

12:10 p.m.

1 Q. What's your sense of that, Mr. Coles, from your experience
2 as Deputy Attorney General? Would you agree with that
3 perception?

4 A. Well, I have had no experience with that in this Province.
5 And that's not to say that it may not have existed. But I
6 personally have not encountered it, nor have anybody, to
7 my knowledge, brought these kind of concerns to my
8 attention when I was Deputy.

9 Q. Are you able to comment as to whether or not you think
10 it...that notwithstanding your lack of direct personal
11 involvement, as to whether or not you think those types of
12 concerns on the part of natives would not be reasonable
13 concerns on their part?

14 A. Oh, I agree.

15 Q. You say the conference pointed out the need for attitudinal
16 changes on the part of those involved in the criminal justice
17 system. I want to come back to my question again, I guess,
18 as to whether or not you have any sense of what those
19 attitudinal changes were that the conference was pointing
20 out? What sorts of things were being raised?

21 A. Well, it's a long time. I don't remember the specifics, but my
22 feeling is that that the native people felt themselves very
23 much alone when they appeared and became involved in
24 the justice system. That they didn't feel comfortable. They
25

1 felt almost like they were strangers, notwithstanding that in
2 this Province, you know, they're Canadians, they're Nova
3 Scotians, they may be of different origin, but they didn't feel
4 that...they didn't feel that there was an appreciation that
5 this was a strange environment for them. They weren't that
6 familiar with the rules and the procedures and that they
7 didn't seem...my recollection is, I don't want to overstate it,
8 is that they didn't sense that there was a sensitivity or even
9 an awareness that there was a group of Canadians or Nova
10 Scotians in this kind of...that felt this way.

11 Q. And would those apprehensions or those reasons or
12 suggestions be the sorts of things that would give rise to
13 your view that the native court worker program would be a
14 useful institution in Nova Scotia?

15 A. Oh, yeah, it couldn't address many of those concerns, but it
16 was certainly, in my view, was a useful program and one
17 that would help.

18 MR. CHAIRMAN

19 Only as a reminder for our researcher, wasn't there a fairly
20 good professional publication following the Natives and The Law
21 conference in Edmonton, a summary of...

22 MR. COLES

23 Yes, and that conference was fully reported and they did
24 publish a book on the conference, yes.

MR. CHAIRMAN

1
2 That's only to remind me to remind these researchers to
3 remind me again to get my copy. That's rather convoluted, isn't
4 it?

MR. SPICER

5
6 Q At the time the Court Worker Program was discontinued, are
7 you able to give us a sense of what caused that to happen?

8 A. Well, we...as I recall, there are several problems. First of all,
9 we had a recruitment problem. During...I think initially the
10 program was funded for three years or some...a period of
11 time less than three years perhaps, and there was some
12 difficulty in maintaining the staffing of that program, and
13 that was partly the responsibility, I think, of those of us who
14 were trying to put in place... There wasn't enough emphasis,
15 it seems to me, given on training people who otherwise were
16 prepared to work in the program, nor was there enough
17 consideration given to offset the expense and the price that
18 some of these people were called upon in giving so much of
19 their time. And these people were very committed people.
20 They, you know, they were...my recollection is, you know,
21 they wanted to do a good job, so much so that some of them
22 got far beyond what the parameters of the program were
23 and that created some problems because they just got
24 carried away because of the need, perhaps, not so much of
25 their own, in responding to a need rather than their own

1 initiative. Then the...and so it got down as I...my recollection
2 is that it got reduced almost to one or two workers and it,
3 you know, was no longer as viable a program as what was
4 expected it to be. Then we got into a situation, we were
5 talking about the renewal of the program and there
6 was...there was some concerns expressed by the sponsoring
7 agency, the Union of Nova Scotia agency about the federal-
8 provincial jurisdictional question, and they...they were very
9 concerned that they ought not to become too involved in a
10 provincially-funded program because they...in their view, it
11 was a federal area of jurisdiction.

12 Q This is the Union of Nova Scotia Indians.

13 A Yes.

14 Q Okay.

15 A And so that they indicated that they didn't want to have any
16 ongoing responsibility as the agency for this program so long
17 as there was this provincial funding component. We had a
18 proposal from a group in Halifax, I don't remember the
19 group now. But there was a proposal to pick up and carry
20 on on a pilot basis. That proposal, I don't think was put in
21 place because it was too restrictive as to who it was going to
22 serve. The Minister was very much in support of the
23 program, as I recall, but he had difficulty in a pilot project
24 being limited to a segment or just a small group of the
25 native people, and I don't think, my recollection is that

1 program did not take off and I think there was a further
2 attempt to...but I don't remember...

3 Q You're talking about an attempt to re-establish the program.

4 A. Yes.

5 Q ...after it was initially discontinued...

6 A. Yes.

7 Q ...which I believe was in '76...

8 A. That would be after '76.

9 Q ...or '77.

10 A. '77 and '78, somewheres around there.

11 Q Perhaps if you could just have a look at page 153 of Volume
12 41. Does that refresh your memory at all as to what the
13 nature of issue was in 1979?

14 A. Well, it doesn't really, but I...

15 Q Have a look at 155.

16 A. Yes, I...upon reading it, it...

17 Q And also...

18 A. ...I have general recall.

19 Q Okay. And also perhaps to be of some more assistance to
20 you, page 178. It seems to refer to a funding problem.

21 A. Yeah, we did, you know, we did run into a funding problem
22 and...

23 Q That's what I want to ask you about. What was the nature
24 of the funding problem in the fall or so of '79?

25 A. Well, I think it was just...it just happened to coincide with

1 government restraint in fiscal policies and the priority
2 which we had identified for this program just didn't attract
3 the necessary support at management board.

4 Q. Who was in favour of the...of this program at that time in
5 1979?

6 A. Well, within the department I think ...I think other than the
7 department I wasn't aware that anyone was not in favour of
8 it. Certainly the Minister was very supportive of it and I...to
9 the extent that I had any involvement, I tried to be.

10 Q. Do I take it that the lack of funds was not as a result of the
11 reallocation of funds to another project but just a general
12 restraint?

13 A. Well, in our...in our estimate process, the system, the budget
14 system required us to identify priorities in order to
15 draw...attract funding, and I don't recall just where this
16 particular program was on the list, but the management
17 board drew the line above this program, and programs
18 below the line, they weren't...they weren't signaling out this
19 particular program, that it just wasn't high enough on our
20 list of priorities to draw down the management board
21 support. And, I think...and one of these letters you referred
22 me to on page 153 I think that was sort of a...it looks to me
23 like a rap on my knuckles because I was trying to...trying
24 to...well, I replied that we couldn't identify funds available
25 that had not been identified with other projects that would

1 enable us to pick up the required monies for this program
2 and, although I don't particularly remember this letter at
3 this point, it seems to me that the chairman of the Treasury
4 Board had a different point of view. He thought that we
5 ought to be able to or at least we ought not to...we ought not
6 to give up trying at that particular point in time. We were,
7 of course, trying to get them to fund this program without
8 our having to change the other order of priorities.

9 Q. Sure. Were you trying to get them to fund fifty percent of
10 the program or a hundred percent of that program, do you
11 remember?

12 A. I don't remember. I suspect it was probably fifty percent. I
13 don't think the federal people ever withdrew their
14 willingness to cost share the program.

15 Q. Just in the scheme of things their...the feds' fifty percent was
16 no longer good enough because you couldn't get fifty percent
17 from the province.

18 A. To match it, right.

19 Q. Did you have any involvement in the native policing
20 matters?

21 A. Yes.

22 Q. Perhaps if I could just draw your attention to, again in
23 Volume 41, at page 202, there's a number of documents,
24 202 and then 215, Mr. Coles, if you could...both of which
25 refer to yourself. One on 215 you were copied on. If you

1 need to take a second to read those to refresh your memory,
2 but if you could indicate to us what the nature of the issue
3 was with respect to Indian policing.

4 A. Well, I might need your help, counsellor.

5 Q. There's two...

6 A. Yeah, 3A, was 3A the...was that the concept of a municipal
7 police force operated by the...

8 Q. Yes.

9 A. Yeah. And then 3B was where they...the native people be
10 recruited by the RCM Police and used in native policing.

11 Q. Yes.

12 A. Okay. Well, the...certain representations were made and
13 these options were available pursuant to the federal-
14 provincial contract for RCM Police services.

15 Q. Right.

16 A. Prior to these options being considered, policing on Indian
17 reserves, and that's really...that's what we're talking about
18 here, when we're talking about native policing, we're talking
19 about policing on Indian reserves.

20 Q. Yes.

21 A. Was by the RCM Police under the provincial contract. Some
22 bands engaged band constables and they were...they were
23 basically to enforce band bylaws and matters of that kind on
24 the reserve.

25 Q. Uh-hum.

1 A. And they were under the...under the jurisdiction of the band
2 counsel. These options became available as a response to
3 the concerns of the...of representatives of the native people
4 that they thought that they ought to have more
5 responsibility in the matter of policing. The 3A concept,
6 which, if I understood it, or understand it now correctly, was
7 that the representatives of the reserves would
8 constitute...would recruit a police force that, in effect, would
9 police those reserves where the bands wanted to have them.

10 Q. Uh-hum.

11 A. It was almost, if you like, like another type of provincial
12 policing native staff.

13 Q. On...solely on reserves.

14 A. Yeah.

15 Q. Okay.

16 A. That had a lot of implications for the province because to
17 begin with it was in the nature of a municipal police force
18 and the province did not directly fund municipal police
19 services. It involved recruiting, it involved training, it
20 involved equipping detachments and the police force itself.
21 The question of jurisdiction, no problem with it on the
22 reserves, but as you know, people don't tend to stay in one
23 place, they move in and off, so that you had an interfaced
24 jurisdictional problem. These were problems with the 3A
25 concept. The funding was perhaps the largest concern, how

1 the province would be able to respond with the required
2 funding.

3 The 3B concept, on the other hand, was more in line
4 with what we were doing. We were paying under the
5 contract for policing, policing Indian reserves with regular
6 RCM Police constables. All this program involved us doing
7 was to recruit some native people as RCM Police constables
8 and let them assist, if you like, complement, the RCM Police.
9 They would then be under the control of the RCM Police and
10 for all practical purposes be RCM Police constables. That
11 was a program that we opted to, although Mr. How at the
12 time was, well, my recollection is he was...he was favourably
13 inclined to the 3A concept, but...and I don't think we ever
14 got very far in considering once we...once all the...all the
15 issues were identified that were implicit in having a native
16 police force.

17 Q. Right. So, 3A was never implemented.

18 A. No.

19 Q. Whatever became of 3B?

20 A. That's in effect. We have implemented. Now, there is a
21 federal study going on now to evaluate that program and
22 that was partly resulting from concerns that were taken in
23 this province, because we found that the cost-sharing
24 arrangements in other provinces varied from that in this
25 province. And, we have always been in support of

1 expanding this program, but we were...we had difficulty to
2 justify doing do until we had a clarification from the federal
3 authorities why the provincial contribution varied from
4 province to province. And, in some cases the answer was
5 that because they were under the Department of Indian and
6 Northern Affairs, whereas in other provinces it came under
7 the Solicitor General's Department. So our difficulty
8 was...was trying to rationalize the responsibility and the
9 funding that was equitable for us to expand this program.
10 But it is in existence here, and it's a good program.

11 Q. Yesterday, Mr. MacDonald put before Mr. Gale Exhibit 161, a
12 letter, do you have that? No, it's a separate exhibit, Mr.
13 Coles, 161.

14 A. Oh, sorry.

15 Q. A letter.

16 A. Oh, yes, no, no. Oh, here it is, here it is, yes, yes.

17 Q. I understand you're generally familiar with that
18 correspondence, sir?

19 A. Very generally, but generally.

20 Q. Are you able to comment on what's become of that?

21 A. No, my recollection, and our counsel has correspondence
22 that...

23 Q. You can speak to it.

24 A. ...to be made available to you, is that...that when it came to
25 my attention I referred it to Mr. Conrad in our office and I

1 think he copied it to the then Department of Social Services,
2 which has in this province the overall responsibility in
3 respect to native people. And, as a result of that exchange
4 of correspondence a committee was struck. They had at
5 least one meeting with the federal people to discuss the
6 proposal and beyond that I don't know...I don't recall what
7 the present status of it is.

8 Q. It's not concluded, I take it, at this point.

9 A. I don't know. It wasn't concluded when I left the
10 department. I don't know what the present status is.

11 MR. SPICER

12 I'll be moving on to another area, My Lord.

13 MR. CHAIRMAN

14 Adjourn until two.

15 LUNCH BREAK - 12:30 p.m.

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1 INQUIRY RESUMES - 2:02 p.m.

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

3 EXAMINATION BY MR. SPICER

4 Q. Mr. Coles, if you could turn to Volume 31, or just put it in
5 front of you, I guess, for the moment. Can you give us some
6 idea of when the first time...when the Marshall matter
7 would have first come to your attention in the department?

8 A. The recollection is that during the investigation in 1982, the
9 police investigation in 1982.

10 Q. During the time that you were in the department from 1972
11 up until 1982, you didn't know anything about Mr.
12 Marshall, I take it.

13 A. Not to my recollection.

14 Q. Okay. Perhaps you could have a look at Volume 31, page
15 13.

16 A. Yes.

17 Q. Have you see that letter before, sir? 13.

18 A. I don't recall whether I did or not.

19 Q. Were you aware generally of the requests contained in
20 paragraph 2 of that letter by Mr. Aronson relating to the
21 RCMP report?

22 A. No.

23 Q. You were not aware.

24 A. Well, if I was I don't recall at this point.

25 Q. Were you generally kept aware, sir, of the progress of the

1 investigation being carried out by the RCMP?

2 A. No.

3 Q. Mr. Gale testified at page 13348 that you were kept aware
4 of the progress of the investigation. Is he wrong?

5 A. Oh, no, I would not say he's wrong. If he said that he
6 obviously did brief me from time to time, but I'm not
7 consciously aware of having been kept advised of the
8 progress of it.

9 Q. Were you kept aware of the various things that were coming
10 light, witnesses changing their stories and that sort of thing?

11 A. Not that I recall specifically.

12 Q. Was this not a fairly important matter in the AG's
13 Department at the time?

14 A. Well, it may have been but it wasn't...it wasn't a matter that
15 I was directly involved with. Eventually we would get a
16 report from the RCM Police, from the RCM Police on their
17 investigation and I would not have thought anything
18 particular one way or the other about not being fully
19 informed on the progress of the investigation.

20 Q. Perhaps I could ask you to have a look at Volume 34,
21 page...commencing at page 9.

22 COMMISSIONER EVANS

23 What page number?

24 MR. SPICER

25 Sorry, 9, My Lord. Volume 34, changed volumes, page 9.

1 Q. That's a report from the RCMP which goes over to, at least
2 the report portion of it, to page 19. Was this report brought
3 to your attention?

4 A. I don't recall specifically, but it may have been.

5 Q. Okay. And Mr. Gale indicated that, 13351, that the Deputy
6 was advised of the RCMP report.

7 A. Well, I'm sure his recollection would be better than mine on
8 that point because he would be the one that would bring it
9 to my attention.

10 Q. Do you have any knowledge or did you have any knowledge
11 at the time of any of the information contained in that
12 report?

13 A. Well, I don't...I don't recall actually what period in time I
14 actually read this report. My recollection is that I read it
15 prior to the reference, but I'm not sure at what point in time
16 that was.

17 Q. And if you read it prior to the reference, if I could just
18 direct your attention to a few pages in the report. On page
19 13, paragraph 15, that would have brought to your attention
20 the fact of Jimmy McNeil having come forward. You were
21 aware of that?

22 A. Yes, yes.

23 Q. Were you also aware that Mr. Chant, as he indicates on page
24 14, or the investigators indicate on page 14, felt that he was
25 being pressured? About halfway down paragraph 18.

1 A. Yeah, I was aware of the general allegation, yes.

2 Q. Were you also aware, as indicated on page 16, of similar
3 statements by Patricia Harriss, that is that she felt she was
4 being pressured, in the last five...last five lines on that page?
5 "Miss Harriss says she told the police repeatedly and they
6 refused to accept..." You're aware of that.

7 A. I was aware of the allegations, yes.

8 Q. Were you aware of the conclusion of Inspector Scott of the
9 RCMP as related on page 19, in the one, two, three, fourth
10 paragraph? "I feel that Marshall is innocent of the offence
11 and that we presently have enough evidence to support a
12 prima facie case against Ebsary for the murder of Seale."

13 A. Yes.

14 Q. Mr. Gale indicated during his testimony that as far as he was
15 concerned this was fairly dramatic stuff that was coming
16 forward. Would you agree with that characterization?

17 A. The allegations were, yes.

18 Q. Yes. Did you have some question as to the...as to the
19 soundness or truth of the allegations at the time?

20 A. No, I didn't...I didn't address myself to that question.

21 Q. If I could just take you back now to Volume 31, and again at
22 page 13 with respect to the request for the RCMP report. At
23 that point in time Mr. Aronson was acting as counsel for
24 Donald Marshall. Would you have had any difficulty in
25 releasing the RCMP report to Mr. Aronson if you had known

1 that he had requested it at that time?

2 A. Probably.

3 Q. Why?

4 A. Well, there had been a long-standing policy in the
5 department that police reports, per se, were not...were not to
6 be released. They were confidential reports and they were
7 to remain that way. Now, that's not to say that some
8 information contained in those reports would not and, in
9 fact, as a matter of disclosure, would be released. But the
10 reports, per se, were not of the kind that would be made
11 available.

12 Q. Would you agree with me that this is really...that the
13 Marshall situation, somebody coming forward and saying
14 that he, in fact, had not committed the murder, was an
15 unusual situation?

16 A. Oh, certainly, sure.

17 Q. And that Mr. Aronson, in attempting to get to the bottom of
18 it, would have been assisted by being able to have the RCMP
19 report?

20 A. Well, I don't know. The report would have to be examined
21 and that part which could be made available ought to and
22 would have been made available. But the principle of
23 releasing the report per se was a policy directive that was
24 not to be without the approval of superiors.

25 Q. As a superior yourself, if the request had been made to you,

1 would you think that you would have had the discretion to
2 release it if you had so chosen to do?

3 A. Yes.

4 Q. I'd just direct your attention to page 27 of that volume.
5 Have you seen that letter before, sir?

6 A. I was aware that such a letter had been sent. I don't recall
7 whether I actually saw this letter. I was not involved in the
8 drafting of it.

9 Q. Were you aware of the circumstances giving rise to it?

10 A. Only to the extent that I was told subsequently by Mr. Gale
11 that he...he drafted such a letter of directions and discussed
12 it with the Attorney General who signed it and forwarded it.

13 Q. Did he seek your instructions prior to doing that?

14 A. Not that I recall.

15 Q. Were you...

16 A. I'm not sure that I was available at that particular time to
17 be...

18 Q. Were you aware at or about this time in April of 1982 of
19 any suggestions that John MacIntyre was not being as
20 forthcoming as the police had hoped he was going to be?

21 A. I was made aware of it at some point, counsel, but I'm not
22 certain whether it was at that time or subsequent
23 to...subsequent to this letter in the explanation or the
24 information that was given to me as to why this letter was
25 forwarded.

1 Q. Are you able to tell us who you were made aware of that
2 fact by?

3 A. It would have been by Mr. Gale if I...if I...

4 Q. Did you know John MacIntyre?

5 A. Not on a personal basis, no.

6 Q. You knew him on what basis then?

7 A. Well, in my official capacity, in my visitations to Sydney I
8 have met with him on one or two occasions in his capacity
9 then as, I think first as Deputy Chief and subsequently as
10 Chief of Police.

11 Q. Other than that no other involvement with him.

12 A. No, not that I recall. I'm...well, I should...I may have met
13 him on a...he may...I may have met him on occasion that I
14 don't recall specifically.

15 Q. At this time, if I could just direct your attention to page 36.
16 Mr. Aronson is writing to Mr. Gale raising...you don't need to
17 go through the letter in detail, but he's raising three matters.
18 One is the handling of the reference. Another matter, as
19 you'll see on page 37 in the third paragraph is the question
20 of Mr. Aronson's fees, and the third matter is he's raising the
21 question of compensation, in the paragraph, second-last
22 paragraph on page 37. Were you aware at this time that Mr.
23 Aronson had communicated these requests to Mr. Gale?

24 A. I was aware of the requests. I'm not sure whether I was
25 aware of it at that particular time. I was aware that Mr.

1 Aronson had made those requests, yes.

2 Q One of the requests that Mr. Aronson made was in
3 connection with his fees.

4 A. Yeah.

5 Q I'd just like to go through the correspondence dealing with
6 the question of Mr. Aronson's fees which is contained in
7 Volume 27. And that volume commences with that same
8 letter that I've referred you to.

9 A. What page is that on, counsel?

10 Q Page 1.

11 A. Oh, I'm sorry, okay.

12 Q And indeed, at page 3 it's yourself that responds to that
13 letter of Mr. Aronson's.

2:16 p.m.

14 A. Yes.

15 Q Why would it, as you say in the second line of that letter, why
16 would it have been appropriate for you to respond to that
17 request of Mr. Aronson's?

18 A. Well, my recollection is that it was referred to me by the
19 Minister and the letter was not copied to me, so it had to be
20 referred to me. It may have been referred to me by Mr. Gale,
21 I'm not certain. Either Mr. Gale or the Minister.

22 Q In the second paragraph of that letter, you're referring Mr.
23 Aronson to Legal Aid.

24 A. Yes.
25

1 Q. Did you consider at that time any other options other than
2 referring Mr. Aronson's request for payment of fees to Legal
3 Aid?

4 A. No.

5 Q. Did you receive any advices from Mr. Gale as to whether or
6 not there were any other options?

7 A. Oh, I don't know whether I received them from Mr. Gale. I
8 knew there were other options, but I didn't consider them at
9 that time.

10 Q. What would be the reason why you wouldn't consider other
11 options in the circumstances of this case?

12 A. I think simply because this, you know, we had entered into
13 an agreement, the province and Canada, to provide for the
14 payment of legal services and it seemed to me that this was a
15 case that was covered by the terms of the agreement and the
16 appropriate recourse was to the provisions of that agreement,
17 which provided a choice of counsel to applicants who were
18 considered eligible.

19 Q. Mr. Aronson had already indicated to Mr. Gale in his earlier
20 correspondence on page two:

21 My instructions are not to apply for Legal Aid or
22 financial assistance from Legal Aid.

23 So you would have known that at the time you responded.

24 A. Probably.
25

1 Q. Is there any reason why you didn't indicate to him that the
2 way that this had to be dealt with was to be Legal Aid?

3 A. Well, I thought I had in this letter. In the second paragraph, I
4 thought that's what I was indicating, that this was a matter
5 that would have to be dealt under provisions of the Legal Aid
6 agreement.

7 Q. Would you agree that at the time and throughout that if you
8 had so chosen, the Department would have had the option to
9 pay Mr. Aronson's account, without referring to Legal Aid?

10 A. The Minister had that authority, yes.

11 Q. Did you ever recommend that he do so?

12 A. No.

13 Q. Why not?

14 A. Well, because at the time, I thought it was an appropriate
15 case to be covered by the provisions of the agreement.

16 Q. Are you able to tell us, perhaps if we turn to page 11. Mr.
17 Aronson, at this point, I believe, has submitted an account
18 somewhere in the vicinity of \$78,000. At page 11, is a Legal
19 Aid certificate. In respect of fees, it says "\$35 per hour to a
20 maximum of \$1500. \$250 per day, appearances before court,
21 board, or commission." Is it fair to say that if Mr. Aronson
22 had applied for Legal Aid and had been paid according to the
23 Legal Aid scale, that he would have received far less than the
24 \$78,000 he was submitting?

25 A. Probably.

1 Q Did you think in the circumstances that that was a reasonable
2 thing to ask Mr. Aronson to do?

3 A. Well, I don't think I considered his request in those terms. I
4 considered that in the province we had this program in place
5 and it was designed to cover situations for people who were
6 unable, under their own resources, retain counsel. And my, I
7 only addressed it in those terms that his client was, in my
8 opinion, probably eligible and he should apply for the benefit
9 of that agreement. I'm not... I don't think I've ever seen this
10 particular certificate before but... Although that is the tariff,
11 maybe. I presume it is, over Mr. Digby's signature, but my
12 understanding is, and I may be subject to correction on this,
13 that in exceptional cases or special cases counsel had a right
14 to appeal the tariff to the committee or the commission and
15 make his or her case for additional fees. I think there's a
16 provision in there, a scale under their agreement for that.
17 That's my recollection anyway.

18 Q. On page 23, if I could direct your attention to that. Federal
19 Minister, Mr. Munro, is writing Mr. How, and about half the
20 way through the third paragraph:

21 Because of this fact and the fact that I feel Mr.
22 Aronson has represented the legal interest of Mr.
23 Marshall in the finest tradition, I would urge you
24 to consider exercising your discretion with
25 respect to the payment of Mr. Aronson's account.

Did you have any discussion with the Minister as to whether

1 or not he ought to exercise his discretion in favour of Mr.
2 Aronson's account?

3 A. Not that I recall. I think I referred the Minister to my
4 previous advice to Mr. Aronson.

5 Q. On page 24, there's a letter back from Mr. How to Mr. Munro,
6 in reply:

7
8 I will have my Deputy discuss Mr. Aronson's
9 account with the Legal Aid Commission.

10 Was this letter pursuant to or after a discussion that you had
11 had with Mr. How about this matter?

12 A. No, I think that was before I spoke to him. I think it was
13 really in response to that letter that I had the conversation
14 with the Minister.

15 Q. And then on page 28, sir, there's a letter under Mr. How's
16 signature in January, 1983 in which he refers to some advice
17 that he received from you. Are you familiar with this letter?

18 A. Yes.

19 Q. Did you draft it?

20 A. I suspect I may have.

21 Q. In the last paragraph:

22 Despite the fact that Mr. Aronson chose not to
23 apply under the Canada/Nova Scotia Agreement
24 of Legal Aid Services, I will be prepared to ask
25 the Commission here to consider retroactively
application for Mr. Aronson to be provided
payment. At the present time, at least, I do not

MR. COLES, EXAM. BY MR. SPICER

1 think I can do anything further to accommodate
2 Mr. Aronson without setting a precedent by
3 going outside the Canada/Nova Scotia Legal Aid
4 Agreement, which I am naturally reluctant to do.

5 To your knowledge, why was there reluctance in this
6 particular case to go outside the agreement?

7 A. Well, before I answer that question, may I go back to a
8 previous question? The phraseology of this letter does not
9 sound like the kind of letter I would have drafted. So I
10 suggested that this was drafted not by me.

11 Q. Would you have so advised Mr. How, though, that to go
12 outside the terms of agreement would set a precedent?

13 A. Probably.

14 Q. Well, let me ask you the question again then. What precedent
15 would be set by going outside the terms of the agreement for
16 this one particular case?

17 A. Well, I suppose it's difficult to speculate, but I would think
18 other people who would be eligible for Legal Aid under the
19 Canada/Nova Scotia Agreement may decide that the scale of
20 tariff was not adequate to cover their solicitor's account and
21 may want also to have special consideration and the payment
22 of such fees and would say, "Well, it was done in Case 1. Why
23 am I being treated and being denied?" I think that's... That's
24 the concern that I had at the time.

25 Q. Given that concern, can there be any circumstance where one
should positively respond to a request for payment of fees

1 outside the terms of the agreement?

2 A. Well, there probably are. I have difficulty in having any
3 come to mind though.

4 Q. Have you been involved in cases yourself over the years
5 where persons otherwise eligible for legal aid have been paid
6 outside the terms of the agreement?

7 A. We have paid people other than under the legal aid scheme.
8 I'm not certain whether those recipients were or were not
9 eligible for legal aid. The circumstances of the payment, in
10 my opinion, were different than the circumstances pertaining
11 to Mr. Aronson's account.

12 Q. What were the circumstances pertaining to Mr. Aronson's
13 account, then, that made you unwilling to want to go outside
14 the terms of the agreement?

15 A. Because the case in which he was retained was the kind of
16 situation that, in my opinion, was covered by the legal aid
17 agreement. It was a kind of criminal proceeding in which the
18 client's liberty was in jeopardy and the kind of situation that
19 was contemplated by the agreement.

20 Q. Did you ever advise Mr. How that Mr. Aronson's fees could be
21 paid outside the terms of the agreement?

22 A. Not that I recall, but I don't think... I don't think there would
23 have been any need for me to advise Mr. How on his
24 authority to..

25 Q. But your recollection is that you didn't.

1 A. My recollection is that I didn't. And, in all probability, I
2 didn't.

3 Q. In May of that year on page 56, it's a letter from Mr. Munro
4 to Mr. How, which was received in the Attorney General's
5 office on May 6th. Mr. Munro is asking, towards the end of
6 that letter, the last three or four lines:

7
8 I would very much appreciate if you would let
9 me know precisely what Nova Scotia Legal Aid
10 can do as well as what options there might be
11 both within the Canada/Nova Scotia Legal Aid
12 Agreement and through any other avenues open
13 to your office to deal with special cases such as
14 this.

15 Was any further consideration given in the Department at
16 that time to other avenues that may have been open with
17 respect to the payment of Mr. Aronson's account?

18 A. Not that I recall.

19 Q. Were you asked by Mr. How to investigate other possibilities
20 at that time?

21 A. Well, I'm not sure whether it was in response to this
22 correspondence or previously, but I was asked to submit Mr.
23 Aronson's account to the Legal Aid people, to have their
24 advice as to what they thought might be payable under their
25 scheme. And that was in response to a request of Mr. How's.
I'm not certain of the chronological order of that request in
relation to this particular letter of the Honourable John

1 Munro.

2 Q. Well, perhaps I can help you out on that. There's a letter
3 from yourself to Gordon Murray on page 26 dated January 7.

4 A. That preceded the dates of the Honourable Munro's letter.

5 Q. Yes, and then there's an answer back from Mr. Murray on
6 page 29 to yourself dated January 26th.

7 A. Yes.

8 Q. In which it would appear that the estimate given to you by
9 Mr. Murray for the amount payable under the Legal Aid
10 scheme would be \$4,943.72.

11 A. Yes.

12 Q. Did you have any concern that that was not a reasonable
13 amount to pay Mr. Aronson considering that he was
14 attempting to get a man out of jail in connection with a
15 situation where he was saying that he didn't commit a
16 murder?

17 A. I didn't consider the account in that context.

18 2:30 a.m.

19 Q. I take it then that you just considered it strictly in the context
20 that this is a person who is eligible for Legal Aid, period.

21 A. That's right.

22 Q. The special circumstances of the case were not something that
23 you adverted to in thinking about his account?

24 A. No.

25 Q. I'll just take you back to Volume 31, in particular page 54.

1 Perhaps you could take a minute and have a look at that
2 letter.

3 A. Yes.

4 Q. Are you familiar with that letter?

5 A. Yes.

6 Q. Did you draft that letter?

7 A. No.

8 Q. Mr. How indicated he thought it was either yourself or Mr.
9 Gale who would have drafted that letter.

10 A. I suspect it was Mr. Gale.

11 Q. Were you involved in the Department in the process of
12 considering which options or which option ought to be used in
13 terms of the reference hearing at all?

14 A. No, not in that sense. I was aware that there was
15 consideration of Option C, if I may refer to it as "C", as well as
16 Option b, under Section 617. I didn't participate in the
17 decision as to which section would be utilized.

18 Q. Were you aware that Mr. Aronson was also involved in this
19 process of correspondence with the federal government
20 concerning the way it should be dealt with?

21 A. No, I don't think so.

22 Q. Would you say that, if you accept this assumption for the
23 moment, that Mr. Aronson was involved in that process, that
24 to the extent that he could have been helped out by material
25 in the possession of the Attorney General's Department, that

1 that material should have been provided to him?

2 A. Material that was relevant, yes, sure.

3 Q. And at this point in time, indeed, when he writes to the
4 federal government on April the 13th at page 38, he doesn't
5 have the RCMP report. Did you have any knowledge at all
6 about Mr. Aronson's either possession or lack of possession or
7 knowledge of the contents of that report in April or May of
8 '82?

9 A. I don't think so. If so, I don't recall.

10 Q. but to the extent that material was relevant in the possession
11 of the Attorney General's Department, you wouldn't have had
12 any trouble making it available to him, I take it?

13 A. No.

14 Q. On page 63, Mr. Chrétien is now on June 16th forwarding a
15 signed copy of the reference. Are you familiar with that
16 correspondence?

17 A. No.

18 Q. Let me just direct your attention to the substance of the
19 second paragraph:

20
21 I [being Chrétien] have refrained from
22 specifically raising the issue of possible
23 compensation to Marshall at the request of your
24 Department on the grounds that the question of
25 whether compensation is appropriate in this case
and, if so, its nature and quantum is a matter for
you and your government to decide.

1 Did you have any involvement in suggesting that the question
2 of compensation not be dealt with in the reference?

3 A. Yes.

4 Q. What was the nature of your involvement in that?

5 A. Well, I think my discussions were primarily with Mr. Gale and
6 also with the Minister. My view was that it was a matter of
7 apples and oranges. The compensation was a different issue
8 than the question of criminality in the issue and that the
9 reference was the jurisdiction of the federal Minister of
10 Justice. The question of compensation was a matter of
11 provincial jurisdiction and ought to be separate and dealt
12 with accordingly. Separate and apart from the reference.

13 Q. Were you of the view at the time that an application for
14 compensation probably would be forthcoming in the event
15 that Mr. Marshall was found to be innocent?

16 A. Oh, yes, Mr. Aronson had indicated that earlier in his
17 correspondence.

18 Q. And the last paragraph of that letter on 63, just the last
19 sentence:

20 I understand, however, that your officials intend
21 to meet with Mr. Aronson and make available
22 the necessary information to enable the
23 appropriate evidence and witnesses to be
brought before the court in an effective manner.

24 Did you take any steps or direct people in your Department to
25 take any steps to make available the necessary information to

1 Mr. Aronson?

2 A. No.

3 Q. Were you aware that the Federal Minister was under the
4 understanding that that was to be done?

5 A. Well, I'm not sure of whether I was aware that he was under
6 the understanding. I mean that was consistent with the
7 policy of the department to make full disclosure and I would
8 expected that to have taken place. Whether or not the
9 Federal Minister was aware of that, I don't know.

10 Q. Other than your involvement, sir, in the question of refraining
11 from having compensation dealt with at the reference, did
12 you have any other involvement in the setting up of the
13 reference?

14 A. No. I have a comment on that, if I may be permitted to make
15 it at this point.

16 Q. Sure.

17 A. And this is on reflection. I'm not satisfied that Subsection (b)
18 was the appropriate section in these circumstances. And Mr.
19 Edwards was of the view, as I recall, and he never spoke to
20 me about this but I understood from Mr. Gale that Mr.
21 Edwards was of the view that Subsection (c) would be the
22 more appropriate section to be utilizing. Subsection (c) was
23 the reference to the court for an opinion. (B) was really in the
24 nature of an appeal. On reflection, I think perhaps Mr.
25 Edwards' position is one that I would, in another event,

1 concur with. I say that because, in this particular set of
2 circumstances, we must remember the Appeal Court that was
3 hearing this reference had already sat in appeal on this
4 particular trial. So, in a technical sense, the Appeal Court, in
5 proceeding under that section, was in the very unusual
6 position of sitting on its own appeal, or else proceeding as if
7 there had not been an appeal heard ten years previously. So
8 I'm not satisfied in my own mind that that particular section
9 is an approp...Subsection is an appropriate section to be used
10 when an appeal in the ordinary course has already been
11 heard by that same court.

12 Q. Did you express those views to your Minister at the time?

13 A. No. As I say, this is on reflection and I think that, I think as I
14 recall, and I got this through Mr. Gale, that Mr. Edwards'
15 concern... I don't know whether they were, that was a basis of
16 his concern or not, but certainly he was concerned with the
17 narrowing down that would take place by the Court in an
18 inquiry under (b) than under (c). And I don't always disagree
19 with Mr. Edwards.

20 Q. Do you think that the Court could have considered
21 compensation under (c)?

22 COMMISSIONER EVANS

23 Sometimes he's right.

24 MR. COLES

25 Sometimes he's right, yes. Probably more often than other.

MR. COLES, EXAM. BY MR. SPICER

1 COMMISSIONER EVANS

2 May I just ask you, though, on the appeal of Marshall, the
3 composition of the panel at that time was not the same as on the
4 reference. Would that make any difference?

5 MR. COLES

6 It makes some difference, My Lord, but it still was a Court.
7 It was still the Court of Appeal of Nova Scotia that had heard the
8 original appeal and was still the Court of Appeal of Nova Scotia
9 that, in effect, was asked to review and, in the process of review,
10 it has to... Well, I shouldn't say it has to, but the perception is that
11 it would be reviewing its own process.

12 COMMISSIONER EVANS

13 Where would it go for an appeal, then? Where would it go
14 for a reference?

15 MR. COLES

16 Well, that's why I say I think Mr. Edwards' concerns had
17 considerable merit. That that may not have been the appropriate
18 section to use. Subsection (c) may have been more appropriate
19 and, true, the Court would not have been able to direct a verdict,
20 but it could make findings that would result in a pardon and the
21 laying of charges against other people, if that was warranted by
22 the evidence. So it may not be the best solution, but it seems to
23 me that there was considerable merit in preferring that
24 subsection than the one that was chosen. but, as I say, and I
25 apologize having to say that, this is my reflection after the event.

MR. COLES, EXAM. BY MR. SPICER

1 I did not address this particular issue at the time.

MR. SPICER

2
3 The panels were completely different. It had MacKinnon,
4 Coffin, and Cooper in 1972. MacKeigan, Hart, Jones, MacDonald,
5 and Pace in '82.

COMMISSIONER EVANS

6
7 But it would still have to go to the Court of Appeal of Nova
8 Scotia, would it not?

MR. SPICER

9
10 Yes.

COMMISSIONER EVANS

11
12 Even though Truscott went to the Supreme Court of Canada.

BY MR. SPICER

13
14 Q. At this point in time in May/June of '83...'82 rather, did you
15 have any understanding of what Mr. Edwards was doing,
16 what work he was doing in connection with the matter?

17 A. No, only that he was very heavily involved in terms of time.

18 Q. You had occasion to call Mr. Edwards on July 21st, I believe.
19 If you look in Volume 17, Mr. Edwards' notes, at page 14.

20 A. Yes.

21 Q.

22 Received call from Gordon Coles. Advised that
23 he was getting feedback from source he wouldn't
24 identify regarding lack of impartiality by the
25 Crown.

What was the source that you were getting feedback from?

1 A. Well, I had a call from Mr. Whalley, who was then the City
2 Solicitor in Sydney, to the effect that he would, was going to
3 be in Halifax and whether I could be available to meet with
4 him, which I did. And he, it was a rather brief meeting but
5 he expressed concern and I presume that the concern he was
6 expressing was given to him by members of the Sydney
7 Police Force that Mr. Edwards appeared to have prejudged the
8 situation and was showing an approach that, in their opinion
9 at least, was something less than full impartiality. And Mr.
10 Whalley expressed these concerns and asked, I think he
11 asked me what the position of the Crown was going to be and
12 I said, "Well, the Crown has an obligation to present all the
13 evidence that the courts will hear and speak to that
14 evidence." I wasn't aware that the Crown had prejudged
15 anything or that the Crown was proceeding in a matter that
16 would be perceived as having prejudged anything. And he
17 said, Well, he had concerns about Mr. Edwards in that regard
18 and I said, "Well, I'll call Mr. Edwards." And after he left, I'm
19 not sure whether it was that day or the following day, I did
20 call Mr. Edwards and I expressed the concerns that he was
21 being perceived as having prejudged this review, judicial
22 review, and was not as impartial as they thought he ought to
23 be, and my purpose of calling him was simply to alert him to
24 that concern and it was a very, as I would have expected it to
25 be, a very congenial conversation, and he indicated to me in

1 response that he had not prejudged it and he wasn't conscious
2 of being impartial in his inquiry and it was not his intention
3 to be so, and that the sum total of it and nothing more was
4 needed on my part, nor did I hear anything further from him
5 on the matter.

6 Q. Was Mr. Whalley suggesting to you that, in his view, Donald
7 Marshall was guilty?

8 A. Not that I recall. We didn't discuss the case in any sense. He
9 wanted to bring to my attention the concerns that were
10 brought to his attention.

11 Q. And what did you understand the concerns that were brought
12 to his attention to have been?

13 A. Well, just as I've said, that Mr. Edwards was perceived as
14 having prejudged the issue that was to be before the Court
15 and was going about his inquiry in less than in an impartial
16 manner. And we didn't get into any particulars. I accepted
17 his representation and I called Mr. Edwards and informed of
18 it.

19 Q. Mr. Edwards' recollection of that conversation occurs at page
20 11895. Referring to you, he says:

21
22 That was the sense I took from this July 21st
23 phone call, you know, and when they said I
24 wasn't being impartial and that I had prejudged
25 the situation. That's what I took him to mean
that, you know, I shouldn't, or to take the
position that Donald Marshall was innocent at

MR. COLES, EXAM. BY MR. SPICER

this stage was premature.

1
2 A. I don't recall getting into that issue. My purpose was simply
3 to communicate to him the concerns that were expressed to
4 me. I had no knowledge that he had, in fact, taken the
5 position or that he was acting impartially.

6 Q. Mr. Edwards had taken the position and had been taking the
7 position since April. If you look back in Volume 31 to page
8 21, I think the following memo on pages 22 through to 25.
9 And, in particular, at page 24, at the top of the page:

10 I submit that there is now no doubt that Donald
11 Marshall did not murder Sandy Seale. Even a
12 complete skeptic would have to agree...

13 A. I'm sorry, Counsel, what page are you reading?

14 Q. 24 of Volume 31, sir.

15 A. Page 24?

16 Q. Yeah, and that's part of a memo dated April 5, 1982 to Mr.
17 Gale, at the top of page 24:

18 I submit that there is now no doubt that Donald
19 Marshall did not murder Sandy Seale. Even a
20 complete skeptic would have to agree that had
21 the evidence which is now available been
22 available in November of 1971, the jury would
23 have had a reasonable doubt and acquitted.

24 Were you aware that that was Mr. Edwards' view?

25 A. I was aware at some point in time that he had personally held
that point of view. I'm not sure that I saw this particular

1 letter at that time. I'm not sure that I... I don't recall seeing
2 this particular letter prior to the preparation for this hearing,
3 but I was aware that, at one point in time, and I think I was
4 made aware of that by, probably by Mr. Gale but it may have
5 been by Mr. Herschorn, that in Mr. Edwards' view, that he
6 was innocent and, and as a matter of fact, that was a view
7 that was shared by many. It wasn't just Mr. Edwards.

8 Q. Was it shared by yourself?

9 A. No, I didn't form any particular view of the matter one way
10 or the other.

11 Q. Did Mr. Edwards ever suggest to you that it was his view that
12 Donald Marshall was innocent prior to the hearing for the
13 reference?

14 A. He certainly did in the meeting I had in my office.

15 Q. Yes, in January, but prior to that?

16 A. Mr. Edwards?

17 Q. Yes.

18 A. No.

19 Q. Were you made aware prior to the January meeting, however,
20 that Mr. Edwards was of that view?

21 A. Oh, yes, I knew that that was his personal view, yes.

22 Q. Did you have some trouble with him adopting that view?

23 A. I did in January, at the January meeting, yes, which followed
24 the hearing before the Appeal Court.

25 Q. Yes, did you have some trouble in July as well when you

1 called him?

2 A. No. No, that was not discussed between us, his views of the,
3 of Mr. Marshall.

4 Q. So when Mr. Edwards says that, "That's what I took him to
5 mean, take the position that Donald Marshall was innocent at
6 this stage was premature." He took from whatever you said
7 the wrong conclusion, is that what you're saying?

8 A. well, I don't know what you're reading from, Counsel.

9 Q. I'm reading from Mr. Edwards' testimony at page 11895,
10 referring to that telephone conversation and telling you what
11 he says he took away from that conversation. That is, "That's
12 what I took him, (being you), to mean, you know. I shouldn't,
13 or to take the position that Donald Marshall was innocent at
14 this stage was premature."

15 A. Yes, I would have expressed myself in a way that he would
16 conclude that, at that stage, it was premature for the Crown to
17 take any position in respect of the matter and that his
18 preparation of the case should proceed as impartially as
19 possible.

20 Q. And, in particular, then, it would have been premature for
21 him to take the position that Donald Marshall was innocent, to
22 particularize it.

23 A. Well, I don't want to be splitting hairs. I wasn't so much
24 concerned about what his personal convictions were. He was
25 entitled to those and I was concerned that the Crown not be

1 either perceived or, in fact, act as if the Crown had prejudged
2 the issue that was to go forward to the Court. And when
3 people made repres... I shouldn't say "people," Mr. Whalley
4 made representations that he was being perceived to be
5 acting in an impartial way because of his perceived
6 prejudgement, I found that such that I spoke to him about it.
7 And I did not think that that, it was appropriate and my
8 recollection of the conversation was that he denied that he
9 was acting in that way and I was satisfied from his response
10 that he would make certain that he was not perceived to be
11 acting that way.

12 Q. Was Mr. Whalley of the view, did he express the view to you
13 that the position Mr. Edwards should be taking was that
14 Donald Marshall wasn't innocent?

15 2:52 p.m.

16 A. No, he didn't express any view as to what view he may have
17 had in respect to Mr. Marshall.

18 Q. Was he concerned that Mr. Edwards was of the view that
19 Mr. Marshall was innocent?

20 A. I don't recall him expressing what he thought Mr. Edwards
21 may have...

22 Q. What was he getting at then?

23 A. Well, he was concerned that...I think, and I'm reading this
24 into the reasons why he raised the issue with me, that if the
25 Crown had prejudged the case, the Crown may be less than

MR. COLES, EXAM. BY MR. SPICER

1 objective in trying to bring forward all the evidence that
2 ought to be heard by the Court, and maybe not intentionally,
3 but would be perhaps more selective than what the
4 circumstances warranted. This was a review process and
5 that he had hoped that all the evidence would be canvassed,
6 not only that which would be consistent with the inquirer's
7 conviction in respect to Mr. Marshall. I think that
8 was...that's the feeling I had for the reason for his call and
9 certainly I thought that the Crown ought not to be perceived
10 as having been...having preconceived views and, therefore,
11 might be open to the suggestion that it was less than
12 impartial in the preparation of his case.

13 Q And that's the position that you took with Mr. Edwards in
14 July. If I can just refer you back to...

MR. CHAIRMAN

15
16 Before we leave there. Mr. Coles, do you recall whether Mr.
17 Whalley during the July meeting...

MR. COLES

18
19 I think it was prior to July, My Lord.

MR. CHAIRMAN

20
21 Oh, well, whenever.

MR. COLES

22
23 Yes, okay.

MR. CHAIRMAN

24
25 Indicated any concern that the investigating police officers

MR. COLES, EXAM. BY MR. SPICER

1 had not interviewed Chief of Police MacIntyre and Urquhart.

2 MR. COLES

3 I don't recall whether he named them specifically. He
4 certainly said that he thought there were witnesses that ought to
5 be interviewed and that he was concerned that they may not. I
6 think there was some reference to...to a probation officer and a
7 sheriff, but my recollection may be faulty in that. He may...he
8 made reference to the fact that he was concerned that all...all the
9 witnesses may not be interviewed and forthcoming if the Crown
10 had already made up his mind as to...that's my recollection, My
11 Lord.

12 MR. CHAIRMAN

13 Okay. Thank-you.

14 COMMISSIONER EVANS

15 Didn't he tell you at the time that he was preparing
16 affidavits for Magee and Urquhart and MacIntyre and that
17 Whalley was going to review them?

18 MR. COLES

19 Who, Mr. Edwards?

20 COMMISSIONER EVANS

21 Yes.

22 MR. COLES

23 I believe he made reference to that, yes.

24 MR. SPICER

25 Q That would be consistent with his notes, Mr. Coles, of a

1 conversation...

2 A. I beg your pardon.

3 Q. That would be consistent with Mr. Edwards' note on page
4 714 of Volume 17 of that call, "Gordon Coles said that they
5 were concerned that I wasn't calling enough witnesses."

6 A. Oh, yes, yes.

7 Q. Magee was one of the names mentioned.

8 A. Yes, yes.

9 Q. Was Magee a name that was mentioned to you by Mr.
10 Whalley?

11 A. I'm not certain whether by name but I think Mr. Whalley
12 made reference to a sheriff and a probation officer and
13 Magee, I think, was a ...I think he was a sheriff.

14 Q. Were you satisfied at the end of this call that Mr. Edwards
15 was being impartial in the sense that you had conveyed that
16 notion to him it was going to be.

17 A. Well, I certainly had the feeling that he was concerned that
18 he would be perceived by anyone as being less than
19 impartial and that he...he had indicated to me that he was
20 not and I concluded from that that he would be...take that
21 into account in his ongoing preparation and...

22 Q. But he didn't back off from the position that he believed
23 Donald Marshall to be innocent though, did he?

24 A. I don't think that...I don't think that was the subject of our
25 conversation. I don't recall that having been discussed by

1 him.

2 Q. He indicates...

3 A. At that particular...during that particular conversation. I
4 don't think I ever heard Mr. Edwards' views prior to the
5 meeting that's referred to in this page on July the 22nd. I
6 heard of them from Mr. Gale but...

7 Q. Right.

8 A. ...not from Mr. Edwards.

9 Q. So, you were aware of the substance of Mr. Edwards' views
10 as expressed in his April memo that not even a skeptic could
11 believe that Donald Marshall was guilty.

12 A. I...I understood that he personally held the view that...to
13 that effect. I don't know about the exact wording. It sounds
14 strange to me about a skeptic.

15 Q. And at the same time, since we're dealing with that memo
16 on page 24 of Volume 31, again in April.

17 A. Just a minute now. Yes.

18 Q. Page 24 under the "Recommendation" section, following the
19 indented material under sub A, "If the Minister of Justice
20 agrees then I submit that the most desirable result of the
21 reference would be a direction by the Appeal Division that a
22 verdict of acquittal be entered on the basis that there had
23 been a miscarriage of justice." Had you been made aware by
24 Mr. Gale that that was Mr. Edwards' view?

25 A. Not to my recollection. The first...the first recollection I have

1 of being made aware of that view was in his letter following
2 the completion of the evidence before the Appeal Court.

3 Q That's the January letter that then gave rise...

4 A. Yes.

5 Q ...to a meeting that you had.

6 A. That's the meeting, yes.

7 Q So, your evidence is that up until that point in time you had
8 no idea that Mr. Edwards was recommending a verdict of
9 acquittal on the basis of a miscarriage of justice?

10 A. That's right. I was aware that he held the view that Mr.
11 Marshall ought to be acquitted.

12 Q Uh-hum.

13 A. But I wasn't aware of that specific recommendation on
14 behalf of the Crown.

15 Q You were aware of the view that he should be acquitted.
16 Was it the fact...

17 A. That he held that as...and I considered that to be his
18 personal conviction.

19 Q Yes. Were you aware that that was what he submitted the
20 direction by the Appeal Court should be, that a verdict of
21 acquittal be entered?

22 A. You're now jumping ahead to his factum.

23 Q No, I'm still in April here. I just want to know exactly what
24 it was you didn't know.

25 A. Well, that's right. I didn't know the nature and contents of

1 this recommendation.

2 Q And did you have any idea up until the time or did you
3 ever have...were you ever given the impression by Mr.
4 Edwards that, in his view, that the basis of the acquittal
5 should be that there had been miscarriage of justice?

6 A. No, but I wouldn't have needed that from him. I don't know
7 how the Court could have come to the conclusion of an
8 acquittal unless it did find a miscarriage of justice.

9 Q Okay. We'll get to that. Were you kept aware or were you
10 made aware of the handling of the reference, that is, what
11 witnesses were called, what was done?

12 A. Only to the extent that I followed it in the newspaper
13 account and I had a ...I had a general but not a specific
14 knowledge of it. I was aware that the court had decided not
15 to hear police witnesses.

16 Q Were you concerned at the time of the hearing of the
17 evidence whether or not Mr. Edwards had been asked to
18 give any theory, any Crown theory?

19 A. Well, that was the concern that I...that was part of our
20 discussions in the July meeting. Prior to that I was not...I
21 was not either aware nor concerned. I...it was not a matter
22 that I had any reason to address.

23 Q If I could just draw your attention to page 16 of Volume 17,
24 again, it's Mr. Edwards' notes. Mr. Edwards is referring to
25 the hearing before the Court of Appeal and a discussion that

1 he had with Martin Herschorn. I just want to draw your
2 attention to the...that rather large paragraph in the middle
3 of 16.

4
5 Martin Herschorn asked whether I had been
6 pressed to give any theory and I reminded him
7 of our talk where I told him that when pressed I
8 told the Court the Crown's position was
9 inquisitorial rather than adversarial. Also
10 reminded him of earlier conversations wherein I
11 told him that the day would probably come
12 where we would have to take a position, and in
13 my professional opinion, we should at that time
14 advocate Marshall's acquittal. Martin Herschorn
15 said I should hold off giving such an opinion as
16 long as possible because the Deputy Attorney
17 General was concerned that we should not
18 appear to be espousing any particular theory.

19
20 Was the fact that you were concerned that there not be any
21 particular theory espoused, was that something that you had
22 discussed with Mr. Gale and Mr. Herschorn at this point time
23 in December?

24
25 A. I don't recall specifically. I obviously had discussed it with
Mr. Herschorn at that time. I don't recall, you know, we had
a very informal relationship in the department and I may
have raised that or...in any conversation I had during that
period.

Q. One of the matters that came up subsequently to the hearing
of the reference was the release by Mr. Aronson of the

1 RCMP report.

2 A. Yes.

3 Q. And I'd like to spend a few minutes just dealing with that
4 for the moment and come back to the hearing of the
5 reference and your meetings with Mr....

6 A. Okay.

7 Q. ...Edwards a bit later. If you could just have a look in
8 Volume 28.

9 A. Yeah.

10 Q. Page 1.

11 A. Yes.

12 Q. "On October 19 you advised," that's Mr. Gale writing to Mr.
13 Edwards. 28 page 1. It's indicated in that letter to Mr.
14 Edwards, "The Deputy Attorney General has asked that you
15 provide us with a report as to how and why and under what
16 conditions you gave the police reports to Aronson." Why
17 was that a matter of concern to you at that point in time?

18 A. Well, it had come to my attention that police reports had
19 been...had been made public and this...this raised a signal in
20 my mind about police reports and the confidentiality of
21 police reports being made public, and I asked Mr. Gale to
22 enquire of Mr. Edwards exactly what he did.

23 Q. This arose in the context of an election campaign, I believe,
24 when the material was somehow...

25 A. It was subsequent to that that it came to my attention and

1 my concern, my concern was about police reports being
2 made available per se, and I read in the morning paper
3 what Mr. Gale had said about he having authorized it.

4 Q. Yes.

5 A. Well, I...with all deference to Mr. Gale, for whom I hold in
6 the highest regard, his recollection is somewhat different
7 than mine. If he had, he certainly didn't tell me that. And if
8 he had, I don't know why he would have written this letter
9 to Mr. Edwards. I would have thought he would have said,
10 "Oh, I know about that, I had a conversation with him" or
11 whatever, "and I told him it's okay," and then I would have
12 got my answers to that enquiry from Mr. Gale. But he made
13 no such acknowledgement to me and I...and as I say, with all
14 deference to him, my recollection is that he at no time ever,
15 ever said he had or had been contacted or whether he
16 authorized it. If he had, obviously I would not have asked
17 him to write a letter to Mr. Edwards.

18 Q. He certainly did indicate in his testimony that he did
19 authorize the release of those reports, that report at 13393.
20 "Mr. Edwards called me and asked about making reports
21 available and I said, 'Well, yes, let him see the report so he
22 can follow through on the thing and prepare his case,
23 because he's got the carriage of it now and we want to see it
24 conducted well.'"

25 A. Yes. I understand that's what I...that's what I was alluding

1 to.

2 Q Right.

3 A. But I would say, counsel, that, you know, which also
4 confuses me and surprises me a little bit is that Mr. Edwards
5 in his reply to Mr. Gale made no reference to the fact that,
6 "Well, I released them because you authorized it," and I
7 would have thought, I would have thought that if Mr. Gale's
8 recollection is correct, that Mr. Edwards would have
9 certainly remembered being so authorized and would have
10 alluded to it.

11 Q And Mr. Gale indicated at 13521 that he told you that
12 Steven Aronson should have access to the material.

13 A. Well, he may have but...and I would have no objection to
14 him having access to all relevant information that we had on
15 file. It may very well be that this particular police report
16 contained nothing that ought not to have been disclosed, but
17 that is not the point in issue. The information I had was that
18 he released a police report. There is no explanation as to
19 why or under what circumstances and that was the purpose
20 of my enquiry. There may have been nothing wrong. It
21 may have contained nothing more than what we would
22 normally have disclosed.

23 Q Right.

24 A. But that is not the context in which the information came to
25 me and that's why I asked Mr. Gale to find out the facts.

1 Q But when you say on page 9 of that volume in your letter to
2 Mr. Edwards in the second paragraph.

3 A I'm sorry, page 9.

4 Q Page 9.

5 A Yes.

6 Q "My concern in having you continue to represent the Crown."

7 A Yes.

8 Q No, I'm sorry, that's another point.

9 A No, that...yeah.

10 Q That's another point.

11 A I think...

12 Q Mr. Herschorn has indicated that if you look at...the policy on
13 page 13...

14 A May I, before you move off of this...

15 Q Sure.

16 A Counsel. In the first paragraph I would like to bring this to
17 your attention, that...in which it says...in which I say, I
18 better read it first. This may not be the letter, but in some
19 communication to Mr. Edwards I made a point that it had
20 nothing to do with the fact that the released report related
21 to the Marshall matter. That it was the release of the police
22 report per se that I was taking exception do.

23 Q Did you consult with Mr. Herschorn or Mr. Gale as to
24 whether or not they considered the release of that report to
25 have been appropriate?

1 A. No.

2 Q Why would you take it upon yourself to say that the release
3 of the report was improper if you didn't consult with the
4 people you described to us as being the experts in criminal
5 law?

6 A. Because the policy of the department was that police
7 reports, per se, were confidential and there is good reason
8 policywise for that position, and that this, in my opinion,
9 was a breach of that position and clear instructions to all
10 prosecuting officers. Mr. Gale knew that, as well as Mr.
11 Edwards. And, my enquiry was to find out the
12 circumstances that Mr. Edwards considered he had the
13 authority to release a confidential police report.

14 Q And Mr. Herschorn has indicated at page 11376 that even
15 under the police...even under the document contained on
16 page 13 of Volume 28, that is dealing with police reports, he
17 has told us that the RCMP report in question could still be
18 released, even under the terms of that document.

19 A. Sure.

20 Q Do you have any trouble with that?

21 A. No, depending on the contents of the report. It may be a
22 report that contained nothing that ought not...that was not
23 relevant and not to be released. And, on the other hand, it
24 may have contained matters that ought not and should not
25 have been released as part of the report. And, it's the

1 examination of the contents of the report that would
2 determine what parts of it could and should be released as
3 part of our disclosure policy. But the police report is a
4 confidential document and it...and, per se, is not included in
5 our doctrine of full disclosure. The contents of it may but
6 the report, per se, is not.

7 COMMISSIONER POITRAS

8 I think what you had in mind, Mr. Coles, is to be found on
9 page 5 of Volume 28, the second page of your letter to Mr.
10 Edwards.

11 MR. SAUNDERS

12 Also, My Lord, the bottom of page 4 of that same letter.

13 MR. COLES

14 Yes, thank-you, My Lord. That was...the last paragraph on
15 page 1 that I was searching for.

16 MR. SPICER

17 Q. Sure. And you would have expected Mr. Gale to say or Mr.
18 Edwards to say, "Look, this was all authorized, why didn't
19 somebody tell me?"

20 A. No, I...and in light of what Mr. Gale is reported to have said
21 before this Commission, I would have expected him, when I
22 raised the question and suggested that he contact Mr.
23 Edwards concerning the conditions and basis for him
24 releasing a police report, I would have expected him to
25 respond to that enquiry and say, "Look, I don't have to write

1 Mr. Edwards, he called me, I looked at the report, I presume,
2 there is nothing in the report that ought not to have been
3 disclosed and I authorized him to do so," and that's the end
4 of the exercise. He, as his superior, would have had that
5 authority. But the information that I had was that police
6 reports were made available, per se, and that was
7 incomplete information to justify, in my mind, anybody
8 breaching the policy of the department.

9 Q. Did you understand that the police report that had been
10 made available was a police report prepared for the use of
11 the Attorney General?

12 3:15 p.m.

13 A. I think at the time I assumed it had but I wouldn't draw any
14 distinction between a police report that's delivered to the
15 Attorney General or a police report that's delivered to one of
16 his agents. A police report is a police report.

17 Q. Were you able to satisfy yourself that the police report in
18 question contained material that should not have been
19 released to Mr. Aronson?

20 A. No, I don't think I ever did ascertain what police report was
21 involved.

22 Q. Would it not be the case that there would be some police
23 reports, or the information contained in some police reports
24 that would be properly disclosable?

25 A. Oh, sure.

MR. COLES, EXAM. BY MR. SPICER

1 Q. Sure.

2 A. Oh, sure.

3 Q. And how could you know in advance that this wasn't one of
4 them if you didn't check?

5 A. Well, I didn't. That's why I had Mr. Gale inquire.

6 Q. And then Mr. Edwards writes back to Mr. Gale on pages two
7 and three and then you write again on page four.

8 A. Yes.

9 Q. At this point when you write in November of '84, do you now
10 know what the contents of that police report was or were?

11 A. No, I was still dealing with the question of releasing police
12 reports per se without them being approved by a superior
13 who had satisfied himself that there was no nondisclosable
14 information in that report.

15 Q. And at that stage in the game, we're still talking really a
16 hypothetical police report.

17 A. Yes, yes.

18 MR. SPICER

19 My Lord, I think I might be a little bit more time on this.
20 Perhaps it would be a good time to break.

21 MR. CHAIRMAN

22 Rather than embark upon another area of examination, I
23 think it may be an appropriate time, but before we adjourn, two
24 matters that I want to bring to the attention of counsel and
25 anyone else. Particularly this week or so, we've had evidence

1 from experienced counsel as to their ability to discern what's in
2 the minds of the judiciary as they watch the behaviour from the
3 bench and I'm sure that you've noted that our colleague, Mr.
4 Justice Evans, has been paying particular attention to the remarks
5 and has shown almost an indecent interest in the evidence that
6 has been forthcoming with respect to ability to negotiate
7 settlements. The reason for it is that tomorrow will mark the last
8 day of his being a member of the Judge of the High Court of
9 Ontario. And I would not want us to adjourn today without noting
10 that fact.

11 It's a recognized fact, as well, that one of the great
12 contributions that Atlantic Canada has made to Upper Canada is to
13 provide a great deal of leadership in all facets of their prosperous
14 way of living, not the least insofar as the law is concerned and the
15 judiciary. Mr. Justice Evans is a native of that great metropolis of
16 McAdam, New Brunswick, where he grew up and then having
17 graduated from St. Joseph's University, he then, for some strange
18 reason, wandered into Ontario and embraced the law and he was
19 called to the Bar in 1939. He was appointed to the High Court of
20 Ontario in October, 1963 and then he took a step that puzzles most
21 of us. He then went to the Court of Appeal of Ontario, where he
22 served from '65 to '76 and then he came back to his senses and
23 became Chief Justice of the High Court of Ontario, where he served
24 until he elected to become supernumerary. When we return a
25 week Monday, Mr. Justice Evans will continue to serve as a

1 member of this Commission as the Honourable Gregory T. Evans,
2 Q. C. He may be more difficult to control than he has been in the
3 past, but in any event, I'm sure that I congratulate him on his
4 achievement and, in so doing I express to him the good wishes of
5 all of us.

6 3:19 p.m. ADJOURNED UNTIL MONDAY, JUNE 20th at 9:30 a.m.

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REPORTER'S CERTIFICATE

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



Margaret E. Graham

DATED THIS 9 day of June

19 88at Dartmouth, Nova Scotia