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#6

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 Orsborn: Commission counsel

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

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

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

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

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

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

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

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

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

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

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

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

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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?

MS. DERRICK

We'll be providing the...

MR. CHAIRMAN

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

MS. DERRICK

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

COMMISSIONER EVANS

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

MR. CHAIRMAN

You may also...

MS. DERRICK

Well, that would...

MR. CHAIRMAN

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

MS. DERRICK

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

MR. CHAIRMAN

Okay. Thank-you.

MS. DERRICK

Thank-you.

MR. CHAIRMAN

Mr. Spicer.

MR. SPICER

Thank-you.

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

EXAMINATION BY MR. SPICER

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?

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

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

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

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

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

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

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,

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

A. Yes.

Q. Would you agree that they were vital?

9:55 a.m.

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

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

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

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

A. I didn't address that, Counsellor.

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

1 not Mr. Marshall was int he 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

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.

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

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?

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.

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

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

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

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

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

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

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

10:14 a.m.

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

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

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

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

Q. Are you saying then that up until the time Mr. Whalley came in to see you you had no idea of what position Mr. 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 order could issue on the basis that there has
24 been a miscarriage of justice. It is submitted that the latter phrase connotes some fault in the
25 criminal justice system. The respondent

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

Was that a view with which you agree?

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

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

A. At that time, yes.

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

A. Well, yes, okay.

Q. Sorry.

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

Q. There was nondisclosure and do you have any reason to disagree with the view of the Attorney General at the time, Mr. Pace, who indicated that the Crown should have 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-

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.
7 MR. CHAIRMAN
8 It may be a very subtle distinction, Mr. Saunders.
9 MR. SAUNDERS
10 Yes, there may be, My Lord.
11 MR. CHAIRMAN
12 In this sense that both Mr. Coles and Mr. Pace are saying
13 "We weren't in the Department at the time, and therefore we are
14 not privy to what was departmental policy or practise," maybe not
15 even what was the court practise at the time. Mr. Pace though,
16 not being aware of that, as I recall, didn't hesitate to advance an
17 opinion with that caveat.
18 MR. SAUNDERS
19 And that's the caveat that I speak to, My Lord, just that.
20 MR. CHAIRMAN
21 Now, Mr. Coles is saying, in effect, I'm not going...I don't feel
22 inclined to advance the opinion because I don't know what the
23 situation was at the time.
24 MR. SAUNDERS
25 Yes.

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

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.
16 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

6 > For the above reasons it is respectfully
7 > submitted that the Court should make it clear
8 > that what happened in this case was not the
9 > fault of the criminal justice system or anyone in
> 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 my 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

so speculative that it's probably...

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

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

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

A. Yes.

Q. Did you consider yourself as...

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

Q. Well, we'll get to that.

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

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

A. I only really had two interventions. One was as a result concerns that Mr. Whalley expressed to me about the lack of impartiality that he perceived on the part of Mr. Edwards in 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

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

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

A. No.

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

A. Yes.

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

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

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

A. To find out the outcome of the reference.

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

A. No.

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

A. No.

Q. Why was that?

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

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

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

Q. In retrospect do you think you should have?

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

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

A. Yes.

Q. What was your view?

A. Well my view was that, and I think I would agree with a statement that I think Mr. Edwards put it perhaps as well as anyone has, that when he decided to give a statement to the police and when he decided to take the stand he was expected 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

on the part of Mr. Marshall?

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

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

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

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

A. That is correct.

Q. That's correct.

10:51 - BREAK

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.

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

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

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

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

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...

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

statement to the detectives on the night of the murder?

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

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

A. Then I would not be aware of it.

Q. You were not aware of it.

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

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

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

Q. Well in what other respect was he untruthful?

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

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

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

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

11:50 p.m.

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

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

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 his (that's Marshall's evidence) was even before
19 > 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 should be any inquiry into the handling of the
22 > original investigation and the prosecution of it. (This is 1971.) Accordingly, I request that you
23 > have your files reviewed to determine whether there are, in your opinion, any instances of
24 > improper police practices...
25

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

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

A. Probably, yes.

12:10 p.m.

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

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

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

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

Q. Yes.

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

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

A. No.

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

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

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

Q. I think the record indicates...

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

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

A. Uh-hum.

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

A. All right.

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

A. Adequate.

Q. Yes.

A. No. No.

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

A. Not that I recall.

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

A. It would appear to, yes.

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

to the Attorney General's attention?

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

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

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

Q. Yes.

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

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

A. No.

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

A. I might...I might, by way of explanation, you know, it may very well be that Mr. How spoke to Mr. Gale and his memo 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.

Q. ...you now say and also Mr. Gale's request to the RCMP to look into...look at the files.

A. Yeah, I'm not...

Q. Those would have been the three things.

A. Yeah, I'm not aware of anything else.

MR. SPICER

This would be an appropriate time, My Lord.

MR. CHAIRMAN

Okay, two o'clock.

LUNCH BREAK - 12:25 p.m.
2:03 p.m.

Q. I understood before lunch, Mr. Coles, that you were interested in the portion of testimony given by Mr. How concerning his views about a position taken by Mr. Edwards and I referred to a page number and didn't quote the excerpt for you. The page number is 10937, and I'll just read you the questions and answers. This question is directed by Ms. Edwardh:

> Q. If I told you that Mr. Edwards didn't call those witnesses, I take it you would be learning that information for the first time then.
>
> A. Yes, but let me simply add that my knowledge of it was that there was the very highest level of cooperation between the Crown and defence counsel because the Crown in the person of Mr. Edwards was not only sympathetic but was advocating that Mr. Marshall be found not guilty.

Q. And you supported that position.

A. Yes, as I said yesterday.

Q. And you communicated that to Mr. Gale?

A. As the information became.

Q. And Mr. Coles?

A. As the case was, as the memorandums disclosed the case situation, yes, I was. (It's gets a little clearer a little further on.

Q. You were sympathetic. You adopted Mr. Edwards' position with respect to the acquittal and you communicated that position with respect to your views to Mr. Gale, Mr. Herschorn, and Mr. Coles.

A. Probably at some stage, I did, yes.

Q. Indeed, you couldn't have been briefed continually on it, sir, without communicating your general support for the position put forward by Mr. Edwards, could you?

A. I don't know. I may have said to him, "Look, I agree with you." In any event, I may have just said that to them, that it appears that this man is not guilty. You go ahead and proceed under 617(b). I know, ahh, you know, I can't recall precisely saying to them, "I have decided in my view he's not guilty." I don't know as I said it in those terms. But all the reports indicated that Crown counsel had taken that position and so, and I shared it.

Q. Yes, and you shared it.

A. I can say that.

And that was his testimony.

A. Thank you.

Q. Were you aware of the fact that he had shared that view?

A. No.

Q. He never expressed it to you?

A. Well, I have no recollection of him having done so.

Q. Before we broke at lunch, we were going through the issues that were raised by Attorney General How in his memo at page 159 of Volume 32. And the third issue was the performance of the Crown originally.

A. I'm sorry, Counsel, what...

Q. 159 of Volume 32. I identified the four issues before lunch and I just now want to deal with your response to the request by Mr. How to look into the question of the performance of the Crown in the prosecution of Donald Marshall. And if you look again at another one of Mr. Herschorn's memos at page 203.

A. Yes.

Q. Item 2 seems to address that in part. The role of the prosecuting officer, Donald C. MacNeil, in prosecuting the charge of murder brought against Donald Marshall, Jr. And Mr. Herschorn then deals with that specifically at page 207 of that memo. Under 2, Subparagraph 1, it refers to Donald C.

1 MacNeil.
2 A. Yes.
3 Q. Are you aware of any other investigation that was done as a
4 result of this direction by Mr. How to look into the
5 performance of the Crown in the prosecution of Mr. Marshall?
6 A. No.
7 Q. Are you satisfied that Mr. Herschorn's response on page 207
8 was directed to that issue at all?
9 A. Well, I would presume from the reading of it that it was.
10 Q. Are you satisfied that that is an adequate response to a
11 request from the Attorney General to look into the
12 performance of the Crown?
13 A. Well, I don't, you know, I don't know to what extent he made
14 any inquiries other than the statement that Mr. MacNeil was
15 now deceased. I'm not aware of the nature of the inquiries
16 that he made.
17 Q. You're not aware of whether or not, for instance, he might
18 have interviewed Mr. MacNeil's assistant?
19 A. No.
20 Q. Mr. Matheson, Mr. Khattar, or Mr. Rosenblum?
21 A. No.
22 Q. Did you feel it was necessary in order to adequately respond
23 to the Attorney General's request that that sort of questioning
24 be done?
25 A. I didn't consider the nature of the inquiry that ought to be

1 made. I left that up to Mr. Herschorn.
2 Q. Well, sir, with respect, the question was directed to you. It
3 was directed...
4 A. Yes.
5 Q. To Mr. Coles to look into the performance of the Crown. Now
6 as Deputy Attorney General, what did you insure was done in
7 order to satisfy that request of the Attorney General?
8 A. I didn't do anything further than refer it to Mr. Herschorn.
9 Q. Did you review Mr. Herschorn's response?
10 A. No, I don't think I reviewed it. I recall reading it. I recall
11 seeing it. I'm not sure at what point I did that, whether it
12 was before or after it was delivered to the Attorney General.
13 Q. Did you not think you had any obligation to satisfy yourself
14 that the reports of the people below you were, in fact,
15 adequate responses to the requests being made by the
16 Attorney General?
17 A. I didn't specifically address it in those terms. I suppose I
18 assumed that if the Attorney General found this less than
19 satisfactory, he would have asked for more particulars or
20 further inquiries.
21 Q. Was there some reason why the Attorney General could not
22 have been told, "Well, we haven't done anything further. We
23 haven't talked to Mr. Khattar. We haven't talked to Mr.
24 Rosenblum. We haven't talked to Mr. Matheson," for
25 instance?

A. Well, I don't know. As I say, I don't know who Mr. Herschorn consulted or contacted in the matter.

Q. Do you accept that it was your obligation to respond to the Attorney General's request?

A. Well, it was my responsibility to respond, but not necessarily personally.

Q. Would you accept that it would be your obligation to insure that that was an adequate response?

A. Yes, I suppose that would be part of my obligation.

Q. Yes, and did you do so?

A. I didn't consider it in that sense, whether it was adequate or inadequate. It seemed to me it was a response that Mr. Herschorn gave and I didn't concern myself in further particular on it.

Q. Were you then satisfied that Mr. Herschorn's response was proper and adequate?

A. I didn't make any evaluation of it at all.

Q. Why not?

A. Well, I suppose, at that time, I had a few other things to deal with and I left this, I assigned this to Mr. Herschorn and had confidence in his ability to pursue and report back, which he did, and I didn't concern myself further.

Q. And I take it, then, insofar as you were concerned, that you were satisfied to turn the thing over to Mr. Herschorn and to not review the adequacy in any way of what he did.

1 A. That is correct.
2 Q. Do you consider on reflection, Mr. Coles, that perhaps a little
3 more ought to have been done to look at the performance of
4 the Crown?
5 A. Well, I note the caption on his findings here. He raises these
6 as factors relevant for consideration. So I would presume
7 that this was just an initial preliminary that he anticipated
8 there be further consideration given to these factors.
9 Q. There's no indication in the memo, though, that there are any
10 other factors. He says, "The following factors are relevant for
11 consideration."
12 A. Yes.
13 Q. You're inferring that there are others.
14 A. Well, I don't know, but if the matter was going to be
15 considered, I wouldn't foreclose there could be other factors
16 brought into the conversation.
17 Q. Is this the sort of memo that if you had been Attorney
18 General, you would have liked to receive as a response to a
19 question to look into the performance of the Crown?
20 A. Well, I don't know what my position would be. I don't know
21 to what extent the Minister was already appraised of certain
22 other factors. You know, I have no knowledge of what he
23 knew at the time or whether he would have considered this
24 useful or adequate or just the starting point for further
25 consideration.

1 Q. Did you ever discuss it with him?
2 A. Not that I recall.
3 Q. Do you know whether or not Mr. Herschorn discussed it with
4 him?
5 A. I have no knowledge.
6 Q. Do you know whether or not Mr. Gale discussed it with him?
7 A. I have no knowledge.
8 Q. You don't know whether anybody discussed it with him.
9 A. No.
10 Q. Do you not think that the performance of the Crown in the
11 original prosecution of Mr. Marshall was a fairly important
12 matter?
13 A. Of course.
14 Q. And did you think that at the time?
15 A. I don't know if I thought that at any particular point in time.
16 I would think that at any point in time.
17 Q. Sure. So that you would have thought that in 1983?
18 A. Yes, but I wasn't privy to any facts that would suggest that
19 the Crown did not properly discharge its responsibilities.
20 Q. Mr. Coles, you knew that the statements of the witnesses,
21 Harriss, Chant, and Pratico... Or Chant and Pratico had not
22 been disclosed. You knew that in 1983.
23 A. I knew they had not been disclosed. I'm not sure that I knew
24 they were in the possession of the Crown and I didn't know
25 what obligation, if any, the Crown was under to make any

1 disclosure.
2 Q. Well, how do you know if you don't check?
3 A. Well, I had no, I personally didn't have any reason to make
4 those inquiries, that I have any recollection of.
5 Q. Well, you told us earlier that you, I think the first day you
6 gave testimony, that you really didn't turn your mind to the
7 question of disclosure until some time in the eighties.
8 A. That's correct. That's the time I thought we were talking
9 about, in the eighties.
10 Q. Yes, we are now.
11 A. Yes.
12 Q. But here you are in 1983 being asked to look into the
13 performance of the Crown and you knew at that stage of the
14 game that those statements had not been disclosed. You say
15 you didn't know whether or not there was a duty at the time
16 in '71. But don't you think there would have been an
17 obligation on you to find out whether or not there was a duty
18 in order to assess whether or not the performance of the
19 Crown had been handled adequately?
20 A. Well, all I can say is what I did, and when I got the memo, I
21 referred it to Mr. Herschorn and left the matter to Mr.
22 Herschorn. Now I did not address myself to those inquiries.
23 Q. Did you discuss the substance of Mr. Herschorn's memo with
24 him?
25

2:16 p.m.

A. Not to my recollection.

Q. No? The other issue that's raised by the Attorney General's memo is the question of perjury. And again, there are some responses from Mr. Herschorn at 203, is that, again, another matter that you turned over to Mr. Herschorn and were happy to have him respond to?

A. Yes.

Q. Did you get involved in it personally yourself?

A. Not to my knowledge.

Q. Did you have any discussions with the Attorney General about it?

A. I think I, to the extent that I concurred that we ought not to proceed with any such charges. I concurred in the views that I understood were represented to him.

Q. And those were represented to you through the memos that were done, for instance, by Mr. Herschorn.

A. That's correct. I think I may have seen a reference to a letter that Mr. Edwards at that time had responded, or had forwarded, I'm not sure whether it was in response to an inquiry or not. And my recollection that was his recommendation.

Q. At about this time, the summer of 1983, there was concern was there not concerning the issue of whether or not there was going to be an inquiry.

1 A. Yes.
2 Q. Questions were starting to be asked. If I could direct your
3 attention to Volume 32 at page 221. A memo...
4 A. 221?
5 Q. 221.
6 A. Yes.
7 Q. It's a memo in which you are copied in August of '83 from
8 Herschorn to the Attorney General. I want to direct your
9 attention to the second paragraph and the last sentence in
10 that paragraph. "You will recall our concern that a public
11 inquiry ought not to serve as a forum for the assembling of
12 evidence for any civil suit initiated by Mr. Marshall." Was
13 that a concern that you shared?
14 A. Yes. Not a major concern but it was a concern.
15 Q. And why would it be a concern of the Government's that a
16 public inquiry serve as a forum for the assembling of
17 evidence?
18 A. Well I'm not so sure it's correct to attribute to the
19 Government. My concern was that a civil suit had been
20 launched. It was against the police officers, City of Sydney.
21 We were not parties to that suit. And I was concerned that
22 any public inquiry, which would be designed to address other
23 issues rather than the settlement of a private suit ought not
24 to have any bearing on that, on those proceedings. As I say I
25 don't think it was a particular overriding concern of mine but

it was a factor to be taken into account. My major concern about the civil suit was that from where the Crown considered its liability in the matter that if that civil suit resulted in full compensation then there be no question for the Crown to consider in terms of ex gratia compensation.

Q. Why would it have been your view though at the time that, is it not often the situation that there's a civil suit, civil suits initiated as a result of a situation and a public inquiry running side by side with it at the same time?

A. Oh, of course. Of course.

Q. And there's nothing wrong with that.

A. No.

Q. And specifically, what was the problem that would, in this particular case, that would raise it in this memo and be a view that you shared? That you didn't think that a public inquiry ought to go along and serve as a forum for the assembling of evidence?

A. Well as a I say they, you know, the police officers who are the defendants in the lawsuit would also be witnesses before the public inquiry and would be examined into areas that may have some effect on the civil proceedings to which they were defendants and they may have felt that it wasn't a matter that was analyzed or considered at any great length. It just appeared on the face of it that there could be a possible effect on the civil proceedings and I did not think that was a proper

1 use to be had of a public inquiry.
2 Q. You were not of the view, were you, that there was any
3 potential liability on the part of the Crown as a result of the
4 actions of the officers of the Sydney Police Department?
5 A. No. Or I was of the view that there wasn't.
6 Q. That there was not.
7 A. Yes.
8 Q. And given that, why would you care if there was an effect on
9 the action by reason of the inquiry?
10 A. Well I can't add to what I've just said. It seemed to me that
11 that would not be a proper use made of a public inquiry and
12 it was a factor to be considered. And that was the basis for
13 my, for the position I held.
14 Q. And was the position that you held, did you seek anybody's
15 advice in your Department as to that position? Discuss it with
16 anybody?
17 A. No, I had the feeling that it was a view shared by others but I
18 don't recall discussing it in the sense of seeking support for
19 that concern.
20 Q. Was it a view that you conveyed to the Attorney General?
21 A. Yes.
22 Q. What was his reaction? I'm talking now about Mr. How.
23 A. Well I'm not sure that he expressed a reaction to it. I
24 expressed my view and as far as I can recall he entertained
25 that as a consideration. I'm not sure that he necessarily

1 agreed with me or disagreed with me. And I don't know to
2 what extent he may have shared that view.
3 Q. Would it be fair to say that at that time you could have taken
4 the position, if you'd so chosen, that the civil suit really
5 doesn't have anything to do with whether or not we're going
6 to have a public inquiry.
7 A. Well it could have but it didn't. That, you know, I don't want
8 to leave the impression that that was the all overriding
9 consideration on the issue, whether it would or would not be
10 a public inquiry.
11 Q. But it was a factor.
12 A. Well it was a consideration that I raised.
13 Q. And that you conveyed to the Attorney General.
14 A. And I conveyed to the Attorney General.
15 Q. On the question of the liability of the police officers, if you
16 could turn to page 239 of that volume. The memo from Mr.
17 Fanning, who was an articling clerk to Martin Herschorn,
18 concerning the liability of the municipality.
19 A. Yes.
20 Q. Was that a memo that you asked Mr. Herschorn to have put
21 together?
22 A. I'm not sure how it got to Mr. Herschorn. I know that, I think
23 I asked Mr. Conrad, I asked somebody senior in the
24 Department to have someone look at that issue. I'm not sure
25 that I was...

1 Q. Did you have...
2 A. I'm not sure I was the one who asked Mr. Fanning to do it.
3 I'm quite certain I wasn't.
4 Q. Did you have any concern at the time, or prior to this rather,
5 that there might be some liability on the part of the
6 municipality, Sydney, for the wrongful acts of its police
7 officers?
8 A. Well I thought it was a question that we ought to research, do
9 some research on. I don't think I was concerned that there
10 was from my limited experience with the liability of the
11 police officers. I was of the view that there was not but I
12 wanted someone to take a look at the law and advise us.
13 Q. Insofar as this memo relates, sir, to the liability of Sydney,
14 liability of the municipality for the wrongful acts of its police
15 officers, why would the Department of the Attorney General
16 be concerned about that?
17 A. Well we couldn't rule out possibly being joined in that civil
18 action. We weren't made original parties but we could have
19 been joined.
20 Q. Had any requests been made to you by anybody in the
21 administration in Sydney to investigate this matter on their
22 behalf?
23 A. I'm not sure. It seems to me I had a conversation with the
24 then mayor, I think he asked whether, I think he raised the
25 question in the context of another meeting I had with him

about the question of liability and I think I expressed a very summary, off-the-top opinion that I didn't consider there was any liability on the part of the Crown.

Q. What about on the part of the municipality?

A. Well I didn't express any views on that.

Q. And I'm asking you whether or not you were asked to investigate that matter by anybody in Sydney. Their potential liability.

A. No.

Q. There's a series of letters starting at 263, actually 262, in September when Mr. Cacchione is writing to the Attorney General. And then on 263 Mr. How responds and indicates, "I am turning your letter over to my Deputy, Gordon Coles, and have asked him to discuss the matter with you and advise me accordingly." That was on September the 27th. Were you aware, at or about that time, of the correspondence from Mr. Cacchione that precedes it. That would be the correspondence on 262.

A. You mean was I aware of his letter of September 21st?

Q. Yes.

A. Well I don't think I was aware of it until I received it from Mr. How.

Q. Do you know whether you received it fairly contemporaneously with Mr. How's response to Mr. Cacchione? That is, around the end of September.

A. Well I would believe so. I would think so although, you know, Mr. How had the habit of dictating on these recording devices and sometimes there would be a delay between the time he dictated it and the time the letters would be taken off. But...

Q. Probably not much delay, though, is that, it would be about the same time.

A. Well I would presume I got it about the time he indicated.

Q. Then on page 269, Mr. Cacchione has not apparently received a response at that point and he writes again to the Attorney and then the Attorney General responds on October the 19th indicating that he had turned this correspondence over to you immediately.

A. Towards the end of September, yes. September the 27th, this letter is dated, yes.

2:29 p.m.

Q. Can you advise us why at this point in time after about three weeks had elapsed, you haven't responded to Mr. Cacchione?

A. No, could be a whole range of reasons. I may have been out of the city. He may have been tied up, I don't know. There's no intention in delay, but sometimes delay occurs for a whole range of reasons beyond one's control.

Q. You indicate in your memo in 272 to Mr. How:

> I did not have an opportunity to attend on setting up a meeting with him (that's Mr.

> Cacchione) prior to that date as I thought it would be more helpful for me to meet when both Gordon Gale and Martin Herschorn were available.

Is that intended to be an explanation for the delay?

A. Could be, could be.

Q. In this memo of yours to Mr. How on 272, you raise a number of issues concerning the inquiry, whether you should initiate an inquiry, about halfway down the page.

A. Yes.

Q. "In the manner in which the Sydney Police investigated the death of Seale." You yourself now are offering the following comments to the Attorney General. I just want to ask you about them.

A. Uh-huh.

Q. And I take it it's in the context of whether or not there ought to be an inquiry. You say in one:

> The incident happened in 1971. The only police officers who were involved and who are presently available are the present Chief John MacIntyre, who is due to retire shortly, and Mr. Urquhart, who is now retired.

Had you done any investigation to see whether or not there were any other police officers who might have had knowledge of that investigation?

A. No, my recollection is I was actually aping what Mr. Herschorn had set forth in his memorandum.

1 Q. Is the answer to my question that you hadn't done any
2 investigation to see whether or not there was anybody else
3 involved?
4 A. I'm sorry, the answer is "no".
5 Q. So that the names of Ambrose MacDonald, Richard Walsh,
6 Howard Dean, John Maloney, Michael Bernard MacDonald,
7 John Butterworth, or Ed MacNeil were not names that were
8 ever brought to your attention.
9 A. No.
10 Q. As police officers who might have had something to say?
11 A. No.
12 Q. You then say:
13
14 > The Crown Prosecutor, Mr. Donald MacNeil, undoubtedly was much involved as he had a
15 > reputation of acting more like a D.A., is deceased. Accordingly, it would be almost impossible to
16 > thoroughly and fairly investigate the activities of the principals involved in the investigation and
17 > prosecution at this point in time.
18 Had you given any consideration before making that
19 statement to interviewing Mr. Matheson?
20 A. No.
21 Q. Mr. Khattar?
22 A. No.
23 Q. Mr. Rosenblum?
24 A. No.
25

1 Q. Mr. Marshall himself?
2 A. No.
3 Q. How can you say then that it would be impossible to
4 thoroughly and fairly investigate the activities of the
5 principals involved in the investigation and prosecution?
6 A. It was perhaps a little overstatement.
7 Q. You hadn't done anything, had you, sir, to follow up on
8 whether or not there was anybody other than Mr. MacNeil
9 who might know something?
10 A. That's correct.
11 Q. Do you consider that that's an adequate response?
12 A. Not on hindsight, no.
13 Q. You than go on to say, dealing in general terms with the
14 question of whether or not there ought to be an inquiry,
15
16 Evidence presented at the preliminary, the grand
17 jury, and trial is what put Marshall to his trial
and convicted him. The Appeal Division of the
18 Supreme Court upheld the conviction.
Subsequent events which led to a further review
19 resulted in the court commenting adversely on
the evidence of Marshall and the credibility of
20 other witnesses and made no adverse comment
on the role of the police in their initial
21 investigation.
22 You knew, though, didn't you, that other than what was
23 before the Appeal Court, there were suggestions that the
24 actions of the police had not been up to standard?
25

1 A. Yeah, and I also knew that the witnesses who gave
2 subsequent, or who gave testimony made allegations that in
3 explaining why they were changing their evidence and the
4 court did not see fit to make any comment on that.
5 Q. But you also knew that there was material available which
6 indicated allegations concerning the role of the police in the
7 initial investigation other than what was said by the Appeal
8 Court. Material contained in the R.C.M.P. reports, for instance.
9 A. Well, I'm not sure...I'm not sure... I'd have to look at those
10 reports. I'm not sure that there's anything in those reports
11 that would support that. The reports that I recall was to the
12 effect that the police officers were overzealous and they had...
13 things of that kind. But there's no suggestion there's any
14 wrongdoing on their part, that I recall.
15 Q. There's some suggestion in a report that I believe you
16 indicated you were aware of, the R.C.M.P. report in Volume
17 34, that Chant had felt pressure, page 14 of that volume;
18 Harriss felt pressure, page 16, last five lines and again at page
19 19. Are you suggesting that there was no material at all in
20 the...
21 A. Oh, no, I'm not suggesting...
22 Q. Department that indicated that?
23 A. I'm not suggesting that. I'm just saying my recollection was
24 that the police did not indicate or report that there was
25 anything to substantiate those statements. And certainly

1 those statements were also made by them in their testimony
2 before the court and I don't recall the court giving any
3 substantiation to those statements. I don't recall the court
4 commenting on them at all, actually. And that's what that
5 reference was intended...
6 Q. Well, it's the only comment... It's the comment that you made
7 in connection with the role of the police in the initial
8 investigation. You don't choose to comment on whether there
9 are allegations against the police outside of the terms of the
10 Appeal Court decision. You make the judgement as to what it
11 is that you're going to tell the Attorney General and that's
12 what you choose to tell him. And I'm asking you why you
13 don't mention to him any of the other suggestions that was in
14 the material that was in the Attorney General's Department
15 concerning the role of the police.
16 A. Well, I can't offer you any explanation except that that's what
17 I said and...
18 Q. If you had chosen to, you certainly could have done that. You
19 could have raised that with him.
20 A. I don't think it was selective in any sense. That's what my
21 information that came to mind when I dictated that letter.
22 Q. You indicate in the next paragraph:
23
24 This is not a situation where there may be an ongoing or present police practice which needs to
25 be scrutinized publicly and corrected.

1 What did you understand... Why did you understand that
2 there was not any ongoing practice which needed to be
3 scrutinized?
4 A. Well, I suppose I was simply responding to the fact that this
5 was a case that was before us. There is no, I wasn't aware of
6 similar allegations being made and that I considered the
7 allegations to be peculiar to this particular case.
8 Q. How would you know if you didn't check that to see whether
9 or not there was an ongoing police practice which needed to
10 be checked into?
11 A. Well, I suppose I relied on the fact that nothing more had
12 been brought to my attention, is my recollection, to give me
13 cause to think that it was otherwise.
14 Q. You're not aware of the suggestions that there was some
15 pressure exerted on juveniles with respect to the taking of
16 evidence... Sorry, the taking of statements?
17 A. No, not to my recollection.
18 Q. You weren't aware of the ages of Chant, Harriss, and Pratico at
19 the time?
20 A. Well, I mean apart from this particular... You're still talking
21 about the Marshall case?
22 Q. I'm talking about Marshall, yes.
23 A. Oh, yes, I'm saying I wasn't aware that there was any other
24 case apart from the Marshall case that would give rise for me
25 to believe that there was an ongoing practice that needed to

be addressed.

Q. Insofar as the Marshall case was concerned, were you aware that there may be some questionable practices?

A. Well, to the extent that the R.C.M. Police reported on them and my reading of the report was that there could be a misunderstanding on the part of these young people as to the role of the police.

Q. Did you do anything to check and see whether or not that practice that you had seen referred to in the Marshall case was still being utilized by the Sydney Police Department?

A. No.

Q. So how would you know whether or not there was an ongoing or present police practice which needs to be scrutinized?

A. Only to the extent that no other such allegations were brought to my attention in respect to other cases.

Q. Did you not consider that you had a positive obligation to check it out?

A. No, I did not.

Q. Did you think the Attorney General was supposed to infer from your note that you had done that? You say very positively that this is not a situation where there may be an ongoing or present police practice.

A. Well, you must remember that the Sydney Police is a municipal police. They have their own police commissioners. They have their own council to which they're responsible and

there's grievance procedures available to people who feel that they are grieved and none of those avenues brought forth any cause for me to think...

Q. Did you check with the Sydney Police Department to see whether or not there had been any grievances?

A. No.

Q. How do you know that then?

A. Well, as I say, none of this was brought to my attention and I reacted with what knowledge I had.

Q. Which wasn't very much.

A. Which was perhaps not very much.

Q. You then go on to say:

> It would appear that no useful purpose would be served by any such inquiry nor would the public interest be served, in my opinion, by such an inquiry.

A. Sounds a little presumptuous, when I read it now.

Q. Yes. Would you agree that at that time when you made that statement, that it would appear that no useful purpose would be served by any such inquiry, was it based merely on the information that you're now conveying to the Attorney General? That is, your view that there was no situation which needed to be scrutinized?

A. It was based on the information which I had at that time.

Q. Yes. Why would you have thought at the time that the public

interest wouldn't be served?

A. Well, I suppose it goes back to my premise. I did, I was not aware that there was any continuance of such practice and, therefore, there didn't seem to me any purpose to have a public inquiry into a matter that didn't, wasn't a continuing practice. If my premise was faulty, then, of course, my conclusion was similarly affected.

Q. You then go on to say with respect to the civil suit launched by Mr. Marshall:

> One might speculate on his reasons for urging a public inquiry at this time.

What did you intend to convey to the Attorney General by that comment?

A. Well, that goes back to my concern that the public inquiry might have an effect on the civil proceedings.

Q. You than go to say:

> It seems to me that his client has received the benefit of an acquittal and is now pursuing his civil remedies by way of redress. Unless the civil suit identifies conduct on behalf of the police officers which would warrant possible disciplinary action, I will continue to be of the opinion that the public interest would not be served by any formal inquiry.

A. Well, that was partly based on the... My readings of the police reports would indicate that there was no wrongdoing on the

1 part of the police officers.
2 Q. But insofar as Mr. Marshall was concerned at that time, were
3 you satisfied to allow Mr. Marshall to carry the burden of
4 finding out whether or not there had been any wrongdoing?
5 A. Well, he initiated the civil suit and I would have thought that
6 if there is negligence on the part of the police officers, that
7 negligence would be identified and if that negligence
8 exceeded the civil level, then that would be a matter that we
9 would have to concern ourselves with and address.
10 Q. But you weren't going to take any positive steps to find that
11 out yourself.
12 A. Well, on the information that I had and on the advice given to
13 me, in my judgement, there's no reason to do so.
14 Q. And you've already told us about that. Would you agree that
15 the effect of this memo, Mr. Coles, is to place upon Mr.
16 Marshall the onus of identifying wrongful conduct on the part
17 of people involved in his original prosecution?
18 A. Probably.
19 Q. Do you consider in retrospect that that was an appropriate
20 position for you to take?
21 A. Well, in my view, I had difficulty in seeing any other position.
22 I did not have information that, in my opinion, justified the
23 public inquiry into the matter of the police activities.
24 Q. Yes, and I think you've told us what that was based on. At
25 page 280, there's a press release dated November 22, 1983.

1 Are you able to tell us whether or not you had any role in
2 drafting that?
3 A. Well, it sounds like my phraseology but I don't specifically
4 recall, but I wouldn't be surprised that I did have a hand in
5 drafting it.
6 Q. And would you have advised the Attorney General that it was
7 the function of the courts to determine whether a person has
8 a right to compensation?
9 A. Probably.
10 Q. Was that your view at the time?
11 A. Yes.
12 Q. This press release also raises again the question of the civil
13 proceedings. Did you discuss with Mr. Giffin whether or not a
14 public inquiry ought to proceed in the face of a civil
15 proceedings?
16 A. Not in that context. I think when the issue of public inquiry
17 was discussed, the civil proceedings was one of the factors
18 that I raised by way of consideration.
19 Q. And would it have been one of the factors that you would
20 have suggested to the Attorney General should be taken into
21 account in not proceeding with the inquiry at that time?
22 A. I don't know if I'd put it that way. I raised it for the reasons
23 which I previously stated that the civil proceedings had been
24 commenced and were a factor to be considered. I don't know
25 to what extent it may have had any influence on his

1 judgement or subsequent decisions.
2 Q. Did he seek your advice or did you just have a discussion
3 about it?
4 A. Oh, I don't know whether he sought my advice or I
5 volunteered it.
6 Q. Would you have given any advice to Mr. Giffin in November
7 or so, December of '83 as to whether or not the province had
8 any legal obligation to Marshall for compensation?
9 A. I'm sure I did.
10 Q. What would your view have been?
11 A. That we didn't have any.
12 Q. Did Mr. Endres ever indicate to you that he thought there was
13 a marginal case against the Crown, based on some notion of
14 malicious prosecution?
15 A. I think he did raise that.
16 Q. Did you convey that information to the Attorney General?
17 A. My recollection is he probably raised that himself when we
18 met with the Attorney General and briefed him on this
19 question.
20 Q. What was your view about that?
21 A. I had no view on that. I didn't, I didn't examine the question
22 at all. But there's always liability in the case of malicious
23 prosecution. Whether or not it was, whether or not there was
24 evidence to support such a charge in this case was a matter I
25 did not investigate or inquire about. I don't think Mr. Endres

1 was implying that there would be. He raised that as a
2 possible area where the Crown could be liable in
3 circumstances such as this.
4 Q. At or about this time, there was a broadcast by the CBC, which
5 is transcribed around page 298 of this volume. And then
6 subsequent to that, there are a couple of drafts of some press
7 releases and on page 302, for instance, there's some
8 handwriting on that draft of the press release.
9 A. 302?
10 Q. 302, yeah. Would that be your handwriting?
11 A. No.
12 Q. Do you know whose it is?
13 A. No.
14 Q. Are you able to tell me whether or not you had any
15 involvement in the drafting of these press releases at all?
16 A. What press releases are you referring to?
17 Q. Look at page 305, the third draft of a press release which is in
18 response to that CBC program. It goes over to 308.
19 A. Not to my knowledge.
20 Q. Did you have any discussions with the then Attorney General
21 concerning what the province's response ought to be to the
22 radio broadcast, or to the broadcast which is transcribed back
23 at 298?
24 A. I have no recollection of seeing this transcript of the
25 broadcast.

1 Q. Were you aware that such a broadcast had taken place?
2 A. Well, if I was at the time, I've forgotten.
3 Q. Okay.
4 A. I have no recollection of it.
5 Q. And you have no recollection of being involved in either the
6 drafting of the press release or in assisting the Attorney
7 General in forming the views that are taken in that press
8 release?
9 A. That's correct.
10 Q. At page 309, there's a letter to yourself from Mr. Cacchione
11 requesting information.
12 A. Yes.
13 Q. Are you familiar with that correspondence?
14 A. Yes.
15 Q. On the following page on paged 311 is your denial of that
16 request.
17 A. Yes.
18 Q. Can you tell us what you did in order to satisfy yourself that
19 the request being made by Mr. Cacchione should be denied?
20 A. Well, my understanding of the appropriate section of the
21 Freedom of Information Act, I think at Section 3, access is
22 denied depending on the source of the information sought and
23 the purpose for which it was obtained. And my reading of his
24 request was that he was seeking information that the source
25 of which and the purpose of which it was obtained by us, if

we had it in our possession, was such that he was not permitted access under the Act.

Q. Did you do anything to check and see whether or not you had any material that came within the terms of Mr. Cacchione's request?

A. No, because I considered the kind of information he requested fell into those categories that we would, if it were in our possession, it would have been there pursuant to those sections that protected it from access.

Q. So when he says in the preamble to his letter, this is Mr. Cacchione:

> I hereby request access to any and all personal information held by or for the Department of the Attorney General or under the direct or indirect control of the said department, including but not limited to...

And then he lists a number of things. Are you telling us that you did not undertake any investigation to see what material the Department had before you denied it?

A. That's correct.

Q. And are you satisfied that a blanket denial without checking to see whether or not there was any material at all in the possession of the Department was appropriate?

A. I considered it so.

Q. So regardless of what the Department had, Mr. Cacchione wasn't going to get it.

A. No, I dealt with what he wanted in particular and that kind of information, if we had it, was from a source that, in my opinion, was protected from public access.

Q. I direct your attention to the beginning of his letter.

> Access to any and all personal information held by or for the Department of the Attorney General or under the direct or indirect control of said department, including but not limited to...

He's asking for anything you've got, correct?

A. Right.

Q. And you're telling him, "We're not giving you anything."

A. That's right. I'm saying that the information... If we had information that would have come from a protected source or would have been information that the purpose of our having it was protected.

Q. How do you know that if you didn't even look at the material?

A. Well, it's a judgement I made based on the request and I informed him that there was an appeal process for my decision.

Q. Do you consider in retrospect that you ought to have accorded him the courtesy of at least looking at the material before you denied it to him?

A. Not of my view of the Act, no.

Q. Is it your view of the Act that anything, any personal information held by the Department cannot be released, is

1 that your view?
2 A. No.
3 Q. That's what he's asking for, isn't it?
4 A. Not personal information within the meaning of the Act. The
5 kind of information that I had... You must recall, I've had
6 access to some of the police reports. The information that we
7 had in our file was primarily from that source. We had some
8 correspondence or some opinions from officers of the Crown
9 and it seemed, in my judgement at least, the kind of
10 information he sought here, if we had any of it, it would have
11 come from one of those sources that was protected.
12 2:52 p.m.
13 Q. But the simple answer to my question, sir, is that regardless
14 of what he was requesting here in his letter, that is all, any
15 and all information, you didn't check it and you denied it.
16 A. That is correct.
17 Q. Mr. Giffin had indicated when he was giving his testimony
18 that he thought that someone had reviewed the files "before
19 Coles turned Felix down", those were his words at 10431. Did
20 you indicate to the Attorney General that somebody had
21 reviewed the files?
22 A. No.
23 Q. Do you think that Mr. Cacchione would have thought that
24 you'd at least looked at the files?
25 A. I can't speak to that.

Q. Well it then goes on from yourself to the Minister, to Mr. Giffin, on January the 18th. Mr. Cacchione asks again. And would you agree with me before we get to that that if you'd wanted to you could have gathered those files together, you could have looked at them and said, "Okay, in the context of this particular case, we will turn some information over to you."

A. Oh, of course, I could have. If you're asking me whether I had the authority to do that, yes.

Q. Yes. And why in the circumstances of this particular case did you choose not to exercise that authority in favour of releasing the material to Mr. Cacchione?

A. I don't think I had any particular reasons vis-à-vis this particular case.

Q. Did you consider that the Department was in any kind of an adversarial relationship with Mr. Marshall?

A. No, that would not have been a factor. It was my interpretation of the Act that I responded to.

Q. Mr. Cacchione then asks the Attorney General, at page 313 and then at 315 Mr. Giffin directs Mr. Herschorn having said,

> I haven't had an opportunity to review the whole file, I'd appreciate it if you'd prepare a letter for my signature rejecting the appeal citing the Sections involved and I will sign it tomorrow.

Were you aware that Mr. Giffin was directing Mr. Herschorn

1 to deny the appeal?
2 A. No.
3 Q. You had no knowledge at all of that?
4 A. No.
5 Q. Mr. Herschorn has indicated that he didn't review the file
6 before he did anything, before he denied it. So we come away
7 from it with Mr. Cacchione making a request for information
8 asking for anything the Attorney General's Department has
9 and it would appear as if nobody reviewed his request in
10 terms of getting the material together and then the Attorney
11 General writes and denies it on February the 8th at page 316.
12 Do you think that that, if you accept that that's what
13 happened that that was an appropriate response on behalf of
14 the Attorney General's Department?
15 A. Well, you know, it's difficult for me to answer that because in
16 my view and in my interpretation of the Act, and I have
17 given that to you, I thought my response was appropriate.
18 Q. And you thought that your response could be made in the
19 absence of reviewing the material.
20 A. Yes.
21 Q. Do you know whether or not, or did you know at the time,
22 whether or not the Department even had any information
23 that's referred to in the specific paragraphs of Mr. Cacchione's
24 request? If you look at 313 for instance. Correspondence
25 with, between the AG's Department and Correctional Services.

1 A. No, I had no, I didn't look at the file. I had no knowledge.
2 Q. No, you had no knowledge of any of those specific requests.
3 A. But if we had I would have considered that and the Minister
4 under the category of affecting the administration of justice.
5 Q. And I believe you told us that you didn't have any
6 involvement at all in the appeal to Mr. Giffin or his response
7 to it.
8 A. That is correct. As a matter of fact I'm not, I hadn't even seen
9 it prior to looking at these documents that were prepared for
10 this hearing.
11 Q. Did you discuss your denial with the Attorney General prior
12 to your letter going out?
13 A. Not to my knowledge.
14 Q. Mr. Giffin indicated at page 10430 that he had discussed
15 Coles' denial with Coles prior to it being issued. Do you have
16 any recollection of that?
17 A. I have no recollection of it. I may have sent him a blind copy
18 of my reply. I may have sent a blind copy of my letter of
19 January 17th to him so that he would be aware in the event
20 that there was an appeal.
21 Q. But where he says that he discussed it with you prior to you
22 issuing it that's not your recollection.
23 A. Well he may have, I don't recall.
24 Q. You don't recall. In early 1984 the Government was taking
25 the position that before compensation could be considered or

1 addressed there were really two issues that had to be dealt
2 with, one was the civil suit that you've mentioned and the
3 other was the question of Ebsary.
4 A. No, no, that's not correct.
5 Q. No?
6 A. The civil suit was never a condition of whether compensation
7 could be addressed or not.
8 Q. You're saying that there was never, that the Government
9 never took the position that the civil suit was any bar to
10 compensation, really to an inquiry?
11 A. That's right.
12 Q. Okay. With respect to the other matter, the Ebsary matter,
13 was that a bar to compensation?
14 A. Well that was a real major concern, yes.
15 Q. Did you advise the Attorney General at the time that there
16 was a connection between the compensation issue and Mr.
17 Ebsary? Would you have had discussions with him about
18 that?
19 A. Yes, I think we discussed it in the context that a public
20 inquiry into the matter of compensation could have a bearing
21 on the Ebsary case. As I recall our discussions we were
22 concerned primarily from the point of view of whether it
23 would affect the fairness of Mr. Ebsary's trial that the public
24 inquiry would have evidence brought before it that could
25 affect the views of jurors. It could affect the recollection of

1 potential witnesses. And Mr. Giffin had a very real concern
2 that the question, any question of compensation which could
3 always be dealt with at a subsequent point in time, if it were
4 to be proceeded with would have to be done in a way that
5 would not have any effect on the trial of Mr. Ebsary.
6 Q. Was it your view that the question of compensation was to
7 relate to the period of time during which Mr. Marshall was
8 incarcerated?
9 A. It was to relate to the period of his incarceration following
10 the...
11 Q. Conviction?
12 A. Following the final determination by the Court of Appeal.
13 Q. The first time around in '72.
14 A. Yes.
15 Q. Yeah. Was it your view then that any question of
16 compensation should not relate to any period prior to that?
17 A. Yes.
18 Q. And if that's the case, and if that was your view, then can you
19 explain to me again why there would be a connection
20 between compensation for that period of time and Ebsary?
21 A. Well at this point we didn't know just what decision would be
22 made in respect to how a commission be mandated or how
23 that commission might interpret its mandate or who may be
24 summonsed to give evidence to speak to it. These were
25 questions that we had no answers to and we may have been

1 erring on the side of caution but it was very important that in
2 the light of the, of how many trials had been involved in
3 respect to the death of Mr. Seale that we ought not to do
4 anything at that point in time which might have a potential
5 effect on the Ebsary trial. And compensation, an inquiry into
6 compensation fell into that category.
7 Q. At the time that the Government was taking this position in
8 January, February or so of '84, were you aware of any
9 pressure being exerted by the Federal Government that you
10 ought to get on with it?
11 A. I'm not sure if pressure is the right word. I...
12 Q. Views being expressed by the Federal Government...
13 A. I think there were views being expressed by the Federal
14 Government asking us, inquiring in this question of
15 compensation, yes. My recollection is that there was some
16 correspondence to that effect. I don't recall in particular.
17 Q. In March, in fact, on March the 5th and I'm, this is Volume
18 33, page 342 the Premier issued a press release...
19 A. Just one moment now.
20 Q. Volume 33?
21 A. Yeah.
22 Q. 342. In which he issued a press release indicating that he
23 was setting up the Campbell Inquiry at that point.
24 A. Yes.
25 Q. Five or six days prior to that the Government had been taking

1 the position that Ebsary's position before the courts was
2 fundamental, the position that was really being taken in the
3 House at the time. Do you have any knowledge as to why the
4 position of the Government changed between February the
5 28th and March the 5th?
6 A. No.
7 Q. Were you consulted?
8 A. No.
9 Q. Were you involved in the decision to set up the Campbell
10 Inquiry?
11 A. Yes.
12 Q. And in what respect were you involved?
13 A. Well I think I drafted the report and recommendation that
14 was submitted to the Executive Council that set it up.
15 Q. Which became the terms of reference.
16 A. Yes.
17 Q. At page 344 of that volume there's a letter from Mr. Giffin to
18 Mr. Cacchione dated March 6th. Were you involved at all in
19 the drafting of that letter? Perhaps you could have a look at
20 it.
21 A. No. Not that I recall. I certainly didn't draft the letter and I
22 don't recall being involved in its preparation.
23 Q. Would it have been your view that at this time in March of
24 1984 that the Attorney General's Department had always
25 cooperated fully with Mr. Marshall and at no time had

1 entered into an adversarial relationship with him.
2 A. Up to this time?
3 Q. Up to that time in February of '84, sorry, March.
4 A. I don't know, I'm sure we had adversarial relations with Mr.
5 Marshall and/or his counsel. I'm sorry, I'm not sure...
6 Q. From February of 1982 until March of 1984, since the time of
7 the re-investigation had commenced.
8 A. Well I would have thought our position before the court
9 would be an adversarial one.
10 Q. Did you think your position with respect to the refusal to
11 disclose information to him was adversarial?
12 A. No, I was discharging a clearly administrative function under
13 the Act.
14 Q. Mr. Giffin indicates in his letter at the top of page 345, "I also
15 want to emphasize that the manner in which Mr. Justice
16 Campbell will discharge his task will be entirely up to him."
17 What was the notion of what this inquiry was intended to do?
18 Was it to be an independent commission to look into the
19 question of compensation?
20 A. As I recall it was to do two things. It was to determine, first
21 of all, it was set up to determine compensation on an ex gratia
22 basis...
23 Q. Yes.
24 A. So there's no question of liability before Mr. Justice Campbell.
25 Basically it was almost in the nature of an assessment of

1 damages. It was set up to determine how much ought to be
2 paid on an ex gratia basis having regard to the period of
3 incarceration.
4 Q. But to do so as an independent commission.
5 A. Well it was independent certainly. It was set up, the
6 difficulty of these, with the commission and I suppose it
7 applies to all commissions, is that its mandate is to report and
8 make recommendations. It doesn't have the power to write
9 cheques.
10 Q. Sure.
11 A. So, you know, it's independent in the degree of its own
12 determination but it's not independent in respect to its
13 recommendations because it's dependent on someone else to
14 give effect to them.
15 Q. The report and recommendation to the Executive Council,
16 there's a draft of it on page 356.
17 A. Yes.
18 Q. Would that be your handwriting on this one?
19 A. Yes.
20 Q. I just want to ask you a couple of questions about that. The
21 final version of it, I think, is at page 364 and I take it from
22 what you've already said that it was your view that the
23 period for which compensation should be considered is the
24 period of incarceration following resolution by the Appeal
25 Court in 1972. That's the period of time we're talking about.

A. Yeah. Are you interested in the particular reason why that was important...

Q. Yes.

A. Because we were concerned that we not set up a precedent that would make the Government responsive to a claim for compensation by somebody whose acquittal was reversed through an ordinary appeal process.

Q. Was that view articulated to Mr. Endres, do you know, by yourself?

A. I don't know. I assume that he was aware of that concern. Well that's, you know, that was the consideration that I held in respect to the drafting of the R&R.

Q. And if I...

A. And also the concern that it not, that the Commission not get into matters that might bear directly on the Ebsary trials or trial.

Q. Wouldn't a simple answer to the, to your concern about not wanting to get into people coming forward who were just eventually acquitted in the normal course have been, but that's not what happened to Mr. Marshall. He was in jail for 11 years and we're considering the whole period of time. You could have said that, could you not?

A. Could have but that's not the position I took.

Q. Did you discuss that position with the senior people in your Department? With Mr. Gale?

1 A. I'm not certain whether Mr. Gale was involved in those
2 discussions. I think I, I think my discussions were probably
3 just with the Attorney General.
4 Q. Did you have any involvement in the decision by Mr. Justice
5 Campbell to pay the $25,000 interim payment?
6 A. No.
7 Q. Are you aware of whether...
8 A. Well I think I prepared the R&R to implement his decision.
9 Q. Was there any discussion, to your knowledge, with anybody
10 in your Department about whether or not that payment ought
11 to be made?
12 A. No. At least I have no knowledge if there was. If there were.
13 Q. Fairly early on after the Campbell Commission is set up you
14 are referred by Mr. Giffin at page 383 to a letter from Mr.
15 Campbell which would follow that note of Mr. Giffin's,
16 (4385?), and Mr. Giffin is saying to you, "It would appear to
17 me that if he takes this approach we would want to have
18 counsel representing the Attorney General's Department." Mr.
19 Giffin has indicated that what that meant was that if there
20 was disagreement with the Province on the procedure and the
21 scope of the inquiry then the Government ought to be
22 represented as one of the parties before the inquiry. Would
23 that have been your understanding of it?
24 A. Yes.
25 Q. And what was it about what Mr. Justice Campbell was

1 proposing that concerned Mr. Giffin to your knowledge.
2 A. Well I think I make reference to it in a letter that I sent to
3 Counsel. I think the answer is probably expressed in that
4 letter.
5 Q. Yeah, you wrote to the counsel for the inquiry?
6 A. Yes.
7 Q. And you wrote to Mr. MacIntosh on May the 8th.
8 A. What page is that on?
9 Q. 407.
10 A. 407.
11 Q. Referring to the Commissioner's letter of March 26th which is
12 the one at 384.
13 A. My recollection is that this arose out of a meeting that we had
14 with counsel at which I attended and there was some
15 difference of opinion on the interpretation of the terms of
16 reference of the commission and that was the issue I, as I
17 recall it.
18 Q. Well your letter of May the 8th to Mr. MacIntosh precedes
19 the meeting with counsel. That was on May the 16th, I
20 believe.
21 A. Does it? Well then it's not in this letter.
22 Q. And you wrote him again subsequent to that meeting.
23 A. Perhaps if you refer me to Mr. Justice Campbell's letter I will
24 be better able to...
25 Q. Sure. That's back at 383-384. 384, Mr. Justice Campbell's

1 letter and that's a letter to which you're specifically
2 responding on May the 8th at page 407.
3 A. Yeah, that's the one I thought I was dealing with.
4 Q. Okay.
5 A. Your question didn't deal with that?
6 Q. No.
7 A. I thought that's what your question dealt with.
8 Q. It does deal with that. I'm asking you what your concern was
9 and you're saying that it was set out in your letter of May the
10 8th, is that correct?
11 A. I think so.
12 Q. Would you have copied Mr. Cacchione on this letter?
13 A. My letter of May 8th?
14 Q. Yes.
15 A. I'm not certain. If he's not shown I probably would not have.
16 Q. Would you have thought at that time that it would have been
17 prudent to copy counsel for Mr. Marshall on your
18 correspondence with the Commissioner?
19 A. Yes.
20 Q. Can you offer any explanation as to why you apparently
21 didn't do so?
22 A. No.
23 Q. You indicate on page 3 of your...
24 A. Unless it's because it also dealt with budget matters and I'm
25 not sure that that, those items were of interest or concern to

Mr. Cacchione. I think the letter goes on and deals with references to Ebsary. Maybe it's because the letter covered areas beyond those with which Mr. Cacchione was involved.

Q. Are you not really telling, giving it to Mr. Campbell, Mr. Justice Campbell, your view of what the inquiry ought to cover in this letter? You're saying, "This is the way I see it."

A. Yes, I was, as my letter says, "in my opinion." This is the way I understood or saw the commission proceeding to deal with this question of ex gratia compensation, yes.

Q. And then at the end of your letter on page 412...

A. Plus dealing with the other questions that he raised in his letter.

Q. Yes, and then at the end of your letter, you say:

> I understand that you will be communicating these concerns to the commissioner and hopefully he will agree that everything be put on hold until he has an opportunity to speak to the Attorney General in respect to these matters.

What were you suggesting there?

A. Well, there seemed to be some difference of opinion between what Mr. Justice Campbell was asking for or indicating in the way he was going to proceed and what I understood to be the position of the government. And my letter was an attempt to at least address those issues and make known to counsel to the commission what I understood from the point of view of

1 my client, the government. And that was simply saying if,
2 you know, there's any further difference of opinion between
3 us, let's not proceed until the matter be raised by the
4 commissioner with the Attorney General.
5 Q. What do you mean, though, "to put things on hold"? Are you
6 suggesting that the process be delayed until he's had an
7 opportunity to have that discussion?
8 A. I think that's the interpretation I would put on it.
9 Q. Did you consider it appropriate at that time for the Attorney
10 General to discuss the scope of the inquiry with the
11 commissioner?
12 A. Well, I thought it was. He made, the commissioner, I'm sure,
13 would have asked for Mr. Cacchione to be present, but
14 speaking for the government, I thought it was an appropriate
15 thing to have resolved and clarified at the beginning rather
16 than partway through the course.
17 Q. When you say in that letter, Mr. Coles, that you would
18 understand, this is at page three of your letter at page 409 of
19 the material. Dealing with the interested parties, you say:
20
21 > The Attorney General representing the public interest rather than the Crown in its
22 > prosecutorial capacity.
23 A. Yes.
24 Q. Can you elaborate on that for us? What do you mean by that?
25 A. Well, this is, I viewed this as a civil process, not as a Crown

1 proceeding. And, therefore, the government was being asked
2 to provide compensation on an ex gratia basis in an area that
3 I did not identify with the Crown in its prosecutorial role. It
4 was my attempt to try to describe this as a civil rather than a
5 criminal proceeding.
6 Q. In that context, was it your view that what the commission
7 ought to be doing was deciding the question of compensation
8 for Mr. Marshall on the basis of reference to some list of
9 factors that they would take into account in making their
10 determination?
11 A. Yes, that's right.
12 Q. And would you consider that the Attorney General's
13 Department or your representative in representing the public
14 interest should be assisting in placing those factors before the
15 commission?
16 A. Yes, I had anticipated that this commission would proceed on
17 a nonadversarial role in the sense that we wold not be
18 adversaries, although that may be a little naive to expect
19 parties to any proceeding to be a nonadversarial role, but I
20 did not.. . I did not see us in a situation too unlike an
21 assessment of damages.
22 Q. But was it your view at the time that the job of the Attorney
23 General's representative, at least insofar as the commission
24 was concerned, was to place before the commission the
25 relevant factors and the information and material in order to

1 assist in making their decision?
2 A. Before the commission?
3 Q. Yes.
4 A. Yes. I think I may have even alluded to that in this letter.
5 Q. And did you at that time, when the commission method was
6 the one that was thought to be the one that was going to be
7 used, would you have expressed that view to Mr. Endres, that
8 it was his job to put before the commission the relevant
9 material and information and factors?
10 A. Well, we never did get before the commission.
11 Q. But you had a meeting.
12 A. I don't think... I think Mr. Endres was aware of the contents of
13 this letter. I don't recall speaking to him specifically
14 subsequent to this.
15 Q. Would you have had any trouble with Mr. Justice Campbell
16 looking at pre-incarceration matters as long as they didn't
17 step on the Ebsary case, didn't deal with that?
18 A. Well, yes, because, in my view, the terms of reference are
19 very explicit. In my interpretation of it, anyway, which was
20 not one necessarily shared by Mr. Cacchione, it was quite
21 explicit as to where the starting time was.
22 Q. Mr. Giffin had indicated to us at 10466 and 10476 that he
23 was of the view that Campbell could have looked at pre-
24 incarceration matters as long as it didn't step on Ebsary. Do
25 you have any trouble with that view?

A. Well, you know, it's not for me to be troubled or not troubled with it. In my view, that's not what the terms of reference provided for.

Q. Did you have any discussions with the Attorney General at the time as to whether or not, assuming you didn't trespass on Ebsary, it would be okay to look at pre-incarceration issues?

A. I don't recall any discussion with Mr. Giffin on that point.

Q. You had a meeting on May the 16th, if you want to turn to page 425. I believe these are Mr. Endres' notes of that meeting which you attended.

A. Yes.

Q. And you say on page 426, or you're noted to have said:

> Reads from O.I.C. and says the starting point is with the incarceration. We can't agree that the commission may consider police involvement in matter of conviction.

And that was your position.

A. Yes.

Q. Did that ever change? Once the commission was essentially put aside and the negotiations took place between Mr. Cacchione and Mr. Endres, was it always your view that the compensation issue was still to deal only with the incarceration time?

A. Yes.

1 Q. And those instructions never changed or those views never
2 changed?
3 A. No.
4 Q. During the course of this meeting, Mr. Cacchione suggests,
5 "Why don't we just try and settle this," essentially, page 429.
6 And then at 431, Mr. Cacchione indicates in a note by his
7 name:
8
9 > Marshall now in need of psychological assistance. May be advantageous for him to settle now.
10 Do you remember Mr. Cacchione making that statement?
11 A. Not specifically. He may have. It's certainly not one I picked
12 up on. He didn't make it with any great... He didn't make an
13 issue of it. He may have.
14 Q. Did you have any awareness in general terms of Mr.
15 Marshall's psychological condition at the time?
16 A. No.
17 Q. Did Mr. Endres advise you at all as to, as the matter
18 proceeded, as to what sort of shape Mr. Marshall was in?
19 A. Not to my recollection.
20 Q. On page 434, again I think these are Mr. Endres' notes of a
21 meeting between yourself, Mr. Giffin, and Mr. Endres,
22 essentially giving the go-ahead to effect the settlement.
23 A. Well, to negotiate.
24 Q. Yes. Did Mr. Endres' job change at this point from what it was
25

when he was to place material before the commission? In other words, at this stage of the game, was he directed to consider what a fair settlement would be for Mr. Marshall?

A. I don't think there was any direct instructions that way. I think one has to remember, the very process of negotiations is a different process than what was contemplated before in the commission. I mean it's difficult to think of negotiations as being nonadversarial in the sense that we had anticipated the representations and submissions to the commissioner would be nonadversarial. I'm speaking for myself now.

Q. Did it become Mr. Endres' job to spend as little as he could?

A. Well, I don't know how he negotiates but I mean, certainly he received no such instructions from me on that.

Q. What instructions did he receive from you?

A. Well, we had invited Mr. Cacchione to indicate a figure, which he did, and that was where we started to negotiate from and we expected the negotiations to come down to a point where they would settle at a figure acceptable to Mr. Cacchione and acceptable to us. And I don't... Obviously, I suppose a negotiator wants to settle the best figure he can for his client. I don't know how to respond to the wording of your question, but he was involved in a process of negotiations and he was trying to see whether or not a figure could be reached that would be acceptable to both sides. If not, we would proceed with the inquiry.

1 Q. Mr. Endres was pretty frank when he was here. I think, in
2 general terms, he indicated that he saw his job in the
3 negotiations was to get to the lowest figure that he could.
4 Would you have any...
5 A. I wouldn't disagree with that, as a process of negotiations, no.
6 Q. And would you have ever given him any instructions to the
7 contrary?
8 A. No.
9 Q. Did you give him any instructions concerning the factors that
10 he ought to take into account?
11 A. Not in the negotiation process, no. I was perfectly confident
12 and relying on that with him.
13 Q. Were you quite happy then to, in a sense, turn Mr. Endres
14 loose to negotiate the best deal he could on behalf of the
15 government?
16 A. Well, negotiate a deal that would be acceptable to the
17 government.
18 Q. And it wouldn't be, it wouldn't upset you if Mr. Endres was
19 trying to negotiate a settlement the lowest figure that he
20 could?
21 A. Not at all.
22 Q. Why would your attitude change in terms of what Mr. Endres
23 was to do? I mean on the on the hand before the commission
24 he's placing before the commission material and information
25 in the public interest, acting on behalf of the public interest,

1 and now he's negotiating and apparently trying to get out as
2 cheaply as he could.
3 A. Well, I think even before the commission, if the matter had
4 proceeded, I think we would probably have adopted the same
5 position of trying to settle on the best price we could for an ex
6 gratia settlement. We weren't, you know, we weren't
7 mandated with a blank cheque and I don't think my position
8 changed any. I just assumed that in the process of
9 negotiation, he would arrive at a figure that would be,
10 certainly had to be acceptable to Mr. Cacchione and certainly
11 one that we could recommend to our Minister. I suppose my
12 initial position, as far as I was concerned, wasn't changed. It
13 wasn't affected. It wasn't influenced by it.
14 Q. Mr. Cacchione put his cards on the table on page 457 when he
15 wrote to you in June.
16 A. Yes.
17 Q. Those are your handwritten notes, are they, in the margin?
18 A. Yes.
19 Q. And he proposes a figure of $550,000.
20 A. Yes.
21 Q. As a total award. What was your reaction to that?
22 A. Well, I thought that was the, you know, that was the top
23 figure that he had and we negotiate from there. I expected,
24 as in most negotiations, it was what he would like to get but
25 was probably much higher than he expected to settle for, and

1 that was the basis of negotiations.
2 Q. Did you have any sense yourself at that time as to whether or
3 not that figure of $550,000 was reasonable?
4 A. Well, I just, you know, I just assumed it was negotiable.
5 That's what I would expect a party to do. Come out with their
6 best figure and be prepared to negotiate from there.
7 Q. But did you have any reason to think that that figure was a
8 reasonable or unreasonable figure?
9 A. No.
10 Q. You didn't focus on that at all?
11 A. No, except I, like I said, my instincts were that it was higher
12 than what he probably expected to get, but he was starting
13 the process of negotiations.
14 Q. What was your view at this time of Mr. Marshall? What did
15 you think of him?
16 A. I had never met him. I had no view...
17 Q. From what you heard and what you knew?
18 A. Or personal... Huh?
19 Q. Did you have any attitude toward Mr. Marshall? Did you
20 think he was deserving of compensation?
21 A. I don't think I... I don't think I had any views. If so, I wasn't
22 conscious of them.
23 Q. If I could just direct your attention to one of your
24 handwritten, a couple of your handwritten notes.
25 A. Uh-huh.

1 Q. Page 458.
2 A. Yeah.
3 Q. Down at the bottom under Item 11.
4 MR. CHAIRMAN
5 Before we move into that, Mr. Spicer, we'll take a short
6 recess.
7 3:29 BREAK
8 4:00 p.m.
9 Q. Just before we broke, Mr. Coles, I was asking about some of
10 the matters raised in Mr. Cacchione's letter on page 457.
11 A. Yes.
12 Q. And, in particular, the first one I wanted to you ask you about
13 is the bottom of page 458, this Item 11. Where it says, the
14 notation that Mr. Cacchione is making. It's referring to "the
15 factor of adverse effects on future advancement, employment,
16 marriage, social status and social relations generally." And
17 what does your handwritten note say?
18 A. "Probably the opposite."
19 Q. What were you intending to get at by that comment?
20 A. Well as you say these marginal notes were made so that they
21 would be matters I would take up with our counsel if we got
22 down to having to deal with these, this particular list of
23 factors and I didn't mean anything particular, I suppose,
24 except I, you know, I was aware that he had dropped out of
25 school. That he may have had some educational provisions at

1 the institution. He had an opportunity to learn, or at least be
2 an apprentice on a trade. It was a note to raise with counsel
3 that there may have been some plus sides notwithstanding
4 the incarceration, denial of liberty. There may have been
5 some plus sides as a result of institutional programs and
6 opportunities.
7 Q. Reinhold indicated, Mr. Endres had indicated, I think, at
8 13172 that "Coles may have thought Junior was better off in
9 jail because he advanced his educational qualifications."
10 A. No, I never thought he'd be better off. I thought there were,
11 there may be some, probably were some pluses to his term of
12 incarceration.
13 Q. Did you have a view as to the strength or otherwise of Mr.
14 Marshall's employment record in connection with any
15 possible claim for compensation?
16 A. Did I?
17 Q. Yes.
18 A. No.
19 Q. Were you of the view at this point in the summer that Mr.
20 Marshall's conduct was still not a factor that was relevant one
21 way or the other?
22 A. Right.
23 Q. And you were not of the view, I take it, from what you've
24 told us earlier that Marshall had helped secure his own
25 conviction by his conduct.

A. Right.

Q. Mr. Giffin said at page 10531 that Junior's conduct was a point that Coles mentioned to Giffin repeatedly. Do you have any reason to disagree with that?

A. That his, I don't recall and it certainly is not the position I viewed of the process of compensation.

Q. He also said that, at 10493, Coles expressed the view to Giffin that the public was outraged by Junior's activities. Is that a view that you held?

A. Well it arises out of the context on page 459 here...

Q. Yes.

A. My comment there and I may have expressed it to the Minister was that, you know, we were not involved in assessing and then compensating for the public outrage. We were talking about compensating Mr. Marshall. And if we're going to get into considering the question of public outrage there's also an element of the public that probably, that in my view thought his alleged activities were a matter of some outrage. But my view was that this was not a relevant issue and that's why I made the marginal note. And I'm surprised that Mr. Cacchione even introduced it because it brought into the equation this whole question of fault. And I may have expressed that, I may have expressed that concern to Mr. Giffin.

Q. Mr. Giffin also expressed the view at 10533 that "Coles felt

that Junior did not have a strong employment record." Would you have expressed that view to Mr. Giffin?

A. No, I had no knowledge of his employment record.

Q. Well why do you think Mr. Giffin, on a couple of occasions then, has indicated to us, first of all, that his conduct, Junior's conduct was a point that you mentioned to him repeatedly?

A. I have no explanation for that.

Q. Mr. Giffin also said at 10420 that "Coles was of the view that Junior was at least in part the author of his own misfortune." Is that a view that you held?

A. No, the view I held is the one I've repeatedly expressed to you. I don't recall using that phraseology. My view of his, of Mr. Marshall was his responsibility for the matter of his statements and testimony at the first trial and what I understood was probably his lack of communication to his counsel.

Q. Mr. How indicated that "Coles held the view that by lying Marshall had helped secure his conviction."

A. Yeah, I would have, that would be consistent with the view I held but it was in the context that if he hadn't the police would probably have investigated the matter differently and hopefully that would have not put him on charge for murder.

Q. Did you subscribe to the view as expressed by the Appeal Court in the last two pages of their decision?

A. I better have a look at those.

1 Q. Sure, that's in Volume 4. That's the stuff dealing with Mr.
2 Marshall having to take part of the blame himself. Volume 4
3 at pages, well really 145, 146.
4 A. Well I would agree with the paragraph that starts with the
5 words, "By lying he helped..."
6 Q. Yes.
7 A. Yes, that would be consistent with the view I held.
8 Q. And Mr. Endres indicated that you pointed those last two
9 pages out to him and that that was a view that you
10 subscribed to.
11 A. Yes, I don't know, I haven't read all the, I haven't read the
12 rest of this but I mean certainly I subscribed to the view
13 that is expressed there in the middle of that page, 145.
14 Q. In your views that, as expressed by Mr. Giffin that,
15 concerning Junior's conduct as is expressed as that in the
16 transcript, are you satisfied that that attitude was not
17 conveyed to Mr. Endres. That really you were dealing with
18 somebody whose conduct really was in question and ought to
19 be a factor?
20 A. Well I, to the best of my recollection I didn't and I think I
21 made that, I think in that letter that was written in May to
22 the counsel, I think I set out in that letter what my view was.
23 That we were not going to get into the question of fault. This
24 was where, I was talking about the proceedings before the
25 commission, that it would be nonadversarial and, as I say, I

may have been naïve in thinking that was possible but we were talking about ex gratia settlement and not of a matter of fault which I would identify with a tort proceeding. And I didn't see any necessity for that being a factor and I think I expressed that point of view or that position in that letter and I don't recall ever changing from that position.

Q. Were you concerned in the process of the settlement, in the process of the compensation matter being negotiated that some form of justice be done to Mr. Marshall in terms of what he was to receive?

A. No, I don't think I looked at in that context. In the negotiating process I was interested in seeing whether or not we could reach a figure that was acceptable to both sides. I didn't qualify it in those terms, no. I presume if it were acceptable that it would answer that question.

Q. On June 26th, if you want to turn to page 473...

A. Yes.

Q. That's a meeting with yourself, I take it, and Mr. Giffin and Mr. Endres.

A. 473?

Q. 473.

A. I think I have the page but is this the one you're talking about?

Q. Yeah, a meeting with Giffin and Mr. Endres indicated that means you "Deputy"...

1 A. Oh, I see.
2 Q. There's an instruction at the bottom of that page, it would
3 appear to be an instruction, "If necessary go higher, up to
4 325, but subject to confirmation." Do you remember that
5 figure being put forward?
6 A. Yes.
7 Q. Would that have come from yourself or from Mr. Giffin?
8 A. No, from Mr. Giffin.
9 Q. Would that have been an instruction to Mr. Endres that his
10 mandate, subject to confirmation, was 325, 325,000?
11 A. Well I don't know if it was an instruction. It was an
12 indication that he could move to that figure if it were
13 necessary. I'm using his language here.
14 Q. Without having to check back.
15 A. I beg your pardon?
16 Q. Without having to check back.
17 A. Yes. But wherever he, whatever level, the rates would be
18 subject to confirmation. I mean he wouldn't be able to, he
19 wasn't authorized to make a commitment at any figure. He
20 could negotiate up to that and indicate that he would
21 recommend...
22 Q. He'd be authorized, would he be authorized to say something
23 like "I'm prepared to recommend."
24 A. Sure.
25 Q. That sort of thing.

A. Oh, sure.

Q. Then at page 476, again a meeting which seems to be with yourself and the Minister and Mr. Endres. Can you tell us what was the, why it was that releases were being looked for from Junior Marshall's parents?

A. Well I think we were probably just being overly cautious, you know, we, from the beginning we are of the view that there was no liability on the Crown but we had agreed to a process of negotiation and/or have the matter determined on an ex gratia basis by the commissioner and the time Mr. Marshall was a juvenile and it was understood from the very beginning with Mr. Cacchione that if we concluded and reached an agreement that would be it. That would cover all bases. And it seemed a reasonable request on our part to ask for such a release. We didn't want to settle with Mr. Marshall and then find ourselves having to respond to a demand on the part of his parents to cover off the fact that he was a juvenile. I think it was just a matter of being overly cautious perhaps. But we did not get such a release.

Q. No, I understand that. There was no intention, was there, to make any payment to Junior Marshall's parents.

A. No.

Q. At page 482 there's a notation, I think in Mr. Cacchione's writing, about, where it says, "Deputy AG..." he's just having a discussion with Mr. Endres, I guess, and he's noting that the

"Deputy Attorney General's not prepared to talk to Ottawa re cost sharing." Was that your position?

A. Yes.

Q. And why were you not prepared to talk to Ottawa about cost sharing?

A. Well I think it was based on our constitutional position, but we understood, I understood this to be a matter of provincial jurisdiction and it was the province that decided to enter into these negotiations on an ex gratia basis and I saw no basis for us to raise the issue of cost sharing with the federal authorities at that time.

Q. Jumping ahead a bit, eventually it was split 50-50.

A. Well that was offered from the federal people. It was not in response to any request that I'm aware of.

Q. Yes. Did you ever have any discussions during this time, in the summer of '84, with Ottawa in connection with the legal accounts of Mr. Aronson or Mr. Cacchione?

A. Well I'm not sure about the dates, Mr. Spicer, but there was some exchange of correspondence as to the payment of Mr. Aronson's account and...

Q. That's the material that we reviewed last time.

A. Yes.

Q. Other than that there wasn't any other further discussion.

A. No. No, not to my knowledge.

Q. Then on 483, Mr. Endres is meeting with you. About two-thirds of the way down there it says: "Deputy says 'add another 15 for a total of 275.'" What was it that you were telling Mr. Endres to do at that point?

MR. CHAIRMAN

What page are we on, Mr. Spicer?

MR. SPICER

Q. Sorry, 483.

A. May I read the rest of the note?

Q. Yes.

A. Well, being refreshed by this note, my recollection is that we were close to reaching an acceptable figure and, however, Mr. Cacchione did not indicate, I gather, that he was all that comfortable with the figure that they had reached and I was aware that the previous advice that the Minister felt that he could recommend up to 325. So just as a... My response was, "Well, go up another 15,000, if that will do the trick." I don't recall anything more than that, but it was a, sort of a reconfirmation that he could go. He could beyond where they had stopped, if there was a reasonable prospect that they might settle on a figure.

Q. Would you have expected Mr. Endres on the basis of that authorization to, in fact, offer another 15,000?

A. Not necessarily. He would use his own judgement, as he had

in the process of the negotiations. He could offer part or all of it, as he saw fit. I wouldn't have interpreted our conversation and my encouragement, if I may use that word, for him to go beyond where they had stopped, as an instruction in that sense, no.

Q. Then on 493, there's a note, it seems to be August the 9th.

A. Yes.

Q. At this stage of the game, they basically arrived at a figure, you say, or the note indicates at the bottom:

> What we could do is inform Hugh of the fact in terms of settlement and invite the commissioner to make his report.

Et cetera. Why... At that stage of the game, was there discussion about whether or not it was necessary to have the commission report at all?

A. Well, I certainly was of the view that, although the commissioner agreed that we ought to try and see if a settlement could be negotiated, we were still under the mandate of the commission and I didn't personally think we had the authority to conclude a settlement that was not acceptable to the commissioner. I thought it was necessary for us to report and tell him the success we had had and that it was acceptable to the Cabinet and also, of course, Mr. Cacchione would communicate his position and, to wrap up the commission.

1 Q. Why was it important for the commission to accept the
2 figure?
3 A. The commission didn't have to accept the figure but the
4 commission had to either accept the figure or reject it and go
5 on to, with the inquiry. That was an option open to Mr.
6 Justice Campbell.
7 Q. But if they were to file their report, though, at that time,
8 would it have been your view that it would have been
9 necessary for them to accept the figure that had been agreed
10 upon?
11 A. I have a little difficulty in seeing how they could report
12 without recommending the settlement that had been
13 negotiated. I suppose it's possible. I hadn't thought of it.
14 Q. Could they not have...
15 A. In those terms.
16 Q. Could they not have just said, "We understand that the matter
17 has been settled between the parties and see no further need
18 to comment."?
19 A. Could have. I drafted, I offered to draft a report and the
20 commission counsel or the commissioner could have changed
21 it. I didn't draft a report in the terms that you have
22 suggested might have been.
23 Q. On August the 10th on page 495, you, there's a note, your
24 name, or "Deputy" at the top and Item 2:
25

Deputy to draft report to Governor-in-Council from commissioner incorporating settlement.

A. Yes.

Q. I take it it was your view at that point in time that the report from the commission would have to at least incorporate this settlement in some fashion?

A. That was my view, yes.

Q. Did you have any discussions with the Attorney General as to whether or not it was necessary for the settlement to be incorporated?

A. Not that I recall.

Q. Can you just turn back a page to 494. It's a note to yourself from Mr. Giffin reporting on a Cabinet meeting and the last paragraph:

> It was also felt that the settlement should be okayed in some fashion or other by Mr. Justice Campbell. We should discuss these points further.

Did you discuss those with Mr. Giffin?

A. Well, I'm sure I did, yes.

Q. Do you know whether or not Mr. Giffin was of the view himself that the settlement had to actually be okayed? He seems to be reporting on the view of Cabinet here.

A. Well, he had to sign the report and recommendation to Cabinet.

Q. Yes.

1 A. So I presume that he agreed with that procedure or he would
2 not have presented it to Cabinet.
3 Q. You were the person who drafted the report... Sorry.
4 **EXAMINATION BY CHAIRMAN**
5
6
7 Q. Mr. Coles, this memo here from the Attorney General says:
8 "Cabinet has given authorization to settle at the amount
9 indicated."
10 A. Yes.
11 Q. So...
12 A. We had communicated the result of the negotiation.
13 Q. Right.
14 A. To get their approval.
15 Q. And Cabinet says, "Fine, we'll pay the amount..."
16 A. Yes.
17 Q. "Of the agreed upon settlement." It could have concluded
18 there, could it not?
19 A. Oh, it could have, oh, yes.
20 Q You simply would have taken your releases, paid Mr.
21 Cacchione the amount of the agreed upon settlement, and
22 written Mr. Justice Campbell and said, "Thank you very much,
23 but your services are no required."
24 A. It could have. I just thought that this was a more formal way
25 of concluding the commission. He was mandated by the

1 Executive Council to do this and he had agreed with the
2 process that was resulting in the settlement and it seemed to
3 me to be the, a way perhaps what I thought was the
4 appropriate way to conclude and wrap up the commission
5 that had been issued to him. But I agree, My Lord, it could
6 have been done less formally.
7 Q. Was there any thought that... You had the findings of the
8 Court of Appeal on the reference, which appeared to point
9 some blame, at least, in the direction of Donald Marshall, Jr.
10 for his...
11 A. I'm having difficulty hearing you, My Lord.
12 Q. When you were deciding, or do you know when... If when it
13 was decided to go the route of having Mr. Justice Campbell
14 approve the settlement, was there any feeling that this would
15 be necessary because of the comments and/or findings made
16 by the Court of Appeal of Nova Scotia on the reference, which
17 indicated that there may have been some blame on the part
18 of Donald Marshall, Jr. for the predicament in which he found
19 himself?
20 A. Not on my part in drafting the report. That was not a
21 consideration.
22 Q. I see. Nor, as far as you know, on the part of government in
23 deciding to follow the route of having that approval...
24 A. That's right.
25 Q. Of Mr. Justice Campbell?

A. I would, once the report and recommendation was presented to the Executive Council by the Attorney General, I would be surprised if there was any consideration at that office.

Q. So, as far as you...

A. I had no knowledge, anyway.

Q. Were concerned, there would be no anxiety on the part of government. Well, what's the public reaction going to be when it gets out? We've agreed to pay Donald Marshall, Jr. "x" dollars in view of what the Court of Appeal...

A. If there was, I wasn't aware of it. The idea to follow this procedure was initiated with me. I thought this was the appropriate way to conclude the matter and this is what I recommended.

EXAMINATION BY MR. SPICER

Q. The final version of Mr. Campbell's report is at page 520. And prior to that at page 498, you had sent a draft of that report to Mr. Endres. It's your memo at 498 indicating that transmittal.

A. Yes.

Q. And you're saying at the fourth line:

> However, I think the important position for us to take is that since he agreed (that's Campbell) to our attempt to negotiate a settlement, now that we have done so procedurally, we should be able to report this as a fait accompli and he, in effect,

> report and recommend it to His Honour in wrapping up his mandate.

Was it your view then that Mr. Justice Campbell was, in effect, recommending that settlement, the $270,000, if that's what was to occur?

A. Yeah, that would be the effect. He was incorporat... If he agreed to it, he was incorporating it and that's the way they... That's the way I drafted the report, if I recall it correctly.

Q. If you go over to 520 and 521, you'll see your report.

A. Five?

Q. 520 and 521.

A. Yes.

Q. You refer to the settlement at the top of 521 and then you go on to say in the second paragraph of that page, or Mr. Justice Campbell is saying it.

A. Uh-huh.

Q.

> Accordingly, I recommend acceptance and implementation of the said agreement in concluding this matter. (He then goes on to say) I shall await the result of your further deliberations. If my recommendation is accepted...

Was it your intention in putting together Mr. Campbell's report that he be seen to be recommending?

1 A. I'm not sure...
2 Q. That last...
3 A. That that last paragraph was included in my draft.
4 Q. No, I think the last paragraph, perhaps, was the one before,
5 really. "Accordingly, I recommend acceptance and
6 implementation..." You can read that off against your own
7 one.
8 A. The last paragraph?
9 Q. No, not the last paragraph, the one before that. "Accordingly,
10 I recommend acceptance..."
11 A. Yes.
12 Q. Was it your intention that Mr. Justice Campbell be seen to be
13 recommending this figure, $270,000, rather than just
14 accepting it, saying, "Okay, counsel have agreed. I accept
15 that."
16 A. I don't recall whether I addressed that specifically. I was
17 following the terms of the order that required him to report
18 and recommend and I suspect I picked up the language there.
19 Q. Did you have any discussions with Mr. Justice Campbell about
20 it?
21 A. No.
22 Q. Do you know whether anybody in your Department did?
23 A. No.
24 Q. There's a press release at 543 of this volume in connection
25 with compensation. It seems to be a press release. Did you

1 have any involvement, sir, in putting that...
2 A. 54...
3 Q. 543.
4 A. Press release? 544? Is that...
5 Q. There's something at 543, "Attorney General Ron Giffin
6 announced today..." Perhaps that's not a press release, just an
7 announcement, "for release at 12:15." The press release that
8 follows is Mr. Cacchione's, I believe. I'm just asking whether
9 you had any involvement in this particular...
10 A. I don't recall whether I had any involvement in that press
11 release or not. I don't remember it.
12 Q. With respect to the compensation issue then overall, do we
13 take it that the $270,000 that was paid was to cover the
14 period of incarceration? That that instruction never changed.
15 A. It was to compensate him for the, in respect of the
16 incarceration. I'm not sure we talked in terms of a period.
17 We weren't talking about so much per day or so much per
18 year.
19 Q. No, I understand that, but issues that may have arisen prior
20 to his incarceration.
21 A. No, no.
22 Q. Were not intended to be included in the 270,000.
23 A. No.
24 Q. I suppose if one...
25 A. That is correct.

4:30 p.m.

Q. So I suppose if one wanted to look at it, quite apart from the issue of the release, that anything that might be owed to Mr. Marshall for a pre-incarceration period has not been dealt with by that $270,000.

A. It was not, anything pre-incarceration period as we have been referring to it, was not included in the ex gratia settlement that was reached.

Q. Right.

COMMISSIONER EVANS

You're not talking about pre-incarceration you're talking about incarceration subsequent to the reference.

MR. SPICER

Oh sure, yeah.

COMMISSIONER EVANS

So we get that...

MR. COLES

I understand.

MR. SPICER

No, we're talking about the period of incarceration subsequent to conviction.

CHAIRMAN

To the....

A. Prior to.

Q. To the appeal. Yeah, and to the appeal.

1 COMMISSIONER EVANS

2 Tell me again what that period is.

3 MR. SPICER

4 Mr. Coles, I think, has been saying to us that it's the period
5 of time starting with the final disposition of the Marshall matter
6 in '72.

7 MR. COLES

8 By the Court of Appeal.

9 MR. SPICER

10 Q. By the Court of Appeal. Starting from that point in time
11 forward and not dealing with any of the period of time prior
12 to that which is the police investigation and prosecution.
13 Correct?

14 A. Correct.

15 Q. And that the, that's the fact notwithstanding the fact that Mr.
16 Marshall's release was executed. Perhaps I could draw your
17 attention to it at 532 and 533, specifically does refer at the
18 bottom of 533, last four or five lines, "releasing the Crown in
19 respect of claims for damages arising in any way from the
20 arrest and incarceration."

21 A. Yes.

22 Q. If that was the case, Mr. Coles, if the money was not to cover
23 that period of time, why was it that Mr. Marshall was asked
24 to execute a release covering a period of time other than the
25 period for which he was being compensated?

A. Well I can't answer that specifically. I did not draw the release except that we were, our position was that we were entering into a process to determine a level of compensation on an ex gratia basis and it was with the expectation that if we were able to negotiate that it would be, it was a one, one trip. That would cover everything and I suppose the release was drawn to make, to close all other options that might otherwise be open to Mr. Marshall. And it was understood that we would be getting a full release in exchange for the agreed upon settlement. And my understanding is that was understood and agreed to by Mr. Cacchione from the very beginning.

MR. SPICER

I expect I'll be some more time, My Lord.

4:32 p.m. - ADJOURNED TO 21 June 1988 - 9:30 a.m.

REPORTER'S CERTIFICATE

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

Margaret E. Graham

DATED THIS 20 day of June 19 88 at Dartmouth, Nova Scotia