 Q. And after his appointment, did those meetings continue?
10 A. Well, they were in a state of hiatus for awhile because they
11 RCMP really didn't know who they should talk to and I
12 wasn't...I didn't know enough to really talk to them, nor did
13 I want to at that particular stage. It was trying...I think
14 they may have been held in hiatus for a two to three month
15 period before they really resumed again.
16 Q. And was there some meetings in the interim, just not
17 regular?
18 A. I don't...to the best of my knowledge there may have been
19 about a two-month period where maybe there was...might
20 have been one meeting, but I'm not even sure there was one
21 meeting during that time.
22 Q. Was Wardrop the CIB officer at that time?
23 A. As I recall he was, yes.
24 Q. Were you aware in November of 1971 that Jimmy MacNeil
25 had approached the Sydney Police and told them that he

had witnessed Roy Ebsary stab Sandy Seale?

A. No, I was not aware of it.

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

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

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

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

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

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

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

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

Q. 16th, pardon me.

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

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

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

1 do and who we would assign appeals to.
2 Q. So, there would be a consultation between you and Judge
3 Anderson as to who would be assigned a particular appeal,
4 whether it's you or him or someone else.
5 A. Yes, I recall at the time he had some interest in drinking and
6 driving cases.
7 Q. And this particular case of course would be murder. What
8 was the practise in the department as to who would be
9 assigned to those major type of cases?
10 A. The practise of the department primarily was who are we
11 going to be able to get to even cover the appeal term, quite
12 frankly, and which appeals did we think were going to
13 require the more elaborate legal arguments. I have handled
14 murder cases myself as far as the appeals go. But just
15 because it was a murder case didn't necessarily mean that I
16 was going to handle it or...as opposed to anybody else.
17 Q. If it was assigned to a very junior lawyer in the department,
18 would there be anything unusual about that?
19 A. I suppose it appears to be unusual, but it probably revolved
20 on the fact of how many appeals were set down for any
21 particular period and the perceived complexity of the
22 appeals.
23 Q. Would there be any consideration given to the identity of
24 the people involved? That is if there were an appeal from a
25 murder conviction of somebody who was, for want of a

1 better word, some prominent person, say the Mayor of
2 Sydney, would that be treated any differently?
3 A. Well, I would not have treated it any differently.
4 Q. You'd assign it to a junior lawyer?
5 A. Well, there were normally...we had great difficulty. There
6 were a number of people who did appeals but they also did
7 many of the other things, as I did myself at the time. It was
8 really a matter of personnel constraints as to who you could
9 have available to do the case at that particular date. So, I
10 don't think it really...there isn't...
11 Q. You don't think it would...
12 A. There was no dependence on who the individual was that
13 was the subject of the appeal. It was more one of logistics of
14 who could do it.
15 Q. And you don't think this particular one would have been
16 treated any differently had it been an appeal from a murder
17 conviction of the Mayor of Sydney compared to a...the
18 appeal of Donald Marshall, Jr.?
19 A. Well, I don't think I would have treated it any differently. I
20 don't know who assigned the case, quite frankly. If it was in
21 November that the notice of appeal came in I'm not even
22 sure at that time what the setting-down day would have
23 been because they are once a term in those days and now
24 they're every Thursday at Chambers. But...
25

MR. CHAIRMAN

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

MR. GALE

Yes.

MR. CHAIRMAN

It's fixed dates. How many a month?

MR. GALE

I'm sorry, My Lord.

MR. CHAIRMAN

How often during the month?

MR. GALE

With the Trial Division?

MR. CHAIRMAN

Yes.

MR. GALE

I'm really not certain, My Lord.

MR. CHAIRMAN

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

MR. MacDONALD

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

1 A. I can't quite frankly think of one at the moment.
2 Q. And yet you weren't aware as a member of a fairly small
3 department at that time that the RCMP were doing a
4 reinvestigation of the Marshall matter in Sydney?
5 A. No, I was not. Mr. Anderson kept the Criminal Code matters
6 to himself. The only involvement I had with it was if it was
7 an appeal.
8 Q. You do know now though that in November of 1971 a
9 witness had come forth to the Sydney Police advising that
10 he had seen Ebsary commit this murder.
11 A. Yes, I know now from reading it, yes.
12 Q. And you do know that an investigation was carried out by
13 the RCM Police and a report prepared.
14 A. Yes.
15 Q. Are you able to say whether that report ever got into the
16 hands of the Attorney General's Department?
17 A. No, I'm not able to say that.
18 Q. Are you able to say that you expect it would have come to
19 the position or the possession of the Attorney General's
20 Department?
21 A. Yes, having...it having been the request of the Department to
22 go in on the matter, then the normal practise would be for
23 that report to come back to the department.
24 Q. The report is in Volume 18, correct, maybe I have it wrong.
25 Yes, at page 7.

MR. CHAIRMAN

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

MR. GALE

Yes, it did, My Lord.

MR. CHAIRMAN

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

MR. GALE

Innes MacLeod.

MR. CHAIRMAN

Innes MacLeod.

COMMISSIONER EVANS

How long did he continue as Deputy?

MR. CHAIRMAN

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

MR. MacDONALD

September of '72, I believe.

MR. GALE

Yes, that would be correct.

MR. CHAIRMAN

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

1 MR. GALE

2 Yes.

3 MR. CHAIRMAN

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

7 MR. GALE

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

10 COMMISSIONER EVANS

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

12 MR. CHAIRMAN

13 18.

14 MR. MacDONALD

15 18 at page 7, My Lord.

16 COMMISSIONER EVANS

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

19 MR. GALE

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

22 COMMISSIONER EVANS

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

1 MR. GALE

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

6 COMMISSIONER EVANS

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

8 MR. GALE

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

11 MR. MacDONALD

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

15 A. Yes.

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

22 A. Well...

23 Q. Was it ever handed to you?

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

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

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

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

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

A. Yes.

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

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

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

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

1 advise defence counsel that Jimmy McNeil had made such a
2 statement, that the RCMP had looked into it, here's the
3 results of it, of their inquiry into it, at least make him aware
4 of...make Mr. Rosenblum and Mr. Khattar aware of what had
5 occurred.
6 Q. And if he was assume...let's assume with me that the
7 Attorney General's office was also aware of the
8 investigation, what was the obligation on the office to make
9 certain the defence became aware of this information?
10 A. Well, I think there is an obligation on the Attorney General's
11 office, if it was also aware of it, to make inquiries and insure
12 that it was satisfied that the defence counsel were aware of
13 the matter.
14 10:37 a.m.
15 Q. And given the fact that at this stage we have an appeal in
16 process, the file having been transferred to Halifax, would
17 there be an obligation as well on the counsel handling the
18 appeal to advise defence counsel?
19 A. Well yes, if he knew of it, yes. There'd be an obligation to
20 ensure that they had been advised.
21 Q. Now if, again, you just accept if you would, Mr. Gale, that that
22 information was not given to the defence, would you agree
23 that that would be a breach of a fundamental obligation owed
24 by the Attorney General's office to see that justice was done?
25 A. In my opinion, yes.

1 Q. Thank you. Between, put it this way. Until 1982 you had no
2 knowledge of any kind about the Donald Marshall, Jr. matter,
3 is that correct.
4 A. That's correct. Because in 1982 it surprised me. I couldn't
5 even recall the matter. I couldn't even recall the appeal of
6 the matter quite frankly, and you know, it was after making
7 inquiries that I found the reference to it and who had
8 conducted the appeal. But other than that I have no
9 recollection of it. It was a, I suppose, what knowledge I have
10 at the time would have been it's another murder appeal.
11 Even then they weren't uncommon in Nova Scotia.
12 Q. How did you become...
13 A. A murder appeal by itself is not necessarily the most
14 interesting of appeals from a legal point of view.
15 Q. Let me ask you how you found out in 1982 that the matter
16 had reared its head again.
17 A. As I recall the matter I think Mr. Herschorn indicated to me
18 that he had been in conversation with Mr. Edwards and that
19 this matter was occurring and I think contemporaneously
20 with that I was advised by Superintendent Christen that, the
21 mere fact this is going on. But it, to my understanding,
22 recollection, they had been involved in it for a matter of two
23 or more weeks before I, maybe three weeks before I heard of
24 it.
25 Q. What did you understand what happening?

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

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

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

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

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

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

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

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

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

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

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

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

Q. What about the Attorney General?

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

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

A. Yes.

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

A. That's correct.

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

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

Q. Would you discuss them with Christen?

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

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

A. Yes.

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

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

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

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

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

1 Volume 34 at page 9.
2 A. Well certainly the Deputy was advised of the matter at that
3 time and frankly I can't tell you whether the Attorney
4 General was advised immediately or shortly thereafter about
5 the matter.
6 Q. Having received the report, was it clear to you that you had a
7 situation now where an innocent man had been convicted of a
8 murder?
9 A. No, it wasn't clear to me that we had a situation where an
10 innocent man had been convicted murder. It was certainly a
11 situation that arose, raised considerable questions about the
12 validity of his conviction. And I suppose philosophically if a
13 person is presumed innocent until proven guilty then, at this
14 point in time, it appeared that it was not a case where Donald
15 Marshall could have been proven guilty of the offence.
16 Q. Let me put it another way. Was it clear to you that Donald
17 Marshall, Jr. had been convicted of a murder that he did not
18 commit?
19 A. Well at this particular time, no, it wasn't clear to me that he
20 had been convicted of a murder that he had not committed.
21 It was certainly clear that the people had changed their
22 stories considerably on the matter, and by the mere fact that
23 they had done that, in my view, did not raise questions about
24 whether one could even sustain the conviction any longer.
25 But I wondered why they had changed their stories.

1 Q. And you're talking about the people who gave evidence at
2 trial.
3 A. Yes.
4 Q. Let me just take you to the report. Without going through it
5 in detail, were you not being told that these witnesses
6 changed their story because, or gave incorrect evidence at
7 trial and incorrect statements because they had been
8 pressured to do so?
9 A. Well I haven't read the report through recently but, yes, I'm
10 not sure, yes, in this one. Yes, there is an indication there that
11 the witnesses felt pressured.
12 Q. And you did have a, on page 17 of that volume in the
13 transcript of a message given by Roy Ebsary where in part he
14 was asked, "Are you admitting to stabbing Seale?" And he
15 said, "Yes."
16 A. Yes, that's there.
17 Q. And you were aware that in November of 1971 Jimmy
18 MacNeil had come forward and told the police that very thing.
19 A. Well I may have been, yes, I suppose that's in this report.
20 Q. I don't want to, let me try and find it for you, Mr. Gale. I don't
21 want to...Page 13. Yes, that's where he's, yes, paragraph 15 on
22 page 13 is an indication that MacNeil had told the police about
23 that some time ago.
24 A. Yes, there's that indication there. I think it was subsequent to
25 that that...

1 Q. In fact...
2 A. We received the...
3 Q. I'm sorry, this is what I was looking for. On page 12,
4 paragraph 12, is attached a copy of Sub-Inspector Marshall's
5 report. And that's the report that was done in 1971. Do you
6 see that?
7 A. Do I see paragraph 12 on page 12?
8 Q. Yes.
9 A. It talks about Sub-Inspector Marshall's report, yes.
10 Q. And they conducted a polygraph test of, in 1971. What I'm
11 trying to determine is having read this report what is there
12 that you still have some doubt who stabbed Seale. Why
13 would you have any doubt based on what information is
14 given to you in March of 1982?
15 A. Well this report, as I recall, is dated February 25th of '82. I'm
16 not...
17 Q. It's actually...
18 A. I'm not sure.
19 Q. It starts them, Mr. Gale, but it's dated, it's done very strangely
20 but we know it's, there are some statements in there of
21 people taken, I think up to March 10th or something like that.
22 It was, is in the mid-March...
23 A. Right. Now I'm not sure exactly when I got this one because
24 it's, doesn't have our date stamp on it so I'm not, I don't really
25 know when I received it.

1 Q. If you look at page 18, down at the bottom under Mr.
2 Wheaton's signature, you see the officer in charge, CIB
3 forwarded March....
4 A. March.
5 Q. 12th.
6 A. 12th, yes.
7 Q. I just assume that's even forwarded to the CIB officer.
8 A. Well that would be to the CIB officer so I suppose this is...
9 Q. If you go over...
10 A. The latter part of March that I would have received it.
11 Q. If you go over on page 19, this is just an addition to the
12 report put on by Inspector Scott. I guess it's the fourth
13 paragraph where he says, "After reviewing this case I feel
14 that Marshall is innocent of the offence." Having read all this
15 yourself at the time, your impression was...
16 A. Well my impression...
17 Q. It's close but you're not quite sure.
18 A. Was that he appears to be innocent of the offence but I recall
19 in discussion, and I can only assume it was with
20 Superintendent Christen, asking what pressure the witnesses
21 had been under and being advised that it was heavy
22 questioning by the Sydney Police at the time. And that there
23 was nothing more than that with it.
24 Q. In fact, Mr. Gale, you don't have to look this up, but for the
25 record I'll note that in Volume 19 at page 43 there is a letter

1 directed to you from Christen which is, in fact, enclosing this
2 report. So that's when you would have got it, on or about that
3 date.
4 MR. PUGSLEY
5 What date is that?
6 MR. MacDONALD
7 It's dated the, March the 16th.
8 Q. You had a visit from Chief MacIntyre at some stage.
9 A. Yes.
10 Q. And I think it was on April the 18th of 1982 and I'm fixing
11 that date relying on what's in Frank Edwards' notes. So to the
12 extent that they are accurate that's the date he indicates.
13 A. I don't think it would have been April 18th as such because it
14 seems to me the dates I recall are the 16th and 19th.
15 Q. 15th. I'm sorry, the 15th.
16 A. Well it must have been the 15th because the 16th, as I recall,
17 was a Friday after looking it up.
18 Q. Frank Edwards' notes, which are in Volume 17 at page 7,
19 indicate that on Friday the 16th of April he called you to ask
20 about MacIntyre's visit.
21 A. Yes.
22 Q. Do you recall that visit with Chief MacIntyre?
23 A. I recall Chief MacIntyre coming into the office and discussing
24 the Marshall matter with me and pulling statements out of a
25 file on the matter.

1 Q. Were you aware that Chief MacIntyre was coming to see you?
2 A. No.
3 Q. Had you ever met with him before?
4 A. Not I had not met with him before. I may have seen him at
5 some function before but I certainly had not met with him on
6 any case before.
7 Q. Did he explain to you why he was coming to see you?
8 A. To the best of my recollection he had some concern as to
9 whether or not the RCMP were really getting the full
10 understanding of the Marshall case.
11 Q. What do you recall about the visit? Tell us as much detail as
12 you can.
13 A. I don't recall that much about the visit. I recall that there
14 were a couple of statements, maybe three, I'm not sure, that I
15 had not heard of before that after he left I called, as memory
16 serves me, the RCMP and I think also Frank Edwards to find
17 out, or certainly talk to Frank afterwards to find out if they
18 were aware of these statements. And I was advised that
19 neither the RCMP nor Frank Edwards had heard of those
20 statements before.
21 Q. Were you under the impression that Chief MacIntyre had
22 some concern about the completeness of the investigation
23 being carried out by the RCMP?
24 A. That's the, I'm not sure if it was the completeness, but the
25 conclusions that they were coming to.

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

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

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

10:59 a.m.

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

Q. How was it left with him?

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

Q. How long was the meeting?

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

1 was half hour range.
2 Q. And were you just basically listening and letting the Chief...
3 A. Yes.
4 Q. ...get things off his chest?
5 A. Yes.
6 Q. Did you walk around the table and put your arm on Chief's
7 shoulder and say, "That fellow was the author of his own
8 misfortune."?
9 A. Well, I have no recollection of ever having done so. I don't
10 usually...I don't walk around tables and put my arms on
11 people's shoulders. I don't like it done to me and I don't do
12 it to others.
13 Q. Did you...forgetting the arms around the shoulder, could you
14 have said to Chief MacIntyre, "Don't worry, that fellow is the
15 author of his own misfortune."?
16 A. No, I don't think I would have said that. It's not impossible
17 that author of his own misfortune may have arisen during
18 the discussion of it because there seemed to be some
19 impression at that time that Donald Marshall was the author
20 of his own misfortune. The police seemed to think that had
21 he told the story originally that he told to Staff Sergeant
22 Wheaton that events might have gone along quite
23 differently.
24 Q. Did Chief MacIntyre ever say that to you?
25 A. He may have, but I, you know, I have no independent

1 recollection of him saying that.
2 Q. Here was the...
3 A. But I think that...
4 Q. Here was the investigator sitting in front of you.
5 A. I think Chief MacIntyre was fully convinced in his own mind
6 that Donald Marshall had committed the offence.
7 Q. That's when he met with you.
8 A. Yes.
9 Q. And at that stage was he aware, to your knowledge, was he
10 aware of this statement that had been taken from Donald
11 Marshall in Dorchester where the suggestion of the robbery
12 is contained?
13 A. I don't recall whether he was aware of it. He...I would
14 assume he probably was. There didn't seem to be much in
15 the reinvestigation of the Marshall case that people weren't
16 aware of quite frankly.
17 Q. You were aware that Chief MacIntyre was being kept up-to-
18 date, were you not, as to the results of the investigation?
19 A. It was my understanding that he was being full apprised of
20 what was occurring in the matter.
21 Q. And he, at that stage, your impression was, still believed
22 that Marshall had committed the murder of Seale.
23 A. Yes.
24 Q. It wasn't him suggesting then that if Donald Marshall had
25 come forward early and told some different story that

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

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

Q. But did Chief MacIntyre have the RCMP report?

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

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

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

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

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

1 Q. Could it have come up that way?
2 A. I don't know.
3 Q. That you could have suggested to Chief MacIntyre, look,
4 there are certain people, some in the RCMP who believe
5 Marshall is the author of his own misfortune?
6 A. Well, it could have quite frankly, yes, it may have. I really
7 don't know.
8 Q. Who in the RCMP believed that?
9 A. Well, certainly as I recall it, it was an indication to me by
10 Superintendent Christen, I think, that if Donald Marshall had
11 been more forthcoming originally that this thing may not
12 have occurred, that if he hadn't been in the Park for an
13 illegal purpose then this would never have occurred.
14 BREAK - 11:07 to 11:36 a.m.
15 Q. I am going to be referring Mr. Gale to documents in Volume
16 31, and on page 13 is the first page, My Lord. There's a
17 request from Mr. Aronson directed to Mr. Herschorn asking
18 for a copy of the final RCMP report which was to be
19 delivered to the AG's Department in the next few days.
20 Were you made aware of this request, Mr. Gale?
21 A. Yes, I believe Mr. Herschorn sent the letter on to me.
22 Q. What would be your position concerning releasing such
23 report to Mr. Aronson?
24 A. We would not release the RCMP report itself to Mr. Aronson.
25 It's a policy of the Department that police reports

1 themselves not be released but that matters in them could
2 be released, statements. But certainly Mr. Aronson would
3 be made fully aware of what was going on, but the police
4 report itself would not be given to him and certainly not at
5 that stage.
6 Q. And did you so advise Mr. Herschorn?
7 A. Well, I would probably so advise Mr. Herschorn. I think I
8 may have also advised Mr. Aronson during one of the
9 conversations that I had with him.
10 Q. Okay. Was it the intention that he would be provided with
11 copies of all statements that the RCMP had obtained?
12 A. Once we got the final report on the matter, but...he would
13 certainly be provided with all statements.
14 Q. What do you mean by "the final report"? The one we've
15 looked at before, is that a final report?
16 A. No, that was not what I considered to be a final report on
17 the matter. I had suggested to the RCMP, to Superintendent
18 Christen that there should be a document put together
19 which put everything in order and as far as possible showed
20 whether or not there was physical evidence that would tend
21 to support or discredit any statement. I think that
22 document that I was looking for was what has since been
23 termed the so-called red book, but at this particular point in
24 time I think we were just...well, in March, I'm at...it would
25 have been later in March where the suggestion was made.

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

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

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

A. Yes.

Q. Turn to page 17, please.

A. 17?

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

The Attorney General of Nova Scotia has the

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

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

11:41 a.m.

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

Q. What about the statements?

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

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

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

1 statements. He didn't ask for statements and my view was
2 that let's get the whole of the, the complete report by the
3 RCMP whenever that's made available and we have
4 determined what to do, what our position is going to be on it,
5 then he can have any of the real information portions, such as
6 the statements.
7 Q. Was Mr. Marshall still in jail?
8 A. Well early on I had checked and I had understood that he had
9 been released to the Carlton Centre quite early on in the
10 matter and I don't know, but I thought that he was out at the
11 Carlton Centre by this time.
12 Q. Would that have been a priority in your mind that doubt at
13 least having been passed on his conviction that, as a priority,
14 effort should be made to get him out of jail?
15 A. Yes, I thought that if Corrections Canada were not aware of it
16 they should certainly be made aware of it and what the
17 matter appeared to be shaping up as and that if he could be
18 dealt with in some fashion to release him or whatever that
19 they might consider that. But I had made inquiries and the
20 answer to the inquiry was, as I understood it, that he was
21 already at the Carlton Centre and my understanding of that is
22 it's a halfway house and it's a pre-release process where the
23 individual is gradually reintroduced into society or having,
24 been...
25 Q. Who did you make those inquiries of?

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

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

A. I made inquiries...

Q. Determined that he was already out.

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

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

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

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

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

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

COMMISSIONER POITRAS

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

1 MR. MacDONALD

2 16, My Lord?

3 COMMISSIONER POITRAS

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

5 MR. MacDONALD

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

7 MR. PINK

8 He was released on the 29th.

9 MR. MacDONALD

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

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

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

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

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

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

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

1 Q. Okay. Good. At this stage had you been in touch with the
2 Department of Justice to consider what type of step was going
3 to be taken?
4 A. To my recollection, yes. And I don't know whether they had
5 contacted me or I had contacted them at that particular time.
6 I had also been in touch with one or two other people in
7 provincial departments across Canada where I thought they
8 might have a little advice to offer or something of this nature.
9 Q. Okay. Mr. Aronson notes that, the fourth line down, "The AG
10 is uncertain, but will have input into the decision 'never seen
11 such a collection of nuts.'" Do you recall making a comment
12 like that to Mr. Aronson?
13 A. I don't recall making the comment but I may have.
14 Q. And toward the bottom of that page it says, the note is made,
15 "RCMP and Gale believe that Junior did not commit the crime."
16 Would that be an accurate reflection of your view at that
17 time, March 31st, 1982?
18 A. Yes, I think that about that time I, my own mind was of the
19 view that he appeared not to have committed the crime and
20 that it appeared that Seale, I'm sorry, that Ebsary had, that
21 there was sufficient evidence might be available to charge
22 Ebsary on the matter.
23 Q. Now did you, let's go to the next page, 21. It's a covering
24 letter to you from Mr. Edwards forwarding a memorandum.
25 You asked Mr. Edwards, did you, for his comments?

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

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

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

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

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

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

11:50 a.m.

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

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

1 statements consistent with the theory advanced by the
2 defence, would you consider that to be breach of duty by a
3 Crown prosecutor?
4 A. I would on reflection. I'm not sure in 1971 that things were
5 dealt with as fully as they are now. At that particular time, I
6 think a lot of prosecutors may well have felt that if they gave
7 any statement at all to defence, it would only be the one that
8 they were going to use.
9 Q. Back to your definition of a Crown Prosecutor yesterday and
10 the duties of a Crown Prosecutor, to be fair. Can't you agree
11 with me that, certainly to be at least fair, to give to the
12 defence...
13 A. Yes.
14 Q. Inconsistent statements.
15 A. I agree with the proposition. I'm just pointing out that things
16 didn't have as much of a refined nicety to them in prosecution
17 in 1970 as they do now. And I'm not sure that all prosecutors
18 felt that they had to give anything more than the accused
19 statement than if they gave any other statements, it would
20 only be the ones that they were going to use.
21 Q. But surely the duty of a Crown Prosecutor hasn't changed. In
22 fact, I think Ms. Edwardh yesterday was reading to Mr.
23 Endres quotes from the fifties from the Supreme Court of
24 Canada, (Boucher?), I think was the case, well-known case.
25 You're familiar with that case?

1 A. Well, I don't know that I'm particularly familiar with the case
2 but the type of quote there, yes.
3 Q. And there was a duty expressed by the Supreme Court of
4 Canada to make available to the defence information such as
5 was withheld here.
6 A. Yes, and I'm not arguing with that.
7 Q. Okay.
8 A. I'm just telling you that, in practical terms, I'm not sure that
9 some of those niceties were necessarily observed by all
10 prosecutors. I think you must remember that in 1971, we
11 had few, if any, I don't think we had any full-time
12 prosecutors then and they were mostly people that were in
13 private practice and on a retainer to act as prosecuting
14 officers.
15 Q. And did Donnie MacNeil fall into that category?
16 A. Yes.
17 Q. Okay. Would you agree with... I'll preface it this way. My
18 understanding of evidence given by Frank Edwards a week or
19 so ago was that the failure to disclose those first statements of
20 Chant and Pratico, in his view, were very instrumental in
21 leading to the conviction of Marshall.
22 A. Well, I have no reason to take any issue with Mr. Edwards on
23 it. I have not gone through the case in the detail that he has
24 on it.
25 Q. And I'm not asking you to take issue on it. I was merely

1 going to say if you would accept that, then would you agree
2 with me that...
3 A. Yes, I can accept that, yes.
4 Q. And the failure to disclose those earlier statements by Chant
5 and Pratico would constitute a real injustice here, wouldn't
6 they?
7 A. Yes, I can agree that it would constitute an injustice.
8 Q. Thank you. Now continuing on with this report from Mr.
9 Edwards, on page 24 of Volume 31, at the top of that page,
10 Mr. Edwards is saying:
11
12 > I submit that there is now no doubt Donald Marshall did not murder Sandy Seale. Even a
13 > complete sceptic would have to agree that had the evidence which is now available been
14 > available in November, 1971, the jury would have had a reasonable doubt and acquitted.
15
16 Do you agree with that statement, or did you at the time?
17 A. I didn't have any difficulty with the statement at the time. It
18 seemed to me that the evidence that had been available in
19 '71, if it had been made available, would probably have led to
20 an acquittal.
21 Q. Let me take you down to the, couple of paragraphs down
22 where it starts out "If the Minister of Justice agrees..."
23 A. Uh-huh.
24 Q.
25 > ...then I submit that the most desirable result of the reference would be a direction by the Appeal

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

Do you agree with that statement?

A. Yes.

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

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

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

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

Is that your understanding of when a pardon is given?

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

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

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

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

What did you do with that request?

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

Q. Did you make any recommendations?

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

Q. Basis other than the normal legal aid basis.

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

1 Q. But you did consider that this case was different than the
2 norm.
3 A. Yes, I considered it was and I indicated that that might be
4 considered. But I didn't presume to tell the Deputy how to
5 deal with it. I just offered that bit of advice and he dealt with
6 the matter.
7 Q. All right, and in the next paragraph, Mr. Aronson says:
8
9 > Finally the matter of compensation for Mr. Marshall must be addressed.
10 What did you do with that topic?
11 A. Well, the matter of compensation wasn't within my purview
12 whatsoever and that, along with the preceding matter, would
13 have been referred to the Deputy, simply by giving him a
14 letter and telling him, "Aronson wants to get paid and he's
15 also talking about compensation." So those are matters over
16 which I have no control and, "They're there. You'd better deal
17 with it."
18 Q. So you pushed that onto the Deputy as well.
19 A. Yes.
20 Q. Okay, thank you. The next letter starts on page 38. This is a
21 letter from Mr. Aronson to the Department of Justice, and I
22 don't want to... There's no notation that you received a copy
23 of this, but I did want to get your comments on a couple of
24 points. On page 40, in the third full paragraph, the last
25

1 sentence, it says:

2

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

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

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

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

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

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

1 Donald Marshall did not murder Sandy Seale."
2 A. There is no doubt... I suppose I have to divide myself off into
3 my own personal opinion that there wasn't any doubt in my
4 mind that he had not but I was trying to deal with it as much
5 as possible on legal considerations as to what was available or
6 what was not available. So I guess, in the back of my mind, I
7 may well have had the view that, you know, of not only was
8 he, should he not have been convicted, but that certainly
9 there was really no evidence to show that he had been at all
10 involved in the death of Mr. Seale.
11 Q. Yeah, I think that's a pretty key phrase, that there is no
12 evidence at this stage, no evidence to show that Marshall had
13 stabbed Seale, isn't that correct?
14 A. At this stage, there's no evidence to show that Marshall had
15 stabbed Seale.
16 Q. And there is evidence to show that Roy Ebsary did.
17 A. Yes.
18 Q. Well can't we just take it from there that Marshall is innocent
19 of the murder?
20 A. Yes, we can take it from there that he's innocent of the
21 murder.
22 Q. And is it likely that you would have told that to Mr. Aronson?
23 A. It's quite likely I would have expressed that opinion to him.
24 Q. Thank you. Now Mr. Edwards provided you an update, I
25 think, of that opinion we looked at a minute ago, and it's

1 found on page 29 of this volume. And there's an explanatory
2 letter, which is found at page 26, just describing...explaining
3 what the various numbers mean. And, again, I don't want to
4 take the time to go through this, I merely want to suggest to
5 you that at this time, as well, this is in early May of 1982,
6 having reviewed all the information, Mr. Edwards is still of
7 the view, or he hasn't changed his view, that the most
8 desirable result here would be that Marshall would be
9 acquitted on the basis that there had been a miscarriage of
10 justice. Do you accept that?
11 A. Yes.
12 Q. And you would have agreed with him at that time.
13 A. Yes, I think, at that time, I was agreeing with him that this
14 was...
15 Q. Thank you.
16 A. The best way to go.
17 Q. Now let me go back then, if I can. I was out of sequence
18 before we broke, and talk about that meeting that you had
19 with Chief MacIntyre. That meeting was on April the 15th
20 and I'd like, again, to understand why there would be any
21 suggestion at that time that Marshall might have been the
22 author of his own misfortune, given the fact that I understand
23 you to agree that there would be a breach of duty or an
24 injustice by the Crown prosecutor in not giving the initial
25 Chant and Pratico statements to defence. A further breach in

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

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

12:10 p.m.

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

A. You're asking me questions about a meeting that I recall certain facts from. I don't recall the full extent of what was said at the meeting. The meeting sticks out in my mind because of the fact that two statements were shown to me 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

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

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

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

Q. And did you?

A. Yes.

Q. And what did you learn?

A. I was told that neither knew about them.

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

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

Q. Okay. Did he tell you that he had been pressing the RCMP to go and obtain the full file from Chief MacIntyre and the 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

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

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

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

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

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

them to look for any type of consent from us.

LUNCH BREAK - 12:28 p.m.
*2:06 p.m.

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

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

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

A. Yes, that's correct.

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

A. That's correct.

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

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

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

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

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

Q. And who gave you those directions?

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

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

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

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

A. It seemed to me, yes, that it could well restrict what was going to happen because on it... A reference by way of an 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.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

A. No, I have not.

Q. Let me just direct you to a couple of points and see if I can get your comment, please. On page 185 where it's submitted that both Chant and Harriss cited police pressure as a factor in influencing their testimony and it would be 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

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

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

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

2:30 p.m.

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

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

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

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

MR. CHAIRMAN

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

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.

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

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

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

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

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

> The Appellant must bear considerable responsibility for the predicament in which he finds himself.

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

A. I didn't see why we had to particularly lay the blame at the feet of anyone. I thought that the main thing was to try and get the acquittal. I can see the point that Mr. Edwards was 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

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

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

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

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

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

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

A. We had the position mainly of being spectators. I don't think I said anything more than to suggest that they might reach that compromise. Mr. Herschorn may have had a few more 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
aforementioned order could issue on the basis
8 that there had been a miscarriage of justice. It is
submitted that the latter phrase connotes some
9 fault in the criminal justice system or some
wrongdoing on the part of some person or
10 institution involved in that system. The
Respondent contends that such was not the case.
11
Is that your belief?
12
13 A. It's hard to answer. My view is that if a person is wrongfully
14 convicted then there is a miscarriage. I don't know that you,
15 that it necessarily denotes a fault with some individual. My
16 view is that our system of law is not perfect but it's as good
17 or better than any other system that's been developed so far.
18 So that it's always possible that somewheres along the way,
19 something can go awry.
20 Q. You believe there was a miscarriage of justice in this case.
21 You believed that in April of 1982.
22 A. Given my term of a miscarriage of justice.
23 Q. Yeah.
24 A. Yes.
25 Q. You believed it in December of 1982.

A. Yes, I believed it then.

Q. And today.

A. And I believe it today, yes.

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

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

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

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

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

> For the above reasons, it is respectfully submitted that the Court should make it clear 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.

Do you accept that as a correct statement?

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

Q. Would you accept a statement somewhat similar to this? The Court should make it clear that what happened here was the result of mistakes made by certain people, including the police and the prosecutors?

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

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

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

Q. Lou Matheson said he did.

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

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

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.
15 MR. CHAIRMAN
16 I have a problem with that meeting. Maybe you can help
17 me, if I may interrupt.
18 MR. MacDONALD
19 Please.
20 MR. CHAIRMAN
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

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

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

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

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

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

Q. So the intended...

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

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

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

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

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.
19 MR. CHAIRMAN
20 All right. Okay.
21 COMMISSIONER EVANS
22 Q. When Mr. Coles threatened to take Frank Edwards off the
23 case because he wouldn't take the position that Mr. Coles
24 was advocating did you support Mr. Coles or did you support
25 Mr. Edwards or did you support anyone?

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

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

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

to that.

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

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

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

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

Q. Tension.

A. The atmosphere at the time.

MR. CHAIRMAN

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

MR. MacDONALD

Getting my exercise.

COMMISSIONER POITRAS

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

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

MR. MacDONALD

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

A. Yes.

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

A. That's correct.

Q. "You are to take no position."

A. That's correct.

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

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

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?
3:14 p.m.
13
Q. At the meeting? I mean you've got, as I understand it, a
14 pretty acrimonious discussion going on here.
15
A. Yes, it's an acrimonious discussion going on. I had thought I
16 made it clear that we, in fact, that I supported his opinion
17 that the Crown make a recommendation. I thought that to
18 avoid the acrimony, that it might be phrased a little
19 differently and both he and Mr. Coles might agree to that.
20 Other than that, I don't know what else I could have done on
21 the matter.
22
Q. Let me go back to one other thing you said a few moments
23 ago, I believe you said, and correct me if I'm wrong. I belive
24 you said in the factum that was filed on behalf of the Crown,
25

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?

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

1 direction, I would not have put in Paragraph 83.
2 COMMISSIONER EVANS
3 Would you have put in the succeeding paragraphs, 84 and so
4 forth?
5 MR. GALE
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.
9 COMMISSIONER EVANS
10 These are philosophical discussions, aren't they?
11 MR. GALE
12 Those are not matters that I, myself, would put into a
13 factum.
14 COMMISSIONER EVANS
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.
22 MR. GALE
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

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.

1 COMMISSIONER POITRAS

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.

5 MR. GALE

6 It didn't come up at that meeting.

7 COMMISSIONER POITRAS

8 Thank you.

9 MR. CHAIRMAN

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?

14 MR. GALE

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.

22 COMMISSIONER EVANS

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

24 MR. GALE

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

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

MR. MacDONALD

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

A. Yes, I was aware of that.

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

A. Yes, there was.

Q. And who participated in those discussions?

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

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

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

Q. And would you have agreed with it?

A. Yes, I agreed with it.

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

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

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

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

A. Yes, I see that.

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

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

And then you would have saw that at the time.

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

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

A. Well, my view on the thing, I'm not sure I necessarily 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

matters that should be dealt with because...

Q. Did you ever get a response?

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

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

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

COMMISSIONER POITRAS

Page 159, perhaps.

MR. MacDONALD

159, My Lord, thank you.

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

> We should be looking into the question of the performance of the police and the Crown in the prosecution of Donald Marshall originally.
> Finally, we must make a decision as to whether 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

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

*4:00 p.m.

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

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

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

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

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

Q. But, in this case...

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

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

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

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.
7 MR. PUGSLEY
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...
14 MR. MACDONALD
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.
17 MR. CHAIRMAN
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

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

MR. MACDONALD

Thank you, My Lord.

BY MR. MACDONALD

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

COMMISSIONER EVANS

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

MR. GALE

A. I'm not saying it's illegal activity. I'm saying it's improper activity by the policeman.

Q. But it would not be illegal.

A. It may or may not be. I have not given that portion of it a great deal of thought. You are leading me on to questions that are very hypothetical, Mr. MacDonald. You have asked me what sort of thing I might consider. I have indicated what sort of thing I might consider. I have told you that I have found very few cases that really deal with counselling of perjury and I find it very difficult to tell you exactly what 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 liabilitiy. 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.

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

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

A. Yes, I did.

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

A. I don't think so.

COMMISSIONER EVANS

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

MR. GALE

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

COMMISSIONER EVANS

Counselling comes into it?

MR. GALE

Before counselling can be properly charged.

MR. MACDONALD

Thank you, My Lord.

BY MR. MACDONALD

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

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

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

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

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

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

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

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

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

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

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

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

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.
4:15 p.m.
20
Q. And did you review those reports?
21
A. Yes, I read them through. They indicated improper activity.
22
There is no... They were saying that it's not the type of
23
activity that would be countenanced today. There is no
24
indication to me there that there is anything more than
25

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

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

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

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

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

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

A. Well, it's possible that it might. But, again, you know, if the police felt that there's a charge there, I'm not there to, at this 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
25 In reviewing the City Police file after the order

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

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

MR. MACDONALD

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

BY MR. MACDONALD

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

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

Q. And, in fact, is...

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

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?

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

Q. Mr. How asked Coles, he said:

> In addition, we should be looking into the question of the performance of the Crown in the prosecution of Donald Marshall.

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

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

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

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

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

MR. CHAIRMAN

Okay, we'll adjourn until 9:30.

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

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