

MR. COLES, EXAM. BY MS. EDWARDH

1 exchange of letters with Mr. Edwards that the release of that  
2 particular report was not proper, if one would read the  
3 letters that way, I take it you didn't intend to convey that  
4 impression? You weren't dealing specifically with the  
5 release of that particular report?

6 A. No, I think I made that point in my letter. I intended to.  
7 My letter on Page 4 of this volume, the last paragraph on  
8 Page 1, the third line, I say to anyone else, whether it dealt  
9 with matters in respect to Donald Marshall or any other  
10 investigation, my reply was directed to the policy pertaining  
11 to the release of police reports.

MR. CHAIRMAN

12 It's almost like locking the barn door. Mr. Aronson had the  
13 report. This is the crucial thing.  
14 2:16 p.m.

15 Q. The next area I'd like to deal with, if I could, Mr. Coles, is your  
16 January meeting with Mr. Edwards, which, as you've  
17 indicated, sir, arose as a result of a letter Mr. Edwards sent  
18 outlining certain concerns, and we'll come to that in a  
19 moment. But prior to that January meeting, it's fair to say,  
20 sir, that you certainly did not have day-to-day responsibility  
21 with respect to the Marshall case.

22 A. I wasn't dealing with it on a day-to-day basis.

23 Q. And would it also be fair to say that you were not reading  
24 statements as they came in or assessing them in the way you  
25

1 would have, for example, if you were prosecuting the case?

2 A. That's correct.

3 Q. And you didn't conduct any interviews. Those were all  
4 conducted elsewhere by others by Mr. Edwards.

5 A. That's correct.

6 Q. Or the police. So your responsibility would have been to  
7 provide direction when matters came to your attention, but  
8 it's quite clear that Mr. Edwards had the day-to-day carriage  
9 and judgement were to be his.

10 A. Under the direction of the Director, Mr. Gale.

11 Q. As always.

12 A. As always.

13 Q. Now Mr. Edwards forms the view that Mr. Marshall is  
14 innocent of the charge of murder, correct? You're aware  
15 that's his personal view.

16 A. Yes.

17 Q. And it's the view of the Crown who has carriage of the case,  
18 so it's a significant view.

19 A. No, it's his view.

20 Q. It's a significant view because he has carriage of the case and  
21 he's the one that's doing the work in the field.

22 A. Well, I'm not going to be argumentive with you, but an  
23 individual prosecutor's view is not necessarily the view of the  
24 Crown, and need it not be.

25 Q. Well, let me just deal with this issue for a moment. Of all the

1 views that might be held in the Department about a case,  
2 would you agree, sir, that the view to which the Crown ought  
3 to adhere to, or listen to at least most carefully, is that of the  
4 prosecutor who is actually out there interviewing witnesses,  
5 reading the statements, and assessing the case?

6 A. Probably in most cases.

7 Q. Yes.

8 A. I don't... I never did take issue with his personal view of the  
9 case.

10 Q. Right. We'll come to that. You also were aware that the police  
11 had formed the view, the R.C.M.P. had formed a view of the  
12 situation.

13 A. Yes.

14 Q. And that they also shared the view that Mr. Marshall was  
15 innocent of the charge.

16 A. That was my understanding.

17 Q. Now let's, I'd like to deal for a moment with the ethics of  
18 Crown counsel making representations to a tribunal. Would  
19 you agree, sir, that in, as an officer of the court, that Crown  
20 counsel has a duty, as do defence counsel, to not put forward  
21 a position which they know to be false?

22 A. Of course. Of course.

23 Q. And that is one of the governing rules of advocacy, would you  
24 agree with that?

25 A. Yes, Counsel.

1 Q. Now in your discussion with Mr. Edwards about his view of  
2 wanting to put forward an acquittal, of saying the Crown's  
3 position was that the court ought to acquit, were you aware,  
4 sir, and was it clear to you that that in part or primarily came  
5 from a commitment or a conclusion on the part of the Crown  
6 that has carriage of the case, that Mr. Marshall was innocent  
7 and the R.C.M.P. supported that view?

8 A. I already answered that question in the affirmative.

9 Q. Now wouldn't it be clear, sir, that not, to urge any other view  
10 on the court, and now I'm going to deal with urging another  
11 view on the court, would be, in fact, not a proper thing for  
12 Crown counsel to do?

13 A. No, for reasons that you say you're going to come to, my  
14 answer is no.

15 Q. It would not be proper to urge another view?

16 A. It depends on the position that you think is appropriate for  
17 the Crown in this particular reference.

18 Q. No, if Crown counsel himself takes the view that to urge  
19 anything else would be to mislead the court, then Crown  
20 counsel, as a matter of their ethical conduct, must not say  
21 anything else, isn't that a fair statement, sir? That's their  
22 duty as an officer of the court.

23 A. Well, I'm not aware that that was the position taken by Mr.  
24 Edwards. He didn't... He held his own convictions but he  
25 didn't indicate to me that to take any other position would be



1 misleading the court, or the language that you have just used.

2 Q. Isn't it implicit...

3 A. I would... The position that I was suggesting would not be one  
4 of misleading the court under any interpretation.

5 Q. Isn't it implicit in his concern that he, having come to the  
6 conclusion that Mr. Marshall was innocent and that with the  
7 support of the police, to urge any other conclusion would be,  
8 in effect, to mislead the court. Isn't that implicit in what he  
9 was saying to you in the two and a half hour meeting you  
10 held?

11 A. Well, it may have been. I did not identify it in that sense and  
12 I think that there are other considerations that had to be  
13 considered by the court and there was some question  
14 whether they would be fully considered by the court if the  
15 Crown, having already prejudged the issue before the court,  
16 may be very selective in its presentation in dealing with the  
17 evidence before the court. I think these are issues, Counsel,  
18 that have to be taken into account if you want to understand  
19 the reasons for the position I was suggesting.

20 Q. So if I understand your answer to my question, Mr. Coles, is  
21 that it did not appear to you at that time that that's what Mr.  
22 Edwards was saying? Is that your answer or are you saying  
23 that it's implicit in it?

24 A. What I understood was that Mr. Edwards had come to the  
25 conclusion of Mr. Marshall's innocence and it was his view

1 that the Crown ought to take that position before the court,  
2 should advocate that position before the court.

3 Q. And to advocate that position because, in fact, it had also  
4 concluded that there were reasonable and probable grounds  
5 to charge someone else with the commission of the crime.

6 A. Yes, I would think that is correct.

7 Q. And to leave open for the court the range of possibilities  
8 would, in fact, invite them to choose this way. Impliedly, it's  
9 having Crown counsel invite them to uphold the conviction,  
10 correct?

11 A. That was one of the options available.

12 Q. And you would have had Crown counsel put that option to the  
13 Court of Appeal, would you, sir?

14 A. I was not advocating putting any specific option before the  
15 Court of Appeal.

16 Q. You were advocating leaving a number of options open. I  
17 understand you.

18 A. I was advocating assisting the court but dealing with the  
19 evidence that was before the court and also making the court  
20 aware of evidence that had been heard in previous  
21 proceedings that was not before the court and recognizing the  
22 court had to make a judgement. The court had to decide  
23 whose statements, at what point it was going to believe at  
24 that time. The whole question of the weight that the court  
25 was going to give to the testimony of Mr. MacNeil was an

1 unknown open question.

2 Q. I understand... I'm sorry.

3 A. Not in Mr. Edwards' mind. At that time, he had satisfied  
4 himself on Mr., on acceptance of Mr. MacNeil's evidence. He  
5 had concluded on that basis. Whether the court would have  
6 shared his assessment and evaluation of Mr. MacNeil's  
7 evidence was a question for the court.

8 Q. No, sir. I'm going to suggest this to you, and perhaps maybe  
9 this is the point of dispute. That although that reasoning in  
10 the ordinary course may hold, it no longer holds at the point  
11 where Crown counsel who stands before the court holds the  
12 belief that to suggest otherwise is not to be honest with the  
13 court. At that point, Counsel's obligations take over.

14 A. Well, two points to that, if I may, Counsellor. First of all, Mr.  
15 Edwards did not make his case in those terms, to my  
16 recollection. Secondly, as you know, Mr. Edwards in the third  
17 Ebsary trial closed the case of the Crown without calling Mr.  
18 MacNeil. And when he was questioned about that, he  
19 expressed a lack of the same credence to Mr. MacNeil's  
20 evidence at that time and was directed by the judge to reopen  
21 the Crown's case and examine Mr. MacNeil. So my point of  
22 referring to that is, you know, these are questions of  
23 judgement for the person who has to make the decision.

24 Q. Which was Mr. Edwards.

25 A. Mr. Edwards made the decision in determining in his own

MR. COLES, EXAM. BY MS. EDWARDH

1 mind the question of Mr. Marshall's innocence. But the court  
2 had the prerogative and the right to make it's own  
3 independent assessment of Mr. MacNeil's evidence.

4 Q. So where we differ then is in an assessment that there comes  
5 a time when Crown counsel is obliged to stand before the  
6 court and say, "I cannot press this matter." It's a matter...  
7 And it's your view that Crown counsel, I'm not talking about  
8 can perpetrate a fraud unto the court, but it's your view that  
9 it would have been quite proper in this case, knowing that  
10 Mr. Edwards took the view that Mr. Marshall was innocent,  
11 that the police took the view that he was innocent, that some  
12 other person could and would be charged with the  
13 commission of the offence, that Crown counsel stand before  
14 the Court of Appeal and say, "It's open to you to reaffirm the  
15 conviction."

16 A. Well, I would like to...

MR. SAUNDERS

18 I realize this is cross-examination again, but I think, in  
19 fairness, if my friend intends to put to this witness the  
20 circumstances of a meeting between himself and Mr. Edwards, it  
21 might be advised if she go to page 18 in Exhibit Book 17 where  
22 Mr. Edwards outlines the position that he took and the position  
23 that Mr. Coles took. And I say with deference that he agreed with  
24 Mr. Coles when Mr. Coles said that the decision was one for the  
25 court. And I'm referring to the fourth to last paragraph on the

MR. COLES, EXAM. BY MS. EDWARDH

1 bottom of page 18, Exhibit Book 17, quote:

2 Stated that it was not role of Crown to take  
3 position, that it was the responsibility of the  
4 court to make the decision - agreed with him on  
5 latter point but not on former.

MS. EDWARDH

6 Well, I don't think it's clear what the decision means in that  
7 quote.

MR. SAUNDERS

9 That it is the ultimate responsibility or decision of the court  
10 to decide what it's going to do, based on the evidence before it.

MS. EDWARDH

12 Of course.

MR. SAUNDERS

14 And I say, with respect, that that's the position of the  
15 witness and it was of Mr. Edwards at the time on that point.

MS. EDWARDH

17 I agree that that is obviously the conclusion one draws. I do  
18 not necessarily take it from that that the ethical problems of, I'm  
19 going to suggest, interfering with Crown counsel's decision about  
20 how to conduct a case, aren't real and very concrete in the facts of  
21 this case.

MR. CHAIRMAN

23 Well, we've heard a great deal of evidence and questioning,  
24 a lot of which is argumentative and this may be somewhat  
25

DISCUSSION

1 difficult to avoid when you have, as witnesses, Crown counsel with  
2 many, many years of experience, to try and ask lawyers not to be  
3 argumentative in cross-examination and to ask lawyers or  
4 witnesses not to be argumentative in their reply would probably  
5 destroy the whole purpose of having the legal profession before  
6 us. But a lot of these questions are getting argumentative and  
7 we've heard them often and I'm not sure that we're going to get  
8 any further answers than we have now and then the Commission  
9 will be left with the...

10 It will be our obligation, anyway, to decide whether or not  
11 the practice that was followed, assuming that the practice that  
12 was followed, whether it was an appropriate practice or not.

13 We've heard two or three... We've heard Mr. Coles explain  
14 now why he felt the position he advocated was a sound one.

15 We've heard Mr. Edwards and we've heard other variations  
16 in between.

17 There was another, as I recall it, a position advanced a  
18 couple of days ago by Mr. Coles that one of his concerns was that  
19 the Court of Appeal on the reference had, and this was a concern I  
20 think that Mr. Edwards expressed, too, had raised, or indicated  
21 they didn't require or didn't wish to hear from certain evidence...  
22 from certain witnesses and didn't wish to... And would not admit  
23 certain affidavits that it appeared at the conclusion of the  
24 evidence that they were going to focus on the credibility of the  
25 three or four or five witnesses that were before them.

MR. COLES, EXAM. BY MS. EDWARDH

1 That raises the whole question then of whether the thing  
2 that maybe could have been avoided by going under Subsection  
3 (c) which both the Attorney General of Canada and the Attorney  
4 General of Nova Scotia wanted to do but, for reasons we now  
5 know, couldn't do. Whether that didn't throw it back in, everyone  
6 back into the adversarial role, which was, I believe, was what's  
7 contemplated under (b) when they talk about the same rules  
8 applying and that may be what's causing all the difficulty.

9 2:30 p.m.

MS. EDWARDH

11 With your Lordship's caution, I'll move then to just...

MR. CHAIRMAN

13 All right.

MS. EDWARDH

15 ...I have one last question I would like to put to the witness.

MR. CHAIRMAN

17 Yes.

MS. EDWARDH

19 I don't think it's intended to be argumentative at all.

20 Q The position you took, sir, with respect to what Crown  
21 counsel ought to do in this case, do I take it that you were  
22 aware that that position might well jeopardize the chances  
23 that Donald Marshall would, in fact, or it would jeopardize  
24 his liberty or it could potentially jeopardize his liberty?  
25 That the results weren't then ensured?

1 A. Well, sure, I was aware that if the Court had decided not to  
2 accept the new evidence, the new statements, they may  
3 have...they may have been in the position of upholding the  
4 conviction. They may have, if they found that there was not  
5 sufficient evidence before them or that the evidence was  
6 such that they were not able to direct a verdict, they may  
7 very well have found it necessary to order a new trial.  
8 These were always possibilities, but it seemed to me that  
9 my concern was that the court have the benefit of a  
10 thorough appreciation of all the evidence that was before  
11 the trial court and what was now introduced as new  
12 evidence and...and they had some tough decisions to make.  
13 They had to accept some and reject others. And I thought  
14 the proper role of the Crown was to assist them in that  
15 exercise.

16 Q. And, I think it's clear though that when it became apparent  
17 that the Court would not have the benefit of all the evidence  
18 before it, you, sir, still felt strongly that the position ought to  
19 be to take and run the risk that Mr. Marshall would not  
20 secure his liberty.

21 A. Well, I'm...

22 Q. Is that a fair statement?

23 A. I don't think I looked at it in those terms. I looked at it how  
24 could the Crown be of the most help and assistance to the  
25 Court in this particular kind of...this particular kind of



1 review. And, I...and my view was that to...for the Crown to  
2 come to its own decision and make its own judgements on  
3 the evidence, pre-judge what I thought was the issue for the  
4 Court, it would put the Crown...it could put the Crown in a  
5 position of being selective in its dealing with the evidence,  
6 and if that, not intentionally, but subconsciously perhaps,  
7 and that would be of less assistance to the Court than I  
8 considered the proper role of the Crown to be.

9 Q. I'm just pointing out what the effect. Do you agree, sir, that  
10 the effect of that was to run the risk that Mr. Marshall might  
11 not secure his liberty?

12 A. Well, that was always a risk when the Court was asked to  
13 review the matter. The Court on its own motion, without the  
14 assistance of the position of the Crown, could have come to  
15 any of those three options. That's always a risk, I suppose,  
16 in that sense.

17 Q. Yes.

18 A. But I mean that's...

19 Q. That's all my question is. You were aware of the risk.

20 A. Well, I didn't think of it particularly in those terms. But I  
21 was aware of the options open to the Court, yes.

22 Q. Let me deal then with another area, which is the Freedom of  
23 Information Act request that was made to you. You're  
24 aware that the request was made that would have produced  
25 access to, for example, the RCMP reports. And, I take it it

1 was in part your view of RCMP reports that caused you to  
2 say, "No".

3 A. Yes.

4 Q. Or was it just the terms of the statute?

5 A. No, my understanding and interpretation of the statute, as I  
6 said to Mr. Spicer, was that there are certain material  
7 information to which there was...access was denied by  
8 reason of the source or the purpose for which that  
9 information was obtained, and I characterized the request,  
10 the information requested, as coming within those areas and  
11 that by the nature of the information, if it were in our  
12 possession, it would have come from either a protective  
13 source or for purposes that were protected under the  
14 section.

15 Q. I understand that. My question, however, is we know you  
16 had the authority and jurisdiction to deny access. We  
17 understand that. My question to you is when you...in  
18 answer to Mr. Spicer's question you simply said, "Well,  
19 within the terms of the statute I denied it." This is...Mr.  
20 Marshall's case was an unusual case. It's...you'll agree with  
21 that.

22 A. The request under the Freedom of Information Act was...did  
23 not change because it happened to be a request on behalf of  
24 Mr. Marshall.

25 Q. So, this is my question, you made the decision to deny access

1 to Mr. Marshall regardless of the merits of his claim or his  
2 need for information, is that a fair statement?

3 A. The fact that it was Mr. Marshall making the request had no  
4 bearing on my judgement to deny the request.

5 Q. And it had no bearing, as well, that he might need the  
6 information to press his claim with the Nova Scotia  
7 government.

8 A. Well, he didn't...he didn't indicate that, but that would be a  
9 matter he would have to take up with the Minister or some  
10 other person.

11 Q. But it's clear you're in the process of, over the time frame,  
12 compensation is growing as an issue. This is the...

13 A. I'm not sure of the time frame.

14 Q. ...three or four months before the Campbell inquiry. Now,  
15 my comment to you is why would you exercise your  
16 discretion, in an application of this kind, without regard to  
17 the need of the applicant, the entitlement of the applicant,  
18 the bona fides of his interest? Why would you do that?

19 A. Well, those considerations did not come to mind when I was  
20 dealing with that request under the Act. I looked at the  
21 nature of the information requested, and in my  
22 interpretation and application of the Act, that was  
23 information to which there...access was not permitted or it  
24 wasn't, was not allowable.

25 Q. Not permitted.

1 A. No, I didn't mean to say permitted.

2 Q. You could have permitted it. Yes.

3 A. I mean that a public do not have a right of access to.

4 Q. But why not give him the access because it may assist the  
5 wrongfully convicted person to assert his interest.

6 A. Well, I didn't consider that to be my responsibility at that  
7 point. I...I exercised my decision on the basis I've indicated  
8 to you and indicated the appeal route available to the  
9 applicant if they took issue with my decision.

10 Q. And you'll agree with me that the effect of the decision-  
11 making model that you have just described is to simply say  
12 "If we can keep it secret, we keep it secret."

13 A. That was not the intent or the purpose or the motivation  
14 under which I denied the request.

15 Q. Are you're saying nothing about the individual applicant or  
16 the merits of his claim or the bona fides of his need would  
17 compel you to release it? It falls within a class which is  
18 within your discretion to release, you don't release it. That's  
19 what you said, isn't it?

20 A. Oh, yes, right. When you say discretion I think you're...I  
21 would take...I would want you to understand that I would  
22 have the authority to release it.

23 Q. Yes.

24 A. And that in that sense a discretion. But it would be a...it  
25 would be an authority that I would...I would not very

MR. COLES, EXAM. BY MS. EDWARDH

1 frequently exercise. That kind of a discretion I would, I  
2 think, more appropriately exercise by the Minister to whom  
3 there is a right of appeal.

4 Q. But you certainly have the authority, you could have  
5 released it and Mr. Marshall's case was unusual, but as you  
6 pointed out, you didn't consider that aspect of it.

7 A. I could have because as Deputy you have the authority to  
8 act for the Minister. And the Minister has that authority.

9 Q. But the Minister knew you were going to say "No."

10 A. Oh, I don't think the Minister was even...

11 Q. I thought...

12 A. The Minister wasn't even aware of the request at the time I  
13 dealt with it, to my knowledge.

14 Q. I'm sorry.

COMMISSIONER EVANS

15 I didn't hear him say that.

MR. COLES

16 No, I didn't say.

COMMISSIONER EVANS

17 Was there any suggestion that the Minister knew?

MS. EDWARDH

18 Q. I thought that there was some indication that you, and I'll  
19 just clarify this, that when you got the request, that you  
20 consulted with the Minister in denying it.

21 A. No.

1 Q No.

2 A. I think you may...may be alluding to the fact that I said  
3 after I sent my letter denying the request, I probably blind  
4 copied that letter to the Minister for his information.

5 Q Probably.

6 A. But that was subsequent. I would normally do it because he  
7 would...he could anticipate an appeal from my decision.

8 Q And I take it, he did not discuss with you the propriety of  
9 your decision?

10 A. Not to my recollection.

11 Q And indeed, it would appear that obviously he then made  
12 his decision without reviewing the matter or without  
13 reviewing the details of the file.

14 A. I don't know what basis he made his decision on.

15 Q Did you discuss with him...

16 A. I'm not privy to it.

17 Q ...his decision?

18 A. No.

19 Q I'm sorry, yes, where I got the notion that you had discussed  
20 it with the Attorney General was that he testified, I believe,  
21 that he discussed your denial with you prior to it being  
22 issued and the reference to that is pages...page 10430, My  
23 Lord.

24 A. Well, if he did, I don't recall that discussion.

25 Q You don't have any recollection.

MR. COLES, EXAM. BY MS. EDWARDH

1 A. No.

2 Q. So, certainly if...

3 A. There would be nothing unusual for him, but I don't recall it.

4 COMMISSIONER EVANS

5 I understood, excuse me, I understood that to be the  
6 discussion that took place prior to the Minister's refusal.

7 MR. SPICER

8 Well, I think the comment was, that I referred him to  
9 yesterday, I think, My Lords, at page 10430, and my note of it, or  
10 my scribbles from yesterday were or was it...If I can just find it  
11 here.

12 MS. EDWARDH

13 I'm sorry, we don't have the volume here.

14 MR. SPICER

15 Yes, it's page 10430 is the reference...

16 MS. EDWARDH

17 If we could have...

18 MR. SPICER

19 You can double check that and see what...

20 MS. EDWARDH

21 10430.

22 COMMISSIONER EVANS

23 10430.

24 MS. EDWARDH

25 Q. Yes, let me just read this exchange. Thank-you.

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Q. Mr. Giffin, before we broke for lunch, we were in January of 1984. I'd just like to go through some documents with you that begin at page 309 of Volume 32. Are you familiar with the letter to Mr. Coles?

A. Yes.

Q. Did you discuss with Mr. Coles prior to his letter of the 17th his denial of the request for the information?

A. Yes.

Q. Did Mr. Coles advise you on what basis he was going to make the denial?

A. Yes.

COMMISSIONER EVANS

That's clear enough.

MS. EDWARDH

Appears to be, My Lord.

Q. So, I take it, assuming your recollection may just be faulty in this regard.

A. It could be.

Q. That you probably, indeed, did have such a discussion with the Minister but he certainly didn't disagree with the denial.

A. Well, I don't recall. As I said earlier why I said I presume I blind copied that to the Minister, there's no "b.c." on the copy that I was shown, but I would normally have copied



1 that to him and I would not be surprised that after he  
2 received it he may have...he and I may have discussed it.

3 Q And, I take it...

4 A. But I don't recall discussing it with him.

5 Q And your notion that it would be more appropriate for the  
6 Minister to exercise the jurisdiction based upon the unusual  
7 nature of the Marshall case or the unusual nature of the  
8 applicant, was that a matter that you think was discussed or  
9 did the Minister simply deal with the suggestion for access  
10 the same way you did?

11 A. I didn't intend to imply that he would consider those things  
12 differently than I. I'm not sure that those factors were  
13 before him either. I'm saying he, the Minister, had the  
14 authority to grant access if he saw fit. I don't know that he  
15 had those particular factors in mind or considered.

16 Q Well, I take it, sir, that what we do know is you were  
17 certainly aware of Mr. Marshall and you chose then to treat  
18 him like all other applicants of any kind without regard to  
19 any need that you might assume he had.

20 A. That is correct.

21 Q And so the presumption then that you work with, with the  
22 greatest of respect, is to keep information from the public  
23 domain if there is a proper foundation to do so.

24 A. No, I try to comply with the Act as I understand it...its  
25 intent.

1 Q. If you have a discretion to release it but can keep it from  
2 the public, do you release it, and if so, how do you exercise  
3 your discretion?

4 A. Well, I would say a person would have to make out a special  
5 case to show why they are entitled to have access when a  
6 person normally would not be entitled to access, and I  
7 would expect a special kind of representation to be made so  
8 that that could be considered and determined whether it  
9 was a proper basis to grant access where otherwise access  
10 would be denied under the Act.

11 Q. Well, you certainly knew that the claim for compensation for  
12 being wrongfully convicted was now being pressed upon the  
13 Nova Scotia government by Mr. Marshall's counsel. You  
14 knew that you had information pertaining to his wrongful  
15 conviction that counsel did not have, and in those  
16 circumstances how could it be that, perhaps you might just  
17 explain to us, that this was not a circumstance that would  
18 not have compelled disclosure.

19 A. Well, the latter I'm not sure of what you're alluding to about  
20 the having information at that time. I'm not sure of the  
21 dates we're talking about. This was after the decision of the  
22 Appeal Court? I'm not sure of the time frame.

23 Q. This would be January '84.

24 A. Yeah, after the decision of the...

25 Q. Yes. After the decision of the Appeal Court.

1 A. I'm not sure I had access...I had information any differently  
2 than what was known to...known to Mr. Marshall's counsel.

3 Q. Well, I'd like you to assume for the moment that you don't  
4 know whether you had anything different. You know that  
5 there is a general policy to not make all police reports  
6 available. There...

7 A. Oh, yes.

8 Q. ...may well have been other matters that Mr. Marshall's  
9 counsel did not have access to that came to Crown counsel's  
10 attention. There could be material on an issue that was  
11 presently being negotiated between Mr. Marshall and the  
12 government of Nova Scotia.

13 A. Well, there is no negotiations going between Mr. Marshall  
14 and the government of Nova Scotia at that time, but...

15 Q. No, they were three and a half months later. What you have  
16 is Mr. Marshall's counsel saying, "Let's deal with  
17 compensation."

18 A. Well, as I said before, I treated it as a regular inquiry for  
19 the release of information and pursuant to section 3 of the  
20 Act I did not consider it was information that ought to be  
21 released.

22 Q. And if I were to suggest to you, sir, that that indicated, and  
23 I'm not trying to be argumentative, that you approached Mr.  
24 Marshall from the perspective that if you could keep it  
25 secret, you would.

MR. COLES, EXAM. BY MS. EDWARDH

1 A. Well, that may be your opinion. That was not...that was not  
2 the purpose or the intention that prompted me to deny him  
3 access. It was...it was based on my interpretation and  
4 application of the Act to the request that I had received.

5 Q. And you chose to keep it within the confines of the Attorney  
6 General's office, and were you aware, sir, that if Mr.  
7 Cacchione had known that he could toddle over to the RCMP  
8 and persuade them that investigation was over, as a matter  
9 of general policy they release those kinds of police reports?

10 A. I was not aware of their practise in those circumstances.

11 Q. And in civil litigation in this province if the investigation is  
12 over, one can apply under the Freedom of Information Act  
13 to obtain their reports. You don't know that.

MR. PRINGLE

14  
15 You better just correct something there. I think my friend...

MS. EDWARDH

16  
17 I'm sorry.

MR. PRINGLE

18  
19 There's no general policy, that I'm aware of, to that extent.  
20 Certainly if there is a subpoena and investigation is complete.

MS. EDWARDH

21  
22 Okay, I'm sorry.

MR. PRINGLE

23  
24 There's no informer's names and then there's a balancing on  
25 the public interest argument in all those cases that we're aware of.

MR. COLES, EXAM. BY MS. EDWARDH

1 MS. EDWARDH

2 Let me put this way, as I understand the situation, that...and  
3 correct me if I'm wrong, that it doesn't just require a subpoena,  
4 that information can be obtained under the Freedom of  
5 Information Act.

6 MR. PRINGLE

7 Ah, no, I don't have the Act here in front of me but...for your  
8 reference.

9 MS. EDWARDH

10 I'm sorry, I thought...

11 MR. PRINGLE

12 But there is a provision, of course, for making a request.

13 MS. EDWARDH

14 But it's not provided...

15 MR. PRINGLE

16 Under section 8(D) of the Privacy Act and certainly a  
17 subpoena is one of the things that's in there, and I don't have in  
18 my head what all the others are, but that's part of the Access to  
19 Information Act federally.

20 MS. EDWARDH

21 I'm mistaken then, excuse me.

22 Q With respect to the approach then that you took with...with  
23 compensation, after Mr. Cacchione doesn't get any of the  
24 information he wants, the department then...

25 A He didn't get information pursuant to that request.

1 Q. Right. And, the Minister writes and assures him he'll get it  
2 pursuant to the Commission of Inquiry struck to assess  
3 compensation. Do you recall that letter?

4 A. I believe so.

5 Q. And then Mr. Cacchione suggests that perhaps it is a waste  
6 of everyone's time and energy and money and that some  
7 negotiated settlement that's mutually satisfactory could be  
8 reached.

9 A. Mr. Cacchione suggested that.

10 Q. Yes. That's correct.

11 A. I thought you said Mr. Giffin.

12 Q. No, no, I'm sorry, I said Mr. Cacchione. He suggested at the  
13 meeting and that's how the negotiation process gets under  
14 way. Correct?

15 A. We advised the Minister of suggestion and the Minister was  
16 agreeable subject to the approval of the Commissioner.

17 Q. Yes. And at that point when discussions begin directly, did  
18 you, sir, instruct Mr. Endres or indicate to him that he  
19 should now disclose any relevant information to Mr.  
20 Cacchione so he could then conduct negotiations with the  
21 department? And if that meant police reports that Mr.  
22 Justice Campbell had, so be it.

23 A. I gave him no such instructions.

24 Q. Was there any discussion about whether he should be given  
25 access to information of that kind or character?

1 A. I'm not sure what...what he may have understood. I  
2 understood the Minister's intention that there be full  
3 disclosure and I presume that that would cover whatever  
4 was thought necessary, but I don't recall what the  
5 discussions were with Mr. Cacchione on that point or what  
6 instructions were given to Mr. Endres. I know I gave no  
7 such instructions.

8 Q. There were instructions with respect to full disclosure in the  
9 sense that it was the Minister's intention to provide  
10 everything to Mr. Campbell.

11 A. To Mr. Campbell, yes.

12 Q. Did that, as far as you understood, encompass an  
13 understanding that when the negotiation process started as  
14 between the Department of the Attorney General and Mr.  
15 Marshall's counsel, that he should then be given information  
16 that would equip him then to proceed to the negotiations?  
17 Would it have been implied in that?

18 A. I don't recall the question being raised. I don't recall the  
19 question being raised.

20 Q. Did Mr. Endres, I take it, never indicate to you any...that he  
21 had any concerns, for example, that Mr. Cacchione not get  
22 ahold of information relating to police procedures?

23 A. I don't recall.

24 Q. Now you've indicated that you had a fairly hands-off  
25 approach to the negotiation process. Is that a fair

1           characterization?

2           A.    Well, we left the...we left the negotiating process to Mr.  
3           Endres. I wouldn't say I had a hands-off. He kept me...

4           Q.    Kept you informed.

5           A.    And also the Minister, informed of the progress and...

6           Q.    And when you say "Informed of the progress," I would take  
7           that Mr. Endres just didn't come in and say, "Well, we're at  
8           210 or 212," he would identify what Mr. Cacchione's  
9           concerns were, what he felt were restraints, and there  
10          would be dialogue about the negotiations that would be  
11          going, even if limited.

12          2:52 p.m.

13          A.    Yeah, we didn't have the occasion to have long discussions but  
14          he would say more than simply the particular figure they had  
15          reached. He would give us a general view of the negotiations.

16          Q.    And what the Crown...

17          A.    I don't recall specifics but...

18          Q.    Okay, but...

19          A.    The feeling I had was that the negotiations were progressing  
20          well and that both sides seemed to be giving ground and the  
21          expectations were that there probably would be a figure to  
22          which both would agree which might be acceptable to both  
23          their clients.

24          Q.    Leaving aside, if I could, just any discussion about the figure,  
25          what I'm trying to identify, Mr. Coles, is that you clearly were



1 involved on, I don't want to call it, certainly not a day-to-day,  
2 but a continuing recurring basis, as Mr. Endres would come to  
3 you and discuss what had transpired...

4 A. I thought I was reasonably well kept informed.

5 Q. And as Mr. Spicer put to you this morning, that in those  
6 circumstances, sir, you must have been aware of the, broadly  
7 speaking, the position the Crown was taking with respect to  
8 the negotiations of what was important and what was  
9 relevant and...

10 A. Well...

11 Q. For example... May I give you an example?

12 A. Sure, please do.

13 Q. Perhaps you can respond to. So, for example, when Mr.  
14 Cacchione put forward a figure with respect to loss of wages  
15 that was substantial, that's the kind of thing that might be of...

16 A. Yeah, that...

17 Q. That comes to your attention. You discuss it with Mr. Endres,  
18 what its strengths and weaknesses were?

19 A. Well, I don't know if we discussed it in those terms. We were  
20 made aware that that figure had been mentioned and it was  
21 one that, one of the many factors, loss of income, many of the,  
22 one of many factors which I would expect to be taken into  
23 account by both negotiators. We did not discuss the basis for  
24 that figure or what it represented. We didn't get into any  
25 discussion about the particulars of it. I recall generally the

1 reference being made that that figure, or a figure of that kind  
2 was mentioned. We did not, it was not a subject of discussion  
3 between us.

4 Q. In the detail, but you were certainly aware of it in its broad  
5 outline.

6 A. It was something that the negotiator, Mr. Endres, would have  
7 to deal with.

8 Q. Now was it your understanding that Mr. Endres was, in fact,  
9 identifying principles upon which negotiations or quantum  
10 could ultimately be assessed? In other words, that they were  
11 proceeding, basically, with the consensus, well, let's deal with  
12 loss of income. Now what do we conclude is a reasonable  
13 figure for loss of income over this decade? Was it your  
14 understanding he proceeded with those negotiations in that  
15 manner?

16 A. No, I was not aware of how those items were dealt with. We  
17 had a letter from Mr. Cacchione outlining a number of factors  
18 that he thought were relevant to the issue and I presume  
19 they were raised and discussed between them and somehow  
20 or other got reflected in the figures that they were discussing.  
21 But as to how or the particulars of it, no, I was not involved in  
22 that.

23 Q. Mr. Endres testified that he did not hesitate, and I'm  
24 paraphrasing his evidence, but he did not appear to hesitate  
25 to use as levers in the negotiation process things like the

1 Court of Appeals assertions of Mr. Marshall's responsibility or  
2 partial responsibility and other levers that rose from the facts  
3 just in the negotiating process. Were you aware he was doing  
4 that?

5 A. Not specifically, but the process of negotiating, the posture,  
6 was left entirely up to him.

7 Q. You would assume he was doing that, would you not?

8 A. I didn't make any assumptions of what he was doing. I knew  
9 that he would negotiate well on behalf of the government and  
10 that he would try to reach a figure that would be acceptable  
11 to the government, as I presume was Mr. Cacchione's function  
12 in respect of Mr. Marshall.

13 Q. And in negotiating well, I take it you, as he indicated in his  
14 testimony, you would assume he would use whatever levers  
15 were to his advantage in the process of negotiating well on  
16 behalf of the government.

17 A. Well, yes.

18 Q. Yes.

19 A. That would not be...

20 Q. And I then take it the next step, sir, that negotiating well on  
21 behalf of the government from your perspective and in terms  
22 of the general mandate you gave Mr. Endres, was to arrive at  
23 the lowest possible figure that was acceptable to Mr.  
24 Cacchione, correct?

25 A. I would think so.

1 Q. And could I then ask...

2 A. But also acceptable to the government.

3 Q. Oh, yes, of course, assuming it had to be acceptable to you, but  
4 his.. His mandate wasn't to find either humane or just or fair  
5 compensation. It was to negotiate whatever was acceptable  
6 to Mr. Cacchione and the government.

7 A. Oh, sure. They would be considerations of the client to decide  
8 whether or not the settlement was acceptable. That would be  
9 a proper role for the client, not for the negotiator, it seems to  
10 me.

11 Q. I'm just trying to find out what Mr. Endres would have  
12 understood of his role and what you understood of what he  
13 was doing.

14 A. And I want to make sure I understand your questions.

15 Q. Certainly, that's fair. Now I take it at no time were you  
16 concerned that the process that was going on leading to the  
17 final settlement involved utilizing Mr. Marshall's own  
18 weaknesses. You would have assumed that to be taking place  
19 in the ordinary course of negotiations.

20 A. I wouldn't assume that at all. All I assumed was that if they  
21 continued to negotiate, they may reach a point that resulted  
22 in a figure that would be acceptable to both parties. Beyond  
23 that, I made no such assumptions.

24 Q. Mr. Endres testified, as I recall his evidence, and someone will  
25 correct me if I misstate it, that eventually it became an issue

MR. COLES, EXAM. BY MS. EDWARDH

1 as to who would hang out the longest and, indeed, he was  
2 aware that Mr. Marshall was in a psychologically, I wanted to  
3 use the term, fragile condition. That he had been told by Mr.  
4 Cacchione that there was psychological problems. Would you  
5 have approved of negotiations conducted in that way if you  
6 had been aware of that fact?

MR. SAUNDERS

7  
8 My Lord, in what way? My friend identified some  
9 knowledge on the part of Mr. Endres about psychological anxiety  
10 which Mr. Cacchione made known at a meeting and now she's  
11 referring to Mr. Endres' apparent statement in evidence that the  
12 parties were trying to outlast one another or however long it  
13 would take, that sort of thing.

MS. EDWARDH

14  
15 Those are the two factors I'm referring to.

MR. SAUNDERS

16  
17 Now she's asking the witness...

MS. EDWARDH

18  
19 Would he approve of that?

MR. SAUNDERS

20  
21 Approve of knowledge of that factor?

MS. EDWARDH

22  
23 Playing a waiting game with a psychologically fragile  
24 person?

MR. SAUNDERS

1 Thank you.

2 MR. COLES

3 A. Well, I mean it's hard for me to comment on that question. If  
4 I were involved in the negotiations, I may act differently than  
5 Mr. Endres. What the purpose and objective of the  
6 negotiations were, and it wasn't a matter that was all that  
7 important to us that we negotiate. This is a process that we  
8 agreed to do, was to determine whether a figure could be  
9 reached that was acceptable to both parties. Now I would  
10 presume, I would presume that both negotiators would  
11 negotiate in their own way and I did not directly involve  
12 myself in the process of negotiations and you'd say that  
13 you're putting a hypothetical situation to me, I don't feel that  
14 I can answer that hypothetical question because I don't know  
15 Mr. Endres' negotiating posture or what his posture was at  
16 that time.

17 Q. If I said to you, maybe you still can't answer it, if you assume  
18 for a moment that was his negotiating posture, would you  
19 approve of that style in relation to negotiations with a  
20 wrongfully convicted person?

21 A. Well, the answer probably is no, I wouldn't, but I don't know  
22 that I could answer that without knowing the whole nature of  
23 the negotiations between he and Mr. Cacchione. I don't know  
24 what kind of position Mr. Cacchione was taking. I don't know  
25 the basis for the hypothetical question.

1 Q. You would agree, sir, that the negotiation of a settlement of  
2 someone who spent eleven years inside a jail can be assumed  
3 to take place with a psychologically fragile individual. Would  
4 you agree with that?

5 A. I have no experience to comment on that.

6 Q. You won't even make that assumption that eleven years  
7 inside a federal penitentiary, when you're wrongfully  
8 convicted, could leave someone in a psychologically fragile  
9 state?

10 A. Oh, sure, it may have, but you must remember these  
11 negotiations were being, were by competent, experienced  
12 lawyers. We're talking about an ex gratia  
13 compensa...settlement. It may be the very fact that there was  
14 an opportunity for an ex gratia settlement. That may have  
15 been, I would have thought, very good news for Mr. Marshall.  
16 And that may have had the opposite effect. I mean I don't  
17 know what effect the negotiations would have had on Mr.  
18 Marshall.

19 Q. No, I'm talking about would you have assumed when the  
20 negotiating process commenced that Mr. Marshall bore  
21 psychological scars and was fragile as a result of his  
22 experience? Would you have known any information or  
23 would you just have assumed that as...

24 A. Well, Mr. Cacchione made reference to that at the first  
25 meeting I had with counsel but he didn't make a big issue of

1 it. He mentioned that there was psychological considerations  
2 but I didn't pick that up as a matter of particular concern at  
3 that time.

4 Q. You were aware, though, from what Mr. Cacchione at least had  
5 said that there were some problems.

6 A. Oh, sure.

7 Q. Okay.

8 A. Oh, yeah.

9 Q. And I take it that throughout the entire period that  
10 negotiations proceeded, you never provided any instructions  
11 to Mr. Endres that would have led him to believe that he  
12 ought to take a nonadversarial and more humane posture in  
13 the negotiating process?

14 A. Not during the negotiations, no.

15 Q. And, in retrospect, given the nature of the claimant, would  
16 you agree that those instructions ought to have been given in  
17 a nonadversarial posture taken on the part of the Crown?

18 A. I don't know. I thought they negotiated a very good  
19 settlement. I thought the figures they arrived at were very  
20 good for an ex gratia settlement. So I would not, I probably  
21 would not have second guessed the effort based on those  
22 considerations.

23 Q. Based upon what you know today?

24 A. Well, I still think it was a very good settlement.

25 Q. I'm not talking just about the final figure, sir.



MR. COLES, EXAM. BY MS. EDWARDH

1 A. Well, that was the purpose of the negotiation, was to see  
2 whether or not they could arrive at a figure that was  
3 acceptable to both parties.

4 Q. Okay.

5 A. They did so and I think they both did a good job.

6 Q. I don't want to belabour this. I take it then in retrospect, you  
7 see nothing problematic or difficult or wrong or inappropriate  
8 with the negotiation process, its premise, and how it  
9 proceeded.

10 A. No, I didn't.

11 Q. Nor the conduct of Crown counsel on the assumptions and  
12 tools they used.

13 A. Well, I'm not prepared to accept there was anything improper  
14 on the part of either counsel in the negotiating process that  
15 I'm aware of.

16 Q. And the tools that they utilized, the levers they utilized.  
17 There's nothing wrong with that either. I just want to make  
18 sure I covered all the...

19 A. Well, I don't know what you're referring to, the levers they  
20 used. You know, I don't know what...

MR. CHAIRMAN

22 If this dialogue continues, I'm going to be led to reach the  
23 irresistible conclusion that the big mistake made by both parties  
24 was that they retained lawyers to negotiate for them. They  
25 should have negotiated their own settlement.

1 MS. EDWARDH

2 Q. If I may just leave that area then and go to another one.

3 During the course of the period of time you were in office,  
4 there was a change that was made with respect to how juries  
5 were brought into the array and you may recall that the  
6 process went from identifying potential people on the array  
7 from just property lists of municipal property owners to the  
8 voting list. Do you recall that change?

9 A. Generally, yes. There was a change.

10 Q. I can't recall the date.

11 A. I don't recall the particulars, yes.

12 Q. Do you know or did you instruct anyone to follow up to see  
13 whether or not that change produced any changes in the  
14 ethnic composition of juries that were being brought into the  
15 array?

16 A. No.

17 Q. When the change was made, was it made as a result of any  
18 input that you had?

19 A. Not to my recollection, although I think most people  
20 expressed concerns about the limited lists that eligible jurors  
21 were drawn from and there was an attempt to broaden that  
22 list and the difficulty was one of logistics, how you have  
23 access to larger lists that would gather up more people. But  
24 to the extent that there was a general concern and  
25 dissatisfaction with the existing arrangement, but beyond

MR. COLES, EXAM. BY MS. EDWARDH

1 that, I had no, I don't recall having any direct involvement.

2 Q. Would it be fair to say that that concern reflected the absence  
3 of different ethnic groups that would be sitting on juries, the  
4 absence of black representations, the absence of native  
5 representation on juries?

6 A. Yeah, and the absence of women on the jury list.

7 Q. And do you know whether anything has been done to identify  
8 whether the new method of bringing in eligible jurors has  
9 done anything to change the composition of juries vis-à-vis  
10 native people?

11 A. No, I do not.

12 Q. I'd like to ask you just to address the question, if I could  
13 briefly, of the request Mr. Aronson made with respect to his  
14 fees. It is apparent, and you might want to have Volume 27  
15 close at hand, that Mr. Spicer pointed this out at page three  
16 where you just refer Mr. Aronson to Legal Aid.

COMMISSIONER POITRAS

18 What page?

MS. EDWARDH

20 Q. Page three, Volume 27. I think that's the letter that you, sir,  
21 wrote to Mr. Aronson.

22 A. Yes.

23 Q. Referring him to Legal Aid.

24 A. Yes.

25 Q. Now we have heard evidence, and I believe it's Volume 75 at

1 page 13373, that Mr. Gale recalls discussing the whole matter  
2 of Mr. Aronson's fees with you and he, by way of advice  
3 generally, indicated that there was a precedent for payment  
4 of fees and that precedent was appeals by the Crown on a  
5 question of law, for example, to the Supreme Court of Canada.  
6 And that there could be some mutually agreeable basis  
7 ranging, I suppose, from Legal Aid onward that the Crown  
8 undertook to pay fees. Do you recall that conversation with  
9 Mr. Gale?

10 A. Well, I don't recall it but I'm not surprised that we would  
11 have had that conversation. I mean the precedent is a long-  
12 standing practice. I was well familiar with it. But the scale of  
13 fees is, to my knowledge, and practically all cases, limited to  
14 the scale of fees approved by the Nova Scotia Legal Aid  
15 Society.

16 Q. Mr. Gale indicated that although the scale of fees could be a  
17 Legal Aid scale, indeed, it could be any scale really that was  
18 settled upon by the parties, mutually...

19 A. No, well...

20 Q. Agreeable to the parties.

21 A. Yes, the Minister has the... The Minister would have the  
22 authority to authorize fees in excess of the tariff or the Legal  
23 Aid if he saw fit, sure.

24 Q. And, indeed, that has happened.

25 A. Probably has on a few occasions. In most occasions that I'm

1           aware of, we have approved the payment of fees based on the  
2           Legal Aid tariff.

3       Q. I'm just trying to establish, though, that the other has  
4           happened as well.

5       A. Oh, I suspect so.

6       Q. And I take it you were aware when you told Mr. Aronson to  
7           go to Legal Aid that in the ordinary course, indeed, as you  
8           understood Legal Aid's offer in this case, Mr. Aronson would  
9           not have his fees covered for the period of time up to and  
10          including May of '82. So the ten months or so of work done  
11          when you wrote this letter on April 23rd would not be  
12          covered.

13      A. I suspect that's so. I presume he had made some  
14          arrangement for the payment of fees when he agreed to be  
15          retained. But I mean that was a private matter with him.

16      Q. Yes, and if he hadn't, it would be apparent that he would not  
17          get that.

18      A. Well, I don't know on what basis he practiced law.

19      Q. And you were aware, sir, I take it from the... I can take you to  
20          the letters if you want, but you might want to look at page 11,  
21          that what Legal Aid was authorizing Mr. Aronson was... There  
22          you can see the terms of the certificate? The effective date  
23          commencing, May 4th, 1982?

24      A. Yes.

25      Q. Would have given him some 42 hours of work in preparation

MR. COLES, EXAM. BY MS. EDWARDH

1 for the reference, is that correct?

2 A. Well, that's what it says.

3 Q. Yes, and you were aware of that proposal, were you not?

4 A. I don't think so.

5 Q. Let me just see if I can take you...

6 A. I was aware of asking the Legal Aid for advice in respect to  
7 Mr. Aronson's bill and asking what they would pay pursuant  
8 to what was shown on that account. But I don't think I've  
9 seen, no, I'm certain I haven't seen this particular  
10 correspondence prior to...

11 Q. This is in your correspondence with Mr. Gordon Murray,  
12 Executive Director of Legal Aid Plan, correct? It starts at page  
13 26. And when...

14 A. Just a moment, Counsel. Yes.

15 Q. And you get a response back from Mr. Murray at page 29.

16 A. Yes.

17 Q. Dated January 26th, 1983.

18 A. Yes.

19 Q. It's a reference to the earlier work that Mr. Aronson has done  
20 and then it starts: "In any event, it may be helpful to refer to  
21 our tariff where the preparation for a first degree murder  
22 charge is \$35.00 per hour to a maximum of \$15,000. Even if  
23 the hours allowed were doubled, it would be \$3,000 plus 250  
24 a day." Okay, and he goes on. So our estimate of \$4900. And  
25 if you double the hours, you get about 80 hours. And I take it

1 that was what you thought would be an appropriate  
2 certificate in this case, is that what you're saying?

3 3:15 p.m.

4 A. Well, I didn't express a judgement on it. I was of the view  
5 that the kind of appeal that was before the Court was  
6 covered and included under the Canada-Nova Scotia Choice  
7 of Counsel Agreement for Criminal Aid. The...I referred Mr.  
8 Aronson's account at the request of the Minister to ascertain  
9 what the Legal Aid tariff would be, if in fact it were to be  
10 asked to pay, and this is the advice they gave me...they gave  
11 back to me. I didn't exercise any judgement, whether it was  
12 ...one way or the other.

13 Q. I thought you said in answer to some questions put to you  
14 by Mr. Spicer that you had come to the opinion or conclusion  
15 that this was an appropriate case for Legal Aid.

16 A. That's...well, for choice of counsel, whether or not a person  
17 applies for it is entirely up to them.

18 Q. It's not just choice of counsel that it's an appropriate case  
19 for. It's an appropriate case for a certificate. I would take it  
20 that means more than just choice of counsel.

21 A. Well, in this province our system is somewhat different.

22 Q. Yes.

23 A. You have regular legal aid counsel unless you are...

24 Q. I see.

25 A. ...eligible to...

1 Q. Yes.

2 A. ...a choice of counsel. Mr. Aronson was, in fact, a choice of  
3 counsel.

4 Q. Yes.

5 A. In these circumstances.

6 Q. So, that, that, in effect, was a conclusion that you early  
7 reached that this was an appropriate case for choice of  
8 counsel.

9 A. I was always of the view that if an application had been  
10 made, it would have been an appropriate case for a choice of  
11 counsel.

12 Q. Yes.

13 A. I was always of the view further that this was the kind of  
14 case that Legal Aid was provided for under the terms of the  
15 federal-provincial agreement.

16 Q. And when you say "it was the kind of case," you'll agree that  
17 certainly the class of litigation that is being dealt with  
18 doesn't fit within any of the ordinary classes that the  
19 agreement covers. It's not a first degree murder, it's not  
20 just an ordinary appeal to the Court of Appeal from a  
21 conviction for murder. It doesn't fit into any of those pre-  
22 conceived classes.

23 A. No, but...no, but...

24 Q. Right.

25 A. There's always flexibility in any program. Legal Aid had no



1 difficulty in accommodating this particular appeal under its  
2 tariff.

3 Q. You'll agree with me though it doesn't presumptively fit  
4 within the classes. So, it is unusual.

5 A. Well, it's unusual depending on your definition. It was by  
6 way of an appeal. It was by way of an ordinary appeal. It  
7 was unusual in the sense that it was a reference and it was a  
8 review, but I mean it was still, in essence an appeal.

9 Q. It was also unusual in the sense that it involved the Court  
10 reconsidering a case that it itself sat on.

11 A. Yeah.

12 Q. Where there was the suggestion that there was a wrongful  
13 conviction and another investigation, different witnesses,  
14 hearing original evidence and testimonial evidence in the  
15 Court of Appeal—all that is unusual.

16 A. And I would suggest it was unusual for the Crown to be  
17 carrying as much of the argument in favour of the acquittal  
18 as the defence. There wasn't the same kind...

19 Q. I appreciate that's your view, sir.

20 A. ...of adversarial role between counsel, so that may have  
21 eased the burden somewhat for Mr. Aronson.

22 Q. I appreciate that that's your view, that Crown counsel went  
23 far too far in seeking that acquittal. The point being though,  
24 if I can go back to the question...

25

DISCUSSIONMR. CHAIRMAN

1  
2 I'm missing something on Legal Aid. I'll give you my  
3 understanding of Legal Aid and maybe the practise has changed.  
4 Legal Aid, as I understood it, emanated from the legal profession  
5 in Canada who came to various governments and said in instances  
6 where people are unable to pay a lawyer, we are prepared to act  
7 at a reduced fee, and following which Legal Aid was implemented  
8 in various provinces over a period of years and the Government of  
9 Canada was persuaded that they too, it was a national problem,  
10 should sign a...and entered into some cost-sharing arrangements  
11 for Legal Aid.

12 My understanding is that whilst they tried to set forth the  
13 categories and the type of cases that are covered, that there...that  
14 there is a discretionary power left in the director and that the  
15 criteria is, first, the ability of the person to pay, regardless of the  
16 nature of the case or the difficulty of the case. If Mr. Marshall  
17 suddenly came upon a million dollars, he wouldn't be entitled to  
18 Legal Aid. He would retain his counsel. But taking a position,  
19 accepting the fact that a person cannot afford to pay and meets  
20 the criteria, where does the...if it is a more difficult case than the  
21 usual, isn't the burden on the legal profession out of their  
22 charitable act of coming forward and promoting this program in  
23 the beginning, to do it at less cost?

MS. EDWARDH

24  
25 Well, it's an interesting ...it's an interesting question, My

DISCUSSION

1 Lord. I suppose I can only throw back this one. Many, many  
2 times the Attorney General's office across the country support and  
3 pay counsel's fees when it is in their interest to litigate a matter.  
4 That is often how matters get to the Federal Court and to the  
5 Supreme Court of Canada, in fact, it's one of the orders the  
6 Supreme Court gives. If you want to take this up, you pay them.  
7 And, it is my view, and I'd like to put it to the witness, that  
8 because of the nature of the Crown's responsibility in this case,  
9 that's what they ought to examine.

10 MR. CHAIRMAN

11 Well, are...is your quarrel, see, I'm not clear we've...there's  
12 been a lot of debate going back and forth over this issue. I'm not  
13 clear whether the point your pressing is that it was not...it was a  
14 matter that should not have been dealt with as a Legal Aid...

15 MS. EDWARDH

16 That's ultimately the conclusion.

17 MR. CHAIRMAN

18 That's what you're saying.

19 MS. EDWARDH

20 That's ultimately the conclusion, and the only reason one  
21 gets to that conclusion is it's apparent that the plan is not capable  
22 or adequate given the nature of the case that was before it, once  
23 the onus shift on to Mr. Aronson to carry the ball. Now, it's quite  
24 one thing to say, well, you know, in the best traditions of the bar  
25 it ought to have been done pro bono.

DISCUSSION

1 MR. CHAIRMAN

2 I realize that. I've heard arguments...

3 MS. EDWARDH

4 For and against.

5 MR. CHAIRMAN

6 ...after it's established that...I can tell you that was the grounds  
7 upon which it was established. I detect that that may be lost sight  
8 of from time to time, and I'm not quarreling with that, if you  
9 accept that it's a social benefit, then I suppose the state has to  
10 pay. But I want to be clear your position is, as I understand it, so  
11 that, if we try to get to the heart of what you're putting to Mr.  
12 Coles, is that this was a matter that should not have been dealt  
13 with in Legal Aid, but rather because of the unusual  
14 circumstances surrounding this case that even though some of it  
15 was retroactive payments for services rendered, that the formula  
16 that should have been used or the policy that should have been  
17 followed by the government of Nova Scotia is that similar to  
18 where they determine that a particular issue, for instance, should  
19 be...should go before the Supreme Court of Canada.

20 MS. EDWARDH

21 Yes, precisely.

22 MR. CHAIRMAN

23 And they then pay, I guess, a higher fee.

24 MS. EDWARDH

25 It could be modestly higher, at least it's negotiated and

DISCUSSION

1 usually payable on actual work hours as opposed to any fixed  
2 notion of maximum.

3 MR. CHAIRMAN

4 So, the only question to put to Mr. Coles is why did he  
5 feel...why does he feel or did he feel at the time that the Legal Aid  
6 was the appropriate approach as opposed to the other approach  
7 for which there is some precedent, albeit limited, in Nova Scotia.

8 MS. EDWARDH

9 Yes, that's...

10 MR. CHAIRMAN

11 In that...

12 MS. EDWARDH

13 I'd like to explore with him.

14 MR. CHAIRMAN

15 Can you answer that question?

16 MR. COLES

17 Well, I...my only answer, My Lord, is that in my opinion it  
18 was the kind of case that the Legal Aid program was set up to  
19 provide payment for legal services, and I did not look at it in  
20 other...in any other context.

21 MS. EDWARDH

22 Q. And you never considered then Mr. Gale's suggestion to  
23 you?

24 A. Well, I...

25 Q. With any seriousness.

1 A. Well, I didn't accept, I didn't...for the reason I just said, in  
2 my...my view of the matter was that it was a case that the  
3 Legal Aid program was designed to provide for and that was  
4 the basis I recommended the matter be dealt with.

5 Q. And you saw...one last question then, and I take it you didn't  
6 see any reason, given the nature of the case, that it ought to  
7 be dealt with under a different formula.

8 A. That is correct.

9 Q. And I take it that view of yours persisted during the entire  
10 period that you were dealing with the question of fees,  
11 whether Mr. Aronson didn't have the burden, whether he  
12 did or otherwise.

13 A. Well, no, it changed once we got it before the Campbell  
14 Inquiry Commission and the negotiating process, the matter  
15 of Legal Aid was one of the items to be dealt with. So, the  
16 position did change there.

17 Q. The matter of fees was to be dealt with.

18 A. I'm sorry, the matter of fees was to be dealt with, so the  
19 position did change at that point in time.

20 Q. And it was your understanding then that the compensation  
21 process, indeed, ought to include compensation for the  
22 necessary fees that Mr. Marshall owed in order to secure his  
23 release?

24 A. That was the decision at the time setting up the Commission.

25 Q. And logically...and compensation should so cover that kind

1 of thing.

2 A. It was an item to be considered by the Commissioner, yes.

3 Q. I see.

4 A. It may not have arisen if Mr. Aronson's other avenues had...

5 Q. Right, of course.

6 A. ...produced payment.

7 Q. In the ordinary course, if one were to design such a  
8 compensation scheme, one would have assumed that  
9 reasonable fees and disbursements were repaid so that  
10 those out-of-pocket expenses in proving oneself to not be  
11 guilty would be dealt with in a compensation scheme.

12 A. I don't know if we're talking about ex-gratia compensation.  
13 I don't know if you can make any assumption at all. I think  
14 it depends on the circumstances of each individual case  
15 unless there is some legislation to provide for that kind  
16 of...that kind of criteria.

17 Q. Would you agree that in the ordinary course that's precisely  
18 the kind of thing that ought to be compensated for? I mean  
19 after being wrongfully convicted and spending money or  
20 going into debt to show whoever that you shouldn't be in  
21 there in the first place, and there's going to be some  
22 compensation, it ought reasonably to include that at least.

23 A. Well, again, I would say yes, but if there were other avenues  
24 that ought to or could be or should be pursued, maybe not.  
25 It depends on the circumstances in each case. It seems to

1 me we're talking about a process to determine a basis for  
2 ex-gratia compensation, it's difficult to say in advance what  
3 the...what ought to be taken into account in a general way.

4 Q. In the process of dealing with the compensation issue and in  
5 the two letters, one in Volume 33, page 407, and the other  
6 439, that you wrote to Commission counsel, in neither case,  
7 sir, did you copy Mr. Cacchione.

8 A. What were those references?

9 Q. Page 407 and 437.

10 A. Volume 33.

11 Q. Volume 33. 407 and...

12 A. What...Volume 33.

13 Q. Yes, Volume 33.

14 A. And what page?

15 Q. I'm sorry, 407.

16 A. Yes.

17 Q. And 435. You've explained that the first letter, although it  
18 deals with matters of substance and question of procedure,  
19 might not have been copied because there is also a  
20 discussion at the end of the letter pertaining to the budget  
21 and some of the difficulties the department had with the  
22 proposed budget. Do you see that?

23 A. Yes.

24 Q. Do you recall that testimony yesterday?

25 A. Yes. And I should have also, and maybe I can at this time,



1 because I was replying to a letter that the Minister had  
2 received from the Commissioners, and I was replying to the  
3 Commissioners' letter on March 26th.

4 Q. Let me just look at that.

5 A. And that letter...that letter did not indicate that he had  
6 copied it to anyone.

7 Q. Right. And, it's not...let me then ask you with respect to the  
8 next letter at page 435.

9 A. What page, sorry?

10 Q. 435. And I don't see that it is in response to a letter, but if  
11 you read the opening lines, it's in response to "a meeting of  
12 yesterday." And, I would take it that the notes of that  
13 meeting are on page 434. Does that assist you?

14 A. No, I would not think that.

15 Q. No, I'm sorry.

16 A. I would think that...

17 Q. You're quite right, would...take a look at 425.

18 A. Hum. It may be the one on 424.

19 3:30 p.m.

20 Q. And in this letter you're making a pitch, so to speak, to Mr.  
21 MacIntosh that he better, or it's your view in fairly strong  
22 terms that it's an amendment to the Order-in-Council if  
23 there's any really question of the scope of his jurisdiction and  
24 you don't really, I take it you're conveying to him that you  
25 don't want the matter to be a matter of argument before him

1 in ruling. Correct?

2 A. Well, yeah, I think, my view was that if we had any difficulty  
3 in understanding the scope of the mandate, let's resolve it  
4 before we all get involved in a process that creates problems  
5 in getting...

6 Q. Well, in the ordinary course, he was entitled, I take it, to have  
7 also called from submissions from concerned counsel and  
8 made a ruling as to his own scope which you could have  
9 sought to review.

10 A. Well, I...

11 Q. Right?

12 A. I don't know what Mr. MacIntosh's position was on receiving  
13 this letter. I don't recall discussing the matter further with  
14 him.

15 Q. Well, let...

16 A. I don't know what he did with it.

17 Q. Let me just take you back to the notes of your discussion. It  
18 was clear to you that Mr. Cacchione thought he could obtain  
19 some advantage but was seeking to have the terms of the  
20 Commission broad enough to include questions of police  
21 conduct.

22 A. Yes, that was Mr. Cacchione.

23 Q. Yes.

24 A. Yes.

25 Q. And so here you are writing on May 17th, 1984 to

1 commission counsel saying, in effect, knowing that Mr.  
2 Cacchione would object to this as the end result, saying well,  
3 "Let's just clarify the Order-in-Council." I mean that's  
4 something Mr. Cacchione didn't want. He wanted the scope of  
5 it left open. He didn't want it clarified to cut that out at that  
6 time. Is that a fair statement?

7 A. I think so.

8 Q. And I take it, sir, you then are suggesting that there ought to  
9 be some clarification sought to the Lieutenant Governor, a  
10 request saying, "Please identify this," rather than have the  
11 commissioner make a ruling himself.

12 A. Yeah, I don't think I said anything in this letter that I hadn't  
13 said at the meeting and there's no reason why this letter  
14 could not and perhaps should have been copied to Mr.  
15 Cacchione. It was an oversight on my part. There is no  
16 reason that I can think of why I would not have copied to  
17 him. I didn't express any view in this letter that I hadn't told  
18 him directly.

19 Q. Well, indeed, I'm going to take it a step farther, if I may, Mr.  
20 Coles. In light of the fact that you're virtually making  
21 submissions to the commission about what it ought to do  
22 about its mandate...

23 A. No, Counsel, sorry, this is addressed to counsel.

24 Q. To the Commission counsel. You're making a suggestion then  
25 what ought to happen in terms of clarifying the mandate, this,

1 and, indeed, this is a point of opposition between you and Mr.  
2 Cacchione, it would only have been proper that he had  
3 received notification that you were making these  
4 representations.

5 A. I agree, and as I say, there's no... I don't think there was any  
6 intention on my part. It was a matter of oversight. I didn't, I  
7 was, I didn't intentionally mean him not to get it and, in fact,  
8 he may, Mr. MacIntosh may have copied it to him and  
9 solicited his views. I don't know.

10 Q. We don't know that.

11 A. I don't know. But, as I say, the views I expressed there are  
12 the ones I expressed at the meeting.

13 Q. I appreciate that. I just wanted to draw to your attention the  
14 absence of any copy to Mr. Cacchione in that correspondence  
15 as well. Do you think, sir, whether... Do you think at all that  
16 the intercession by way of such a memorandum to  
17 Commission counsel is improper or wrong and that what  
18 should have been proposed is that the matter be first dealt  
19 with in submissions?

20 A. Well, our first meeting was to sort of get some idea of how the  
21 Commission might proceed to deal with the issue. And at that  
22 meeting, the suggestion was advanced by Mr. Cacchione that  
23 we try to reach a negotiated settlement. So the matter  
24 became rather academic. The issue that seemed to... The issue  
25 that was raised by Mr. Cacchione as to the starting point for

1 the purposes of compensation ceased to be an issue once the  
2 negotiations got underway.

3 Q. I'm not sure that answers the question.

4 A. Sorry.

5 Q. Do you think there is any, I don't want to put the word  
6 "improper", but the appearance the letter gives is of one  
7 where you resolve from the prospect of Crown counsel being  
8 left to the vagaries of a ruling on behalf of the Commission.  
9 And I'm curious as to why you were so concerned that the  
10 Commission not be entitled to make its own determination of  
11 its terms of reference as they interpret its mandate as set out  
12 in the Order-in-Council. And why the government felt it so  
13 important to go back.

14 A. Well, I think the intent and purpose of the Commission was  
15 certainly clearly understood by my principles that as to the  
16 starting point for considering compensation. And if the terms  
17 of the order were not explicit enough, then it seemed to me  
18 that that was an issue that ought to have been raised with the  
19 Attorney General and let's get it as it was intended to be.  
20 That was my view and that was the position I took. I made it  
21 clear what I understood the intent and purpose and what the  
22 terms of reference provided for, which I thought were in  
23 clear language and very explicit. But if there was any  
24 ambiguity about it, well, let's get it sorted out at the  
25 beginning. We're talking about an ex gratia process and let's

1 be clear on where we start from.

2 Q. And I take it you felt strongly enough about that proposition,  
3 and let me rephrase that. You felt strongly enough about the  
4 fact that the Commission ought not examine police conduct  
5 and ought not examine the conduct of those leading up to the  
6 conviction. That you did not want to leave it for the  
7 Commissioner to make his own ruling.

8 A. The Commission was to look at the matter of compensation  
9 from a point following the decision of the Court of Appeal.  
10 And the reason for that is what I gave in reply to a question  
11 put by Mr. Spicer. And my function was to, as I saw it, was to  
12 communicate and make certain that the government's  
13 position in interpreting and applying the terms of reference  
14 was clear.

15 Q. Why shouldn't the fault attributable, if any, to official  
16 government agencies or police forces be a matter of concern  
17 in the compensation process?

18 A. Because that was not the decision of the Executive Council and  
19 mandating the Commission was otherwise.

20 Q. Did you advise the Executive Council in relation to that?

21 A. I certainly advised the Attorney General as to where I  
22 thought the appropriate starting point was.

23 Q. Did you advise or provide any documents for the exercise of  
24 decision-making by the Executive Council?

25 A. Not to my knowledge, apart from the report and

1 recommendation that gave rise to the order.

2 Q. Well, I may be missing a document here, and please point it  
3 out to me, but what I'm suggesting to you, sir, is that you held  
4 very strongly a view that the police... Before the executive  
5 order ever came down or the Order-in-Council ever came  
6 down, that improper conduct on the part of the Crown or on  
7 the part of the police ought not to be part of the process.

8 A. That's right.

9 Q. That's what I wanted to explore.

10 A. Oh, yes.

11 Q. Why shouldn't it be? Why shouldn't it have been in this  
12 case?

13 A. Well, gosh, we have to go back through a lot to answer that. I  
14 had no... I had no reason, no advice or information that  
15 suggested to me wrongful conduct on the part of the police or  
16 the Crown. Now if there had been, that could be appropriate  
17 civil suit in tort for negligence, or if it were malicious  
18 prosecution. We're talking about ex gratia compensation.  
19 That is, determining whether or not there should be money  
20 paid, notwithstanding the absence of any wrongdoing on  
21 anybody's part.

22 Q. I appreciate... Go ahead.

23 A. And that, also, would include possibly Mr. Marshall. Now if  
24 you want to avoid getting into the whole tort concept of  
25 determining compensation, and address it on an ex gratia

1 basis, it seemed an appropriate starting point was after Mr.  
2 Marshall was incarcerated. That's the time when the court  
3 said, "This is the end of the road." That was the period that  
4 the decision was taken to address the question of  
5 compensation. The other concern was the, what I mentioned  
6 earlier, two other concerns, was there was concern that the  
7 carrying, the Inquiry, not in any way affect the prospect of  
8 Mr. Ebsary having a fair trial. And you say how? Well, who  
9 knows? No one knows once witnesses are called before the  
10 Inquiry. There was concern...

11 Q. It could always be in camera, though.

12 A. I beg your pardon?

13 Q. It could always be in camera.

14 A. Well, it could be. It may not be. That would be up to the  
15 Commissioner, whether he would, how he would deal with it.  
16 The other concern was we did not want, through this incident,  
17 to set a precedent that would give rise to a claim for  
18 compensation in cases where a person's conviction may be  
19 reversed on or through the ordinary appeal process. And so,  
20 in a long way, that's why the starting point was where it was.  
21 And as I say, I acknowledge this letter to Mr. MacIntosh on  
22 May 17th. I see no reason why it shouldn't have been copied  
23 to Mr. Cacchione and it was just an oversight, in fact, that it  
24 wasn't.

25 Q. Let me then just go to one last area. With respect to the



1 approval, the apparent approval of the Commission. You felt,  
2 I take it from your testimony yesterday and, indeed, from the  
3 notes in the material in Volume 33, that the Commission  
4 ought to approve the settlement in some way.

5 A. Well, I...

6 Q. And approve in the sense of it is a process and...

7 A. Yeah, I thought to complete the process that the Commission  
8 was set up, mandated to report and make recommendations.  
9 Now the process was changed through the agreement to  
10 attempt to reach a settlement through negotiations. Well,  
11 when that process was completed, was acceptable to both  
12 parties, it seemed to me only proper that the Commission  
13 then decide whether it would accept it, incorporate it,  
14 approve, or what have you. It seemed to me that there would  
15 be an expectation on the part of the Commissioner to  
16 complete his mandate by making a report and  
17 recommendation. And it was a formal way of tidying up the  
18 Commission.

19 Q. Okay, the suggestion would appear, sir, that the very wording  
20 of the report, in part which you drafted, gives the sense to the  
21 community and to the public reading it that the quantum was,  
22 in fact, approved by the Commissioner. If you want me to  
23 refer you to the report, it's at 520 and 521, Volume 33... I'm  
24 sorry... Yeah, at Volume 33.

25 A. Five?

1 Q. 520 and 521.

2 A. Well, you know, I would expect if the Commissioner was going  
3 to incorporate and recommend it, he would approve of it. If  
4 he didn't, if he wasn't prepared to accept the acceptance of  
5 the parties as a basis for his approval, then I would not have  
6 expected him to sign the report.

7 3:45 p.m.

8 Q. So I take it that rather than indicating any surprise for my  
9 suggestion to you it was your purpose and, indeed, your  
10 understanding that there was an express approval actually  
11 given by the commissioner when he signed this.

12 A. Well I'm not so sure that's what I understood at the time. I  
13 thought the report should set forth what the settlement was  
14 and using the language of the commission, of Mr. Justice  
15 Campbell, that required of him to report and recommend, I  
16 incorporated that language. And I presume the fact that he  
17 agreed to the use of that language acknowledged some kind of  
18 approval on his part. Certainly agreement.

19 Q. Your purpose then, in doing this, using this kind of language  
20 though, I just want to identify your purpose, was to then seek  
21 and give the impression of approval by the commissioner of  
22 the quantum and of the settlement.

23 A. I have some difficulty with the way you phrase that. My  
24 intention and purpose was to set forth the full amount of the  
25 settlement and to have it constituted as his report and

MR. COLES, EXAM. BY MS. EDWARDH

1 recommendation in compliance with the commission that he  
2 was given.

3 Q. And you intended to convey, I take it, that if he disagreed  
4 with the settlement process or the quantum that he wouldn't  
5 have included it in his report.

6 A. Well I assume that if he weren't prepared to accept this as  
7 satisfaction of his mandate he would not have, he would have  
8 rejected it. Or he would have dealt with it in some other way.

9 Q. And I take it that when you use that language and drafted it  
10 it also conveyed to third parties reading it if he would sign it,  
11 that he approved the quantum involved.

12 A. It would have that effect but it was not, those words were not  
13 used with that intent and purpose expressly in mind.

CHAIRMAN

14  
15 Were you aware that in drafting the report, if you look at  
16 page 513, Mr. Endres and Mr. Cacchione had advised  
17 Commissioner MacDonald, or Campbell rather, through their  
18 solicitor that "we're both satisfied that with this settlement the  
19 purpose of the inquiry has been accomplished. We therefore  
20 recommend its acceptance and approval."

MR. COLES

21  
22 I'm sorry, My Lord, I missed...

COMMISSIONER EVANS

23  
24 513.  
25

14124 DISCUSSION

1 COMMISSIONER POITRAS

2 Page 513 at the bottom.

3 MR. COLES

4 Page 513?

5 COMMISSIONER POITRAS

6 Yes, at the bottom of the page. "We are both satisfied..."

7 MR. COLES

8 Well I'm not sure when I saw that letter, My Lord.

9 CHAIRMAN

10 I see.

11 MS. EDWARDH

12 Q. I just want to draw to your attention...

13 A. I know that I asked Mr. Cacchione, Mr. Endres to  
14 communicate to counsel on the matter.

15 COMMISSIONER EVANS

16 Did Mr. Cacchione sign it?

17 MS. EDWARDH

18 Yes, he did but this letter was not sent to the commission  
19 until after the report was signed. Do you recall, after the releases  
20 were signed. I'm sorry.

21 CHAIRMAN

22 Right.

23 MR. COLES

24 Oh no, it was before the report though.

25

14125 DISCUSSION

1 CHAIRMAN

2           Anyway, I guess it's for us to interpret what the words  
3 "accordingly I mean acceptance and implementation of the said  
4 agreement in concluding this matter." I can only reach one  
5 conclusion that Mr. Justice Campbell approved.

6 MR. COLES

7           May I interrupt? Counsel, this letter is dated August 15th,  
8 the report is dated is August 17th.

9 MS. EDWARDH

10           Quite right. And it's sent, the letter is sent September the  
11 25th.

12 MR. SPICER

13           Page 540.

14 MS. EDWARDH

15           So it's sent after.

16 COMMISSIONER EVANS

17           The information apparently was given by, I presume the  
18 information was given in order for the report to be signed on  
19 August the 17th.

20 MS. EDWARDH

21           Well I think the report had been drafted, had been sent  
22 over before this letter, My Lord. That's why I asked...

23 CHAIRMAN

24           Well there's no doubt, is there, that Mr. Justice Campbell was  
25 aware of the fact that the parties had agreed before he sent the

1 report.

2 MS. EDWARDH

3 Yes, that's correct.

4 Q. One brief set of questions to draw to a close, Mr. Coles. So I  
5 understand your testimony, it seemed a little bit to change in  
6 answer to a number of questions my friend posed to you  
7 about what your belief was that Mr. Marshall was in part  
8 responsible for his "predicament" or his incarceration. I take  
9 it that what you are saying is, and I'd like to go back to my  
10 recollection of one of your answers is that it is, indeed,  
11 nothing short of, and was nothing short of speculation on your  
12 part that any information, or that Mr. Marshall would have  
13 offered of a different kind would have changed the nature of  
14 the investigation or the conviction or anything else. It's just a  
15 sheer speculation.

16 A. Yes.

17 Q. And that you have, indeed, no information that would  
18 indicate today or at the earlier times when you made these  
19 comments that had Mr. Marshall said anything different to  
20 the Sydney Police they would have conducted their  
21 investigation in any different fashion, correct?

22 A. Correct.

23 Q. And, indeed, Mr. Marshall gave to the Sydney Police a  
24 description of the two men and they did what they did with  
25 that description.

1 A. My understanding is he gave a description of two men. I  
2 don't know if it was the description of that two men.

3 Q. Well let me assure you that it is a description of height,  
4 weight, appearance, et cetera, given on the night of the  
5 incident. And that the police did with that what they, well  
6 we've heard evidence of that. There's no reason to assume  
7 they would have done anything different than what they did.

8 A. Well I don't know.

9 Q. You don't have any information to the contrary.

10 A. No.

11 Q. I'm going to suggest to you, sir, there isn't a realistic shred  
12 here from all the evidence that you know of and your  
13 information about this case that would indicate that if  
14 Marshall had said anything different the results of this case  
15 wouldn't have been the same at the first level. That the  
16 problem is with perjured...

17 A. The problem is we don't know. The problem is we don't  
18 know.

19 Q. And the problem, in fact, arose because of perjured  
20 testimony, correct? That's what you said at the very  
21 beginning of the afternoon.

22 A. Well it's testimony that was changed and subsequently and  
23 turned out to be perjured.

24 Q. Yes. The problem arose that a jury relied on perjured  
25 testimony.

MR. COLES, EXAM. BY MS. EDWARDH

1 A. Yes. It relied on the perjured testimony of people who  
2 purported to be eyewitnesses...

3 Q. Yes. All the more serious.

4 A. Yes. It did not presumably accept the evidence of Mr.  
5 Marshall.

6 Q. No, they relied on perjured testimony. Of people who were  
7 eyewitnesses who have said that they gave that perjured  
8 testimony because of police pressures, correct, sir?

9 A. Well, I suppose one could also say that the police also relied  
10 on perjured statements. I mean you could argue both sides I  
11 suspect.

12 Q. Those statements were not under oath, sir. There is a small  
13 difference.

MS. EDWARDH

14  
15 Those are my questions.

MR. MURRAY

16  
17 No questions on behalf of MacIntyre or Urquhart.

MR. BARRETT

18  
19 I've just got several questions.

CHAIRMAN

20  
21 Well before you start maybe we should take a break. But  
22 before, Mr. Barrett, I'm going to have to restrict you to matters  
23 that are related to your client.

MR. BARRETT

24  
25 I understand.



CHAIRMAN

1           And to ask you to please avoid repetition. The areas have  
2 been canvassed very thoroughly by both Mr. Spicer and Ms.  
3 Edwards and unless there's some new angle to a particular area  
4 that's already been canvassed that would be repetitious. So with  
5 that rider we'll rise for a few minutes.

6 3:54 p.m. - BREAK

7           4:15 p.m.

MR. CHAIRMAN

8  
9           Mr. Barrett?

EXAMINATION BY MR. BARRETT

10          Q. Mr. Coles, my name is David Barrett. I represent the Estate of  
11 Donald C. MacNeil and I just have a few questions. Mr. Coles,  
12 you gave evidence of your experience in private practice  
13 prior to 1972 and is it fair to summarize your evidence that  
14 in smaller areas, an informal system existed where the  
15 defence counsel would discuss with the prosecutor the case  
16 against his client?

17          A. I really can't comment on that. My practice is in the Halifax/  
18 Dartmouth area. So I don't know what the practice may have  
19 been outside of the metropolitan area.

20          Q. But in the Halifax/ Dartmouth area at that time, you would sit  
21 down with Crown and discuss the case against your client?

22          A. I always felt no difficulty in approaching Crown and  
23 discussing the case that they had against my client, yes.

24          Q. Would you request that they provide you with a list of  
25

MR. COLES, EXAM. BY MR. BARRETT

1 witnesses and statements or show you statements of those  
2 witnesses?

3 A. As I recall, the file was made available to me and I don't  
4 think the provided me with copies, but they would show me  
5 statements, if there were statements that they had on file. I  
6 never sensed there was anything that was kept from me that  
7 I inquired about.

8 Q. So do you feel that you or any other experienced defence  
9 counsel would be remiss in not requesting this information or  
10 to be shown this information?

11 A. No, I don't think I would say they would remiss in not  
12 requesting it. I think it depends on the individual lawyer and  
13 his, the rapport he may have with Crown counsel and what  
14 his approach to preparing his defence might be. I wouldn't  
15 attribute any such thing to a lawyer who may not avail  
16 himself with an opportunity.

MR. BARRETT

17  
18 Those will be all my questions.

EXAMINATION BY MR. PRINGLE

19  
20 Q. We have two questions, I think, Mr. Coles. My name is Al  
21 Pringle. I'm counsel for the Royal Canadian Mounted Police.  
22 In your evidence this morning, sir, you made reference to the  
23 1971 first statements and the fact that you had no knowledge  
24 that there was any breach with respect to disclosure of those  
25 statements. Correct?

MR. COLES, EXAM. BY MR. PRINGLE

1 A. Yes.

2 Q. And you went on further to say that you thought perhaps the  
3 Royal Canadian Mounted Police in 1971 or 1982, or indeed,  
4 the Court of Appeal on the reference might have looked at  
5 that aspect or uncovered that aspect as to whether or not  
6 there was disclosure of those first statements.

7 A. Well, I'm not sure exactly how I replied to the question.  
8 What I... I'm not sure I was talking about 1971. I thought the  
9 question was referenced to the reinvestigation in 1982.

10 Q. Okay, fine, we'll take it from there. Do you have Volume 17  
11 in front of you?

12 A. Volume 17, yes.

13 Q. And that's Mr. Edwards' notes and I'm referring you to page  
14 four, sir, where Mr. Edwards writes on date February 26th,  
15 1982, at the bottom of the page:

16  
17 H. Wheaton phoned to confirm my opinion the  
18 defence did not know of previous inconsistent  
19 statement. I told him that in my opinion they  
20 did not. (And then a little later) 9:30 a.m.  
21 Phoned Herschorn. Told him of above.

22 My question to you, sir, is did you ever hear from Frank  
23 Edwards or Martin Herschorn that opinion that Frank  
24 Edwards apparently held at that time?

25 A. No.

Q. Did you ever ask them?

A. No.

MR. COLES, EXAM. BY MR. PRINGLE

1 Q With respect to 1971 and the R.C.M. Police reinvestigation, did  
2 you, sir, at any time become aware of what the mandate of  
3 the Royal Canadian Mounted Police was in 1971?

4 A. No.

5 Q Did you ever ask?

6 A. No.

7 MR. PRINGLE

8 Thank you.

9 MR. CHAIRMAN

10 Mr. Wildsmith?

11 MR. WILDSMITH

12 I should say, My Lords, that Mr. Ross indicated he had some  
13 questions. He didn't expect to be back this afternoon. I think he  
14 understands that if Mr. Coles is finished this afternoon, that he'll  
15 have forfeited his opportunity.

16 MR. CHAIRMAN

17 Mr. Coles will be finished this afternoon.

18

19 EXAMINATION BY MR. WILDSMITH

20 Q Mr. Coles, I'm Bruce Wildsmith and I'm here for the Union of  
21 Nova Scotia Indians. I guess it's clear from the evidence that  
22 you're no longer the Deputy Attorney General of Nova Scotia.  
23 Could you tell us when you ceased to hold that position?

24 A. I think December of last year.

25 Q 1987. And could you tell us what your present role is in the

MR. COLES, EXAM. BY MR. WILDSMITH

1 Attorney General's Department?

2 A. I am a special adviser on constitutional and intergovern-  
3 mental affairs.

4 Q. Does that mean that with respect to all constitutional matters  
5 involving aboriginal peoples you would be an adviser?

6 A. Yes.

7 Q. And you have done that as part of your duties as Deputy  
8 Attorney General?

9 A. Yes.

10 Q. We had some evidence from Mr. Giffin, former Attorney  
11 General, that with respect to Indian conditions in general, it  
12 was his view, and I'm not clear whether it was his personal  
13 view or the government's view, that self government was the  
14 way to go. Do you share that view?

15 A. Well, I share that view, subject to a definition of self  
16 government.

17 Q. If we think about it in terms of more Indian control over  
18 issues that affect Indian people?

19 A. Yes, if we're talking in terms of jurisdiction, identifying areas  
20 of jurisdiction over which the native people ought to have a  
21 control, my answer is yes.

22 Q. Thank you. Could you indicate whether you have had any  
23 contact with native people outside of your official duties as  
24 Deputy Attorney General or as special adviser?

25 A. Not in any real sense. I know aboriginal people and I know

MR. COLES, EXAM. BY MR. WILDSMITH

1           them on a personal basis. But apart from that, on a personal  
2           basis, the answer is no.

3       Q. NO social contact outside of the official duties or perhaps  
4           passing them on the street or visiting with them at meetings.

5       A. I've been at social occasions where they have been present.

6       Q. Yes, what sort of social occasions?

7       A. Private social parties.

8       Q. Okay, coming back around to the National Conference on  
9           Native Peoples and Criminal Justice that your attention was  
10          directed to by Mr. Spicer, how was it that you ended up going  
11          to this meeting, as opposed to the Attorney General?

12      A. I don't honestly recall.

13      Q. Just as an observation, I noticed that...

MR. CHAIRMAN

14                   Is this the meeting in Edmonton?  
15

MR. WILDSMITH

16                   Yes.  
17

MR. COLES

18                   Yes.  
19

MR. CHAIRMAN

20                   The Attorney General was there. Take it from me, I was  
21                   there, too.  
22

MR. WILDSMITH

23                   I'm quite happy to accept Your Lordship's recollection. I  
24                   have the proceedings and the list of...  
25

MR. COLES, EXAM. BY MR. WILDSMITH

1 MR. CHAIRMAN

2 Yes, I think you...

3 MR. WILDSMITH

4 Personnel is indicated here on page five and...

5 MR. CHAIRMAN

6 Oh, I don't know if the Attorney General of Nova Scotia was  
7 there, but the Attorneys General were there.

8 MR. WILDSMITH

9 Yes, and that comes around to my point, which is why Mr.  
10 Coles was there and not the Attorney General of Nova Scotia...

11 MR. CHAIRMAN

12 Oh.

13 MR. WILDSMITH

14 When every other province and jurisdiction was there.

15 MR. CHAIRMAN

16 I misunderstood you. I thought you were saying that this  
17 was not a meeting of Attorneys General.

18 MR. WILDSMITH

19 No, the point was, why was Mr. Coles there and not the Nova  
20 Scotia...

21 MR. CHAIRMAN

22 That's a good question.

23 MR. WILDSMITH

24 Attorney General.

25

MR. COLES, EXAM. BY MR. WILDSMITHMR. COLES

1  
2 A. I was obviously there at the direction of the Attorney  
3 General. I don't know why the Attorney General was not  
4 available to attend.

5 Q. You have no recollection then to assist us?

6 A. No.

MR. CHAIRMAN

7  
8 What year was that, Mr. Wildsmith?

MR. WILDSMITH

9  
10 It was 1975, February the 3rd to the 5th, 1975 in Edmonton.

BY MR. WILDSMITH

11  
12 Q. Do you recall who the Attorney General was at that time?

13 A. In '75?

14 Q. Yes.

15 A. It was probably Mr. Sullivan, but...

MR. CHAIRMAN

16  
17 Yes, I think, Mr. Sullivan was. I'm not on the witness stand,  
18 am I? I feel reasonably certain it was the late Mr. Sullivan.

BY MR. WILDSMITH

19  
20 Q. In any event, I guess at that point in time, Mr. Gale had been  
21 assigned the responsibility for all legal matters concerning  
22 native people within the Attorney General's Department.

23 A. Probably.

24 Q. He didn't accompany you on this meeting?

25 A. No.



MR. COLES, EXAM. BY MR. WILDSMITH

1 Q. Did he have any briefing from you after your return?

2 A. I would doubt it, but I don't recall. It would not be the kind  
3 of thing that I would see the need to brief Mr. Gale on.

4 Q. After you came back from this conference, you wrote the  
5 letter that we have on page 43 in Volume 41. Perhaps you  
6 should turn to that. It is Volume 41, page 43.

7 A. Yes.

8 Q. I notice that the context of this letter is writing to Mr.  
9 MacKinnon as a result of his letter of January the 30th, which  
10 we have at page 45 dealing with government services to  
11 native people. And what I'm really wondering about is the  
12 comment in the third paragraph in which you're informing  
13 the Deputy Minister of Social Services that perhaps more than  
14 anything else, the conference pointed out the need for  
15 attitudinal changes on the part of those involved in the  
16 criminal justice system. And, secondly, the need for the  
17 system itself to be more sensitive to native people who come  
18 in conflict with the law. I'm wondering whether there was  
19 any particular reason why you made that statement to Mr.  
20 MacKinnon?

21 A. Well, that was the conclusion I drew from the conference  
22 from those who participated and expressed their views and  
23 concerns and I came away with that understanding that... and  
24 I communicated to Mr. MacKinnon, or Dr. MacKinnon.

25 Q. Well, did you expect Dr. MacKinnon to do anything as a result,

1 or were you just providing that for his information?

2 A. Oh, I didn't intend anything by it, except communicate to him  
3 the general feeling that I came away with and I didn't expect  
4 or anticipate that he would do anything. I just wanted to  
5 share with him my impressions from the conference.

6 Q Fair enough. You copied this letter to a variety of individuals,  
7 most of whom are in your Department.

8 4:28 p.m.

9 A. Yes.

10 Q It appears to me, perhaps you can correct it, that you copy it  
11 to them with reference to the Directory of Government  
12 Services referred to at the bottom of page 43.

13 A. Yes.

14 Q Did you expect any of them to do anything with respect to  
15 paragraph 3?

16 A. Well I wanted them to be aware of what I had set out in the  
17 letter and I had identified on the first page some of the areas  
18 that I thought ought to be taken into account having regard to  
19 what I perceived and I understood to be a need.

20 Q Well, for example, one of the persons copied is Mr. Gale.

21 A. Yes.

22 Q And he is responsible for all legal matters concerning native  
23 people. Did you expect him to do anything as a result of  
24 receiving a copy of this letter in connection with paragraph 3?

25 A. Well I wanted it to generate some thinking on their part and

1 wanted them to address what I considered to be a concern.

2 Q. Did Mr. Gale in any way address the concerns in paragraph 3  
3 to your knowledge?

4 A. Oh, I don't think so. I don't think we actually came back to  
5 this, per se. I think I, I don't recall any specific responses.

6 Q. No responses from any of the people to whom the letter was  
7 copied.

8 A. Well not responses in the sense of a memorandum or  
9 recommendations.

10 Q. Yes.

11 A. I'm sure that we all had discussions arising out of this. It was  
12 about that time we were thinking in terms of the needs of  
13 improved communications in the whole of the justice system  
14 and not only in respect to native peoples but all peoples. I  
15 don't mean to sound as if I were the only one but others in  
16 the Department shared the concern that we didn't have a  
17 very good communications network in our justice system in  
18 the province and that this was a matter that ought to be  
19 addressed and I think consideration then was given to putting  
20 a proposal forward to the federal people which found some  
21 favourable response.

22 Q. Okay, well I'll come back around to that proposal but with  
23 respect to this letter and the third paragraph, can you point to  
24 anything in particular, anything specific that happened as a  
25 result to change or to explore the need for attitudinal change

1 on the part of those involved in the system or to make the  
2 system itself more sensitive to the needs of native people?

3 A. No, I can't point to any particular responses.

4 Q. Okay. I guess as is evident, and I think it was in your earlier  
5 testimony, there were proceedings that came out of the  
6 conference in 1975. Do you recall whether or not any of the  
7 recommendations contained in that report and approved by  
8 the provinces and Federal Government by resolutions were  
9 implemented in the Province of Nova Scotia?

10 A. Well I don't recall. I would have to have reference to the  
11 recommendations.

12 Q. Well without wanting to take you through them step by step,  
13 can you recall if anything was done to implement?

14 A. Well I can't because the lead responsibility was that of the  
15 Department of Social Services and I'm not aware of what  
16 programs or policies that may have been, of theirs that may  
17 have been influenced by that conference.

18 Q. Okay. Nothing that was done under your direction at least.

19 A. Well we, you know, we did involve ourselves in the Native  
20 Court Worker Program. I think that was commenced prior to  
21 the conference but I think there was probably a greater  
22 appreciation of the usefulness of that program as a result of  
23 the conference. I think we, and I'm not sure about the  
24 timeframe here, but I think there was a fuller realization of  
25 the usefulness of involving native Nova Scotians in policing on

1 reserves. I think there was a fuller awareness and a better  
2 appreciation than perhaps what had existed previously in the  
3 Department.

4 Q. Fair enough. I note on page 46 in the report in the  
5 proceedings there's a reference to certain discussions that  
6 took place in connection with the consideration of resolutions  
7 and this is at page 46 in the proceedings I have, not that you  
8 have. And this is attributed to you, the Deputy Attorney  
9 General of Nova Scotia, Gordon F. Coles. And it's in connection  
10 with the proper representation of native peoples on juries.  
11 And you're reported as saying that,

12  
13 It is important to distinguish between selecting a  
14 panel from which a jury is eventually chosen  
15 and the composition of the jury itself because  
16 the process of jury selection rests with counsel  
17 before the court.

18  
19 And then it goes in the next paragraph to say, He  
20 (meaning you) presented as Proposal 5, a  
21 recommendation from a workshop that was  
22 approved by the Ministers with a minor change.  
23 It recommended that provincial and territorial  
24 Attorneys General be asked to change present  
25 methods of choosing jury panels so that native  
people have an equal opportunity to serve on  
these panels.

23 Do you recall making that recommendation?

24 A. Vaguely but not specifically.  
25

1 Q. Okay, you have no reason to think that this report of your  
2 recommendation and suggestion is incorrect.

3 A. I'm flattered to be identified with it.

4 Q. Fair enough. That leads to the next question then, having  
5 approved this recommendation in which provincial Attorneys  
6 Generals are asked to present methods of changing the  
7 choosing of jury panels so as to provide an equal opportunity  
8 for native people to serve, what, if anything, did you do upon  
9 your return to implement that recommendation?

10 A. Well I would presume that I would have reported to the  
11 Attorney General and I would expect that it was discussed at  
12 a subsequent meeting of Attorneys General and I don't recall  
13 specifically what action was agreed upon at such a meeting  
14 and I'm not aware that in our province any steps were taken  
15 to give effect to that resolution.

16 Q. Okay. And I take it from your response that other than  
17 informing the Attorney General of this suggestion you didn't  
18 take a personal interest in yourself in seeing that your  
19 recommendation was acted upon.

20 A. I don't recall taking any steps to give effect to it but I'm sure  
21 I continued my interest in the subject and...

22 Q. All right. And finally with respect to this conference, on page  
23 59 under the title of "Follow-up" it suggests that, "The  
24 Ministers wound up their day-long meeting with the decision  
25 to establish a Canadian Advisory Council on native peoples in

1 the criminal justice system" and it goes on to explain the  
2 membership of that advisory council and that it was to  
3 include representative from each of the provinces. Do you  
4 recall whether such an advisory council was created and  
5 whether the Province participated?

6 A. Well I don't recall. If it were created I would think that our  
7 representative would come from the Department of Social  
8 Services.

9 Q. Even though it involves criminal justice, the criminal justice  
10 system?

11 A. Yes. Probably.

12 Q. Okay. It wouldn't have been Mr. Gale.

13 A. Oh no, I would not think so.

14 Q. All right. And the very last sentence here says, "Each  
15 province and territory would also set up an advisory body  
16 with government and native representations." Do you know  
17 whether the Province of Nova Scotia set up its own advisory  
18 council on native people and criminal justice?

19 A. Well we did have in existence at that time, and continue to  
20 have, a tripartite committee, and I'm not sure whether or not  
21 it was thought that there need to be an additional advisory  
22 council to that particular committee. I'm not aware what  
23 action would have been taken in response to that and, again, I  
24 would expect it would have been under the auspices of the  
25 Minister of Social Services.

MR. COLES, EXAM. BY MR. WILDSMITH

1 Q. With reference to that tripartite committee you, in part,  
2 address that in your letter that's in Volume 41 at page 43 in  
3 paragraph 4 by pointing out that this body represents status  
4 native people in Nova Scotia and not non-status.

5 A. Yes.

6 Q. And that perhaps its role ought to be reassessed.

7 A. Yes.

8 Q. But despite that what you're saying is that to the best of your  
9 knowledge there was no other mechanism that served as this  
10 advisory body.

11 A. That is correct.

12 Q. Okay. Now a few moments ago you mentioned about this  
13 time in 1975 being concerned about communications in the  
14 criminal justice system. Do you, and you referenced dealings  
15 with the Federal Government, perhaps the Department of the  
16 Solicitor-General. I have in front of me a newspaper clipping  
17 from the front page of the Chronicle-Herald, Thursday,  
18 January the 30th, 1975. It's the lead article on the front page.  
19 I'd like to read a couple of paragraphs and see if this jives  
20 with your recollection of what you're speaking about. The  
21 headline is "Nova Scotia's Criminal Justice System 'Total  
22 Examination' Planned - Findings Could have National  
23 Application" written by Don MacDonald, Staff Reporter. It  
24 says,  
25



1 'Nova Scotia has been chosen for a four-  
2 year intensive study of its criminal justice  
3 system,' Attorney General Allan Sullivan said  
4 Wednesday. In an interview Mr. Sullivan said  
5 the project, the first of its kind in Canada, will  
6 involve 'a total examination' of the present  
7 system with a view towards developing  
8 alternative methods of dealing with persons  
9 convicted of crimes. An agreement has been  
10 signed by the Province and the Federal Solicitor-  
11 General's Department for the study. The Federal  
12 Government will provide \$360,000 towards  
13 staffing the project, while Nova Scotia's share  
14 estimated to be less than \$50,000, will be used  
15 towards cost of supporting research and  
16 administration of the project.

17 Mr. Sullivan said the highlight of the  
18 project (there's a little ambiguity in here,  
19 misprint, something about an assessment) of the  
20 overall criminal justice system in the Province as  
21 opposed to studies of separate parts. He  
22 described the project as the most important  
23 study of criminal justice in the country. All  
24 sectors of the present system, along with the  
25 general public, will be involved in the project.  
'The project will solicit attitudes of judges,  
policemen, prosecutors, correctional officers and  
members of the general public,' he said.

Does that jive with your recollection of the events in 1975?

4:40 p.m.

A. Yes.

Q And that, in fact, is the study that you were referring to  
about communications.

A. Yes.

Q And one other aspect of this report or this article, it says,

1 the Minister emphasized the importance of involving the  
2 general public in the review, 'The system is there for the  
3 protection of the public, we have to know how they feel  
4 about the system. In the past the general public has  
5 discussed the system, 'amongst themselves', because there  
6 has never been a broad vehicle for discussion," he said.  
7 That, as well, is your recollection of the project.

8 A. Generally, yes.

9 Q. And my information is is that the project continued from  
10 1975 to 1979.

11 A. Correct.

12 Q. And that there was reasonably extensive representations by  
13 the Union of Nova Scotia Indians to a special study group on  
14 minorities in the criminal justice system. Is that correct?

15 A. That's my recollection.

16 Q. And was there a final report then prepared?

17 A. The, ah, I have some notes here, if I may refresh my  
18 memory on it.

19 Q. Yes, you have some advantage then over me.

20 A. There were a number of research reports completed. I might  
21 just list them, if I may.

22 Q. Yes.

23 A. I don't know if this is of interest to the Commission or not.  
24 I'll give this to Commission counsel. There is, "A Survey of  
25 Public and Professional Attitudes Relevant to Criminal

1 Justice in Nova Scotia," these are headings of these reports,  
2 "The Economics of Crime and Crime Control," "Provincial  
3 Temporary Absence Programs", "Attitudes of Minorities to  
4 Criminal Justice Services in Nova Scotia", "The  
5 Administration of Correctional Institutions in Nova Scotia,  
6 Problems and Options". At that time they were under the  
7 control of the municipalities. "Public Inebriant Population  
8 Within Correctional Institutes... Institutions in Nova Scotia",  
9 "The Mentally Ill Offender in Nova Scotia". "In addition to  
10 these research initiatives, the project sponsored a number of  
11 seminars on selected topics aimed at improving  
12 communication between the various components of the  
13 criminal justice system." So, there...you know, there are  
14 these reports. The notes I have I just briefly made.  
15 Perhaps I'll just read these brief notes, aftermath.

16  
17 Subsequent to the completion of the project in  
18 1979, the government has taken action on a  
19 number of issues identified in the various  
20 research seminar reports prepared by project  
21 staff. (1) Public inebriates were diverted from  
22 correctional institutions to the institution of new  
23 police practices in 1981, the provincial  
24 government assume responsibility for the  
25 correctional institutions in 1986, an inter-  
departmental committee was appointed to  
develop programs and facilities for the mentally  
ill offender. The critique of the project  
conducted in 1979 notes that, 'In spite of its  
many shortcomings, the project was not without

MR. COLES, EXAM. BY MR. WILD SMITH

1 its successes. Examples cited are the various  
2 research reports as well as the project's role in  
3 creating an awareness of problems and  
stimulating debate among persons in the  
judiciary, law enforcement and corrections.'

4 Q Can you tell us what you're reading from?

5 A Yeah, this is a...this is a note that was prepared by James L.  
6 Crane, Executive Director, at the request of Mr. D. William  
7 MacDonald, Q.C., present Deputy Attorney General, dated  
8 May 5th, 1988.

9 Q Thank-you. I have been provided with a copy of one of the  
10 studies you mentioned, "Attitudes of Minorities to Criminal  
11 Justice Services in Nova Scotia", and it includes a very  
12 extensive submissions by the Union of Nova Scotia Indians.  
13 I want to just turn for a moment to the recommendation  
14 that is contained on page 89 in the document that I'm  
15 looking at. I'm afraid that it's a little long-winded, even  
16 moreso that I usually am. It says,

17  
18 It is, therefore, the recommendation of the Nova  
19 Scotia Communications Project on Criminal  
20 Justice, recognizing the need for improved  
21 communications and consultation between the  
22 various sectors of the criminal justice system  
23 and the province's minority groups, that an  
24 officially appointed and recognized group of at  
25 least three representatives, each from the  
municipal, provincial and federal levels of  
government working within the criminal justice  
system, along with at least one representative  
from each of the larger recognized minority

groups in the province.

1  
2 And I think that earlier documents suggested that at least  
3 includes the Union of Nova Scotia Indians and the Black  
4 United Front.

5 Begin the process of on-going communications,  
6 consultations and information sharing so as to  
7 deal with the issues raised in this report and the  
8 issues that will normally arise due to the process  
9 of change within the administration of criminal  
10 justice in Nova Scotia.

11 I take it from your earlier comments and the memo from  
12 Mr. Crane that this recommendation was not one of the ones  
13 that was acted upon.

14 A. I don't recall what...what was done with that  
15 recommendation.

16 Q. Okay. And you have no knowledge of a...

17 A. Of such a group being formed.

18 Q. Yes. That's right.

19 A. No.

20 Q. And, finally, the last paragraph on this page references this  
21 group to another advisory group that is suggested as part of  
22 this project, and it refers to a criminal justice advisory  
23 group, and it was recommended that that be established in  
24 the overall conclusions. Do you know whether such a  
25 criminal justice advisory group?

A. Not at present I don't, I would have to check.

1 Q. Okay. So, to the best of your recollection today, you don't  
2 know about such a criminal justice advisory group being  
3 established in 1979?

4 A. I don't know of any being in existence at the present time,  
5 that's right. I don't know whether attempts were made to  
6 establish it or not.

7 Q. Okay.

8 A. I don't recall, I should say.

9 Q. Right. Just a couple of other details left here. With  
10 reference to the Court Workers Program, Mr. Spicer dealt  
11 with you largely on this and I just wanted to ask you two  
12 questions about it. If you'll turn in Volume 41 to page 143  
13 and 146. 143 is a memo from your Director of Programs  
14 and Administration, Mr. MacDonald, to Attorney General  
15 How, and this is in 1979 referring to a memorandum to the  
16 Executive Council relative to the Native Court Workers  
17 Program and goes on to note, "This is one area where the  
18 province could show good faith with the Union of Nova  
19 Scotia Indians." And on 146, we see a copy of that memo to  
20 Executive Council, and your name appears on it as Deputy  
21 Minister. There was some confusion, I think, when Mr. How  
22 was testifying as to whether this document, in fact, was  
23 taken by him to Cabinet. Can you help us out as to whether  
24 this expression of support for the Native Court Workers  
25 Program in 1979, in fact, did go to Cabinet?

1 A. Well, I can't. I would have expected it to have gone to  
2 Cabinet.

3 Q. Do you have a recollection of the Native Court Workers  
4 Program ever going to the Cabinet, whether it's through this  
5 memo or at any other time?

6 A. Oh. Oh, I'm sorry. I...my recollection is this matter went  
7 to...went to Management Board, which is a committee of  
8 Cabinet. I'm not sure about this particular memorandum.  
9 But my recollection is that our dealings were at the  
10 Management Board level, which is a committee of Cabinet,  
11 rather than the full Cabinet.

12 Q. Okay, my information is that there has not existed a Court  
13 Workers Program in this province since 1976. There was  
14 one off and on during the early seventies, but not since  
15 1976. Are you referring to this matter going to  
16 Management Board after 1976?

17 A. Well, I would have to...I would have to refer to some  
18 documentation. We try to...we tried to have the program re-  
19 established. Initially,, the program was for a three-year  
20 term and towards the end of that term there was difficulty  
21 encountered. There were some proposals to have a project  
22 program, as I recall, in the metro area, which did not...did  
23 not cover a large enough constituency to attract the  
24 necessary support of the Minister. We had attempted to  
25 revive the program and we ran into fiscal restraints at that

1 time. But those...those kind...those matters were dealt with  
2 Management Board, as I recall.

3 Q. Yes. And we have some correspondence with Mr. Thornhill  
4 and yourself over that issue.

5 A. Yes.

6 Q. And Mr. Spicer went through it with you.

7 A. Well, apart from that, that's my recollection of our  
8 involvement at that time.

9 Q. All right. And I take it from your earlier evidence that the  
10 Minister was supportive and you were personally  
11 supportive of the Court Workers Program.

12 A. Yes.

13 Q. And, is it fair then to conclude that the only reason why  
14 there isn't a Court Workers Program today in Nova Scotia is  
15 a matter of priorities in budgeting?

16 A. Well, not entirely. I think that's perhaps the major  
17 consideration. But we encountered some difficulty with  
18 the...with the agency that would run the program. Initially  
19 it was with the...through the, as I recall, the Union of Nova  
20 Scotia Indians and we got into some jurisdictional issues.

21 Q. Yes, and if I recall the documentation, that was in 1975-76.  
22 4:50 p.m.

23 A. Could be. And my recollection is that they, their support was  
24 contingent on total federal funding. Their renewal support  
25 for the program would be contingent on total federal funding,



1 which didn't seem feasible to us or available, for that matter.  
2 And it was difficult to get the necessary support from the  
3 representatives of the native people to generate the kind of  
4 support that a new program or revival of an old program  
5 required.

6 Q. Yes, although if I read the documentation correctly, and  
7 maybe I have an advantage over you, this was a kind of  
8 bump that appeared in 1975, '76 and was resolved by the  
9 time this Cabinet document was prepared that we just looked  
10 at in 1979.

11 A. Well, you may be correct on that. My recollection is, it doesn't  
12 help me.

13 Q. The bottom line that I'm looking for is whether since this  
14 period of 1979 to date whether there's any reason why the  
15 program has not been implemented except for the question of  
16 priorities, both within Management Board and within the  
17 Attorney General's Department.

18 A. And the support of the representatives of the native people in  
19 the province. Both so-called status and non-status.

20 Q. Well, I guess the documents speak for themselves, but 148  
21 you'll see a document that was prepared by Mr. MacDonald  
22 that talks about the Attorney General receiving a delegation  
23 of status and non-status Indians on Tuesday, January 16th to  
24 discuss the Native Court Workers Program. And it's the third  
25 paragraph on page 148, it says,

1                   The status and non-status Indians presented a  
2                   report to the Premier and his colleagues and the  
3                   meeting held on Tuesday recommends the  
4                   Native Court Workers Program be re-established.

5                   I think it's obvious that as of January 1979, at least, the  
6                   native community was united on how this was to be  
7                   presented.

8                   A. Well, my point is, if that situation continues to prevail, I  
9                   would say that that would be a factor in consideration.

10                  Q. Okay.

11                  A. Now it obviously prevailed in 19... in January 1979.

12                  MR. CHAIRMAN

13                         Mr. Coles, is it the practice in Nova Scotia that any  
14                         submission to Cabinet by a Minister which involves expenditure of  
15                         funds must first go to Treasury Board, or Management Board, I  
16                         think it's called here.

17                  MR. COLES

18                         Yes, whether it goes to the Cabinet first or goes through the  
19                         Management Board, it eventually goes back to Management Board  
20                         for that determination before Cabinet will deal with it. And if the  
21                         matter raises policy considerations, at that time, there's a change  
22                         now in the structure of government. At that time, there was a  
23                         further committee of Cabinet called "the Policy Board", which was  
24                         made up of senior Cabinet Ministers and the policy issues would  
25                         have to be run past that Board before it would go to Management

MR. COLES, EXAM. BY MR. WILDSMITH

1 Board.

2 MR. CHAIRMAN

3 So if Management Board says, "Sorry, the funds are just not  
4 available for this program," then the Policy Board could review  
5 that decision and say, "As a matter of policy..."

6 MR. COLES

7 Or the full Cabinet.

8 MR. CHAIRMAN

9 Or the full Cabinet.

10 MR. COLES

11 The Minister could appeal the Management Board's decision  
12 to full Cabinet.

13 MR. CHAIRMAN

14 And Cabinet could then decide to proceed with the program,  
15 presumably to find the funding from some other source.

16 MR. COLES

17 They could direct a change of priorities.

18 BY MR. WILDSMITH

19 Q. Now I'd like to turn to the native police in question and Mr.  
20 Spicer went over the material concerning with so-called  
21 "Option 3A", the municipal style of Indian police force. And  
22 your evidence, I think, is that the largest concern was with  
23 respect to funding. Is that correct?

24 A. The largest concern, yes.

25 Q. Yes, on the part of the province.

1 A. Yes.

2 Q. And you say that knowing that the federal government  
3 approved of it in principle?

4 A. Well, you know, I considered policing to be a provincial  
5 matter and so their approval in principle would probably be  
6 more or less directed to cost sharing.

7 Q. Yes. I'd like to direct your attention to a letter that appears  
8 at 215 and 216 in Volume 41, copied to yourself, and written  
9 in response to a letter that appears at 217 that you wrote to  
10 the Union of Nova Scotia Indians. Now the first question is  
11 this. In the letter that you wrote on 217, at the end you say:  
12 "The Attorney General approved in principle Option 3A." Is it  
13 your view that approval in principle does or does not include  
14 the funding question? That is, when a Minister approves in  
15 principle, is he, in fact, approving in principle the expenditure  
16 of money for this program?

17 A. No.

18 Q. So when you talk about...

19 A. Approval in principle does not commit to any funding to the...

20 Q. I know it doesn't formally commit to money, but does it  
21 include in its umbrella of approvement [sic] in principle the  
22 notion that you would help pay for it?

23 A. That the Province would help pay for it?

24 Q. Yeah.

25 A. Well, I don't know what funding arrangements were

1 discussed between Mr. How and the representatives that he  
2 had.

3 Q Okay, well, when you talk pros and cons in your letter in the  
4 second paragraph in determining feasibility.

5 A. Yes.

6 Q Are you including in that the cost of the program?

7 A. I'm including cost of the program, the portion to which,  
8 particularly which the Province and the Federal people would  
9 share. I'm talking about the recruiting, the training of the  
10 police. I'm talking about the jurisdiction that the force would  
11 have. All these questions are the pros and cons and I  
12 understand from 3A, we're talking about a separate police  
13 force, one separate from the provincial police services.

14 Q Yes, I think my point to you, though, is you don't mention  
15 funding as being a concern when you write to the Union of  
16 Nova Scotia Indians on 217.

17 A. Well, it would be implicit. I mean that's a matter for the  
18 governments to... That's a matter for the governments to try  
19 to work out, but I mean it's subject to being worked out.

20 Q Well, just let me make sure I understand it. You're saying  
21 that the greatest concern was funding, but when you wrote  
22 the letter to the Union of Nova Scotia Indians about it, you  
23 don't express funding as being a concern directly.

24 A. Perhaps not, but I would say when I say "subject to the  
25 feasibility"...

1 Q. All right.

2 A. I would have thought that funding would be part of the  
3 feasibility of implementing the principle that was acceptable.

4 Q. Okay, let's turn to the previous letter then, the one... It's the  
5 Union of Nova Scotia Indians' response and see, I guess, that  
6 they were, they considered, at the bottom of page 215, your  
7 letter to be unresponsive and a step backward. And they  
8 address the letter to Mr. Clarke, who is the coordinator for  
9 aboriginal issues in the Department of Social Services. Now if  
10 you look to the last part of the letter, you'll see that what's  
11 being requested there is a letter confirming that Option 3A is  
12 considered a valid program for policing for those bands that  
13 are consenting and it goes on to say "so that funds can be  
14 obtained." My impression is that they're saying funds can be  
15 obtained from the federal government if the province  
16 approves in principle. Do you take that from the letter?

17 A. That's not my recollection, but that may be an interpretation.

18 Q. Fair enough.

19 A. You know, it seems to me that, you know, we're talking about  
20 setting up a separate police force in the province and there  
21 are a lot of factors to be considered, including the matter of  
22 funding. Whether or not it will be totally a federally-  
23 provincial funded police force or whether there would be  
24 other variations on the thing.

25 Q. Do you have any knowledge...

MR. COLES, EXAM. BY MR. WILD SMITH

1 A. And it would be part of the feasibility of our being able to  
2 approve of it.

3 Q. Do you have any knowledge of the letter requested there ever  
4 being prepared?

5 A. I beg your pardon?

6 Q. The letter that's requested here on page 216 from the  
7 Province saying that 3A is considered a valid program. Do  
8 you know whether such a letter was ever prepared?

9 A. Well, certainly not by me.

10 Q. Fair enough. And, finally, I direct your attention to page 233  
11 and 234. This is now another communication from the Union  
12 of Nova Scotia Indians, this time going directly to you with  
13 the Union's brief comments on Option 3A. And if you look at  
14 the end on page 234, the end of the first paragraph, it says:  
15 "Funding is expected solely from the Federal government."

16 5:00 p.m.

17 A. Yes.

18 Q. Is that unfamiliar to you, the notion that funding might be  
19 fully from the Federal Government?

20 A. Well it certainly would be a new stance for the Federal  
21 Government to agree to. They haven't taken that position in  
22 respect to the 3(b) program.

23 Q. Well it says, it suggests in this paragraph we just referred to...

24 A. Yeah, I realize...

25 Q. That that is the existing arrangements in Quebec. That is the

1 Amerindian police force in Quebec is fully paid for by the  
2 Federal Government.

3 A. Um-hmm. That's my understanding. However when we  
4 raised this issue with the Federal representatives in respect  
5 to the 3(b) program we were told that the Solicitor-General's  
6 Department was not prepared to extend full funding to the  
7 policing on native reserves.

8 Q. Okay.

9 A. And I suspect and I may stand corrected, but I think this  
10 Quebec program was under the Indian and Northern Affairs,  
11 funded through Indian and Northern Affairs, not through the  
12 Solicitor-General's Department.

13 Q. It wasn't the Province of Quebec in any event.

14 A. Yes.

15 Q. And the last question about this is on page 233 the suggestion  
16 in this communication to you is that option 3(a) was going to  
17 the Policy Board. Can you help us out as to whether option  
18 3(a), in fact, did go to the Policy Board?

19 A. To my knowledge it did not but it may have gone without my  
20 knowledge.

21 Q. Well this communication is directed to you, I think, for the  
22 purposes of you bringing it, maybe along with the Minister, to  
23 the Policy Board.

24 A. I did not...

25 Q. You did not.



MR. COLES, EXAM. BY MR. WILDSMITH

1 A. Advance the 3(a) option to Policy Board.

2 Q. All right. And I take it it's fair from that you didn't support  
3 option 3(a) to the Minister either.

4 A. Well I, there hadn't been enough examination and  
5 consideration of the, what I referred to as the pros and cons  
6 for me to move that far on the project.

7 Q. All right. I'd like to direct your attention very briefly to a  
8 letter written by Mr. Edwards. It appears at page 126 in  
9 Volume 31. We need not look at it. I think you're quite  
10 familiar with it. It's the one that has the (a) and (b) and then  
11 the discussion.

12 A. Perhaps I better.

13 Q. Perhaps you should. The discussion of what representations  
14 would be made to the Appeal Division.

15 A. What page?

16 Q. It's at page 126 in Volume 31.

17 A. Yes.

18 Q. Dated January the 18th, '83. And I wanted to just direct your  
19 attention to the last part of paragraph (b) which says that  
20 "Police were not motivated by malice either to the accused or,  
21 has been suggested in some press reports, prejudice towards  
22 his race." I take it from your testimony already that you did  
23 not direct your mind to any of the comments that are in  
24 paragraphs (a) and (b) in that letter.

25 A. That is correct.

MR. COLES, EXAM. BY MR. WILDSMITH

1 Q. And, therefore, not to this question of whether prejudice  
2 existed against Mr. Marshall's race on the part of the Sydney  
3 Police.

4 A. That is correct.

5 Q. And my one question to you is this, assuming that Mr.  
6 Edwards had no knowledge of whether that was the case one  
7 way or the other, that it would be improper to make that  
8 representation as a point of emphasis to the Appeal Court.

9 A. I would think so.

10 Q. Thank you. Mr. Spicer also read to you, but didn't ask for a  
11 comment on a reference to Donald C. MacNeil that appears in  
12 Volume 32 at page 272. We don't need to look it up but I just  
13 put it in for the record, in which you make the comment that  
14 "he had the reputation for acting more like a D.A." Could you  
15 explain what that means?

16 A. Well I, my understanding of D.A.'s is based pretty much on  
17 the media representation but I understand that they do more,  
18 they are involved more than simply in a, what I would  
19 describe as a prosecutorial role. That they tend to be more  
20 involved in an investigative aspect which makes them a focus  
21 point of interest and attention. I, the late Mr. MacNeil was a,  
22 physically a very impressive person. He had a presence  
23 about him that people were aware of. He, and I say this in a  
24 complimentary sense. He was a, he struck me as a  
25 commanding person. And I was of the impression that he had

1 a very good rapport with not only his colleagues, the Crown  
2 counsel, but also the defence counsel and also with the police  
3 and that they would avail themselves of meeting with him  
4 and his knowledge and experience and in that sense I thought  
5 of him as being a little more proactive than our traditional  
6 prosecuting officer who tends to have people come to his  
7 office and deals with what they leave with him.

8 Q. Is it fair for us to think that that isn't a mode of action that is  
9 particularly approved by the Attorney General's Department?

10 A. No, I wouldn't draw that conclusion. I think Mr. MacNeil  
11 looked upon himself as a Crown resource person and people  
12 had access to him and as far as I know they benefit from it.

13 Q. Okay. Mr. MacNeil ceased to be Crown prosecutor somewhere  
14 between 1971 and 1978. Mr. Gale commented on this briefly.  
15 I think Mr. Gale's testimony was that he was asked to resign  
16 and he did.

17 A. That's my recollection.

18 Q. I believe your testimony is that nobody is asked to resign  
19 without cause.

20 A. That's right.

21 Q. And by cause I take it it means some form of misconduct  
22 related to his professional duties.

23 A. Well I don't know, necessarily rights to his professional  
24 duties.

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MR. COLES, EXAM. BY MR. WILDSMITH

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MR. WILDSMITH

Well with the Commission's indulgence I think we should have on the record the knowledge this witness has of the reason why Mr. MacNeil was asked to resign.

MR. BARRETT

No, I object. You're getting back before...Personal matters.

MR. SAUNDERS

That was my point, My Lord. Maybe the witness, that was my point exactly. Maybe the witness can quickly say whether it had anything to do with his professional duties. I don't think it did.

CHAIRMAN

We all know what it was. It had nothing to do with his profession...

MR. COLES

No, it had nothing to do with his professional duties.

MR. WILDSMITH

You're saying that the Bench knows what it is and...

CHAIRMAN

I think we ...

COMMISSIONER EVANS

What difference does it make what it was as long as it was not in his capacity as a Crown attorney and his professional duties. Isn't that all you're concerned with?

MR. COLES, EXAM. BY MR. WILDSMITHMR. WILDSMITH

1 Yes. That's the primary point.

CHAIRMAN

2 That's right. There's some copies of newspaper clippings  
3 around and I think made reference to all sorts of things. It had  
4 nothing to do with professional duty.

MR. WILDSMITH

5 Q. Mr. Coles, did you have any conversation with Chief Justice  
6 MacKeigan or any member of the Appeal Division in reference  
7 to the reference?

8 A. No.

9 Q. And one final small point. You've been referred to various  
10 times to documents that relate to the Marshall matter. I'm  
11 wondering if you had a file in your office, in your possession,  
12 on Donald Marshall in which you kept all of the various  
13 reports and correspondence that came in?

14 A. No. You mean separate from our central filing?

15 Q. Yes.

16 A. No.

17 Q. And...

18 A. Well, you know, if a report came in and it was on my desk  
19 until such time as I finished with it but it went to central  
20 filing.

21 Q. And when you would make a decision or take action in  
22 relation to the Marshall matter would you invariably call in  
23  
24  
25

MR. COLES, EXAM. BY MR. WILDSMITH

1 the Donald Marshall file from central filing?

2 A. I don't think any, I don't think the decisions that I took  
3 required me to recall anything from the file, not that I recall,  
4 but I may have looked at, I may have asked for a police  
5 report and looked at it. I don't recall specifically.

6 Q. So you don't have any distinct recollections of reviewing the  
7 police reports before making any decisions?

8 A. No. I remember reviewing police reports, reading police  
9 reports as I have indicated Mr. Spicer...

10 Q. As they came in.

11 A. Well not necessarily as they came in but subsequently. And  
12 the one in '82, I looked at sometime subsequent to its arrival  
13 but prior to the time of the reference. But...

14 Q. Put that a different way then. It was not your practice to  
15 bring in the file and review the file when writing  
16 correspondence or making decisions.

17 A. Well to the extent that I made decisions or wrote  
18 correspondence vis-à-vis the Marshall file, the answer is no.

MR. WILDSMITH

19 Thank you, those are my questions.

MR. SAUNDERS

20 I have no questions for Mr. Coles at this time.

MR. SPICER

21 No re-direct.  
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MR. COLES, EXAM. BY MR. WILD SMITH

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CHAIRMAN

Just one question, Mr. Coles, and I'm not sure if this was covered or not. Were you aware of the, maybe you weren't, were you Deputy Attorney General when Mr. Anderson, Mr. Robert Anderson was working....

A. No, I was not.

CHAIRMAN

So then you can't help us. Thank you very much, Mr. Coles.

WITNESS WITHDREW

5:12 p.m. - ADJOURNED TO 22 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 21 day of June 1988 at Dartmouth, Nova Scotia