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

Volume 78

Held: June 20, 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
The Honourable G. T. Evans, Q.C., Commissioners

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

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June 20, 1988INDEX - VOLUME 78Mr. Gordon Coles

Examination by Mr. Spicer	13786
9:55	13798
10:37	13827
11:32	13837
11:41	13842
11:50	13848
12:10	13861
2:03	13871
2:16	13880
2:29	13887
3:14	13918
4:00	13928
4:15	13937
Examination by Chairman	13941
Examination by Mr. Spicer Cont'd	13943
4:30	13947

1 MS. DERRICK

2 My Lords, I wish to advise the Commission that we, as
3 Junior Marshall's counsel, will be making an application to the
4 Commission to have the television cameras and lights turned off
5 during the course of his testimony, which we expect will be early
6 next week, and we will be prepared to argue this motion next
7 Monday, June 27th. We have had discussions concerning this with
8 Commission counsel and they understand that we're going to be
9 bringing this application and are in agreement with the date of
10 our intended motion.

11 COMMISSIONER POITRAS

12 Did you say cameras and lights?

13 MS. DERRICK

14 Yes.

15 COMMISSIONER POITRAS

16 Or just lights?

17 MS. DERRICK

18 Cameras and lights, television cameras and lights. Not still
19 cameras, just the television cameras and lights.

20 MR. CHAIRMAN

21 So, that will be next Monday.

22 MS. DERRICK

23 Yes, if that's acceptable to your Lordships.

24 MR. CHAIRMAN

25

Do you have any medical certificates, et cetera?

1 MS. DERRICK

2 We'll be providing the...

3 MR. CHAIRMAN

4 If we could see them in advance, it would help.

5 MS. DERRICK

6 Yes, certainly, My Lord, we are...

7 COMMISSIONER EVANS

8 To find out if there's going to be any objection.

9 MR. CHAIRMAN

10 You may also...

11 MS. DERRICK

12 Well, that would...

13 MR. CHAIRMAN

14 Either you or Commission counsel inquire of other counsel
15 whether there's likely to be any objection.

16 MS. DERRICK

17 We will certainly do that, My Lord, that is our intention.

18 MR. CHAIRMAN

19 Okay. Thank-you.

20 MS. DERRICK

21 Thank-you.

22 MR. CHAIRMAN

23 Mr. Spicer.

24 MR. SPICER

25 Thank-you.

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

EXAMINATION BY MR. SPICER

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Q. Mr. Coles, when we broke last time we were discussing your conversation with Mr. Edwards in July, that's about where we left off. Prior to speaking to Mr. Edwards in July, did you consult Mr. Gale?

A. I'm sorry, counsel, I didn't have any conversation with Mr. Edwards in July.

Q. Okay. From July twenty...from July of '82 until the meeting with Edwards in January, did you consult Mr. Gale concerning the position that Mr. Edwards was taking?

A. We're talking about the meeting in January now.

Q. In January of '83.

A. Of '83.

Q. That's right.

A. Yes.

Q. From July of '82 until that time, did you have any discussions with Mr. Gale concerning the position that Mr. Edwards was taking or was going to take?

A. I don't recall having any discussions until we received or I received a copy of Mr. Edwards' letter. That's the first time that I recall having any discussions concerning the position he was going to take at the reference.

Q. Did you have any discussions with Mr. Herschorn prior to the meeting in January?

A. No, not on that subject. Mr. Herschorn attended with Mr.

1 Gale with me when I discussed my concerns about a part of
2 that letter, yes.

3 Q. The conversation that I was referring to a minute ago when
4 you indicated you didn't speak to Mr. Edwards was on
5 Wednesday, July 21, '82, when he indicates that he received
6 a call from you. That's the...that's what we were talking
7 about the last time.

8 A. Oh, yes, oh, yes. I'm sorry, I thought you were talking in
9 reference to the, ah, the meeting in January.

10 Q. No.

11 A. Yes, I did have a call. I spoke to...

12 Q. Right. And what I'm trying to get at is between that period,
13 between the time you had that call and the time you had the
14 meeting in January, other than in response to the letter in
15 January of '83, did you have any discussions with Mr. Gale
16 and Mr. Herschorn concerning the position that Mr. Edwards
17 was going to take on the reference?

18 A. Not to my knowledge.

19 Q. Did you receive any further representations from Mr.
20 Whalley concerning the way Mr. Edwards was handling the
21 reference?

22 A. Not subsequent to the meeting he had with me in my office.

23 Q. Okay. Did you receive any further representations from
24 anybody outside the Attorney General's office concerning
25 the position that Mr. Edwards was going to take?

- 1 A. No.
- 2 Q. Were you advised in December of 1982 of the way in which
3 the reference hearing had gone and the evidence that had
4 been presented to the court?
- 5 A. I had a fairly good appreciation of how the evidence had
6 gone, yes.
- 7 Q. Were you advised by somebody?
- 8 A. Not in the sense of being advised. It was discussed from
9 time to time in an informal way. I wouldn't call it advice,
10 but...
- 11 Q. All right. Let's use another word then. Were you told?
- 12 A. I was knowledgeable, I was aware of it. I'm not sure
13 anybody told me specifically. I had access to the media, I
14 had access to people in the department. It was a...
- 15 Q. Did you discuss it with people in the department prior to...or
16 sorry, in around December, 1982?
- 17 A. Not to my knowledge.
- 18 Q. Did you not seek out anybody in your department to find
19 out what had happened at the reference hearing?
- 20 A. I don't think I sought anyone out. I had a, what I thought, a
21 general appreciation of what was happening.
- 22 Q. All right. Well, let's get it straight. Did you talk to anybody
23 in the department or not in December of 1982 about the
24 reference?
- 25 A. Not specifically about the reference, but I'm sure in the

1 course of conversation the subject was mentioned.

2 Q. And if it was mentioned, with whom would you have been
3 discussing it?

4 A. Oh, it would have been mentioned in the context of various
5 conversations that I would have had over that...during that
6 period with Mr. Gale or Mr. Herschorn, not specifically
7 directed to that question, however, that I recall.

8 Q. Did you understand that the police evidence had not been
9 put before the Appeal Court?

10 A. Yes.

11 Q. And from whom did you understand that?

12 A. I don't recall understanding it from anyone specifically. I
13 heard it...I think Mr. Herschorn mentioned it to me, but it
14 may have been Mr. Gale.

15 Q. Was that...was that of interest to you?

16 A. Very much so.

17 Q. Why?

18 A. Well, I thought the reference was going to afford an
19 opportunity to address some of the allegations that were
20 made and I was quite surprised to hear that the Court
21 decided not to hear the police evidence. I don't know if it's
22 relevant to your question, but, you know, they were
23 mandated to review what happened at the time of the initial
24 trial and, of course, as you know, statements were taken and
25 they were introduced and they were found to be voluntary

1 and I found it very difficult, personally, to understand how
2 the court was going to deal with that question if it didn't
3 examine the circumstances under which the original...the
4 statements that were admitted were received. And, I was
5 quite surprised with that decision.

6 Q. Prior to meeting with Mr. Edwards in January, were you of
7 the view that Donald Marshall was innocent?

8 A. I didn't have any particular view. I hadn't addressed that
9 question. It wasn't a matter that I had considered.

10 Q. You knew that it was Mr. Edwards' view that Mr. Marshall
11 was innocent.

12 A. I learned of that subsequently in the course of the
13 investigation, reinvestigation, yes.

14 Q. Yes. Which would have been prior certainly to December or
15 January.

16 A. Oh, certainly, yes.

17 Q. Do I take it then that you weren't prepared to accept his
18 view that Mr. Marshall was innocent?

19 A. I had no views on what he...on that at all. He was entitled to
20 his view. The fact that he concluded that was not germane
21 to me. That was a matter for himself. I had no...I had no
22 difficulty with him coming to that conclusion if that were his
23 conclusion.

24 Q. But it was not a conclusion that you were prepared to
25 accepted based on his advice?

1 A. I don't think I addressed it in those terms. I didn't think it
2 was the...I didn't think his particular conclusion ought to be
3 the position advanced by the Crown.

4 Q. Do I take it then that insofar as...insofar as it was his
5 position that Mr. Marshall was innocent, that was a view
6 that by not taking a position you weren't prepared to
7 accept?

8 A. Well, counsel, I did take a position. I wasn't prepared to
9 concur in the position he was advocating for the Crown.

10 Q. Fine, we agree. What advice had you received at that time,
11 in December '82, January '83, to the contrary? That is, that
12 would indicate that there was any evidence at all pointing to
13 Mr. Marshall's guilt.

14 A. Well, I don't think I received any particular evidence. But if
15 I may say so, you know, up until the decision of our court on
16 the reference, Mr. Marshall stood convicted of an offence,
17 and that conviction was upheld by our Court of Appeal. So,
18 you know, apart from that as being the starting point for the
19 reference I don't think I...well, I didn't receive any evidence
20 or any information to the contrary, but I wasn't expecting to.
21 I was not seeking it.

22 Q. Okay. So, you didn't receive any advice to the contrary. Did
23 you consult Mr. Herschorn or Mr. Gale as to what their views
24 were as to Donald Marshall's guilt or innocence at this time?

25 A. No.

1 Q. Why would you not have done that?

2 A. For no particular reason. I wasn't interested particularly of
3 what individual person's views of Mr. Marshall were. They
4 were entitled to their own views. I wasn't taking issue with
5 anybody's views on Mr. Marshall's guilt or innocence.

6 Q. You were merely taking issue with the manner in which the
7 argument respecting disposition was going to be presented.

8 A. I was concerned about how helpful the Crown was going to
9 be in assisting the Court in this reference, that's right.

10 Q. And with respect to this...to the narrow issue of Mr.
11 Marshall's guilt or innocence then, I take it, that you didn't
12 consult Mr. Herschorn, you didn't consult Mr. Gale and you
13 didn't receive any advice to the contrary indicating that
14 there was any evidence pointing towards Mr. Marshall's
15 guilt, is that correct?

16 A. That's correct.

17 Q. Can you tell us why it was then that you rejected Mr.
18 Edwards' view that an argument ought to be made urging
19 acquittal?

20 A. Well, yes. My view was this, we...the evidence before the
21 Court of Appeal and reference had been heard. The Court
22 did not consider it necessary or useful or for whatever
23 reason decided not to examine the circumstances under
24 which the statements that were admissible and, at the trial,
25 were taken. That area was not before the Court. The Court

1 permitted witnesses who had given previous statements to
2 give further testimony in which they refuted the previous
3 statements. So, the Court had a question. They had to either
4 accept, reject subsequent statements or go with the
5 statements that were admitted before, this is my analysis at
6 least. The Court also permitted, quite properly, Mr. Marshall
7 to give further evidence. It was quite a different kind of
8 Court of Appeal process that I had understood. Mr.
9 Marshall, as you know, gave testimony different than what
10 he gave at the trial. The Court, therefore, had to evaluate
11 and decide which statement they were going to believe, at
12 what point in time. It seemed to me...I wasn't certain
13 whether or not they would consider themselves competent
14 to make that kind of evaluation. Courts of Appeal
15 sometimes prefer that to be dealt with at trial level. Mr.
16 MacNeil's evidence was before the Court. Well, I was
17 familiar with the '71 report. I was familiar with the
18 polygraph results. I was familiar with the opinion of the
19 operator of the polygraph who said no reliance could be
20 placed on Mr. MacNeil. His evidence was before the Court. I
21 didn't have no idea whether the Court was prepared to
22 accept Mr. MacNeil's evidence or reject it. This was all a
23 matter for the Court. So, it seemed to me, quite apart from
24 what Mr. Edwards may have felt personally, that the
25 Crown's role there was to assist the Court in addressing

1 what...if they accepted the new evidence of the witnesses
2 who gave evidence at the earlier trial, if they accepted
3 MacNeil's evidence, what the consequences were, what
4 consequences would flow if they didn't accept that evidence.
5 So, my position was I thought the proper role of the Crown
6 was to assist the Court in evaluating the pros and cons and
7 the weight to be attached and what the consequences would
8 be depending on what statements they accepted and what
9 point of time they were...they were prepared to accept them.

10 Q. Did you consider that there was any issue to be decided by
11 the Appeal Court, other than Marshall's guilt or innocence?

12 A. No, not, not once...not once they had proceeded to eliminate
13 hearing police evidence on the circumstances of the taking
14 of those statements that were admitted.

15 Q. Okay. So, then the answer to my question is that as far as
16 you were concerned there wasn't any issue at that point to
17 be decided by them other than the guilt or innocence of
18 Junior Marshall?

19 A. That's right. Well, no, I would go one step further. They
20 had the further option to order a new trial. I didn't rule
21 that out.

22 Q. Sorry, you didn't...

23 A. No, no, the Court had a further option to order a new trial
24 rather than to determine the guilt and innocence. The Court
25 could have found that there was sufficient new evidence to

1 warrant a new trial being ordered.

2 Q. Was that an option that you thought ought to be left open to
3 them?

4 A. That, well, in my opinion that was an option before them,
5 yes, and I realized there were difficulties inherent in having
6 a new trial, but that was for...that was another issue for
7 somebody else and one that we could have addressed. But it
8 was still an option for the Court, certainly.

9 Q. It certainly was the view of Mr. Edwards, I believe he
10 indicated in correspondence which we'll get to, on January
11 the 18 that there was not, and I think his words were "Not
12 as single scrap of evidence which pointed towards Junior
13 Marshall." Now, how do you suggest that the Appeal Court
14 should be in a position to consider ordering a new trial in
15 that kind of situation?

16 A. Well, if the Court had not been prepared to accept the
17 subsequent testimony of witness Chant and was not
18 prepared to accept the evidence of MacNeil, there was still
19 the further evidence of Mr. Marshall who had decided to
20 give evidence that would be heard. There was further
21 evidence of Pratico, which my understanding is, was
22 practically dismissed by the appellant court, so there was a
23 conflict as to what evidence the court ought to accept and it
24 may very well have thought that it ought to go back for a
25 new trial to have a Judge or the jury evaluate that evidence.

1 Q. Were you of the view that Mr. Pratico gave testimony at the
2 reference?

3 A. No, no, but his affidavit, I think, there was an affidavit
4 submitted and I'm really recalling what the Court had to say
5 about...the value that they would have attached to his
6 statement if he had given one.

7 Q. These views that you've just expressed to us are views that
8 you formulated on your own, I take it, without consultation
9 with...

10 A. Certainly.

11 Q. ...Messrs. Herschorn or Gale.

12 A. Certainly.

13 Q. You...

14 A. And they're views that I expressed when I met with Messrs.
15 Gale and Herschorn prior to meeting with Mr. Edwards.

16 Q. And that would be subsequent to receiving this letter from
17 Mr. Edwards?

18 A. That is correct. And they are views with which, it was my
19 understanding, both had agreed with at the time.

20 Q. We'll get to that. Page 126 of Volume 31.

21 A. Sorry, the page again?

22 Q. Sorry, 1 2 6. You're familiar with that letter?

23 A. Yes.

24 Q. Upon becoming aware of that letter, sir, and prior to meeting
25 with Mr. Edwards, did you seek the advice of Messrs. Gale

1 and Herschorn concerning the matters raised in this letter?

2 A. No, I don't think I sought their advice. I called them in and
3 had them meet with me and I expressed to them my
4 difficulty with the...actually what's on the second page, with
5 the position which I understood Mr. Edwards was intending
6 to advance on behalf of the Crown.

7 Q. Did you discuss with Messrs. Gale or Herschorn the views
8 expressed by Mr. Edwards on page 1 of the letter, in items A
9 and B?

10 A. No.

11 Q. Did you not think that those were important matters?

12 A. Well, I don't think...I don't think that was a matter of a
13 question of importance. I was concerned with the position
14 that he was being...he was advocating. I...these were
15 matters that I did not address personally. I would presume
16 they would be dealt with by Mr. Gale and Mr. Herschorn if
17 there's any reason to deal with them.

18 Q. Was not Mr. Edwards asked to come to Halifax to discuss the
19 letter of January the 18?

20 A. Well, I don't know what Mr. Gale communicated to him, but
21 the purpose of him coming to Halifax was to discuss the one
22 issue, the position that the Crown was going to take before
23 the Appeal Court.

24 Q. Mr. Gale indicated in his testimony that he thought the
25 matters on page 1 of that letter in items A and B, that is,

MR. COLES, EXAM. BY MR. SPICER

1 that the appellant must bear considerable responsibility and
2 the bona fides of the police were in his words "vital matters"
3 that were not discussed at the meeting on the 25th. Would
4 you agree with that?

5 A. Yes.

6 Q. Would you agree that they were vital?

7 9:55 a.m.

8 A. Well I didn't address it, this particularly. These weren't
9 matters that concerned me about Mr. Edwards' position. It
10 was the advocacy that he was going to make before the court.
11 I would not have had any difficulty personally with those
12 statements on page 1 but they were not, I did not address
13 this. And they were not discussed at, or raised in the meeting
14 with Mr. Edwards.

15 Q. Were you then satisfied for your representative, Mr. Edwards,
16 to go to the Appeal Court and argue that Mr. Marshall must
17 bear considerable responsibility for the predicament in which
18 he found himself?

19 A. This was a matter between he and Mr. Gale. Mr. Gale was the
20 director and he was in charge of appeals. That was a matter
21 that I would have thought was best left to him.

22 Q. That wasn't my question. My question was whether or not
23 you were happy to allow Mr. Edwards to go to the Appeal
24 Court and argue that position.

25 A. I didn't address that, Counsellor.

MR. COLES, EXAM. BY MR. SPICER

1 Q. Did you address at all the question of whether or not the
2 police believed that they had the guilty party bona fides in
3 the person of Donald Marshall?

4 A. No.

5 Q. Did you not think that that was important?

6 A. Of course it was important but it was not a matter that I
7 addressed. There are others that had responsibility here that
8 I would, assume, would have considered that.

9 Q. I take it then that you were content to leave those two issues
10 to other people but not content to leave the issue of
11 disposition to Mr. Edwards?

12 A. I was concerned with the position that he was advocating on
13 that point and the other matters I was, it wasn't a matter of
14 not being concerned but they were left to others. I had no
15 particular difficulty or concern about them. But this one I
16 did.

17 Q. Well, let me ask you about that for a second. Did you think
18 that it was relevant to Mr. Marshall's guilt or innocence as to
19 whether, with respect to the murder, that he might have been
20 in the Park attempting to commit a robbery?

21 A. I didn't address that. I would not have an opinion on that.

22 Q. Sorry, you would not...

23 A. Have had an opinion on that.

24 Q. What is your opinion on that though? Do you think that's
25 relevant and had anything to do with it at all? Whether or

MR. COLES, EXAM. BY MR. SPICER

1 not Mr. Marshall was in the Park to try and commit a
2 robbery?

3 A. What, in respect to his...

4 Q. Guilt or innocence on that murder charge.

5 A. I, you know, I'm not familiar enough with the circum..., I
6 would not think it's relevant unless it's part of the just that
7 there was provocation and he was involved in a confrontation
8 with a party that was going to be robbed and as a
9 consequence of that, a murder took place, I mean, in that
10 sense, if murder was one of the factors involved, I suppose it
11 would be relevant, but I'd have no opinion on that. I've
12 never considered that.

13 Q. Never thought about it?

14 A. No.

15 Q. You indicated to me that you were satisfied to leave issues (a)
16 and (b) to Mr. Gale. Did you discuss them with Mr. Gale at all?

17 A. I don't want to sound as if that was an affirmative decision. I
18 mean this would normally be part of Mr. Gale's responsibility
19 and I would simply assume that he would address the other
20 elements of the letter that, to the extent that he thought it
21 was necessary to address them. I didn't address them and I
22 just assumed that he, in the normal course of his
23 responsibilities, would have done so, if there was any concern
24 on his part.

25 Q. Did he indicate to you at any time that there was any concern

MR. COLES, EXAM. BY MR. SPICER

1 on his part?

2 A. Not to my knowledge.

3 Q. What was Mr. Gale's view with respect to the issues raised on
4 the second page of that letter, that is, the disposition?

5 A. Well, my clear understanding is that both he and Mr.
6 Herschorn agreed that the Crown ought not to advocate a
7 particular position and that they ought to assume the role of
8 addressing the evidence that was before the court and, to my
9 recollection, concurred with my view, that that was a proper...

10 Q. Did he express...

11 A. Position for the Crown to take.

12 Q. Did he express that view to you?

13 A. No, I don't know that he expressed it but he certainly, they
14 both agreed with that position.

15 Q. Did they agree with it by saying something or just by not
16 disagreeing with you? In other words, by silence.

17 A. No, I had the very definite understanding that they agreed
18 with my position, otherwise, if I had felt otherwise, we would
19 have discussed their particular views which were not
20 discussed.

21 Q. All right. So is the answer to my question that you assumed
22 their agreement by reason of the fact that they didn't say
23 anything to you?

24 A. No, I think in the exchange of conversation they expressed
25 themselves in agreement with my position.

MR. COLES, EXAM. BY MR. SPICER

1 Q. Mr. Gale indicated to us that he wasn't happy with the
2 position that you took with respect to Mr. Edwards at page
3 13404. "That he'd never before seen the Crown not take a
4 position." That's on the same page. And that he didn't agree
5 with your position at all on that.

6 A. Well that's a view that he didn't express at the time. If he
7 held that view, he certainly didn't express it.

8 Q. And you're saying to the extent that he says that he did, that
9 he disagreed with you, he didn't express that view to you?

10 A. Just the contrary.

11 Q. Did you discuss it with Mr. Gale prior to meeting with Mr.
12 Edwards?

13 A. My recollection is I had only had the one meeting with he and
14 Mr. Herschorn.

15 Q. Prior to meeting with Mr. Edwards or at the meeting with
16 Edwards.

17 A. Oh, no, no. The conversation that we've just...

18 Q. Yes.

19 A. Was prior to meeting with Mr. Edwards.

20 Q. Okay. And that was, Mr. Herschorn was also at that meeting?

21 A. Yes, and it was pursuant to that meeting that he made the
22 phone call to Mr. Edwards.

23 Q. Right. What was, what views did Mr. Herschorn express at
24 that meeting vis-a-vis the disposition issue?

25 A. Well, my recollection is that he also concurred with the views

MR. COLES, EXAM. BY MR. SPICER

1 that I thought were the proper position for the Crown to take.

2 Q. And, again, was that a concurrence that was expressed
3 actively or did he just sit there and not say anything?

4 A. No, it was expressed.

5 Q. So you were satisfied when you went into your meeting with
6 Mr. Edwards that both Mr. Gale and Mr. Herschorn were in
7 agreement with you?

8 A. Oh yes, certainly.

9 Q. Did you...

10 A. But neither expressed any views to the contrary either at the
11 meeting or subsequent to the meeting.

12 Q. Did you have any discussions with the Attorney General as to
13 the position to be taken by the Crown?

14 A. Not at that time, no.

15 Q. Subsequently?

16 A. Afterwards, yes. I reported to him that I had expressed
17 these, wanted this position which, this was after the filing of
18 the factum, that, I'm not sure exactly when but subsequent to
19 that, I advised the Attorney General that there was a
20 difference of opinion between counsel, Mr. Edwards and
21 myself, and I summarized to him what my views were and
22 what Mr. Edwards' views were and I don't recall there was
23 any response but it was more of an information.

24 Q. Did he indicate to you his agreement with the position that
25 you were taking?

MR. COLES, EXAM. BY MR. SPICER

1 A. I don't recall any response just, thank you. I don't recall him
2 taking any position either for or against, either one of them.

3 Q. He indicated to us at page 10937 that he agreed with
4 Edwards' view concerning disposition. Did he indicate that to
5 you in any way?

6 A. Who's "he"?

7 Q. The Attorney General.

8 A. Mr. How?

9 Q. Yes.

10 A. Certainly not. Where is that statement, Counsellor?

11 Q. 10000-, no, it's in the evidence.

12 A. Oh.

13 Q. He indicated that he agreed with Edwards on the disposition
14 issue, page 10937.

15 A. Well, if he...

16 Q. In any event he didn't express that to you.

17 A. He never, he didn't express that to me. As I said, I don't
18 recall him making any comment on that.

19 Q. If you could, can you tell me how your discussion with Mr.
20 Gale and Herschorn, prior to the meeting with Mr. Edwards
21 went. Did you solicit their advice or did you say to them,
22 "This is my view, what do you think?" Which way did it go?

23 A. Well, at the risk of sounding high-handed, I suspect I
24 probably, after I read the letter, I called them in and said,
25 "Look, I'm not very comfortable with this position of Edwards.

MR. COLES, EXAM. BY MR. SPICER

1 It seems to me (and I don't want to repeat myself) this is the
2 approach that the Crown ought to take."

3 Q. Yes.

4 A. And my recollection is they agreed. And I said, "Well look,
5 how about getting a hold of Edwards?" and the rest is what
6 we have come to, I guess.

7 Q. And it wasn't, I take it from what you're saying that there
8 wasn't a murmur of disagreement from Mr. Gale on this?

9 A. That is correct.

10 Q. Now you meet with Herschorn, Gale and Edwards on January
11 25th. Did you discuss at that meeting any of the issues that
12 are covered in page 1 of Mr. Edwards' letter?

13 A. No.

14 Q. That is, you didn't.

15 A. No.

16 Q. Was there any view expressed at any time during that
17 meeting by anybody there that those issues ought to be
18 discussed?

19 A. No, I think everyone there understood why we were there.
20 We were there to discuss the question of, on page 2, the
21 position that Mr. Edwards thought he was obliged to take.

22 Q. I take it, then, that there was no discussion by anybody about
23 the issues on page 1.

24 A. Not with that meeting, not at that meeting with me.

25 Q. Okay. Give us your recollection of what happened at the

MR. COLES, EXAM. BY MR. SPICER

1 meeting.

2 A. Well, I think generally I've had an opportunity to see Mr.
3 Edwards' notes. I think, generally, they probably set out the
4 substance of the meeting. We met and, I'm not sure now, we
5 had quite a long meeting. I think it went a couple of hours
6 and I explained, I think I opened the meeting by explaining
7 the reason why we were there and the nature of my concern
8 and what I considered to be the more appropriate position for
9 the Crown to take and my reasons for it and then I think Mr.
10 Edwards expressed his views and made his argument and
11 from there we joined issue on what the proper role of the
12 Crown was in this particular set of circumstances and I don't
13 recall Gordon, or Mr. Herscho-, Mr. Gale and Mr. Herschorn
14 participating to any great extent. They had the odd
15 intervention but I don't think, I don't recall particular to what
16 effect....

17 Q. The sense one gets of that meeting, it was basically a
18 discussion between yourself and Mr. Edwards.

19 A. I think that's correct.

20 Q. And at times a fairly heated discussion?

21 A. I don't know heated, perhaps we raised our voices. I don't
22 know what you mean by "heated" but we both held strong
23 views on that particular issue I think. I think that would be a
24 correct way of putting it.

25 Q. And what was the reason for, or what information or advice

MR. COLES, EXAM. BY MR. SPICER

1 did you have in formulating your view that the position that
2 Mr. Edwards was taking was incorrect? Other than your
3 sense of it.

4 A. Well as I said to you earlier, he had made a judgement and he
5 presumed the court was going to make the same judgement
6 on the statements or the testimony which was now to be
7 accepted by these witnesses, including Mr. Marshall. And I
8 generally did not think that was a proper function for the
9 Crown. We're there to present all the relevant information
10 and evidence and to address it. And I thought by taking that
11 position we were, in effect, usurping the role of the court.
12 The court was mandated to make these decisions, not the
13 Crown.

14 Q. Isn't by taking a position, wouldn't by taking a position,
15 wouldn't Mr. Edwards be doing exactly what the Crown does
16 in every other case, that is, take a position? Mr. Gale
17 indicated to us he'd never seen a case before, and he argued
18 hundreds of cases, where the Crown had not taken a position.
19 What I want to know is, what's different about this one?

20 A. Well, first of all, Mr. Gale has never been before the court on
21 this particular kind of case. This was not an ordinary appeal
22 where the Crown, of course, is, it depends, of course, which
23 side it is. I don't need to tell you that. Whether it's a hole in
24 the conviction or whether it's asking for additional sentencing.
25 Of course, in those particular cases the Crown may have a

MR. COLES, EXAM. BY MR. SPICER

1 very specific position. This was not, if we were taking a
2 specific position, I suppose, if this were an ordinary kind of
3 appeal, we would be upholding the Appeal Court, our own
4 Appeal Court, in the normal course if this was an ordinary
5 kind of a case. This is not an ordinary, but we did take a
6 position, you know. You keep making reference that it was a
7 case of Mr. Edwards advancing a position and I advancing no
8 position. That is not correct, Counsel. I was advocating the
9 position, a different position from that taken by Mr. Edwards.
10 And for the reasons I started to tell you. It seems to me that
11 Mr. Edwards, for the best of reasons, I'm not imputing malice
12 or anything here, he came to a certain conclusion. But he did
13 that in the same process that the court was to going to have to
14 come to. And it seemed to me it was less helpful to the court
15 to say, "This is the position. Save yourselves the trouble. I've
16 already answered all these questions that you probably have,
17 this is the answer." I didn't consider that to be a proper role
18 of the Crown. I thought the Crown should address all the
19 evidence before the court and evidence that was not before
20 the court, but evidence that was before the trial. If it was
21 going to review to determine whether or not there had been,
22 in fact, a miscarriage of justice.

23 Q. Did you not think it would have been of assistance to the
24 court to have the view of the Crown, as to disposition? Since
25 this was such an unusual case?

MR. COLES, EXAM. BY MR. SPICER

1 A. Well, if the court felt so, the court then could have asked
2 counsel and the counsel would say, well, and given the
3 counsel's own opinion. I'm not so sure it would be proper for
4 the counsel to equate his personal opinion with that of the
5 Crown. But if the court found it helpful or useful, I'm sure the
6 court would have asked the question or could have asked the
7 question. But basically that was the essence of our
8 disagreement. And also, as I say, in expressing that position
9 to Mr. Edwards, you know, I also made reference to Mr.
10 MacNeil's evidence. Now I had no idea, neither did Mr.
11 Edwards, what weight the court was going to give to Mr.
12 MacNeil's evidence. We knew what, in '71, what was thought
13 of Mr. MacNeil and his testimony at that time. And I'm sure,
14 you know, I don't need to refer you to that. I'm sure you
15 looked at that report.

16 Q. Is not Mr. Edwards, though, in this position essentially, it's
17 like he's in a trial court in the sense that the Appeal Court is
18 on a fact-finding mission in this particular case. Do you agree
19 with that?

20 A. Yes.

21 Q. And would you not agree that for the most part Crown
22 counsel will take a position with respect to the fact-finding
23 issue in a trial court?

24 A. Yes.

25 Q. Yes. All right. So in this case, which is really just moving the

MR. COLES, EXAM. BY MR. SPICER

1 fact-finding issue up one court, what was so wrong with him
2 wanting to take that position in the Appeal Court?

3 A. Well, because, I'm not saying, I guess I am saying it's wrong.
4 It was not what I thought to be the appropriate position for
5 the Crown because quite apart from what Mr. Edwards may
6 have concluded in his own judgement on the evidence, the
7 court was still faced with having to make a choice between
8 the evidence that was admissible at trial and what was now,
9 and then testimony which it was now hearing some ten years
10 later. Now that was still a question for the court to
11 determine. Mr. Edwards had already satisfied himself on
12 that. So that's the difference, in my opinion, between the trial
13 and this hearing it on appeal.

14 Q. Had you ever suggested to any of your prosecutors prior to
15 this time that they take the sort of position that you were
16 advocating on this case in other cases?

17 A. No, this is the first time we had ever been involved in this
18 kind of review process during the time I was in the
19 Department. And to my knowledge neither Mr. Herschorn,
20 Mr. Gale nor Mr. Edwards had ever been involved in this kind
21 of a particular reference.

22 Q. This is a pretty unusual situation?

23 A. Well it was certainly unusual to us. It was our first
24 experience with it.
25

1 10:14 a.m.

2 Q. And prior to the time that you received a call from Mr.
3 Whalley, back in July, had you any knowledge at that time
4 as to what kind of view Mr. Edwards was going to take?

5 A. I had very little knowledge at all of the Marshall case prior
6 to that. I knew there was a reinvestigation and I knew that
7 there...it wasn't...pursuant to correspondence we had from
8 the Minister of Justice, but as far as the particulars of the
9 case, I had very little knowledge of it.

10 Q. I think we went over this ground last time. But I believe
11 you indicated that you were aware of the fact that, and
12 correct me if I'm wrong, that as early as April of '82 Mr.
13 Edwards was taking the position that an acquittal ought to
14 be urged and it ought to be urged on the basis of
15 miscarriage of justice and that that report had been brought
16 to your attention.

17 A. Well, if I said that I'm not sure that that...that I intended to
18 say what you've just read to me. I'm not sure I even
19 remember when Mr. Whalley was in to see me. But it was
20 just about that time that I was...that I was made aware of it.
21 I wasn't aware to the extent that I subsequently became
22 aware of it.

23 Q. Are you saying then that up until the time Mr. Whalley
24 came in to see you you had no idea of what position Mr.
25 Edwards was going to take?

1 A. I think that's a correct statement.

2 Q. And as...

3 A. I may have heard, I may have been told that he's inclined to
4 a particular position, but I was not aware that he had
5 concluded a position in respect to the guilt and innocence.

6 Q. Is it fair to say, then, that the formulation of your position
7 was initiated by the discussion you had with Mr. Whalley?

8 A. No, that's not correct.

9 Q. It's not. Well, what was...what then was the issue that
10 initiated your formulation of your viewpoint on this?

11 A. Was the letter, the letter I looked at from Mr. Edwards in
12 January...on January 18th as, was the first indication I had
13 that he was going to advocate this as the Crown position.

14 Q. I see. So...

15 A. I knew what his own personal views were prior to this, but
16 I didn't realize that he was intending to make his personal
17 views those of the Crown.

18 Q. Mr. Edwards files his factum a few days later on February 4.
19 Did you see that factum, sir?

20 A. Yes.

21 Q. It's in Volume 4, which I think you have in front of you at
22 page 1.

23 A. Yeah. I saw it after it was filed.

24 Q. Sure. Did you see it before the argument was made in the
25 Appeal Court?

- 1 A. I think so.
- 2 Q. The meeting with Mr. Edwards was left on the basis that you
3 weren't going to take him off the case, is that correct?
- 4 A. Yes.
- 5 Q. Would it have been your preference if you had the time to
6 do so to have taken him off?
- 7 A. Yes.
- 8 Q. Did you consult Mr. Gale as to whether or not there was time
9 to do that?
- 10 A. No. I knew there wasn't time. I made that clear at the
11 meeting with Mr. Edwards. Now whether or not he would
12 have come off the case would have largely depended on
13 whether or not the Attorney General agreed with me, if the
14 time had allowed for that decision to be taken. It certainly
15 would have been my recommendation to do so.
- 16 Q. When Mr. Edwards left that meeting were you of the view
17 that he was still going to go to the Appeal Court and argue
18 for an acquittal?
- 19 A. Oh, I think so. I think I may have been a little optimistic
20 that he might on his way home to Sydney re-think our
21 conversation and might...might be persuaded otherwise. But
22 I didn't have much expectation that he would do that.
- 23 Q. Sorry, when he left the meeting you didn't, he hadn't
24 included to you, okay, I'll relent, I'll...
- 25 A. Oh, no, no, no.

1 Q. ...position.

2 A. No, no, no. No, no, at that point I was quite convinced that
3 he was not prepared to change his position on that matter.

4 Q. When you reviewed the factum was there...what...

5 A. I didn't review the factum.

6 Q. You didn't.

7 A. I looked at the conclusion to see whether or not he may
8 have changed his position and found that he hadn't.

9 Q. Now the conclusions start at page 37 of the volume, page,
10 sorry, page 39 of the volume, page 37 of the factum.

11 A. Yes.

12 Q. Mr. Edwards indicated to us at page 12,001 that Mr.
13 Herschorn had called him and told him that you were very
14 upset with the factum. Is that a fair characterization of your
15 views?

16 A. I was upset to see that he hadn't been persuaded by my
17 argument.

18 Q. Uh-hum.

19 A. Yes. But that's the only part of the factum I concerned
20 myself about. I must have, I glanced at some...I wasn't
21 aware that Mr. Herschorn had made such a call. He didn't do
22 it on my instructions.

23 Q. But it would be a fair characterization of the way you felt.
24 That you were upset that he hadn't changed his...

25 A. Oh, yes, oh, yes.

1 Q ...changed his position.

2 A. Oh, yes.

3 Q Sure. If I can just direct your attention to paragraph 83 of
4 the factum on page 39. The submission that there
5 essentially was no fault in the criminal justice system.

6 A. Yes.

7 Q Was that...was that a view that you subscribed to?

8 A. Me?

9 Q. Yes.

10 A. Yes. But I...when I read this at that time, my recollection is,
11 I thought he was responding to some argument advanced on
12 the part of the appellant, attributing fault to the criminal
13 justice system. I...when I read this the second time and
14 subsequent to Mr. Edwards' testimony before this
15 Commission I took from his testimony he meant something
16 other than what...other...additional to that. And I didn't
17 appreciate that at the time.

18 Q. Well, at the time that you reviewed the...the time you read
19 the factum in February of '83, did you agree with the
20 submission in paragraph 83,

21
22 The respondent disagrees with counsel for the
23 appellant who argues that the aforementioned
24 order could issue on the basis that there has
25 been a miscarriage of justice. It is submitted
that the latter phrase connotes some fault in the
criminal justice system. The respondent

1 contends that such was not the case and that
2 care should be taken to dispel any such notion.

3 Was that a view with which you agree?

4 A. Well, I agreed, in my view there was, you know, if the Court
5 found in favour of an acquittal it would have to be on the
6 base of a miscarriage of justice. I did not think in my view
7 that miscarriage arose as a result of the criminal justice
8 system. It arose because witnesses, the court accepted
9 subsequent testimony that witnesses had lied. They were
10 the...it was the lying on the part of witnesses that gave rise
11 to the miscarriage of justice in my opinion. It was not the
12 criminal justice system.

13 Q. You knew at the time that there had been failure to disclose
14 the contradictory statements of Chant and Pratico.

15 A. At that time, yes.

16 Q. You knew that. You knew that there had been...

17 A. Well, yes, okay.

18 Q. Sorry.

19 A. Well, you say "failure", that implies a duty, and I'm not sure
20 what...what duty there was at that time on the part of Crown
21 to make a disclosure. There was nondisclosure.

22 Q. There was nondisclosure and do you have any reason to
23 disagree with the view of the Attorney General at the time,
24 Mr. Pace, who indicated that the Crown should have
25 disclosed those statements?

1 A. Well, he may have...he may have knowledge of...that I lack.
2 I don't disagree with him, of course not.

3 Q. All right.

4 A. But that is not a position that I'm in a position to take.

5 Q. Are you telling us as...are you telling us, sir, that as the
6 Deputy Attorney General at this time, in 1983, that you
7 were not prepared to formulate a view as to whether or not
8 it was wrong for the Crown not to turn over those
9 contradictory statements of those witnesses in 1971-'72?

10 A. I don't know, as I said to an earlier question, Counsel, I
11 don't know what instructions were given to the Crown. I
12 don't know what the duty, if there was a duty, in respect to
13 those statements in 1971. I was not in the Department. I
14 was not privy to that information and so I think it's
15 inappropriate for me to make a comment. I know now in
16 the light of the policies and directives of the Department it
17 would be very, very much a breach of a duty.

18 Q. And if the Attorney General at the time had thought that it
19 was a breach of an obligation you would have no reason to
20 disagree with him, even if you don't have a view yourself.

21 A. That's correct.

22 MR. SAUNDERS

23 Well, with respect, My Lords, as I recall the evidence given
24 by former Attorney General Pace, he very carefully stated that he
25 wasn't sure either whether there was a legal obligation in 1971-

MR. COLES, EXAM. BY MR. SPICER

1 '72 to provide that kind of information. He admitted very clearly
2 to my friend, and my friend asked a series of questions as to
3 whether or not it was wrong, and he agreed that it was wrong.
4 But he took the same position that an obligation implied a duty,
5 and he wasn't sure that in 1971 there was a legal requirement
6 that that disclosure take place.

MR. CHAIRMAN

8 It may be a very subtle distinction, Mr. Saunders.

MR. SAUNDERS

9 Yes, there may be, My Lord.

MR. CHAIRMAN

11 In this sense that both Mr. Coles and Mr. Pace are saying
12 "We weren't in the Department at the time, and therefore we are
13 not privy to what was departmental policy or practise," maybe not
14 even what was the court practise at the time. Mr. Pace though,
15 not being aware of that, as I recall, didn't hesitate to advance an
16 opinion with that caveat.
17

MR. SAUNDERS

18 And that's the caveat that I speak to, My Lord, just that.

MR. CHAIRMAN

19 Now, Mr. Coles is saying, in effect, I'm not going...I don't feel
20 inclined to advance the opinion because I don't know what the
21 situation was at the time.
22

MR. SAUNDERS

23 Yes.
24
25

MR. COLES, EXAM. BY MR. SPICER

1 MR. CHAIRMAN

2 Well, what's your problem?

3 MR. SAUNDERS

4 My problem was that I didn't think my friend had
5 expressed the caveat that was mentioned by Mr. Justice Pace
6 when he spoke to it, that being that he wasn't certain what the
7 state of the law was in 1971 as to whether or not there was a
8 legal requirement for that information to have been disclosed.
9 Simply that point, My Lord.

10 COMMISSIONER EVANS

11 You say that there was no legal requirement.

12 MR. SAUNDERS

13 I believe that was his evidence, My Lord.

14 MR. SPICER

15 Page 12,811 indicating to Mr Orsborn, dealing with
16 disclosure of the statements, "You've indicated earlier you believe
17 that was the appropriate practise to be followed. " "Yes."
18 "Although, as you've indicated, you couldn't personally oversee
19 every case." And he indicated at that page that the Crown should
20 have disclosed the Chant, Harriss and Pratico first statements with
21 that caveat, that it was prepared to accept the fact that even
22 though he wasn't there at the time he would agree with that, that
23 it should have been disclosed. And with respect to MacNeil's
24 evidence, at page 12,812 he indicated that the Crown should have
25 disclosed MacNeil's fresh evidence even in the absence of a

MR. COLES, EXAM. BY MR. SPICER

1 request from the defence.

2 MR. SPICER

3 Q. That's what I was going to come to you next with, Mr. Coles,
4 is whether or not you were of the view that the Crown had
5 an obligation to disclose the fact of Mr. MacNeil coming
6 forward.

7 A. Well, again, my answer is the same. In the absence of a
8 request on the part of the defence I don't know what the
9 situation was in respect to the duties or obligations of Crown
10 in those circumstances in 1971.

11 COMMISSIONER EVANS

12 Q. How could they request if they were unaware of it?

13 A. Well, I would think, My Lord, that defence counsel,
14 particularly in the preparation of an appeal, which is the
15 time we're talking about now, would inquire of the Crown
16 whether there's any new evidence that's come to light that
17 ought to be made available for the purpose of the appeal. I
18 would have thought that would be a normal kind of inquiry
19 on the part of defence in preparing for an appeal.

20 Q. I see. In your days of practise did you ever have occasion to
21 run into that situation where prior to the appeal you went to
22 the Crown and said, "Have you anything more that I already
23 know of?"

24 A. I can't remember specifically, My Lord, but I remember
25 talking to the Crown in these areas, these are small

1 communities, and I remember from time to time even in the
2 course of a trial asking the Crown whether any new
3 evidence has come forward that I ought to be aware of, and
4 I would not have found it surprising to expect that of
5 counsel in Sydney, particularly the counsel that Mr. Marshall
6 had, a very experienced, very senior counsel, in preparation,
7 particularly in the light that you...we must remember they
8 were privy to the conversation that took place during the
9 trial in which one of the witnesses indicated that they
10 were...wanted to change their statements. So they were
11 alerted that there may be some change of facts, and I don't
12 know...this is supposition and I ought not to engage in it.
13 But I...I would not have been surprised to expect that
14 counsel of the stature and experience that Mr. Marshall's
15 counsel were to make that kind of an inquiry.

MR. SPICER

17 Q. If you didn't have any views, call them your absence of
18 views on disclosure, why did you not seek out somebody's
19 views as to whether or not it would have been correct or
20 proper for those statements not to have been turned over in
21 1971? How could you support the position that there was
22 no fault in the criminal justice system if you didn't know,
23 you didn't have a view as to whether or not it was proper or
24 improper to turn over the statements at all?

25 A. Well, that's a question I didn't address, Counsel, that's the

1 only answer I can offer you. I...

2 Q. If you could look at paragraph 86 of the factum, at the
3 bottom of page 40 and over to 41, Mr. Edwards, on behalf of
4 the Crown,

5 For the above reasons it is respectfully
6 submitted that the Court should make it clear
7 that what happened in this case was not the
8 fault of the criminal justice system or anyone in
9 it, including the police, the lawyers, the members
 of the jury or the court itself.

10 How could you possibly allow Mr. Edwards to make that
11 submission if you didn't know what the nature of the
12 obligation was in 1971?

13 A. Well, as I said, I did not...I did not address that part of his
14 factum. I was concerned primarily with the advocacy as in
15 the role of the Crown and this is a matter that I did not
16 concern myself, this would be a matter that I would think
17 would be the concern of Mr. Gale. He was a director in
18 charge of criminal appeals.

19 Q. Why is it that you are satisfied to accept Mr. Gale's opinion
20 on these other matters, but not prepared to, sorry, prepared
21 to accept Mr. Gale's dealing with this particular issue but not
22 prepared to let him deal with the other one himself?

23 A. It wasn't a question of not letting him deal with the other
24 one. I was concerned with it from the policy point of view,
25 the proper role of the Crown before the Court. I was not...I

1 was not directly concerned with the evidence and
2 submissions on the evidence. This is a matter that I just did
3 not concern myself about. I assumed that if there were
4 concerns, they would have been dealt with by Mr.
5 Herschorn or Mr. Gale. But I was concerned with the role of
6 Crown counsel before the Court and that's what I concerned
7 myself with.

8 Q Let's take your phrase, you were concerned with the role of
9 Crown counsel before the Court. Did you not consider that in
10 making this submission, that is that there was no fault in the
11 criminal justice system, that your counsel was making a
12 pretty basic policy statement before the Court on behalf of
13 the Crown?

14 A. Well, I can't agree or disagree with that. I did not concern
15 myself with this part of the submissions on the part of the
16 Crown.

17 Q And looking at it now do you not consider that that
18 submission was a fairly important policy statement on the
19 part of the Crown?

20 A. What paragraph was that you...

21 Q Thirty...86.

22 COMMISSIONER POITRAS

23 I think you have to read that in light of the lower part of 85,
24 I think. "It seems reasonable to assume..."

25

1 MR. SPICER

2 Halfway through paragraph 85.

3 MR. CHAIRMAN

4 Well, at the very beginning of 85, the whole of 85.

5 MR. COLES

6 A. Well, I don't know how helpful that submission to the Court
7 would be, but...

8 Q. My question was whether or not you now would consider
9 that to be a fairly important policy position that Mr.
10 Edwards was taking before the Court on behalf of the
11 Crown?

12 A. Well, again, you're premising that question, it seems to me,
13 with deference, to there being a duty and obligation on the
14 part of the Crown.

15 Q. No, I'm asking you now whether or not...

16 A. I don't know whether that would be so.

17 Q. No. That's not what I'm doing at all. I'm asking you
18 whether or not you consider paragraphs, let's put them both
19 in, 85 and 86, to be policy positions taken by the Crown in
20 the Appeal Court?

21 A. Well, I can't answer that question because, you know, I don't
22 know how the Court could address these issues when there
23 was no evidence before the Court on these factors. I don't
24 know how the Crown could ask the Court to respond to this
25 kind of request in the absence of evidence before it. I...

- 1 Q. And you knew that at the time, did you, sir, that there was
2 no evidence before the Court on those issues?
- 3 A. As I said, counsellor, I did not...I did not address these
4 submissions and this conclusion. I only looked at it to
5 determine whether or not there had been a change in the
6 position of counsel in respect to advocating or submitting
7 the acquittal.
- 8 Q. I understand that, but now looking at them, you just
9 indicated to us you don't know how the Court could address
10 them since there wasn't any evidence before them.
- 11 A. I think...
- 12 Q. What I'm asking you...
- 13 A. I think...
- 14 Q. If you just let me finish.
- 15 A. I'm sorry. I'm sorry.
- 16 Q. What I'm asking you is whether or not at the time you knew
17 that there wasn't any evidence to support those propositions
18 before the Court?
- 19 A. Yes, I...my recollection of what was before the Court would
20 say yes to that question.
- 21 Q. And notwithstanding the fact that you knew there was no
22 evidence to support those particular positions, you didn't
23 consider it appropriate as the Deputy Attorney General to
24 intervene, is that what you're telling us?
- 25 A. That's...I didn't read this part of the conclusions and did not

1 address them. I would have left that, as well as the rest of
2 the factum, to the consideration of Mr. Gale.

3 Q. You didn't consider that it was appropriate on your part to
4 intervene?

5 A. It was not the part that interested me or concerned me in
6 respect to arising out of my conversation with Mr. Edwards.

7 Q. Can you tell us how you distinguish in importance between
8 the submission being made by the Crown that there is no
9 fault on the part of the criminal justice system and the
10 submission that Mr. Edwards wanted to make urging
11 acquittal? Why is one more important than the other to
12 you?

13 A. It probably isn't more important, but the...from where I sat,
14 the interest...the part of his letter that attracted my
15 attention was his, what I considered foreclosing some of the
16 options opened to the Court by taking the position which I
17 thought inappropriate for the Crown to take. Now that was
18 my only interest and my involvement in the Crown's
19 position before the Court. And it was that aspect of my
20 concern that I looked at the factum to see whether or not
21 there had been, in fact, any change in his position. The
22 rest...the rest of the matters raised in his letter of January in
23 the factum were not matters that I addressed.

24 Q. Do you think in retrospect, Mr. Coles, that those are things
25 that you ought to have addressed?

1 A. Yes.

2 Q. And why have you come to that conclusion now?

3 A. Well, because apparently they were not addressed by Mr.
4 Gale.

5 Q. Apart from that, looking back on it now, would you consider
6 that you had any direct responsibility yourself to look at
7 those matters?

8 A. No, you have to rely and depend on staff and I certainly did
9 so.

10 Q. I take it then is the answer to my question that looking back
11 on it now you wouldn't consider that you had any direct
12 responsibility to address those issues?

13 A. That's right. But in hindsight it would appear to me that
14 there is some question about the appropriateness of those
15 kinds of submissions to the court in the light of the evidence
16 that they heard, and if...

17 Q. If for some unfortunate reason it was to be done all over
18 again, and you were still Deputy Attorney General, do you
19 think you would, reading those sort of things in a factum,
20 would intervene and say, "Now, wait a minute, there's nothing
21 before the Court on that."?

22 10:37 a.m.

23 A. I would, I don't know if I would make that decision but I
24 would raise that question whether or not there's evidence to
25 support that kind of submission. But I think your question is

1 so speculative that it's probably...

2 Q. There have been a lot of those and I'm just asking your
3 opinion, whether or not you probably would intervene.

4 A. I would think I would ask my senior staff to consider
5 whether or not that submission is supported and they would
6 have to satisfy themselves whether it was or not. I would not
7 do it myself personally.

8 Q. In what respects, up to this point in time, February or so of
9 '83, were you close to the Marshall case? Was it just this
10 issue with Mr. Edwards that you considered yourself to be...

11 A. Yes.

12 Q. Did you consider yourself as...

13 A. Well no, that's not quite complete. There was concerns about
14 a public inquiry. There was concerns about whether there
15 would be an investigation into the Sydney Police force...

16 Q. Well, we'll get to that.

17 A. Yeah, but I mean, no, these, there were these aspects to the
18 Marshall case that...

19 Q. But leading up to the time of the reference is what I'm getting
20 at at this point. Was your contact with the case
21 predominantly dealing with this Edwards' issue?

22 A. I only really had two interventions. One was as a result
23 concerns that Mr. Whalley expressed to me about the lack of
24 impartiality that he perceived on the part of Mr. Edwards in
25 the re-investigation and the role that Mr. Edwards was

1 suggesting be that of the Crown before the reference. They
2 were the two issues, yes.

3 Q. Were you keeping the Attorney General advised as to the
4 progress of the police investigation and the steps leading up
5 to the reference?

6 A. Not specifically as I recall.

7 Q. Well if not specifically, how so?

8 A. Well I suspect that from time to time he would inquire as to
9 the progress of the re-investigation and then we had some
10 conversations in respect to replying to correspondence we got
11 from the Federal authorities in respect to the reference but
12 the latter were, after my initial involvement, the latter was
13 left up to Mr. Gale and I had no direct involvement with the
14 correspondence dealing with the setting, determining the
15 reference.

16 Q. Did you have any discussions at all with the Attorney General
17 then on the matters raised by Mr. Edwards in these
18 paragraphs of his factum? That is, that there's no fault in the
19 criminal justice system. Did you raise that with him at all? -

20 A. No. As I said, Counsellor, I did not...

21 Q. I understand. You didn't discuss that issue at all.

22 A. They didn't attract my attention.

23 Q. Sometime later, you don't need to look at it, in November or
24 so of '84 in connection with the discussions you were having
25 with Mr. Edwards about release of the Aronson material, you

1 mentioned in one of his letters, in one or your letters, that
2 you considered that the position he took on the reference was
3 not the proper position for the Crown to take and you go on to
4 say, this is at Volume 28, page 9, but it was a view concurred
5 in by other senior members of your Department. Who would
6 the other senior members of the Department have been who
7 concurred?

8 A. Mr. Gale and Mr. Herschorn.

9 Q. And you're referring now to your earlier testimony this
10 morning which you say that Mr. Gale indicated agreement
11 with that position as did Mr. Herschorn.

12 A. Yes. Now may I ask you, was that letter that you referred to,
13 was that copied to Mr. Gale and Mr. Herschorn?

14 Q. I expect so. Volume 28, page 9. It doesn't indicate that it is.
15 Would you have thought it would have been?

16 A. Well it, I would have expected it would be blind copied to
17 him, to both of them, yes.

18 Q. Did you have any discussions with Mr. Edwards subsequent to
19 the argument on the reference and prior to the reference
20 decision coming down in May?

21 A. No.

22 Q. Did you have any discussions with senior staff in your
23 Department as to the way in which the argument had gone?

24 A. Not that I recall.

25 Q. Did you do anything, really, in connection with the Marshall

1 matter between the time of the hearing of the argument and
2 the time of the reference decision coming down?

3 A. No. Not in reference to the reference itself.

4 Q. What did you do then between, did you do anything else
5 between February and May of '83?

6 A. Yeah, I think there was some discussions about questions of
7 inquiries, public inquiries. It may not have been that early
8 but my recollection is that it was.

9 Q. Not much happening, though, between the period of the time
10 when the argument was given and the time that the actual
11 decision came down which got things going again.

12 A. Not that involved me, no.

13 Q. Did you review the decision of the Appeal Court?

14 A. I've read the decision.

15 Q. Yes. What impression of that decision did you come away
16 with insofar as it dealt with the issue of miscarriage of
17 justice? The decision's in Volume 4 at page 80.

18 A. Well I don't need to look at that to answer your question. I
19 didn't have any, I don't recall forming any opinion on that
20 issue. Volume?

21 Q. 4, sir, page 80.

22 A. Yes.

23 Q. If I could direct your attention to page 145, the paragraph
24 following the quotation.

25

MR. COLES, EXAM. BY MR. SPICER

1 Donald Marshall was convicted of murder and
2 served a lengthy period of incarceration. That
3 conviction is now to be set aside. Any
4 miscarriage of justice is, however, more apparent
5 than real.

6 Did you have a view as to that statement when you read it?

7 A. No.

8 Q. Were you not of the view that, as I believe you indicated to
9 us earlier, that you couldn't acquit unless there had been a
10 miscarriage.

11 A. Yes.

12 Q. So would you have had some difficulty then with subscribing
13 to this view of the court?

14 A. If I had considered it. I didn't consider it at that time.

15 Q. For what reason were you reading the decision other than of
16 interest?

17 A. To find out the outcome of the reference.

18 Q. Did you review it or read it with a view to advising the
19 Attorney General as to what the decision meant?

20 A. No.

21 Q. Did you advise the Attorney General as to what the decision
22 meant?

23 A. No.

24 Q. Why was that?

25 A. Well I didn't see any need to. He would have read the
decision, I presume, and formed his own opinion.

Q. This wasn't a common or (gardening?) appeal. It was a pretty

1 important case. Did you not consider that you had an
2 obligation to speak to the Attorney General about it. Say,
3 "Look, these are the consequences of this decision from the
4 Department's point of view."

5 A. Well, maybe I should have but the answer to your question is
6 I didn't.

7 Q. In retrospect do you think you should have?

8 A. Well I don't know. I don't know whether I should have or
9 not. But we, I'm sure the subject of the decision was
10 mentioned between us but I did not brief him or advise him
11 specifically in respect to the question that you're now putting
12 to me.

13 Q. On the last page of the decision, page 146 of the volume and
14 66 of the decision, last sentence of the second-last paragraph.
15 "There can be no doubt but that Donald Marshall's
16 untruthfulness throughout this whole matter contributed in
17 large measure to his conviction." Did you have a view as to
18 whether or not that was appropriate?

19 A. Yes.

20 Q. What was your view?

21 A. Well my view was that, and I think I would agree with a
22 statement that I think Mr. Edwards put it perhaps as well as
23 anyone has, that when he decided to give a statement to the
24 police and when he decided to take the stand he was expected
25 to tell the truth. And if he had it may have influenced the

1 police investigation. Certainly it seemed to me that after his
2 conviction he did himself a disservice for which I think he
3 must assume some responsibility in not properly briefing his
4 counsel as to the actual facts that took place that particular
5 night so that they themselves could have, through their own
6 investigation, offered him a better prospect of success on
7 appeal than what the present circumstances permitted him at
8 the time. So I, you know, I think that his, he didn't have to
9 say anything but once he decided to say something he ought
10 to, in his own self-interest it seems to me, and his failure in
11 doing so, I think supports what I would understand from that
12 statement he contributed in large measure to his conviction. I
13 don't know whether that's a phrase I would use to his
14 conviction. He certainly contributed to his being in the
15 predicament that he found himself. Whether or not he can,
16 whether or not one can go so far and say he contributed to his
17 conviction I think you have to take into account what the
18 other witnesses had to say and whose testimony the jury
19 believed. They obviously didn't believe Mr. Marshall's
20 testimony at the trial.

21 Q. Was it a view to which you subscribed though at the time that
22 the reference decision was handed down. That is, that his
23 untruthfulness contributed in large measure to his conviction
24 or did you have some trouble with that?

25 A. I don't know if I would have said large measure to his

1 conviction. I think I would agree with what Mr. Edwards
2 said, large, he used the word "predicament" as I recall and I
3 think that's the word I would have used. It may have been
4 the word I used, as a matter of fact.

5 Q. Can you think of any evidence, sir, that was before the Appeal
6 Court that would have allowed them to conclude that his
7 untruthfulness contributed in large measure to his
8 conviction?

9 A. No, I'm not in a position to answer that. I don't know the
10 evidence before the court to that extent.

11 Q. No, you have indicated to us, though, a degree of knowledge
12 of the evidence before the court.

13 A. Yes.

14 Q. Are you saying that you don't know what the evidence was?

15 A. Not directly. Not directly.

16 Q. Was the decision of the Appeal Court analyzed in detail after
17 it was rendered by anybody in your Department to see what
18 position the Department now ought to take?

19 A. Not to my knowledge. I presume that it would have been
20 read more carefully by Messrs. Gale and Herschorn than by
21 myself but that's a supposition.

22 Q. Did you direct any such analysis of the decision?

23 A. No.

24 Q. Did you have an idea at that time that based on the acquittal
25 that you may be looking at an application for compensation

1 on the part of Mr. Marshall?

2 A. I think that's correct, yes, but I'm not sure just at that time,
3 but certainly subsequent to that, yes. And it wasn't long
4 coming.

5 Q. And did you have any view at that time as to whether or not
6 the statements of the Appeal Court concerning Marshall's
7 contribution to his conviction would have any bearing on the
8 compensation issue?

9 A. Well the, at that time the answer would be no, because we, no
10 decision had been made as to how the question of
11 compensation be addressed because that was only addressed
12 or considered subsequently.

13 Q. And in the days then following the rendering of the decision,
14 that is, May or so of '83, you wouldn't have had any view, is
15 that fair to say, as to whether or not the contribution to his
16 conviction would have any effect on any application by Mr.
17 Marshall?

18 A. That is correct.

19 Q. That's correct.

20 10:51 - BREAK

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11:32 a.m.

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Q. Mr. Coles, just before we leave this question of the reference and Mr. Edwards' handling of it, I want to try and get some idea, if I can, of who, in fact, was responsible, and I want to refer you to a couple of excerpts of testimony from the other actors in this. Mr. Herschorn, I asked him a question whether or not he thought it was relevant, and this is at page 11319 of the testimony:

Q. ...as Mr. Edwards' superior for the issue of the attempted robbery to be before the Appeal Court? (And he says:)

A. Again, I didn't formulate a view on that. Mr. Edwards had the carriage of the case and I and the Department, with one exception, which you're going to get to, left the carriage of the matter to him.

So it didn't seem like he thought he had a responsibility to intervene. Mr. Gale, in answer to some questions by Mr. MacDonald dealing with whether or not anybody ought to be blamed, said at page 13406:

Q. When Mr. Edwards said that's what he was going to emphasize. (Mr. Gale then says:)

A. Yes, but as I told you, I didn't follow the case closely at all. It was turned over to Mr. Edwards at the time of the appeal and I was not going to second-guess him on the matter.

1 So we have both Mr. Gale and Mr. Herschorn, and Mr.
2 Herschorn again, in fact, at 11389. I was asking him, or Ms.
3 Derrick was asking him some questions about the Patricia
4 Harriss evidence and he says:

5
6 A. I'm not certain that I was familiar in detail
7 with it. I may have perused police reports.
8 Again, I should point out that I wasn't the
9 primary person dealing with Mr. Edwards.
(Now we have) Mr. Gale was the primary
liaison person on the Marshall file.

10 Does that testimony surprise you as to the responsibility or
11 lack of responsibility that the persons in your Department
12 thought they had with respect to Mr. Edwards and the
13 hearing of the reference?

14 A. It certainly does. I mean Mr. Gale is the Director of Criminal
15 Appeals and I don't know what he would understand his
16 position to involve, if he didn't, if it didn't encompass
17 responsibility for appeals. He was the person in the
18 Department dealing with the federal authorities in
19 determining the, not determining, but advising from the
20 provincial point of view on the reference itself. He was the
21 person who recommended that Mr. Edwards carry the appeal
22 on behalf of the Crown, which was itself somewhat unusual
23 because appeals, and to this extent, this type of reference fell
24 into that category, are always conducted within the staff of
25

1 the Department at head office and it was Mr. Gale who
2 thought that Mr. Edwards' involvement and his closeness to
3 the situation in Sydney was appropriate and the person that
4 ought to carry it. But he also knew that he had never, to my
5 knowledge, carried any criminal appeal to the Appeal Division
6 of Nova Scotia on behalf of the Crown, then I would have
7 thought that he would have monitored, or certainly involved
8 himself much more than what that testimony would imply.

9 Q. Certainly one gets the impression that everybody is saying:
10 "Here, it's your ball, I don't want it," and throwing it around
11 and I want to ask you whether or not from Mr. Edwards'
12 point of view, was Mr. Edwards of the view that he, in fact,
13 was the person that had carriage of this appeal and that the
14 representations that he was going to make to the court were
15 really a matter for his decision?

16 A. I can't answer that?

17 Q. As far as you knew.

18 A. I can't answer that because that would be a matter between
19 he and Mr. Gale.

20 Q. Did he ever express that view to you?

21 A. Not that I recall, although it may have come up in our
22 meeting in January. He may have made it... I don't recall that
23 specifically, but if such a statement had been made at that
24 meeting, I would have said, "Yes, of course, subject to Mr.
25 Gale, who is the Director of that section."

1 Q Do you think that your intervention on one issue in particular;
2 that is, the question of disposition, could have given the
3 impression to others that you were satisfied with the position
4 being taken on the other issues; that is, issues A and B in that
5 letter on page 126?

6 A. It's difficult to me to answer that. I would not have thought
7 so. Counsel, all parties at that meeting understood that there
8 was one issue that I was addressing and there was one issue
9 that was addressed.

10 Q And Mr. Gale certainly then never expressed the view to you
11 that what he called the vital issues in that January 18th letter
12 weren't dealt with and were regarded by him as being vital.
13 He never expressed a view that "Why didn't we deal with
14 those matters?"

15 A. No.

16 Q No. In the days following the reference, directly following the
17 reference, the Attorney General at the time, Mr. How, was
18 quoted in the press on a couple of occasions. In Volume 38,
19 you don't have to turn to this, but for Counsel's benefit,
20 Volume 38, page 34, in May 11th issue of the Cape Breton
21 Post, amongst other things, the Attorney General at the time
22 is quoted as talking about Mr. Marshall as being "the author
23 of his own misfortune." And then in Volume 38 at page 36,
24 the May 17th Cape Breton Post, he's talking about the
25 "compensation issue and reduction of the amount because of

1 Mr. Marshall's illegal mission." Did you have any discussions
2 with Mr. How about that time that would have assisted him in
3 formulating those views?

4 A. Well, I may have had discussions but I would not have... My
5 discussions with him would not be a basis for those views
6 that you have indicated that he has expressed.

7 Q. How can you be certain that your discussions with him would
8 not be the basis for those views?

9 A. Well, I don't think, I don't ever recall using the phrase
10 "author of his own misfortune." That's not a phrase that I
11 would have used in connection with the Marshall matter. I
12 would have expressed myself about responsibility in respect
13 to his untruthfulness on the stand and that had he, where he
14 agreed to give a statement to the police, that the statement, if
15 it had been otherwise, it may have assisted the police in their
16 investigation that may have led to a different result. And his
17 responsibility towards instructing his counsel. They are the
18 areas that I would have attributed to responsibility to Mr.
19 Marshall, but I would not have... I don't recall using that
20 phrase, author of his own, whatever, misfortune, whatever.

21 Q. So you would not...

22 A. That would have been, that would not have been lifted from
23 conversations that I may have had with the Minister. The
24 second part of the question was about compensation. No
25 consideration at that time, to my recollection, was given to

1 whether the province would respond to any request for
2 compensation. So I would not have been involved in
3 discussing those kind of details with the Minister at that time.

4 Q So you wouldn't have had any discussions with him
5 concerning the effect that Mr. Marshall's own conduct might
6 have on any subsequent application...

7 A. No.

8 Q For compensation? Would you have any idea then where Mr.
9 How would have gotten that advice?

10 11:41 a.m.

11 A. No.

12 Q In the aftermath of the reference decision and looking back
13 on it now for a moment, would you agree with me that you
14 would, you did have the discretion as Deputy Attorney
15 General at the time, to have agreed with Edwards, the position
16 that Edwards was taking before the Appeal Court, you just
17 chose not to.

18 A. Yes.

19 Q You would have had the discretion to, if you focussed on that
20 issue, to stop Mr. Edwards from making the submission to the
21 court that there was no fault in the criminal justice system.

22 A. Yes, but not necessarily with any more success than I had on
23 the first point.

24 Q. No.

25 A. I would have been faced with either replacing him...

MR. COLES, EXAM. BY MR. SPICER

1 Q. It's difficult to say on that one because you didn't discuss it
2 with him...

3 A. No. True.

4 Q. So you don't know how strongly he held the view but you
5 would have had the discretion to intervene...

6 A. Oh yes.

7 Q. On that issue.

8 A. Oh, of course.

9 Q. And, indeed, would have had the discretion if you had so
10 chosen and felt that way to admit partial blame on the part of
11 the Crown.

12 A. If I were privy of the facts that would support that, certainly.

13 MR. SPICER

14 Could the witness be shown Exhibits 138, please, and yeah,
15 138?

16 COMMISSIONER EVANS

17 What volume is that?

18 MR. SPICER

19 It's not in a volume. It's separate pages, they're letters.

20 Q. I just want to direct your attention to the first two pieces of
21 correspondence in that pile of materials. The August 29th
22 letter from Mr. How and the September 7 letter. Are you able
23 to tell me whether or not you would have had any
24 involvement in drafting that correspondence?

25 A. I had no involvement in drafting. I have no recollection of

1 seeing either of them prior to now.

2 Q. It, would correspondence that the Minister was sending out to
3 citizens, as in the case of these two letters, be something that
4 he would consult you about from time to time?

5 A. In some instances, yes. Not, you know, not necessarily as a
6 rule but...

7 Q. Was the Marshall case one of those instances where he might
8 consult you?

9 A. Yes, but he certainly did not in respect to these pieces of
10 correspondence.

11 Q. Are you able to tell us whether or not he consulted you with
12 respect to the views that he expresses in these letters quite
13 apart from whether or not you were involved in the drafting
14 process? Perhaps you want to take a second and have a look
15 at them.

16 A. Well the, if I may refer to Exhibit 138, the second paragraph,
17 I would have no difficulty with that position expressed. That
18 would coincide with the views I held personally.

19 Q. In the first paragraph, sir?

20 A. I mean the first, well, the...

21 Q. First paragraph of the letter...

22 A. The first main paragraph that starts, "I would remind you..."

23 Q. Yes. Sorry, the first main paragraph.

24 A. The contents of that is a statement that I would...

25 Q. I thought you indicated to us earlier that you had some

1 trouble with the view that Mr. Marshall was, in large part, the
2 author of his own imprisonment.

3 A. Well, I'm talking about, the view is here that he, I was really
4 referring to the fact of his untruthfulness in his statement
5 and that if he had been truthful at his original trial and to the
6 police and the court then the murder charge may not have
7 been laid. That aspect of it would coincide with my views.

8 Q. Let me ask you about that for a second. On the basis of what
9 information would you conclude that that was the case? That
10 is, if Mr. Marshall had said, "Yes, I was in the Park to attempt
11 a robbery." What's the basis of your view that that would
12 have made a difference to the way the investigation
13 proceeded?

14 A. Well quite apart from what reason he was there, he obviously
15 witnessed what happened vis-à-vis the late Mr. Seale.

16 Q. Yes.

17 A. And he obviously was in a position to give a fairly good
18 description of the other two gentlemen and as a matter of
19 fact, my recollection is he even had some idea of the general
20 direction in which one of them lived. And that kind of
21 information it seems to me if it were included in the
22 statement that he volunteered or gave to the police, would
23 have or should have affected the investigation. And similarly,
24 if he had given that kind of a particular to his counsel I would
25 have thought they, too, in their preparation for his defence

1 would have been assisted and the events may have ended up
2 differently.

3 Q. Were you not aware that on the night of the incident that
4 Junior Marshall did, in fact, give a description to Mr.
5 MacDonald of the two people who were involved in the
6 incident? Are you not aware that's precisely what he did.

7 A. Well my information was that the description was in the
8 context of a couple of people he described as priests from out
9 of town.

10 Q. Were you aware that he did give a description to MacDonald
11 that evening?

12 A. I was aware that he did give a description but I'm not sure
13 whether it was the description that I would have expected
14 had been given that would have identified or assisted the
15 police in identifying them as local people.

16 Q. Well if you're now, if you were aware that he did in fact give
17 a description...

18 A. My recollection is, as a result of reading what has come out
19 subsequently, I wasn't aware at the time of course...

20 Q. Did you...

21 A. I wasn't...

22 Q. Did you seek to find out whether or not Mr. Marshall had
23 given a statement?

24 A. No, I think it came out in the police reports that I read in '82.

25 Q. Did you know in 1982 that Mr. Marshall had given a

1 statement to the detectives on the night of the murder?

2 A. I believe I did. If it was in that report I was aware of it.

3 Q. If it wasn't in the report...

4 A. Then I would not be aware of it.

5 Q. You were not aware of it.

6 A. Do you want me to continue with these exhibits?

7 Q. No I want to, still, I don't think I have an answer to my
8 question yet. With respect to the attempted robbery why
9 would you have thought that that would have made any
10 difference if Mr. Marshall had said something about that.
11 Assuming that he gave a description, pretty good description
12 of the two people involved.

13 A. I don't think I said that to you, you'd have to, I don't think I
14 said that the attempted robbery would necessarily be a factor
15 as to...

16 Q. Well in what other respect was he untruthful?

17 A. Well my recollection is the explanation he gave as to what
18 happened and how he became involved with the two men.
19 That he could have been there for the purpose that has
20 subsequently been made public or for other purposes.

21 Q. Sorry, I'm not understanding your answer. Are you telling
22 me that in your view the attempted robbery did make a
23 difference or didn't make a difference?

24 A. Well I don't know whether it would have or not but it seems
25 to me that even if he were not prepared to admit his own

1 reasons for being there and had a different explanation as to
2 how and for what purpose he encountered these two
3 strangers and indicate, in fact, what they had indicated to
4 him. It seems to me if that were made known to the police
5 they would have pursued it differently. I think the
6 explanation he gave of these two strangers obviously was not
7 such that they put any credence in or at least they didn't
8 follow through on, and my only explanation would be that
9 they didn't accept what he had told him. Now if he chose to
10 give them a statement and chose to tell them what he was
11 there for, I don't know what effect that would have had on
12 the police, but it seems to me that what he told them was less
13 than helpful in his own cause because obviously it didn't give
14 them rise or cause to pursue their investigation after they got
15 the statements from people who purported at the time to be
16 eyewitnesses.

17 11:50 p.m.

18 Q. What else should Mr. Marshall have done other than give a
19 statement identifying or giving a pretty good description of
20 the two people he says were involved? What else do you
21 suggest he ought to have done?

22 A. Well, I think he, and I don't know, I don't know what he told
23 or what he didn't tell his counsel, but I would have thought
24 if...

25 Q. Forget about his counsel for the moment. Let's talk about the

1 police.

2 A. Oh, the police. Oh, I don't know that there's anything further
3 than that he ought to have told them or could have told them.

4 Q. So is the answer to my question then that, in your view, you
5 have no reason to think that the robbery or the failure to tell
6 the story of the attempted robbery made a difference or
7 didn't make a difference, in your view?

8 A. I don't know. I don't know what effect it would have. It may
9 have. I don't know.

10 Q. Were you satisfied that Mr. Marshall was at least in part the
11 author of his own misfortune?

12 A. I'm satisfied that he had the responsibility. I don't... "Author
13 of his own misfortune" is a phrase I have a little difficulty
14 because I think...

15 Q. Well, let's use your phrase then.

16 A. His misfortune was a result of the verdict of the jury.

17 Q. He was hardly the author of that.

18 A. Well, that's why I'm having difficulty with your phrase,
19 "author of his own misfortune." I think he could have helped
20 himself differently than what he did and...

21 Q. In what respect?

22 A. Well, I think...

23 Q. What else could he have done?

24 A. He could have told the police the full story. He could have
25 told the police more than what he did tell the police. That

1 may have been a basis for the police to conduct a more
2 extensive investigation than what they did in light of the
3 other statements that they had received. He may have put
4 those other statements in some doubt, if he had made that
5 kind of a disclosure. That's sheer speculation on my part.

6 Q. Other than your sheer speculation, did you have any reason to
7 believe that if Mr. Marshall had said anything other than he
8 said, that the course of the investigation and the prosecution
9 would have been any different?

10 A. No.

11 Q. So I take it then, sir, to come back to these letters in Volume...
12 Sorry, Exhibit 138, in the second paragraph where the
13 Attorney General says, "As a result, five judges of our Appeal
14 Division considered Mr. Marshall was in large part the author
15 of his own imprisonment." That while that may have been
16 the view of the Appeal Court, that wouldn't have been your
17 view?

18 A. I didn't address it in those terms.

19 Q. Have you not just told us that you didn't think that, apart
20 from speculation, that there wasn't anything that you can
21 think of that Mr. Marshall might have said or done that would
22 have affected the course of the investigation or the
23 prosecution?

24 A. Yeah, but...

25 Q. Having said that... Let me finish.

1 A. Just a moment now.

2 Q. Let me finish.

3 Q. Just a moment, counsel.

4 Q. Having said that, how can you now tell us that you didn't
5 form a view as to whether or not Mr. Marshall was, in large
6 part, the author of his own imprisonment?

7 A. Because, in my view, his cooperation with the police and his
8 instructions to his own counsel, if they had been other than
9 what they apparently were, then the police in their
10 investigation and presumably the counsel in their defence,
11 would have, those results would have been different. And to
12 the extent that he admits or has admitted, to my knowledge,
13 that he did not tell the truth in his statement either to the
14 police or when he took the stand and presumably withheld
15 information from his counsel, it seems to me that he has to
16 accept some responsibility for the predicament he found
17 himself in. Now I don't say that those shortcomings on his
18 part amounts to he being the author of own wrongdoing, or
19 whatever your phrase is.

20 Q. Well, let's use your phrase. Do you, were you of the view at
21 the time that, to a degree, Mr. Marshall was, in some measure,
22 responsible for ending up in jail?

23 A. Not at the time but subsequent to the conviction and the
24 appeal, which both happened prior to my coming into public
25 service.

1 Q. But your view in in '83.

2 A. In '82.

3 Q. '82, '83, '84 as the Deputy A.G.

4 A. Yes.

5 Q. You would have been of the view that to some degree he was
6 responsible?

7 A. Yes.

8 Q. And that was based on anything other than your speculation
9 about what he withheld?

10 A. No.

11 Q. Basically the same issue is raised in that second letter, Mr.
12 Coles, to Noreen Provost. Would you have had any
13 discussions... I'm just going to direct myself to the paragraph
14 which beings on the first page and finishes on the second, and
15 particularly the last sentence of that paragraph referring to
16 the Appeal Court. It says:

17
18 The Court took pains to say how unsatisfactory
19 his (that's Marshall's evidence) was even before
the Appeal Division.

20 Did you have any discussions with the Attorney General about
21 that aspect of the matter?

22 A. Perhaps I should read it.

23 Q. Sure.

24 A. Well, I agree with part of it. I have trouble with some of it.

25 Q. Okay, which part of it do you agree with and which part of it

1 do you have trouble with?

2 A. Well, I don't know about the comment about the media. I
3 don't know the basis for that comment. I have difficulty with
4 the sentence that starts at the bottom and goes forward to the
5 next page.

6 Q. "This should not be interpreted as finding him innocent."

7 A. "...finding him innocent." I don't know how else you would
8 interpret the court's finding. They found him, in my reading
9 of the decision, that's exactly what the court said. So I have
10 trouble there. I don't know, you know, the language is, it's
11 different language than I would employ. I don't know
12 whether the court took pains, you know. But I...

13 Q. Do you remember having...

14 A. I agree with what the court in, I mean I'm familiar with what
15 the court said in speaking as to the testimony it heard from
16 Mr. Marshall. That it expressed less than full satisfaction with
17 the candour with which he testified.

18 Q. Was that something you would have discussed with the
19 Attorney General?

20 A. No.

21 Q. No?

22 A. No.

23 Q. Do you know whether or not from your own experience,
24 whether or not those issues were discussed between the
25 Attorney General and either Mr. Herschorn or Mr. Gale? Were

1 you ever advised of that?

2 A. Not to my... I have no knowledge of it.

3 Q. And it's not something you talked to him about?

4 A. No.

5 Q. Can I ask you to turn now to Volume 32, page 152? It's a
6 memo from Mr. Herschorn to Donald Marshall, in connection
7 with Donald Marshall. Do you know whether or not you
8 would have requested Mr. Herschorn to speak to Mr. Edwards
9 on these particular matters?

10 A. Well, I don't think I asked him to speak to Mr. Edwards. It
11 seems to me, if my recollection serves me correctly, that the
12 Attorney General sent a memo to me in which he raised these
13 questions and I passed it to, I passed his memo to either Mr.
14 Gale or to Mr. Herschorn and asked him to advise, or words to
15 that effect.

16 Q. There's a memo from Mr. How at page 159. Is that the one
17 that you would have... You recognize, of course, the trouble
18 with that is that it's 12 days after Mr. Herschorn's memo.

19 A. No, that's not... I don't think that's the memo that I had. I
20 thought there was a memo specifically asking...

21 Q. I think Mr. Herschorn's testimony...

22 A. Asking these issues, raising these issues with me.

23 Q. Your testimony, in any event, is that you weren't involved in
24 the direction to Mr. Herschorn to follow up on these particular
25 items; that is, the charge of perjury or the attempted robbery

1 against Marshall?

2 A. No, that's... No, my recollection is that I did not initiate the,
3 that I was passing on to Mr. Herschorn a request from the
4 Minister.

5 Q. I see.

6 A. Which I think was directed to me.

7 Q. Did you have discussions then with the Minister concerning
8 the appropriateness of charges of perjury or charges of
9 attempted robbery at the time?

10 A. I may have. I don't recall.

11 Q. Did you have a view yourself, sir, at the time as to whether or
12 not it might be appropriate to proceed with charges of
13 perjury?

14 A. No.

15 Q. You didn't have a view?

16 A. No.

17 Q. Did you have a view as to whether or not it would be
18 appropriate for charges...

19 A. You mean at the time when this request was made?

20 Q. Yes, in May?

21 A. No.

22 Q. Did you have a view as to whether or not it was appropriate
23 to consider charges of attempted robbery against Donald
24 Marshall, Junior?

25 A. Not at that time. Not until we had Mr. Herschorn consider the

1 matter and we got his report, his advice back.

2 Q. At about this time...

3 A. I had some views at that point.

4 Q. Okay, I'm going to get to that. At about this time, in fact on
5 the same date, if you have a look in Volume 20 at page four...

6 A. I don't believe I have Volume 20. 24?

7 Q. Volume 20, page four.

8 A. Yes.

9 Q. Correspondence from Mr. Gale to the R.C.M.P. also dated May
10 13, '83. Are you familiar with that correspondence?

11 A. I was familiar that an inquiry was going to be made of the
12 R.C.M. Police. I'm not sure I'm familiar with this particular
13 letter per se.

14 Q. Were you involved at all in the decision as to whether or not
15 it was appropriate to request the R.C.M.P. to look into the
16 original investigation?

17 A. Sorry, you mean their reinvestigation in 1982?

18 Q. The direction from Gale, or the request from Mr. Gale in the
19 third paragraph:

20
21 There remains the question as to whether there
22 should be any inquiry into the handling of the
23 original investigation and the prosecution of it.
24 (This is 1971.) Accordingly, I request that you
25 have your files reviewed to determine whether
there are, in your opinion, any instances of
improper police practices...

1 A. And your question, Counsellor?

2 Q. My question was whether or not you were involved in the
3 determination that this question ought to be asked of the
4 R.C.M.P. at that time?

5 A. I'm not sure whether I was involved with the question to the
6 R.C.M. Police. I was involved with the question that we ought
7 to examine or inquire into this and whether or not it was to
8 be done by the R.C.M. Police at that point, I'm not certain that
9 I was involved in that. But this would be, this would be a
10 course that I would have supported or recommended, but I
11 don't recall whether I was specifically involved in the
12 decision to write this letter to the R.C.M. Police, but it's one
13 that I would have approved of.

14 Q. Why would you have approved of it, sir, if the position taken
15 by the Crown on the reference hearing itself, just referring
16 back to Mr. Edwards' factum again, was that it was to be
17 made clear to the court that what happened was not the fault
18 of the criminal justice system or anyone in it, including the
19 police?

20 A. Because, as I said earlier, Counsellor, I had not specifically
21 addressed myself to that submission being made by the
22 Crown and, at this particular time, there had been previous
23 representations or the issue was raised that there ought to be
24 an investigation into the police and that decision was
25 deferred, but the question of timing seemed to be relevant in

1 our judgement. But we had never actually addressed the
2 issue whether there would be or would not be such an
3 investigation. And with the, my recollection is that with the
4 conclusion of the reference, that was one of the outstanding
5 issues that the Minister would need to address at some point
6 in time. And this was preliminary to that decision.

7 Q. Was the question of the police practices or procedures a
8 matter that had attracted your attention?

9 A. Not particularly, but it was a public issue that had been raised
10 and Mr. Edwards had made a reference to it and it was one of
11 those issues that had to be considered before you could close
12 the file.

13 Q. And were you satisfied then at the time that's something that
14 needed to be done? Have a look at the...

15 A. Yes.

16 Q. Investigation?

17 A. Yes, in the light of the allegations that were being made.

18 Q. And you knew of those allegations and had known of them
19 for some time, I guess, is that correct?

20 A. Yes, I knew of it. I'm not sure how long I knew of it.

21 It would not have preceded '82, but...

22 Q. No. Did you read those pages in Mr. Edwards' factum dealing
23 with absolving the police, the lawyers, the jury, and the
24 court?

25 A. Not to my recollection.

1 Q. You didn't even read them.

2 A. No. I may have glanced through them, but I would not
3 considered having read them in the sense that I would
4 understand your question to be. I was primarily concerned
5 with determining whether or not he had changed his position
6 that he had previously indicated he was going to take in
7 respect to the Crown's role.

8 Q. If I could go back now to the memo at page 159, which is a
9 direction from...

10 A. Same volume?

11 Q. Sorry, 32.

12 A. Yes.

13 Q. That's a memo from Mr. How to yourself asking you to do a
14 number of things.

15 A. Yes.

16 Q. And you've indicated to us in your previous testimony at
17 13058 that you would see it to be your job to insure that a
18 direction of the Attorney General would be carried out?

19 A. Yes.

20 Q. And this particular memo covers off, I think, four issues,
21 considerations in respect of compensation, in the first
22 paragraph; performance of the police, in the third paragraph;
23 performance of the Crown, in the third paragraph; and the
24 question of perjury, correct?

25 A. Yes.

1 Q. Those are the four issues that are dealt with.

2 A. Yes.

3 Q. I want to now go through the material that we have in
4 connection with those four issues to see what your response
5 was to that request from the Attorney General. To start with,
6 if we could just direct ourselves to compensation. Can you tell
7 us what was done on your part in response to the request
8 from Mr. How concerning "the formulation of considerations
9 to take into account if we receive a request from Donald
10 Marshall for some form of compensation"?

11 A. I don't recall that I did, at that stage, much more than to have
12 staff inquire as to whether there were comparable situations
13 in which the issue of compensation arising out of a set of
14 circumstances that pertain to Mr. Marshall and to inquire and,
15 if so, try to get that information.

16 Q. At page...

17 A. I think... My recollection is I simply asked, and I think it may
18 have been Mr. Gale, but it may not have been Mr. Gale, asked
19 someone in the department, and I think it may have been Mr.
20 Gale, but it may not have been, to inquire and seek and try
21 and gather some experience from other jurisdictions.

22 Q. There is a memo from Mr. Herschorn to the Attorney General
23 at page 169 dated May 31 of '83, which in part responds to
24 the compensation question and deals with compensation more
25 particularly towards the end of that memo. Page 177. Are

1 you able to tell us whether or not, having seen that, it would
2 have been Mr. Herschorn that you might have asked?

3 A. Probably, yes.
4 12:10 p.m.

5 Q. Would you have seen this memo that was generated by Mr.
6 Herschorn?

7 A. I probably did although I don't specifically recall. I
8 probably did see it. I would have expected that he would
9 have copied it to me.

10 Q. Sure. At page 177 when Mr. Herschorn deals with the
11 question of compensation, the only issue that Mr. Herschorn
12 advertises to in this discussion of compensation at all is the last
13 two pages of the Appeal Court's decision and the comments
14 about Mr. Marshall's behaviour. Would you agree with that?

15 A. What, that this is all he commented on?

16 Q. Yes.

17 A. Well, I have no reason to question you, counsel. I'm sure
18 you're more familiar with it than I.

19 Q. Would you consider that to be an adequate response to a
20 request to formulate considerations to be taken into
21 account?

22 A. No.

23 Q. Were you aware of any other memos dealing with
24 compensation that were generated in your department other
25 than this memo from Mr. Herschorn, and he...there's another

1 one later, but at least insofar as it relates to compensation,
2 it's identical.

3 A. Well, I...I'm not aware without reference to something
4 offhand the, ah...

5 Q. I think the record indicates...

6 A. This was not...this does...I beg your pardon.

7 Q. I think record would indicate that there is no other memo...

8 A. Uh-hum.

9 Q. Other than another one from Mr. Herschorn which is
10 identical.

11 A. All right.

12 Q. Would you consider then his comments on page 177 to be an
13 adequate response to the Attorney General's request?

14 A. Adequate.

15 Q. Yes.

16 A. No. No.

17 Q. Did you discuss that with Mr. Herschorn at the time?

18 A. Not that I recall.

19 Q. Would you have assumed that...let me ask you this. Did
20 you...would you agree with me that this reference to
21 compensation on page 177 deals only with the...what you
22 could call the bad stuff, in a sense, and says "This is what
23 you got to take away"?

24 A. It would appear to, yes.

25 Q. Yes. And would it be your view that in responding to a

1 request from the Attorney General that one would expect
2 that at some stage of the game he would get both sides of
3 the picture?

4 A. Oh, yes, and in fact, he did.

5 Q. Okay.

6 A. I don't know if it's...if it's appropriate, but, you know, I
7 always...I was always of the opinion that there is no legal
8 liability on the Crown to compensate in these circumstances.

9 Q. Uh-hum.

10 A. And I always held the view that any compensation would be
11 ex gratia, would be an ex-gratia settlement, and in those
12 terms I never...I never entertained the question of
13 contributory negligence, if I may use that reference. That
14 ex-gratia compensation would be simply that. And, it
15 would be determined as a...and at that stage we didn't know
16 whether...how it was going to be determined. There's no...we
17 didn't know whether consideration would be given to setting
18 up a commission, which in fact happened, or whether we
19 would simply get a request and we would have to deal with
20 it on that basis. But...but I...as far as my own view on
21 compensation that was the...that was the basis for my
22 consideration.

23 Q. Would it...

24 A. Of compensation.

25 Q. Just so I understand that answer correctly, would it have

1 been your view that these comments of the Appeal Court
2 that Mr. Herschorn refers to, were neither here nor there
3 insofar as the quantum of compensation that was to be paid
4 to Mr. Marshall.

5 A. In my opinion, yes.

6 Q. Yes. And would you have expressed that view to the
7 Attorney General, Mr. Giffin, at the time?

8 A. When we got to the stage of considering, ah, responding to a
9 request in terms of ex-gratia compensation, yes.

10 Q. Yes. And would you also have expressed that view to Mr.
11 Endres?

12 A. Yes.

13 Q. That...

14 A. Oh, Mr. Endres. I think he was made...I think he was made
15 aware of my views prior to our going into negotiations
16 we...that was a development that happened after Mr. Justice
17 Campbell was appointed.

18 Q. Yes.

19 A. And he was certainly aware of my views on compensation,-
20 ex-gratia compensation. I think...I think I expressed them,
21 as a matter of fact, in a letter that I'm sure he was made
22 aware of. But...

23 Q. Other than... Sorry.

24 A. I'm sorry. But I was speaking here in terms of the
25 compensation to be considered by the Commission. I'm not

1 sure whether the subject even came up when we got down
2 to agreeing on attempted negotiations.

3 Q Well, would it have been your view that, forgetting about
4 the Commission for a moment, that when Mr. Cacchione and
5 Mr. Endres were negotiating some kind of a deal, was it still
6 your view that the question of Marshall's behaviour really
7 was neither here nor there?

8 A In my opinion, yes.

9 Q Yes. And, that's a view that you would have conveyed to
10 Mr. Giffin and...

11 A Well, it's a view I certainly conveyed to Mr. Giffin and it's
12 certainly a position I expressed to the counsel for the
13 Campbell Commission, and I'm sure that Mr. Endres was
14 aware of that. Now, I don't recall specifically addressing it
15 at a subsequent time with Mr. Endres during the course of
16 events that had transpired at that time.

17 Q Mr. How, when he gave testimony, indicated to us that the
18 sorts of things that he was considering or thinking about in
19 terms of factors for compensation, this is at page 10,853,
20 were length of time, responsibility for the incarceration,
21 some notion that he ought to be given a gift, loss of earnings,
22 loss of freedom, and on top of that, at page 10,856, legal
23 expenses. Were you aware that...of those factors Mr. How
24 was considering, thinking about?

25 A Not specifically, but generally I suppose I was. I don't recall

1 them being specifically enumerated in that way, but...

2 Q Other than the memo to which I've referred you at 177 from
3 Mr. Herschorn, what other factors, to your knowledge,
4 considering...in connection with compensation, were
5 conveyed to Mr. How by people in your department?

6 A. I don't have any recollection as to whether there were
7 others or weren't others.

8 Q If you didn't know, do I take you're not...you're not sure
9 whether or not there were any or you don't remember or
10 what?

11 A. Well, I...well both. I'm not sure and I don't remember. I
12 don't recall having any series of discussions with Mr. How at
13 that time on the question of compensation and compensation
14 really became a matter of involvement on my part
15 subsequent to Mr. How's term of office.

16 Q At the time that this memo of Mr. Herschorn's was
17 generated, and I believe you indicated to me that that
18 wouldn't be an adequate response to Mr. How's request,
19 what if anything further did you do to ensure that Mr. How
20 did, in fact, receive an adequate response to his request in
21 connection with compensation?

22 A. Well, the only thing I can recall is a request that staff
23 inquire and assemble the experience of these kind of
24 situations in other jurisdictions.

25 Q Are you satisfied that that was done and that was brought

1 to the Attorney General's attention?

2 A. Oh, it was, I'm not sure at what point in time. I'm not sure
3 whether that information became available to us during Mr.
4 How's term of office or whether or when Mr. Giffin assumed
5 office.

6 Q. Well, if it didn't come to your attention during the time that
7 Mr. How was Attorney General, then can you tell us what
8 your...what you are sure that Mr. How received, other than
9 this memo from Mr. Herschorn?

10 A. Well, I said I don't...I don't have any knowledge of whether
11 he...having received anything other than this.

12 Q. Yes.

13 A. Although with the caveat that that other material may have
14 been available during his term of office and, if so, he may
15 have had it, may have received it.

16 Q. You didn't follow that up personally yourself?

17 A. No.

18 Q. The second issue that's raised in that memo of the Attorney
19 General's, is the performance of the police in the prosecution
20 of Donald Marshall originally, and that's dated May 25, so
21 that would have been twelve days later than Mr. Gale
22 having generated that note to the RCMP. What did you...

23 A. I might...I might, by way of explanation, you know, it may
24 very well be that Mr. How spoke to Mr. Gale and his memo
25 was a follow-up, you know, confirmation to me, I mean. It

1 may have been, it may have been that he had a
2 conversation with Mr. Gale and that's what prompted that
3 letter, and the memo may have been...may have been
4 dictated and not taken off the tape until the subsequent
5 date there. That's speculation on my part.

6 Q. The...

7 A. But obviously it related to the same...

8 Q. All right.

9 A. ...same piece of correspondence.

10 Q. Mr. Herschorn's memo again, at 169, responds, in part, to the
11 role of the Sydney City Police Department in item 1.

12 A. Um.

13 Q. Reference is contained in the decision of the Appeal Division.

14 A. Well, Mr. Gale was the person responsible in dealing with
15 the police, so he would be more...the more likely person to
16 respond to that aspect of the inquiry.

17 Q. Are you able to tell us who it was that generated the three
18 requests that are dealt with by Mr. Herschorn in his memo
19 on 169?

20 A. Well, my recollection is it was the Minister.

21 Q. And you conveyed them through to Mr. Herschorn.

22 A. Yes. That's my recollection.

23 Q. Okay.

24 A. But, as I said, he may have spoken directly to Mr. Gale and
25 he may have been privy to this prior to my receiving the

1 memo.

2 Q. Would you have conveyed or, are you able to tell us
3 whether or not, you would have conveyed to Mr. Herschorn
4 the request that the police aspect of his memo deal only
5 with the references in the Appeal Court decision?

6 A. No.

7 Q. Sorry, you're not able to tell us or...

8 A. No, I would not have...I would not have done anything more
9 than what my...than what that memo could tell us.

10 Q. Do you have any idea how it was then that Mr. Herschorn
11 came to look at the issue of the police behaviour only in the
12 context of the Appeal Division?

13 A. No.

14 Q. Would you agree with me that the activities of the Sydney
15 City Police Department were much broader than any
16 references that were contained in the decision of the Appeal
17 Court?

18 A. Oh, yes.

19 Q. Sure. Because the police evidence wasn't before the Court.

20 A. Wasn't before the...

21 Q. Did you review Mr. Herschorn's discussion of those
22 references in that memo?

23 A. Not that I recall.

24 Q. Some time later in July there's another memo from Mr.
25 Herschorn at page 203 to Mr. How and I think you can tell at

1 the last page of that, on page 208, both yourself and Mr.
2 Gale are copied on that. And, item 2 deals, at least in part,
3 with the activities of the Sydney City Police.

4 A. Yes.

5 Q. Are you able to tell us whether or not the response
6 contained in this memo, and in particular those responses of
7 Mr. Herschorn in item 2, again are responding to the
8 Attorney General's concern about the activities of the police
9 in 1971?

10 A. Yes, that would be my understanding.

11 Q. And would you have reviewed that memo, sir?

12 A. Yes.

13 Q. Other than the memo dealing with the performance, sorry,
14 the comments of the Appeal Court, and this memo of Mr.
15 Herschorn's, are you aware of any other advice that was
16 given to the Attorney General from officials in your
17 department in response to his request to you in May, that is,
18 that we look into the question of performance of the police?

19 A. No. No. Well, you made me aware of Mr. Gale's letter to the
20 RCM Police.

21 Q. Yes.

22 A. Yes.

23 Q. That's why I'm asking, material generated from within your
24 department other than those two memos and...

25 A. No.