ROYAL COMMISSION ON THE DONALD MARSHALL, JR., PROSECUTION

RG44 Vol. 056 80

Volume 80

Held: June 22, 1988, in the World Trade and Convention Center, Halifax, Nova Scotia

Before: Chief Justice T.A. Hickman, Chairman
Assoc. Chief Justice L.A. Poitras and
The Honourable G. T. Evans, Q.C., Commissioners

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

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

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

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

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

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

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

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

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

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

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

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

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

Court Reporting: Margaret E. Graham, OCR, RPR

MEDIA POOL COPY

June 22, 1988

INDEX - VOLUME 80

Dr. Roland Perry

Examination by Mr. MacDonald		14167
	9:55	14177
	10:15	14189
Examination by Ms. Edwardh		14196
	10:37	14203
Examination by Mr. Ross		14207

Mr. Herbert Desmond

Examination by Mr. MacDonald		14210
Examination by Mr. Ross		14207
	11:02	14221
Examination by Mr. Wildsmith		14229
Examination by Ms. Edwardh		14232
Submission - Ms. Derrick		14234
Submission - Mr. Spicer		14242
Submission - Counsel		14246
	12:05	14249
Decision		14252

MR. MacDONALD

Good morning, My Lord. Dr. Perry is the next witness.

DR. ROLAND PERRY, duly called and sworn, testified as follows:

EXAMINATION BY MR. MacDONALD

Q. Now, sir, your name is Roland Perry.

A. Yes.

Q. And at the present time you're the chief medical examiner for the Province of Nova Scotia.

A. That's correct.

Q. And you obtained your degree of Doctor of Medicine from Dalhousie in 1961?

A. Yes.

Q. And would you just for the benefit of the Commission trace your career from that time, please?

A. Since...from 1961 until the end of 1976 I was in general practise, from 1964 until the end of '76 I was part-time medical examiner for the Province...for the County of Halifax, and from 1977 until 1984 I was the full-time chief medical examiner for the County and also acting at that time in an informal way as chief medical examiner for the Province, and in 1984 I was appointed chief medical examiner for the Province.

Q. Could you describe generally for me your role as chief medical examiner?

A. The role of a medical examiner is to investigate the

circumstances surrounding sudden unexpected deaths and to do the appropriate examinations in order to determine two things: that's the cause of the death; and the manner of death. The cause of death being the disease or injury which produced the fatal outcome. The manner of death is the way in which the cause of death came into being.

There are two broad categories in manners of death. There are either natural causes or unnatural causes. Natural causes is by such things as heart attacks, cancers, things that are normally considered parts of the problems which we're all subject to. Unnatural manners of death refer to accident, suicide, homicide, or the fourth category is undetermined. And, these are the areas in which the medical examiner operates. Whatever examinations have to be done in order to determine these two criteria are carried out. Sometimes that means performing an autopsy. It might mean taking x-rays. It might mean doing various toxicological studies. Anything that is deemed necessary in order to come to the cause and manner of death.

Q. Your position is a statutory position, created by statute?

A. Yes.

Q. Do you have other medical examiners under your control throughout the Province?

A. Yes, I do. At the present time there are about 105 medical examiners scattered throughout the province. These are all

1 part-time people, most of whom are in general practise. In
2 Nova Scotia, one must be a medical doctor in order to be a
3 medical examiner, and along with the 105 medical
4 examiners, there are approximately 18 pathologists, again
5 scattered throughout the Province in order to be available in
6 case an autopsy is required by the medical examiner.
7 Q. All medical examiners, except yourself then, are part-time.
8 A. That's correct. And all the pathologists are fee-for-service
9 too. That's...I'm the only full-time medical examiner in the
10 Province.
11 Q. What is a pathologist?
12 A. A pathologist is a doctor who has specialty training in
13 pathology, which is the study of disease processes in the
14 body. Pathologists are the people who commonly do
15 autopsies, in particular clinical autopsies. Those are the
16 types that occur in hospital settings where the permission of
17 the family must be obtained in order for the autopsy to be
18 done. This is to separate it from the medical-legal autopsies
19 where permission is not necessary from the family. It's at
20 the decision of the medical examiner as to whether or not an
21 autopsy should be done. Most clinical pathologists, as a
22 matter of fact I guess all of them, their focus, at least
23 ninety-five percent of the time, probably more, is focused
24 on clinical autopsies, which are really completely different
25 from the medical-legal end in the scope and in the

1 objectives.
2 Q. One of the phrases we've heard here frequently is forensic
3 pathologists. Could you tell us what that is?
4 A. Forensic means pertaining to a forum or the results of the
5 investigation which may come up before a forum and in that
6 regard implies that it may be the subject of Court
7 proceedings.
8 Q. The...you yourself perform autopsies, do you, doctor?
9 A. Yes, I do. Over the 24 years that I've been a medical
10 examiner I've probably examined over 6,000 bodies of
11 which 2,500 or so I've done autopsies. I've been in court
12 probably over 400 times in a 24-year period, not only in
13 Nova Scotia, but also in P.E.I., New Brunswick and
14 Newfoundland with regard to cases in which I've been
15 involved.
16 Q. What type of training is given to persons who are part-time
17 medical examiners in this province?
18 A. Well, at the moment there is not a great deal of training
19 being given, and this is something that is going to have to be
20 rectified. The medical examiners have general instructions
21 as to how to approach cases which come to their attention.
22 Basically the people are appointed in the... especially in the
23 smaller areas. It's not a type of job that people are standing
24 in line for as general practitioners. It's not because of the
25 nature of the job, because it's actually quite interesting. But

most of the general practitioners are not too happy, in their spare time, and also in their busy practise times, having to go out and be involved in a medical-legal investigation. So, these people are not, as I say, it's more of a public service which the medical profession does. It's not only in Nova Scotia, this is the situation everywhere. In every province, and probably in all the states, most of the people that are involved in the medical-legal system are fee-for-service or part-time people.

Q. Is there any legal requirement to have an autopsy carried out in Nova Scotia in the event of a violent death?

A. No, there isn't. The legal requirement is that if a person dies and, to use the legalease, "Where a chief medical examiner is informed that..." and chief medical examiner implies a medical examiner who is acting for the chief medical examiner in cases. Anyway if he's notified that

> There is lying within the territory to which he's appointed the dead body of any person, and it appears that, (a) there's reasonable cause to suspect that the person died by violence, undue means or culpable negligence, or (b) the person died in a place or under circumstances requiring an inquest under a statute, where the cause of death is undetermined or a person, (d) a person died in jail or prison, then the chief medical examiner shall forthwith take charge of the body and shall make diligent enquiry respecting the cause and manner of the death of the person.

1 So, there's a requirement that the medical examiner be
2 notified. Then it's up to the medical examiner to enquire
3 into the circumstances surrounding the death and to decide
4 on the basis of that whether any further investigation has to
5 be done in order to determine the two things that have to be
6 done, that is to determine the cause of death and to
7 determine the manner of death.
8 Q. What statute were you reading from, Dr. Perry?
9 A. This is the Fatal Inquiries Act.
10 Q. Thank-you. Now, the...in the event of a violent death then it
11 is required that the chief medical examiner or his appointee
12 take control of the body. Yes.
13 A. That's right.
14 Q. And the decision then is left with the medical examiner to
15 do whatever he considers necessary to determine those two
16 criteria you have said, the cause of death and manner of
17 death.
18 A. Yes.
19 Q. Now, are there times when you can make that assessment
20 without the requirement of performing an autopsy? Can
21 you give me an example of that?
22 A. Yes. Yes, in...as a matter of fact, in most cases or the
23 majority of cases, take for example a person who is, say,
24 sixty-five years old who may or may not have a past history
25 of heart disease, comes home at night says to his wife, "I've

1 got a pain in my chest, just started when I was outside
2 working on the lawn and I don't feel well," and his wife
3 thinks he looks rather pale, sweaty and he's having some
4 difficulty breathing and he says, "I think I'll go upstairs and
5 lie down." He does that, his wife goes up in a half hour's
6 time, he's dead in bed. That's a classic story of a heart
7 attack and if this man had not been attended recently by his
8 family doctor or a physician, then usually what happens is
9 the ambulance is called, sometimes the fire department,
10 sometimes the police, as you can imagine the shock of this
11 sort of thing. So, they sometimes are calling anybody and
12 everybody they could think of. When that occurs, if the
13 ambulance attendants get to the scene first, for example,
14 and the person is obviously dead, then the medical
15 examiner's office is called. For example, if I take the call, I'll
16 get the story from the medic...from the ambulance attendant
17 or from the family if there is somebody there who is up to
18 saying what happened. Then depending on the story, I'll
19 either go to the scene or have the body removal people take
20 the body from the scene to the Path. Lab where I'll see the
21 body, examine the body, check for old history, that's medical
22 records and then determine whether anything else has to be
23 done. In a case like this that I'm describing, this type of
24 case, it would be sufficient to examine the body and if this
25 examination doesn't show anything unusual and it's

1 consistent with the story, there's no need from the medical-
2 legal point of view to go any further in order to determine
3 the two things that I need to know. It's death by heart
4 attack and it's a natural death. Then a report is made up,
5 it's filed with the clerk of the Crown and that...the death
6 certificate is filled out and that's usually the end of it, other
7 than maybe dealing with the family again in order to
8 answer any of their questions. And also, if there's any
9 insurance forms or any of that sort of thing that follows
10 later and that's done.
11 Q. Let's deal with a situation where it's a violent death.
12 Someone is killed under circumstances that appear to be
13 culpable or criminal.
14 A. Okay. In those cases, just before I get to that, if I could. For
15 example, you can go to a violent type of death, such as a
16 motor vehicle accident. It may be a single vehicle, one-
17 occupant fatality where the circumstances are known.
18 There are several witnesses to what's happened, the police
19 get to the scene, the person is dead at the scene. Say it's a
20 twenty-year-old male. And, the police then would call my
21 office from the scene and give the information as they have
22 it at that time. The body again would be sent to the morgue
23 and examined there, and if the circumstances are quite clear
24 as to what's happened from the witnesses and from the
25 examination of the body externally, it's quite clear that the

1 person died of injuries, then what I would do is, without an
2 autopsy, take blood and/or urine if it's present to determine
3 the presence of alcohol and/or drugs, because this is the
4 major cause of the accident phase, of a pre-collision of an
5 accident. If, go to the next case, where it was clearly
6 culpable negligence. In other words, you know it's going to
7 go to court, usually the protocol is that an autopsy is done, in
8 spite of the fact that it's quite obvious what the cause of the
9 death is. When one gets to court, it's not beyond the realm
10 of probability that some rather, maybe I could say, arcane
11 questions are asked by some of the lawyers, usually defence
12 lawyers, but prosecutors are not immune. So, that in a way
13 in order to...in order to not have to explain, like I'm
14 explaining today, why it's not necessary in some cases to do
15 an autopsy, one is done, just so that these questions can be
16 answered very quickly. So, that's the situation. In
17 homicides we get to the worst type of case that we get
18 involved in. Then the practise is that all homicide cases are
19 autopsied in spite of the fact it may be very clear as to what
20 happened. There may be an excuse for not doing one in
21 cases where it's very straightforward, say you're in a crowd
22 of several people and there's an argument and people are
23 watching these two people argue and one guy takes out a
24 gun and shoots the other person dead, the bullet goes right
25 through him so you don't have to recover the bullet, and

then you could say, well, all we need to know is if he was drinking, how much was he drinking, you take blood again, and urine, without having to do an autopsy. But generally speaking an autopsy should be done. That presupposes, of course, that the medical examiner is notified, which is leading up to, I guess, the reason I'm here.

Q. We've heard some evidence, as well, that some hospitals have a requirement that anybody who dies within twenty-four hours of entering the hospital must be subjected to an autopsy, is that correct?

A. No, it's not correct. It's a policy with some hospitals. It's certainly not a law. It's not in the Fatal Inquiries Act in Nova Scotia. It is in some of the provinces, but it's not here. The policy may be that if someone dies within twenty-four, and this has been twenty-four to forty-eight hours on admission to the hospital that the medical examiner be notified. That's the requirement. But that's a policy, that's not a law. And, as a matter of fact, what used to happen here in the Victoria General Hospital, and that's been stopped, because we were getting calls all the time for clearly natural deaths which were of no consequence from a medical-legal point of view. So, they don't do that anymore. If somebody has died as a result of violence, whether it's as soon as they got in the door of the hospital or whether it's ten months later when they die of complications of the

injury or of maybe they've taken an overdose or something, then still it's a case that has to be reported to the medical examiner. So, a time element isn't important.

Q. Who signs that death certificate in Nova Scotia?

A. Two people, two groups can sign death certificates. In cases which are not medical-legal, in other words, I'm the family doctor and my patient who I had been treating for several months, say terminal cancer, dies. I get the call from the family. I will sign the certificate and there's a box designated on the death certificate which states medical examiner or last attending physician. So, in that case I would check that off as last attending physician. If it's a case where the medical examiner has been involved, then the medical examiner should sign the death certificate, and he would check off the box designation, medical examiner.

Q. The set up that you've described in operation in Nova Scotia in the event of, and I'm concerned primarily with violent deaths, where the medical examiner must be notified, do you know how that compares with other provinces?

A. Oh, it's the same. It's everywhere. Whether it's the medical examiner system, which we have here, and also in Manitoba and Alberta, or whether it's the coroner's system which is in most other places. The preamble, if you like, about who should be...which cases should be reported to the medical examiner or the coroner are always the same. Sudden

1 unexpected deaths basically, certainly all violent deaths are
2 reported to the coroner or to the medical examiner. Again,
3 it's up to him and not in every province is a coroner a
4 medical doctor, then it's up to him to determine whether or
5 not further investigation warrants such things as an
6 autopsy, toxicology, x-rays, things of that nature. But
7 everywhere the requirement is for the coroner or medical
8 examiner to be notified, and then it's up to him or her to
9 determine whether or not anything else has to be done.
10 Q. What type of liaison is in existence between your medical
11 examiners and the police who are investigating the
12 circumstances of a violent death?
13 A. Well, in my experience it's always been excellent, especially
14 in homicides, there's no question. In homicides I know I
15 always go to the scene, some...even if the body has been
16 moved, for example, if the person wasn't dead at the scene, I
17 always have a look at the scene and especially if the body
18 has not been moved, in other words, the body is found
19 somewhere and the police are notified, then before the body
20 is moved and that's another power which the medical
21 examiner has, is that that body is not to be touched until the
22 medical examiner gives the authority for the body to
23 touched, moved or whatever. The police have no authority
24 to move bodies, nobody does except the medical examiner.
25 So, as I say, in cases like that we work very closely together.

9:55 a.m.

Q. Now in the event of violent death and an autopsy is being performed, is there the possibility of obtaining information carrying out the autopsy which could be of assistance to the investigators?

A. Yes. It's always possible. Sometimes you get much less evidence or information in some cases than you do in another. And, again, leading up to this particular case, we're not dealing with a body which was found undisturbed in a room or out in a field somewhere. We're talking about seeing somebody after 20 hours of treatment and fairly extensive alteration of the body. So that any information that would be obtained there would be much less and maybe infinitesimal, if not completely none, compared to the information that you could gather from the time person is found and the time the person died. The people who have control of that patient, the person at that time, certainly have a duty to make sure that they make fairly accurate observations as to what the situation is, especially if they know that this is likely to go to court. So to go back to the original question, if the person is found at a scene and the person is dead, of course there's a chance of a lot of information being obtained. The obvious cause of death, the cause of it may be quite obvious but there's more to the cause of death in the investigation of these causes. You want to know is there injuries on the body

and if there are, do they have a pattern. And if they do, what is the pattern. If it's a firearms' injury, is it consistent with close or a distant wound. Stab wounds, is it single, multiple or can you have an idea of what type of weapon was involved. So all of these things are important in trying to determine not only what the cause of death is but with this information does it fit with the stories that have been given by people who have been interviewed or interrogated by the police. If these findings fit, then that helps to either prove or disprove, or helps to whether or not the stories that are being given are likely to be truthful.

Q. How far afield do you personally go with respect, let's talk about homicide. If there's a homicide in Halifax County, I assume that will be you supposing you're available, is that correct?

A. Yes.

Q. Now what about other counties? Do you go to other counties as well?

A. In other areas bodies have been sent to me. I haven't gone to the other areas. Fortunately, in most things in life, the common things are common and most homicides are fairly straightforward from the medical point of view. In spite of what you see on TV and movies with "Quincy" and "Murder She Wrote" and all these types of programs, life doesn't work that way. Most of these cases are very straightforward from

1 the medical point of view and you'd never get a sponsor to
2 allow me, for example, to go on TV for the day-to-day stuff I
3 do. You have to embellish everything with lots of
4 fictionalized aspects.
5 Q. Are your medical examiners in other counties though given
6 advice or instructions to always go to the scene of the crime,
7 for example? You do that as a matter of course, but are the
8 people in the other counties...
9 A. Well, they always go there because the police call and say
10 we'd like to have you here which means you go. And the
11 usual practice in Nova Scotia, even up to now, again which is
12 something that we're trying to change is that, if anything,
13 more autopsies are done which are not necessary than ones
14 not done which should have been done. So the problem is
15 usually not one of an autopsy not having been done when it
16 should have been done, but it's the other way around. Tend
17 to do more ones that are not needed from the medical/legal
18 point of view.
19 Q. Have you ever had a case where you have determined, or one
20 of your medical examiners, that a autopsy is not required and
21 the police insist that one be carried out?
22 A. It's happened occasionally but usually the reason for the
23 insistence of the autopsy has no basis in any reasonable
24 request. I've been involved in few like this where the
25 medical examiner has called and said the police insist in

1 having an autopsy when it's clear form the story that one is
2 not necessary. And I've checked with the police. What they
3 really wanted was want to know whether the guy was
4 drinking. Well, of course, you can check that out without
5 doing an autopsy. This is what they're interested in. So
6 there's usually no real problem there. The only problem is in
7 these cases where, in fact, is all they're wondering was
8 whether the person was drinking and they feel that you can't
9 tell it unless you do an autopsy when it's quite easy to take a
10 blood sample without doing an autopsy.
11 Q. Now let's move to this particular case, Dr. Perry. At my
12 request you've reviewed the medical records here, is that
13 correct?
14 A. Yes.
15 Q. And you've also had the opportunity to review evidence?
16 A. Yes.
17 Q. And what evidence did I give to you?
18 A. Tons of it. Dr. Naqvi's testimony. You gave me the copy of
19 the hospital records, Dr. Naqvi's testimony in the original trial
20 and then the subsequent several inquiries. Dr. Gaum, I think
21 who was assisting Dr. Naqvi at the original operation, his
22 testimony. Dr. Naqvi's testimony at the Inquiry here along
23 with, I think I counted 55 pages of questioning from various
24 lawyers here to various, mainly members of the police
25 departments, as to whether or not an autopsy should be done,

1 should have been done in this particular case.
2 Q. Now let me get you identify two particular pieces of evidence.
3 I've put in front of you Volume 16, which is the larger
4 volume, and also Exhibit 53, which is Volume 24, I think.
5 The, if you go to page 159 on that Volume 16...
6 A. Page 159?
7 Q. 159, yes. From 159 to page 164 are the records of the
8 operation. You have reviewed those.
9 A. Yes.
10 Q. Is that correct?
11 A. Yes.
12 Q. And if you'd also just pick up that other volume, which is
13 Exhibit 53, Volume 24, those are the records, the nurses'
14 notes and so on from the Sydney Hospital. And you have
15 reviewed those.
16 A. Yes, I have.
17 Q. Thank you. From your review of the documents that I asked
18 you to look at and the evidence, are you able to generally tell
19 us your understanding of what was done here medically.
20 A. Yes. What was clear was that Sandy Seale came into the
21 hospital shortly after midnight on May 29th, 1971, with a
22 single stab wound to his belly. The stab wound was to one
23 side of the umbilicus, the navel, the belly button, and it was
24 in an up and down direction, in other words, vertical.
25 Furthermore, a lot of the small intestine was protruding from

that stab wound and was on the, lying on his belly, outside belly surface. He was as close to being at death's door as one could get at that moment. The physicians, Dr. Naqvi was the surgeon, was called. Ultimately, or eventually rather, he is taken to the operating room at around 1:15 in the morning and a two-hour operation ensues.

The operative notes indicated that the stab wound went through some vessels which provide blood to the small and large intestine, went through the transverse colon, which is the large intestine which goes horizontally across the upper part of the body, and then had gone into the back of the abdominal cavity, perforated the lining of the cavity and perforated the aorta, which is the major artery in the body. There was a huge, what is medically termed, a hematoma, which in lay terms means a huge collection of blood in this space behind the belly. This is not in the abdominal cavity itself. This is behind the abdominal cavity. But it bulges into the space of the abdominal cavity so that, that's one of the reasons that the bowel was protruding out through the opening of the stab wound.

At the time Dr. Naqvi felt that the more important of the two problems was to tie off or ligate the bleeding vessels in the belly and to do a colostomy, in other words, to bring the bowel out to the surface of the body. He started the operation by extending the stab wound up and down so what

1 he had was a very extensive, what is called a paramedian
2 incision, and all that means is that it's to the side of the
3 midline. And this was to the left of the midline. So he
4 extended the stab wound altering it extensively. And then
5 these things were done. He felt that, at the time, that maybe
6 the huge hematoma in the area around the aorta would stop
7 itself by means of pressure. And because of that feeling,
8 decided to suture up the belly and send him back to the
9 recovery room.
10 During that time he apparently had around seven
11 units of blood and back in the recovery room around five in
12 the morning he's got blood pressure that goes from 104 over
13 60, eventually by 7 o'clock it's down to 66 over maybe close
14 to nothing. And his pulse rate is rapidly rising, a clear
15 indication that he's continuing to bleed. This was his problem
16 when he first came in among other things, but the first major
17 problem was that he was exsanguinating— he was bleeding to
18 death.
19 Had he survived, he was looking forward to lots of
20 problems with infection from the belly wound because when
21 the stab wound went through the bowel it produced fecal
22 material which went into the bowel and would have produced
23 a tremendous problem. But in any event, this is what
24 happened up until about 7.
25 Then it was clear that he was continuing to do very

1 badly and he goes back to the operating room at 9:15 in the
2 morning till about 12:40 during which time he had 11 units of
3 blood. The hematoma at this time is even bigger if you can
4 imagine, and you have to see some of these things, you see
5 this in natural disease in ruptured aortic aneurysms in older
6 people and the amount of bleeding there is just very
7 extensive. In any event, he was back in and the swelling's
8 even more extensive. These are all according to his notes as
9 you can imagine.
10 At this time then he feels now we should look into
11 getting the aorta fixed. He starts to incise the back of the
12 belly wall in order to do this and when this happen blood
13 starts to spurt into the belly cavity. Before it was apparently
14 oozing there in a fairly decent rate but, again, he felt that the
15 original pressure might have stopped it. So now he's
16 confronted with a belly full of blood and, you know, if we use
17 the expression "all hell breaking loose again," a tremendously
18 difficult problem for everyone involved here.
19 So what he then decides to do is do a thoracotomy,
20 which it's make an incision in the chest wall and they spread
21 the ribs and they go in that way and clamp off the aorta
22 above the diaphragm, the diaphragm being the muscle that
23 separates the chest from the belly. He clamps off the aorta in
24 order to stop the bleeding and at that time he sees that there
25 is about a half-inch long perforation, stab, through the

1 anterior wall of the aorta. And the aorta is, as I say, the
2 major artery in the body and it's a good sized vessel, I mean a
3 very good sized vessel. He sutures that and this then
4 apparently stops the bleeding. He also notices that there is
5 blood in the stomach which later on he, apparently in his
6 testimony, wasn't quite sure where it was coming from. In
7 any event, this was the extent of the operation at that time.
8 In spite of now having the aorta sutured and not
9 bleeding, Sandy Seale's condition remained extremely grave
10 and, in fact, he died at about 8 o'clock on the evening of May
11 29th, 1971.
12 Q. If repair the aorta had been the first thing to which Dr. Naqvi
13 directed his attention be done immediately when Seale
14 arrived at the hospital where he was disclosing no blood
15 pressure, he was in shock, if he'd gone in then and sutured
16 that aorta, are you able to say whether Seale still would have
17 died, at least in the manner he did?
18 A. Hindsight's great but I don't want to try to judge what Dr.
19 Naqvi did after the fact because, as I said, he was confronted
20 with a kid who was just about a death's door and something
21 had to be done and there were multiple problems. His first
22 decision was to do the belly. My feeling is that the aorta
23 certainly should have taken first precedent because, as I say,
24 it's the major vessel in the body. It's already produced a
25 huge amount of bleeding behind the belly wall and it's not

1 going to stop from pressure, it's just going to keep extending
2 because it's an artery, it's not a vein. Arteries pump, veins
3 just return blood and you can put pressure on veins and get
4 the bleeding to stop, but with an artery, it just keeps pumping
5 away. But as I say, he had such a terrible situation at the
6 time that his feeling was that this was the first thing hoping
7 that the aorta would, in fact, stop bleeding and then would
8 deal with that later.
9 Q. How could it stop bleeding if you're going to continue to pump
10 blood into the body? How's the aorta ever going to stop
11 bleeding...
12 A. Well, it's going to stop bleeding eventually when the person
13 either pumps out all his blood volume or until he dies.
14 Totally here, according to Dr. Naqvi, 27 units of blood was
15 administered throughout this whole affair. So a boy his size
16 and his age, he's probably got about five and a half liters of
17 blood and 27 units of blood, 500 cc's per unit, you're talking
18 almost 14 units, 14 liters of blood there. So he's just, he's
19 pumping it out as fast as they're pumping it in.
20 And on top of his problems which were the
21 perforation of the bowel, the perforation of the smaller but
22 still important vessels of the bowel itself, now he may have
23 ended up, had he not had the aortic problem with a dead
24 bowel, severe infection. As I say, he was in terrible shape no
25 matter what. And when somebody comes in under those

1 circumstances, in smaller areas too, you're not dealing with
2 areas where you've got all of the resources in the world to
3 help, one has to do what you think is the appropriate thing
4 at the time. And I think obviously this is what was done.
5 10:15 a.m.
6 Q. Do you know if the medical examiner was notified in this
7 case?
8 A. Maybe just before I answer that, I just want to follow up on
9 one other thing I think which is important, which was not
10 done, is that in a record of the case, the medical records,
11 especially in a case where you know it's going to go to court
12 if somebody is accused, that it is important to make a
13 diagram and describe as accurately as you can what the
14 injury was. This was not done here and this creates a bit of
15 a problem, because in all of this testimony following it was
16 enough to give me a headache trying to follow this whole
17 business, when I think it's important that accurate records,
18 including a diagram, which is very simple to make.
19 Q. And that would have been made by the surgeon.
20 A. Yes.
21 Q. Now...
22 A. It makes it simpler. Now, okay.
23 Q. If we go back to my question, are you able to tell us in this
24 case whether the medical examiner was notified?
25 A. The medical examiner was never notified. Dr. Naqvi signed

1 the death certificate. There is no record anywhere on the
2 medical chart that the medical examiner was notified. There
3 is no report at the clerk of the Crown from a medical
4 examiner. There is no record from the police that the
5 medical examiner was ever notified. So there is nowhere
6 anywhere, any indication that the medical examiner was
7 ever notified.
8 Q. If the medical examiner had been notified who would sign
9 the death certificate?
10 A. It should have been the medical examiner.
11 Q. And the medical...the death certificate in this case is signed
12 by Dr. Naqvi.
13 A. Yes.
14 Q. Thank you. Should the medical examiner have been notified
15 in this case?
16 A. Oh, unquestionably. I mean there's no question. This is
17 a...this is not only a violent death, I mean it's a homicide.
18 And if you're going to miss calling the medical examiner for
19 an accident that's one thing, and this happens. I mean you
20 can't...even now I'm at the Victoria General Hospital
21 occasionally a person who dies of an accident is not...we
22 don't get notified. This happens very, very infrequently
23 now, but it still is one of those things that does happen.
24 Q. Should there have been an autopsy in this case?
25 A. Well, from the general protocol point of view, yes, but from

1 the point of view of learning anything more about what
2 happened you wouldn't have learned anything more. We
3 know he was stabbed around the belly button. On surface
4 anatomy that corresponds to the disc between the third and
5 fourth lumbar vertebrae. Those are the low backbone
6 vertebrae. Dr. Naqvi said in his records that the stab wound
7 in the aorta was just below the renal vein, that's the vein to
8 the kidneys. We know from surface anatomy that the...this
9 corresponds to the disc between the first and second lumbar
10 vertebrae. So you've got the belly button wound between
11 three and four, the wound in the aorta between one and
12 two. So clearly the wound...the stab wound was going in a
13 somewhat upward direction. The wound has been altered
14 almost, well, it's been altered completely because the stab
15 isn't extended up, it's been extended down. The person who
16 would have the best idea as to what the wound looked like
17 obviously would be the people who first saw it, the
18 surgeons, the medical people in the hospital. The person at
19 that time was alive. In the morgue he's dead. Rigor mortis
20 has set in. The body has been sutured. The whole bodily
21 parts, everything has been altered. So,that you're not going
22 to get anything of any substance in a case like this. You
23 know that the wound is three, about three inches long is
24 what...as far as I can tell from the evidence that's been
25 given, it's three inches thereabouts. So we can say that the

1 maximum width of the knife would have been three inches.
2 As to the minimum length of the knife, now this is another
3 problem because the wound was in the belly. The belly is
4 very compressible. Somebody can have a knife that long
5 [Witness indicates approximately 6 inches.] and push it, if
6 you push it hard enough in a person, especially if one is not
7 expecting it, can push it right to the backbone and this
8 would not allow you to give an accurate idea as to the length
9 of the weapon. If it happens in the chest that's a different
10 thing, because if it goes into the hilt, for example, it can only
11 go that far if it strikes bone, say a rib or something, so that
12 you have a better idea of what minimum lengths are there.
13 So all the information that was available was there while he
14 was in the hospital. The information afterwards was going
15 to be of no basic value. He's had 27 units of blood. Are you
16 going to take a blood specimen, you know, after he dies. You
17 know, whose blood are you...whose blood are you taking
18 from him and what tests are you going to do on someone
19 else's blood is what it amounts to. So this is the type of case
20 where the medical end, again like most homicides, is not
21 very...it's not, ah, a mystery. It's straightforward. It's one
22 single stab wound to the belly. The how it happened is not
23 the problem, the who did it is...was always the problem.
24 And this has happened all through the...since 1971. It never
25 came up as a problem in the trial. It never was a problem

with the prosecution, with the defence lawyers. It was never a problem even in the book that was written about this. This has never been a problem. It's only come up since the Marshall Inquiry started as to how come an autopsy wasn't done and all the things that could have been, maybe could have been found out by an autopsy. Well, that's basically a myth.

Q. Is there anything that you consider could have been determined that would have assisted the police in carrying out their investigation, any evidence?

A. Not really. The information, the other thing that is important to see, and which pathologists don't often see and should, is that the clothing is something that the examiner should see. The clothing in a medical/legal case is part...as much a part of the body as the skin. Unfortunately, as I say, most people are involved in clinical cases and bodies come to see...come to the morgue without any clothing on, or a johnny shirt, and so clothing in the external examination of the body is usually fairly casual, because it's not the important area. But in medical/legal cases the clothing should always be examined. So, if the clothing could be examined, say if there's a defect in this person's shirt and that's consistent with the wound that was noted on his body. Then whatever further examination is going to be by the Crime Lab is done by them, such as if there's blood stains

1 they will do whatever they have to do there, check the
2 blood types and they'll check for anything else that may be
3 present.
4 Q. Would it have been possible in an autopsy to determine
5 whether there had been altercation, for example, in which
6 Mr. Seale was involved, other than the one that resulted in a
7 knife going into his stomach?
8 A. No, that's all on the outside. You know, this is the myth that
9 you do a medical/legal autopsy the way you do a clinical
10 autopsy, where in clinical autopsies everything is inside, you
11 know, you can't wait to get inside to see the problem,
12 because outside is nothing. In medical/legal autopsies...in
13 medical/legal examinations most of the information on
14 violence is present on the outside of the body. Are there
15 lacerations, are there bruises, are there other types of
16 injuries which are obvious to anybody. Now, whether or not
17 the people notice them is another thing. But it's all on the
18 outside. This boy was in the hospital for twenty hours.
19 Nurses' notes are always quite accurate and usually more
20 detailed than medical, than doctor notes and nowhere there
21 was there any mention about anything other than a single
22 stab wound. I think you can take from all of that that that's,
23 in fact, what was there, was a single stab wound.
24 Q. And the cause of death would be known without doing an
25 autopsy.

1 A. Cause of death is stab wound to the abdomen with
2 perforation of, without going into all the medical
3 terminology, the various vessels, the large intestine and the
4 aorta.
5 Q. And the manner of death.
6 A. The mechanism is haemorrhage or exsanguination, he has
7 bleed to death. That's the mechanism. The cause is the stab
8 wound. The manner of death is homicide. Now whether it's
9 culpable homicide that's a legal terminology, and that's not
10 for the medical examiner to say, but I mean it's quite clear
11 in a case like this it would be culpable, but our
12 determination is only it's homicide. Whether it's culpable is
13 something for the lawyers and the police to determine as a
14 result of their investigations.
15 Q. The system that's now in use in Nova Scotia, the medical-
16 examiner system, Dr. Perry, is it any different than it was in
17 1971?
18 A. I hope it's a little better. Certainly around the Halifax area it
19 is, and it's always been pretty good because in almost all
20 cases of death, certainly in violent death, autopsies are done,
21 almost to whether they're needed or not. Most of the cases
22 almost invariably are, from the medical point of view,
23 violent deaths are not subtle types of injuries. Battered
24 babies are not...that's not subtle. Gun shot wounds, stab
25 wounds, beatings are not subtle. So it's awfully difficult for

1 a medical examiner to miss something that's obvious. And
2 this is what most homicides are, I mean, they're usually
3 pretty obvious. So the system, I think, is improving.
4 Certainly it's still got improvements to be made because,
5 again, you have medical examiners who don't see many
6 cases, and it's hard to be all keen and excited about doing
7 medical/legal cases when you only get about five a year. If
8 you're down in some little tiny spot at the tail end of a
9 province or in the middle of the province in some small
10 area, as a public service to that community you have to act
11 as a medical examiner. It's just not reasonable to expect
12 that all of those cases would have to be sent into a big area
13 like Halifax for investigation. So they don't have really any
14 problems. And in this case, in spite of the fact an autopsy
15 wasn't done it made no difference whatsoever to the
16 outcome of the whole case. The medical evidence was
17 always straightforward.
18 MR. MacDONALD
19 Thank you, that's all the questions I have, My Lord.
20 EXAMINATION BY MS. EDWARDH
21 Q. Dr. Perry, just a couple of questions, sir. In terms of the
22 overall system that is in place in Nova Scotia now, you've
23 described the medical examiners appointed outside of the
24 County of Halifax as general practitioners. I take it none of
25 them are general pathologists.

A. No.

Q. And so the general pathologists act in a consultative capacity to the...

A. Yes, they're there...

Q. ...medical examiners.

A. They're available, some of them are available for medical/legal autopsies.

Q. And if you were, assuming not in Halifax, and decided as a medical examiner that a post mortem ought to be, or an autopsy ought to be performed would you...would the medical examiner do it or would the pathologist be called into do it?

A. The pathologist would be called.

Q. So I take it you're the only medical examiner who does, then, autopsies, is that...

A. That's right, yes.

Q. Okay. Perhaps the sense that an autopsy should have taken place in this case comes primarily from certain questions I have, and let me pose the question to you differently. Whether or not a person skilled in medical/legal analysis decides a post mortem or an autopsy should be performed, would you agree that at least there should be that kind of inspection of the body that determines, for example, whether or not fingernail scrapings should be taken, whether or not nurses may have missed bruising, might not

be at all relevant to the injuries they are examining, that that kind of physical inspection of the body is also part of, broadly speaking, the examination a medical examiner would undertake before he decided a post mortem was or was not necessary?

A. No question about it. As I said the medical examiner must be notified. He wasn't here, so that's...nothing we can do about it if we're not notified. He must be notified and then the medical examiner always must examine the body. For example, if I get a call and somebody says someone has died at home and these were the circumstances and it's all quite straightforward and I agree from the story, I wouldn't for a moment think that I would fill out the death certificate, give it to the undertaker without seeing the body.

Q. Seeing the body.

A. You always, always see the body.

Q. So when my colleague asked you the question would a post mortem or would an autopsy have been of any assistance and your answer in this case is "No," would you agree that all the observations of the external parts of the body, looking for bruising, deciding whether you should take fingernail scrapings, any of those kinds of issues weren't even dealt with in this case. No one looked at that.

A. Well, but he...this is not a person who was found dead at a scene and was sent immediately to the undertaker for

1 burial.
2 Q. Of course not.
3 A. He was seen for twenty hours by all kinds of medical
4 personnel. His body, when he was alive, was altered
5 extensively. This business of fingernail scrapings to me
6 is...falls in the mythical character. I don't know why people
7 fixate on fingernail scrapings. In all my...
8 Q. Well, let's...
9 A. I know.
10 Q. Let me pose the problem this way.
11 A. Just...
12 Q. You're dealing with a situation where there is no known
13 assailant. The circumstances are unclear. So if you were, for
14 example, conducting an investigation where there is no
15 known assailant and the circumstances of the death are
16 unclear in terms of what happened. Would you not then
17 approach the matter from using all the investigative tools
18 that remained to you, just even preserve the evidence.
19 A. But some of the inves...some of the information was known.
20 Before the body is examined I, as the medical examiner,
21 would find out from the police what information they have,
22 they have information as to what seems to have happened.
23 Now, whether it's true or not this is the information they
24 have. And when you look at the body does that...does that
25 conform with what you see.

1 Q. Let's look at the kind of information they don't have though.
2 They do not have the identity of an assailant.
3 A. Okay, but that's...that's an investigational point of view from
4 the police point, not a medical investigational problem.
5 Q. So when you then do a examination and you...do you
6 approach the question by saying, first of all, are there any
7 other injuries that may tell us a little bit more information
8 about what, in fact, transpired? Is there evidence of an
9 altercation? Do you do that kind of examination?
10 A. Yes. First of all, get the history, whatever is available.
11 Secondly, the body is examined. You examine it the usual
12 types of findings, such as how tall is he, what's his weight,
13 whether he has clothing on or not, the colour of his hair, the
14 colour of eyes, the teeth, any scars, any congenital problem.
15 Q. You fill out the form.
16 A. This sort of thing and then you look for surgical or medical
17 intervention. Then you describe that. And then you look
18 for evidence of injury. The first, and again if this boy had
19 not been operated on, if he been found dead at the scene
20 then this is different. You say there is a stab wound and
21 then you describe it, and then if there are any other injuries
22 these would be described, these would be examined. And
23 during the course of the examination, during the course of
24 the autopsy then blood, urine if he's got any or other body
25 specimens would be examined. The clothing would be

1 examined.
2 Q. Yes.
3 A. And then whatever other information had to be checked...
4 Q. So let's...
5 A. ...then this would all be done.
6 Q. Right. Now, let's work back from there. You are now are in
7 a much more difficult situation from a medical/legal
8 perspective because the person has been in the hospital and
9 they've had massive intervention. But you'll agree with me,
10 and let's just follow it through, certainly a medical
11 examination would have examined the clothing, would have
12 preserved the clothing.
13 A. Ah, I doubt it in 1971. The police would have had the
14 clothing.
15 Q. Well, you would have taken the clothing...
16 A. The pathologist would have had the body.
17 Q. Yeah. But you would have taken the clothing.
18 A. I would have, yes.
19 Q. And you would have handed it over to the police in the
20 circumstances where they would have decided what they
21 may wish to do with it.
22 A. After I examined the clothing.
23 Q. Yes.
24 A. It would be passed over to the police and then they would
25 do with it what they would do.

1 Q. And further to that you would have looked at the body to
2 determine not only in terms of the stab wounds, but
3 whether there were any other indications of injuries, even
4 minor bruising would be recorded by you. Is that a fair
5 statement?
6 A. Yes, which...
7 Q. Minor lacerations would be recorded.
8 A. Yes, or major laceration, I mean.
9 Q. Yes.
10 A. Of course, all of those things.
11 Q. All of it, okay, and all of that could have...
12 A. Some of which...
13 Q. Excuse me, all of that could have been recorded twenty
14 hours after as well, indeed, you would have done it if you
15 were doing this examination twenty hours after.
16 A. If there had been anything else, yes, and...
17 Q. Yes.
18 A. You'd certainly expect that they're be some bruising of the
19 body after twenty hours of handling and a boy who is, as I
20 say, at death's door for most of the time, so there would be
21 all kinds of...or I shouldn't say all kinds, but there would
22 likely be bruising from the handling of the patient while he
23 was alive.
24 Q. And some of that bruising might be inconsistent with the
25 handling of the patient and indicate it may have occurred

1 earlier, or may simply look as though it occurred earlier
2 because of the age of the bruise itself. All I'm ...all I'm doing,
3 Doctor, is to put this proposition to you in general terms.
4 When you say that a post mortem, an autopsy in this case
5 wouldn't have given any further information, it's all to
6 say...also important to note that because there was no general
7 examination of the body there may have been other
8 information of the kind and character we don't know, outside
9 the...on the body. Would you agree with that?
10 10:37 a.m.
11 A. Yes, oh sure, yes.
12 Q. Okay. That's my sole point. And I guess the other question is
13 in the ordinary course in terms of... you've noted there would
14 be no point taking a blood specimen. If you were involved in
15 a case like this, would there be any point in taking any tissues
16 specimens in terms of an urine analysis or drug analysis...
17 A. Well, he wouldn't have any urine. This is the other thing. I'm
18 sure that they would have had a urinary catheter...
19 Q. Sure.
20 A. So there'd be no urine...
21 Q. How about tissue?
22 A. The only thing that I would have taken would be eyeball
23 fluid, in all likelihood. Eyeball fluid is somewhat separate
24 from the rest of the body and it may give some indication of
25 whether alcohol was present though I'd be extremely

1 surprised after 20 hours whether this would be...
2 Q. Certainly questionably reliable.
3 A. So if I hadn't done it, I don't think I would have missed a
4 thing. There's no specific tissues you have to take in a 16-
5 year old kid who's healthy, not only healthy, he was a very
6 good athlete from what I've read. So you're talking about a
7 healthy teenager and you describe the injury that he has, but
8 it's all documented, or sort of documented if you look through
9 the chart, as to what he had when he got in the hospital
10 before he was altered.
11 Q. And I guess the last question, sir, is it obviously requires
12 some training and skill to know what evidence to obtain and
13 what evidence to preserve in the medical/legal case. Are the
14 people...
15 A. Yes.
16 Q. Who are the medical examiners outside of yourself given any
17 training or direction as to what they ought to do in cases of
18 homicide or violent death?
19 A. Yes, I've talked to quite a few of the medical examiners but
20 they're not the ones who deal with this. They get the call and
21 then usually what happens is the body is sent to the morgue
22 and then the pathologist does the examination.
23 Q. So they don't do an original examination themselves as well
24 as the general pathologist.
25 A. They may, yes, at the scene or they may even come to the

1 morgue, but they don't actually do the examination of the
2 body. This is left to the pathologist and...
3 Q. So really...
4 A. A lot of the pathologists, because of their training, 95 percent
5 of the time or so, is in clinical pathology, they tend to look at
6 the bodies in a clinical manner rather than a medical/legal
7 manner and this is not to demean the pathologists, because
8 they are doing this, again, as a public service because of the
9 areas in which they practice, but their usual outlook is for
10 clinical, from a clinical perspective rather than a
11 medical/legal perspective.
12 Q. Do you authorize, for example, in terms of the system that's
13 established, do you engage in any kind of contract with the
14 pathologist? People agree to go on contract with you for a
15 fee-for-service base, on a fee-for-service basis or...
16 A. Well they're on a fee-for-service basis.
17 Q. How, do you designate them?
18 A. Oh, I don't. I mean I, sometimes I plead for them to do the
19 work.
20 Q. You have a long line of...
21 A. I mean it's not something that these people want to get
22 involved with. They, and it's a natural feeling. They don't
23 want to do a case where they think they may have to come to
24 court and be confronted by a lawyer. I don't know why but...
25 Q. Some of us are so nice. In terms of the resources available to

you, I understand the natural reluctance of the medical profession to find themselves in a legal forum, but then the next question, sir, is in terms of the resources available to educate, to provide education about what ought to be preserved and how things should be dealt with and handled, do you have those resources available to you?

A. Well, I have talked to pathologists about how autopsies and how medical/legal examinations should be conducted. But my problem is being full-time medical examiner, I also am still doing all the work around this area. So in order to also go around and do educational lectures and that sort of thing, it makes it very difficult. So at the moment there is a problem there.

Q. An education problem.

A. Yes. Oh yeah, by far.

Q. Are there any, other than yourself, who may have over the years acquired the expertise, is there anyone in the province who works with you, or is there to advise you who might be regarded as exclusively a forensic pathologist?

A. No. If there's any advising, I do it, because none of the pathologists have the medical/legal experience that I have. As I say, some of them are very good. The ones around here who cover for me are excellent because they have more opportunity to see a lot of medical/legal cases whereas the pathologists out in the smaller areas don't have the same

1 opportunity so it's a problem there. But as I say, they do a
2 very good job and in cases in which they have to go to court
3 in homicides, I can't recall any case offhand where the
4 medical evidence caused any problem with the normal
5 running of the case.
6 MS. EDWARDH
7 Thank you, those are my questions.
8 A. Maybe you remember some in particular.
9 Q. No, not in Nova Scotia.
10 A. Okay.
11 Q. Elsewhere there are rumours.
12 A. Well, it doesn't happen in Nova Scotia.
13 CHAIRMAN
14 Mr. ...
15 MR. PUGSLEY
16 I have no questions, My Lord, thank you.
17 MR. MURRAY
18 No questions, My Lord.
19 MR. SAUNDERS
20 Nor do I, My Lord.
21 CHAIRMAN
22 Mr. Ross.
23 EXAMINATION BY MR. ROSS
24 Q. Just a couple of arcane questions, My Lord. Dr. Perry, my
25 name is Anthony Ross. I take it from your testimony that you

1 become involved in these investigations after being notified
2 by the police. Am I correct?
3 A. Are you saying in this case?
4 Q. No, generally.
5 A. Yes.
6 Q. Generally.
7 A. Well, it doesn't have to be the police, although it's usually the
8 police when we're talking about homicides. It can be if the
9 person has arrived in the hospital, it can be hospital staff. It
10 can be an ambulance attendant if they're there before the
11 police arrive. So those are the three groups who usually call
12 the medical examiner. The medical and/or surgical nursing
13 people, the ambulance attendants and the police.
14 Q. And Dr. Perry, have inquiries ever been directed at you as to
15 whether or not there's a difference in attitude when the
16 victim is black or white?
17 A. Sorry, what, would you repeat that?
18 Q. I'll try. Have inquiries ever been directed to you as to any
19 difference in attitude when the victim is black or white,
20 attitude of the police or anybody like that?
21 A. I can't say that I ever have had...
22 Q. That inquiry...
23 A. In my experience and I mean I wouldn't take it. I mean to
24 me a person's a person and I don't care what...
25 Q. But I'm asking you about if inquiries have been made of you.

I take it no inquiries have been made.

A. No, I'm not sure what type of inquiries you mean with regard to race but...

Q. Anybody asking you whether or not you, as the medical examiner, have found a difference in attitude of perhaps the police, ambulance attendants or anybody, in the situation of a black as opposed to a white victim.

A. No, I haven't.

MR. ROSS

Thank you very much, that's my question.

MR. WILDSMITH

No questions.

WITNESS WITHDREW

MR. MacDONALD

I only have one other witness, My Lord. I don't anticipate he'd be very long.

1 **HERBERT DESMOND**, duly called and sworn, testified as follows:

2 EXAMINATION BY MR. MacDONALD

3 Q. Your name is Herbert Desmond?

4 A. Yes, it is, sir.

5 MR. MacDONALD

6 My Lords, I just want to indicate that Mr. Desmond is being
7 called at this time out of the normal sequence at a special
8 request of Mr. Ross, counsel for Oscar Seale. And Mr Desmond
9 will be talking about Sandy Seale, his relationship with him,
10 his general character and things of that nature.

11 Q. Mr. Desmond, at the present time you live in Halifax, sir?

12 A. Yes, I do.

13 Q. And how long have you lived here?

14 A. Since 1972, since I came to university.

15 Q. And you do have a degree in Sociology, is it?

16 A. Sociology and Philosophy.

17 Q. And you're working at the present time in?

18 A. The Halifax City Regional Library.

19 Q. You're a native of Sydney, are you?

20 A. Yes, I am.

21 Q. And when were you born?

22 A. November 3, 1952.

23 Q. I'm interested in talking about your relationship with Sandy
24 Seale. You knew Mr. Seale?

25 A. Yes, very well.

Q. He was a childhood friend of yours?

A. Yes, we were lifelong friends for as long as he lived, yes.

Q. We've heard a little bit about Sandy Seale but would you just tell the Commissioners your general recollections of him. The type of boy he was, the activities he participated in, this sort of thing.

A. Well, Sandy was an average black growing up in Sydney. You know, he had his share of problems like most of us in dealing with basically what was a racist and segregated society. He had to overcome a lot of obstacles, whether it was in school and sports, socially and even dating a girl. But he overcame those, he was very outgoing. He was not a bitter individual. He learned to handle things well and let things roll off his shoulder.

Q. He was an athlete?

A. Quite an exceptional athlete. He excelled in hockey as one of his main sports but he also played baseball. He did track and field.

Q. Were you yourself participating in sports?

A. Yes, I was, yes.

Q. Were you a teammate of Sandy's?

A. No, not at any particular time. When we played school hockey in the elementary school league, we played on the same team but as we progressed through the years into the City league, minor league hockey league, we all dispersed to

1 different teams.
2 Q. Did you used to go to the dances and these sort of things with
3 Sandy Seale?
4 A. Well, it wouldn't necessarily be with Sandy. There was a
5 number of us in the community that were close friends. It
6 was a very close-knit community. Sydney was an area where
7 you lived basically in your part of town. We were stuck in a
8 part of the community which they labelled the "Coke Ovens"
9 in a derogatory manner and we were expected and, often
10 times we found most of our livelihood in that area.
11 Q. When you say "we," are you talking blacks?
12 A. Blacks, yes.
13 Q. And so the blacks were congregated or lived in a particular
14 area, at least the majority of blacks, is that...
15 A. Yes.
16 Q. Correct? Was there a particular area where other ethnic
17 minorities lived?
18 A. The immediate area surrounding the, well, it was known at
19 the Coke Ovens was a milieu of ethnic and some racial groups.
20 There were Polish, Ukrainian, Yugoslavian peoples, Italian
21 peoples, basically a working-class district. On the other end
22 you had the Micmac community which would sit on the
23 extreme opposite side of the community of Sydney and they
24 were basically living on the fringes on the reservation.
25 Q. Did you yourself growing up have interaction with members

of the Micmac community?

A. Yes, I did.

Q. Are you able to comment whether there was any friction between those two communities?

A. There was not any real animosity or any friction of any sort. There was a realization that we were the only visible minorities within the community. There were some East Indians but they atoned to more taking on the values of the larger white society and, therefore, their reaction towards to us and their attitudes were basically that of the white racist society that existed there.

Q. Okay. In particular, did you know Junior Marshall?

A. Yes, I knew Junior.

Q. And how would you know him? In what circumstances would you know him?

A. Well, Junior was an athlete at that time also and we would play sports against each other. We would see each other at social functions. Sydney is not a big community, so it wasn't as if you weren't going to see anybody at any particular time when you went to a certain part of town or whatever.

Q. Now did you ever have anyone suggest to you up until the time of Sandy Seale's death that he had been engaged in any criminal activity?

A. Junior Marshall?

Q. No, Sandy Seale.

A. No, Sandy was never involved in any crimes.

Q. Are you aware of whether he was ever involved in, for want of a better word, "bumming" of money in the Park or otherwise?

A. No, Sandy was in, maybe one step above us in the sense that his father had a real good job. He owned a night club. He was quite able to provide for Sandy things that some of us of Sandy's age in the community weren't able to get from our parents and, therefore, he had no need to even think of committing a crime for profit.

Q. What the relationship between Sandy and his father?

A. It was one of love and admiration. I think his father was very proud of Sandy and his accomplishments as an athlete. His father was a strict individual, although very loving and caring. He wanted his family to be on the straight and narrow and basically they were told to do that.

Q. If Sandy was told by his father to be home at 12, from your experience, would he be home at 12?

A. He better be.

Q. He better be?

A. That's right.

Q. Were you with Sandy on the night of the, that he was stabbed?

A. Yes, I was.

Q. Where did you see him that night?

A. Sandy came into the dance at St. Joseph's church hall. I can't remember the exact time but we spent a bit of time there together. At the time he entered the dance, it was sold out so, like most of us did at the time, we snuck into the dance. You know, it was not an unusual sort of thing. It was not a thing that people looked down upon you. As a matter of fact, if you could get into the dance without paying, that was more power to you. It wasn't as if they were out to make a whole out of money off you.

Q. Okay. Did you leave the dance with Sandy?

A. No, Sandy got kicked out shortly before the dance was over.

Q. When did you hear that he had been stabbed?

A. Somewhere along the way home. He usually hitch-hiked home from that area of town and somewhere along the way, I can't remember, some white individuals were saying that there was a stabbing in the Park and that "Sandy had got cut" was the expression that was used

Q. Were you surprised?

A. Very surprised. There wasn't any immediate information available. We couldn't verify it right away sort of thing and...

Q. When did you first hear the suggestion that Sandy had been involved in a robbery attempt?

A. A few years ago, actually. No more than two or three years ago.

Q. And what was your reaction to that?

1 A. I think it's a goddamn lie.

2 MR. MacDONALD

3 That's all the questions I have, thank you.

4 MS. EDWARDH

5 No questions.

6 MR. PUGSLEY

7 No questions, My Lord, thank you.

8 MR. MURRAY

9 No questions.

10 MR. PRINGLE

11 None.

12 MR. SAUNDERS

13 No questions, My Lord.

14 CHAIRMAN

15 Mr. Wildsmith?

16 EXAMINATION BY MR. ROSS

17 Q. For the record, Mr. Desmond, my name is Anthony Ross, and I
18 want to ask you a couple of questions about your relationship
19 with Sandy Seale and I will also ask you one or two about the
20 black community in the Sydney area. I take it that you went
21 to school with Sandy?

22 A. Yes, I did.

23 Q. And which school did you attend at that time?

24 A. Eastmount Junior High and I think Whitney, Eastmount
25 Elementary and Whitney Junior High.

1 Q. And where are these two schools located one with respect to
2 the other? Are they just across the road? Close by?
3 A. Well the junior high as in terms of (Dombasco?) and Whitney
4 were in very close proximity. Dombasco School which is
5 another junior high was a Catholic school and Whitney School
6 was no more than a parking lot away from that.
7 Q. I see. They shared almost a common parking lot, did they?
8 A. Yes, they did.
9 Q. And I take it you went to one of these schools and Sandy
10 went to the other?
11 A. Yes, he did.
12 Q. But as far as the community is concerned, you had your own
13 little group within that common parking lot concept.
14 A. Well, because we went to different schools together didn't put
15 us in any special social class as far the other larger
16 communities are concerned. We were still blacks, we still
17 lived in Cokes Ovens and that was their attitude.
18 Q. Yes. As far as Sandy is concerned, did he live down in the
19 Coke Oven section also?
20 A. He lived a few streets up which was considered part of the
21 uppity, sort of white district as you moved up along your
22 proximity to the black community, the affluence is more
23 apparent.
24 Q. And as far as Sandy is concerned, I take it that you visited his
25 house quite often.

1 A. Yes, when he lived in the Pier up on Mt. Pleasant Street it
2 was, we frequently visited each other's homes, yes.
3 Q. He visited yours and you visited his.
4 A. Yes.
5 Q. And I take it you would have had meals at his house...
6 A. Yes.
7 Q. And he would have had meals at yours?
8 A. Yes.
9 Q. Did he ever stay over at your house?
10 A. No, that was not a common thing that, our parents weren't
11 that lenient.
12 Q. Sure. And did either of you have any friends on the reserve?
13 A. We had acquaintances on the reserve. There was no, per se,
14 friendship involved with the Micmac Indians. We respected
15 them they respected us and we kept our mutual distances.
16 Q. And did you, in fact, visit the reserve from time to time?
17 A. I visited the reserve once, I believe it was in 1970, with a
18 group who were involved with, a program involved with
19 community relations between the RCMP and the City Police.
20 Q. But prior to that you hadn't visited the reserve?
21 A. No.
22 Q. Although you lived in Sydney.
23 A. Yes.
24 Q. And what about Sandy, do you know whether or not he had
25 any friends who lived on the reserve?

A. Like I said, we had a lot of acquaintances that we would interact with in the community, in school, at dances and that sort of thing, but friendship was a rather strong word.

Q. And your knowledge of Junior Marshall, what did you know of Junior Marshall personally?

A. Well, Junior was a big bully of a boy. He pushed his weight around. He was basically a teenage alcoholic when I look back upon it now and in terms of past work in the years just gone by. Like most of the Indians on the reservation, there was a deep social problem in terms of alcoholism that wasn't being addressed by the larger community. It was rather ignored, but still it existed.

Q. Was there anything else in particular that you could recall about Junior?

A. Well Junior was an abusive individual. We know that he carried a knife. A lot of the Indians carried knives for one reason or another. And that he was dangerous and not to be trusted.

MS. EDWARDH

With the greatest of respect I think the witness is going way beyond what he can attempt to...

MR. DESMOND

I'm giving my personal opinion on my experience.

MS. EDWARDH

Excuse me, sir, but of his own personal knowledge.

1 CHAIRMAN

2 Your personal knowledge.

3 MR. DESMOND

4 Well, that is my personal knowledge.

5 MS. EDWARDH

6 Well, I think my friend might have better laid a foundation or

7 just move on to another area.

8 CHAIRMAN

9 Yes. Would you tell us on which, how you, the kind of, you

10 say interaction...

11 MR. DESMOND

12 Well this is based on observation and of being there in the

13 time and place. There was areas, times when Junior would be

14 at a dance, he'd start being an asshole, he'd start fighting with

15 people. He might pull out a knife, he might not. He might

16 beat up somebody smaller than himself. You know, that's an

17 observation.

18 CHAIRMAN

19 But have you seen him pull a knife?

20 MR. DESMOND

21 I've seen him with a knife, yes.

22 MS. EDWARDH

23 No, that's not the question.

24 CHAIRMAN

25 Well, pull a knife.

MR. DESMOND

Pardon?

CHAIRMAN

Pull a knife.

MR. DESMOND

Well, I've seen lots of people with knives out, whether they were pulling them for any useful purpose or not is irrelevant. The fact that he had a knife is...

CHAIRMAN

But have you seen him with a, at a dance when there's fighting or animosity apparent, have you seen him with a knife in his hand?

MR. DESMOND

I've seen him with a knife on his person, maybe not with a knife in his hand.

MR. ROSS

Q. And what can you tell us about the likelihood of Junior Marshall and Sandy Seale being involved in a fracas and you, in the black community, not knowing about it?

11:02 a.m.

A. It would be pretty well impossible, even though Sandy had lived in Westmount at that time, we still kept in frequent contact because, as I said, the community was quite small. You still had to go into the shopping centre to shop, so to speak, so, and to socialize into town. There was only one

1 shopping district. So, therefore, like, I've seen Sandy quite
2 regularly and he at no time ever mentioned to me that, you
3 know, as I've heard, that he had...that Junior had beat him
4 up because he was arguing with his girlfriend or something.
5 The likelihood of Junior being a friend of Sandy is nil as far
6 as I'm concerned.
7 Q. And perhaps you could just tell the Commission about your
8 experiences as far as the general policing of your area in
9 Sydney, of the Coke Oven section of Sydney. Was there an
10 obvious police presence?
11 A. It was an intimidating police presence. It was no unusual
12 for a police squad car to drive through our street on Tupper
13 Street twenty, thirty times a day and to continue that
14 through the night. This was not because of any particular
15 concern for our community. Their presence there was not a
16 friendly presence. They sneered at you. Sometimes they
17 might call you nigger, sometimes they...you know, if you
18 were playing hockey on the road they might turn around
19 and tell you to get off the street, you know, although if you
20 went up to the white streets, you'd notice like the kids
21 played hockey up there with no problem at all.
22 Q. The night that Sandy Seale was stabbed, I take it that you
23 saw him being escorted from the dance by Officer John
24 Maloney.
25 A. Yes, I did. We were in the bathroom at the time. We were

1 sharing what was left of a little bit of wine and we were sort
2 of carrying on and we expected to go back out to the dance.
3 At that time Officer Maloney entered. He had previously
4 kicked out Sandy so he had identified him right away, and it
5 was just another trip to the door.
6 Q. I see. Did Sandy resist?
7 A. No.
8 Q. Was he in any way belligerent?
9 A. Never...not belligerent at all, you know, he...in most cases
10 like that, there's more people than him that got kicked out
11 that night, let me look at it that way, and it wasn't as if he
12 was...he felt that he was being singled out in particular, it's
13 just that he didn't have a stamp and what he had was a bit
14 of a makeshift thing and it was common practise for the
15 cops to go around and check your stamp, and if you didn't
16 have a proper stamp, then out you go.
17 Q. I see. So, he wasn't...Maloney was not specifically picking on
18 Sandy. He was making sure that those who didn't pay get
19 out.
20 A. Well, John Maloney was what I would consider one of the
21 more fairer policemen in the city at that time. He had a
22 different outlook and perspective on black people. He spoke
23 to you in a friendly manner. He didn't sneer at you. If he
24 seen you in a part of town, he wouldn't stop the police car
25 and ask you like, well, what are you doing in this part of

town, you know, and these sorts of things and he knew, I believe, most of our parents, and so there was a bit of respect on their part.

Q. What about other police officers? Did you know of Chief MacIntyre?

A. Yes, I did.

Q. Did you have any personal knowledge of him?

A. MacIntyre was...

MR. MacDONALD

Perhaps, again, My Lord, in fairness to other counsel who missed the opportunity, the witness should answer that first question, did he have any personal knowledge, any personal dealings. And, if he's only going to be giving evidence based on hearsay, the question should be identified.

MR. CHAIRMAN

Very definitely.

MR. MacDONALD

He has not answered the first question.

MR. DESMOND

A. Yes, I did have personal knowledge of John MacIntyre.

Q. What was your personal knowledge of John MacIntyre?

A. Well, sometime after the stabbing, John MacIntyre and I believe it was MacNeil, I'm not sure, or Urquhart and they came down to an O.F.Y. project we were working on on Laurie Street at the time. They asked us if we had been at

1 the dance, something that they already knew, and they
2 asked us if we would come over and identify some clothing
3 that belonged to Sandy and to give them some information.
4 Q. How did they treat you?
5 A. They were rude.
6 Q. Tell me, did you have plans to see Sandy the day after he
7 was stabbed?
8 A. Yes, I did.
9 Q. What plans did you have?
10 A. We had planned to...Sandy had invited us out to his father's
11 property to clear some land, clear some trees off a wood lot.
12 His father had just purchased the property just shortly
13 before that and he had invited us out to come to spend the
14 Saturday or...the Saturday to just carry on and do some
15 work.
16 Q. And when he was being escorted out by Maloney, did he tell
17 you anything about the next day or where he was going?
18 A. He said he was going home and he said, "I'll see you
19 tomorrow."
20 Q. Did you attend Sandy's funeral?
21 A. Yes, I did.
22 Q. Did you see Junior Marshall around the funeral parlour at
23 any time?
24 A. Yes, I did.
25 Q. Did you speak with him?

A. Yes, I did.

Q. Could you tell us the nature of the conversation?

A. Well, basically it was...I asked Junior what the hell happened and what was going on. He was very nervous and tense. He started to...muttering things about two people who looked like priests, you know, him and Sandy walking through the park together, which never really made any sense because he wasn't at the dance, and never seen Sandy.

MS. EDWARDH

Now, we're getting a running commentary. At least the witness could confine himself to the words he recalls actually spoken.

MR. DESMOND

Could you repeat the question, please?

MR. CHAIRMAN

What was your question again? The question, I think the question, well, let me put it. The question, as I understand it, was did you see Donald Marshall, Jr., at Sandy Seale's funeral?

MR. DESMOND

Yes, I did.

MR. CHAIRMAN

And you said "Yes".

MR. DESMOND

Yes.

1 MR. CHAIRMAN

2 And the next question was...

3 MR. ROSS

4 Did you speak to him?

5 MR. CHAIRMAN

6 Did you speak to him?

7 MR. DESMOND

8 Yes, I did.

9 MR. CHAIRMAN

10 And you did.

11 MR. DESMOND

12 Yes, I did.

13 MR. CHAIRMAN

14 And the question was what was his...what did he say?

15 MR. DESMOND

16 Like I said he was...

17 MR. ROSS

18 I think it was a little broader than that, My Lord. I think I
19 asked what was the nature of the conversation.

20 MR. CHAIRMAN

21 Well, the nature of the conversation, but that means what
22 did he say, in my mind.

23 MR.DESMOND

24 A. Well, we discussed the circumstances surrounding Sandy's
25 death and what involvement or any knowledge that he had

of that incident on that night.

Q. I see. And, did you see Junior Marshall after that and prior to his trial?

A. In the courtroom was the last time I saw him after that, yes.

Q. Mr. Desmond, there are some reports before the Commission and some of them suggest situations of gang warfare between the blacks and the Indians. Would you be aware of any such gang warfare?

A. No, I would not.

Q. And specifically I'm, for the record, I'm referring to Volume 35, page 71, under the heading, "Precipitating circumstances," relate to gang warfare. Further, at some stage when Marshall was applying for leave to come back to Sydney, the police, the Sydney police advised that there might be reprisals from the black community. Were you aware of any problem which existed which could lead to reprisals?

A. No, there was no problem. That is basically consistent with the racist nature and the attitude of the Sydney police at that time.

Q. Do you know whether or not Sandy Seale ever carried a knife?

A. No, he'd never carry a knife.

Q. And you're sure of that.

A. Positive.

1 Q. In your discussion with Junior Marshall around the time of
2 the funeral was there any suggestion or any statements to
3 the effect that there might have been self defence involved?
4 A. No, he never indicated anything of that sort. He kept to his
5 story of these two men dressed like priests who attacked
6 him and Sandy and he got cut and Sandy got stabbed.
7 Q. Sure.
8 MR. ROSS
9 Thank-you, very much, Mr. Desmond. My Lord, recognizing
10 that Mr. Desmond was called pursuant to my request, I think it
11 might be appropriate if other counsel have got any arising from
12 my leading him through this, it might be appropriate to have a
13 response.
14 MR. CHAIRMAN
15 Well, let me first go to Mr.Wildsmith and then we'll come
16 back.
17 EXAMINATION BY MR. WILDSMITH
18 Q. Thank-you. I do have a couple of brief questions. Mr.
19 Desmond, my name is Bruce Wildsmith and I'm here for the
20 Union of Nova Scotia Indians. I'd like to ask you a couple of
21 questions related to Indians in general. We've had some
22 evidence that Sydney in 1971 was what one might call a
23 "red-necked town" in the sense that racial prejudice was
24 widespread. I take it from what you've said so far you
25 would agree with that view?

A. Yes, I do.

Q. And with respect to that racial prejudice, is it your observation that Mic Mac Indians suffered as well as black members of the community?

A. Yes, that's true.

Q. Did you have occasion to observe the treatment of Mic Mac Indians by the Sydney police at dances or other occasions?

A. Well, I can remember police picking up people off the street and I can honestly say, yes, that I've seen them pick up some Indians up off the street when they were drinking or inebriated, so to speak.

Q. I'm wondering if you have any experience with discriminatory treatment of Indians by Sydney police?

A. Have I observed such treatment?

Q. Yes.

A. Yes, I have.

Q. And can you tell us the nature of that form of discrimination?

A. Well, basically, you know, it's...rather than maybe an approach where they would ask a gentleman if he's all right or anything like that, if he's sitting on the sidewalk, I remember one incident, a guy was walking down Charlotte Street and he was maybe tilting a little bit and the police stopped him and they didn't ask him like, you know, any particular questions, they just grabbed him. He resisted a

bit and they put him in a choke hold. They, you know, put his arm behind his back and they shoved him into the car.

Q. And that individual was an Indian, was it?

A. Yes, it was.

Q. And, you mentioned something about Sydney police cruising the Coke Ovens and referring to blacks in disparaging terms.

A. Yes.

Q. Did you observe Indians being referred to in disparaging terms by the Sydney police?

A. Well, the common term for Indians at that time throughout the whole larger white community, they were referred to as "wagon burners".

Q. Yes. And did you hear Sydney police using that term?

A. Yes.

MR. WILDSMITH

Thank-you. Those are the questions.

MR. CHAIRMAN

Now, there is some...this witness was called ostensibly as a character witness with respect to Sandy Seale. There were questions put by Mr. Ross that could not have been anticipated by some other counsel. So, I would give any other counsel an opportunity to cross-examine on these areas other than the character witness.

MS. EDWARDH

With your permission, My Lord, I would seek an

1 opportunity to ask a couple of questions.

2

3 EXAMINATION BY MS. EDWARDH

4 Q. Mr. Desmond, if I can just go back to some initial comments
5 you made. I take it that as far as you were concerned, you
6 had no direct knowledge of any kind that there was any
7 animosity or hostility or difficulty between Mr. Marshall and
8 Mr. Seale? There wasn't any indication of that.
9 A. Well, they didn't like each other.
10 Q. You had said they were people who played hockey...
11 A. They were acquaintances.
12 Q. They were acquaintances.
13 A. Just like you knew each other, that doesn't mean that they
14 particularly liked each other. Junior was an intimidating,
15 bully sort of fellow. Sandy was not the type of guy that
16 would befriend such an individual. As a matter of fact we
17 even talked about various members of the community that...
18 Q. Let me just stop you.
19 A. ...we stayed away from and Junior was one of those people.
20 Q. Let me just stop...
21 COMMISSIONER EVANS
22 Don't give speeches. Answer her questions.
23 MS. EDWARDH
24 Q. There was...I'm not suggesting that Mr. Seale and Junior
25 Marshall were close friends.

1 A. No, they weren't.
2 Q. What I'm suggesting to you, sir, is those two had never been
3 in a physical fight to your knowledge that you observed?
4 A. Not according to Junior Marshall in the statements that he
5 made in Springhill.
6 Q. I'm asking in terms of your knowledge when you saw them
7 play hockey together, when you'd pass by them in the
8 street.
9 A. There were altercations on the ice, yes, there were, there
10 were altercations.
11 Q. Between Sandy and Junior?
12 A. Yes, there was.
13 Q. Were you ever in any position, sir, to see any hostility on
14 the street between the two of them, and I'm talking about
15 hostility?
16 A. You mean did they actually fight?
17 Q. On the street, yeah.
18 A. No.
19 MS. EDWARDH
20 All right. Those are my questions.
21 MR. MURRAY
22 Nothing, My Lords.
23 MR. PRINGLE
24 No.
25

MR. SAUNDERS

No, My Lords.

MR. CHAIRMAN

Mr. MacDonald.

MR. MacDONALD

My Lords, the only thing remaining for today is the application that my friends wanted to make with respect to Mr. Marshall. Would you like to adjourn for a brief break and come back to do that? They're prepared to do it at that time.

MR. CHAIRMAN

All right, fine.

BREAK

11:42 a.m.

CHAIRMAN

Ms. Derrick.

MS. DERRICK

Thank you, My Lord.

My Lords, we're applying to Your Lordships for the right to call the evidence of our client, Donald Marshall, Jr. in chief when he is scheduled to testify as a witness before this Inquiry. Of course, all other counsel representing parties with standing and Commission counsel would have the right to cross-examine Mr. Marshall on his evidence. Our reasons for making this application is because we believe it to be in Mr. Marshall's and the Commission's best interest that his evidence be brought out in the

first instance through his own counsel. Mr. Marshall's evidence will be enhanced, I submit, if it is elicited in this fashion.

I submit that the principal concern for Your Lordships is that the best and most effective evidence is before you so as you assist you in your difficult task.

Mr. Marshall is a native person for whom testifying in court or in a court-like setting is an alienating and oppressive experience.

Your Lordships have heard considerable evidence of his being an ineffective witness in such settings and evidence of how such proceedings cause him to experience great anxiety. These proceedings will certainly be very stressful for Mr. Marshall.

Over a period of two years Mr. Marshall has developed a good and trusting relationship with his own counsel. I submit that the primary objective in calling his evidence is to ensure that it be adduced in a way most compatible to his nature and character and that means knowing and trusting the person to whom he is speaking. Having his evidence elicited in chief by his own counsel is what Mr. Marshall desires.

In determining this question, it's important to look at the nature of this inquiry. It is an inquiry constituted by Order-in-Council under the Public Inquiries Act and a public inquiry with the power to make recommendations to the government. According to the terms of reference, and I'm referring to clause 5 of the terms of reference,

> The Commissioners may adopt such rules, practices and procedures for the purposes of the inquiry as they from time to time may consider necessary for the proper conduct of the inquiry and may vary such rules, practices and procedures from time to time as they consider necessary and appropriate for the purposes of the inquiry.

Therefore I submit that although it has been the practice for Commission counsel to directly examine witnesses testifying before Your Lordships, this procedure is not chiseled in stone. Your Lordships have the discretion to vary the practices, procedures and rules as you deem necessary and appropriate for the purposes of the inquiry. And I urge you to do so in this instance.

Mr. Marshall may well be affected by the findings of this Inquiry and, indeed, by his own evidence.

There has been evidence before this Commission, whether you accept it or not is another matter, that there was an attempted robbery in progress the night that Sandy Seale was stabbed. In other proceedings Mr. Marshall has denied this. However, a number of witnesses before Your Lordships have testified to believing that an attempted robbery was under way and that, further, that Mr. Marshall's failure to disclose this in 1971 contributed to his wrongful conviction and incarceration. Most particularly, this assertion has been advanced by representatives from the Attorney General's Department, for

example, Mr. Edwards and Mr. Coles.

As a result of these views this issue has, in fact, been commented upon by Your Lordships and if I may refer you to Volume 68 of the transcripted evidence, page 12102, this was when Mr. Edwards was being examined by Mr. MacDonald in direct and had put forth the theory that by not disclosing this alleged robbery, Mr. Marshall contributed to his wrongful conviction and Justice Poitras said,

> Just a question, Mr. MacDonald. Assuming for a moment that it is still possible today to query whether Marshall was involved or not in an attempted robbery...
>
> Mr. Edwards said yes.
>
> JUSTICE POITRAS
> If, in fact, Marshall was not involved in an attempted robbery, what would that do to the theory that at not disclosing the intended robbery he contributed to his conviction.
>
> Mr. Edwards said, That would destroy the theory.
>
> JUSTICE POITRAS
> I think so, so there is still something to be proved, I leave that open.

It is within the mandate of this Commission to make findings of fact. These findings might include a finding of fact that

there was an attempted robbery. Mr. Marshall could, therefore, be affected both in reputation and by the possibility of criminal sanctions.

As he stands in some peril I respectfully submit that he is entitled to testify in chief through his own counsel thereby providing him with the best opportunity to tell his story and giving the Commission the benefit of having the best evidence available.

The practice of allowing parties to testify in chief through their own counsel has considerable precedent and I just want to refer Your Lordships to three cases which you have before you which I'll only be referring to briefly but they support our assertions.

In the Re The Children's Aid Society of the County of York, this involved allegations of negligence and incompetence which were leveled at the Children's Aid Society and it was acknowledged by the Ontario Court of Appeal that the function of the commission looking into these matters at the request of the government was not to try a case or charge against anyone and that the purpose of the commission was to inform people concerning the facts of the matter to be inquired into and that remedies might then arise in response to any of these findings.

And it was held, and this is at page 420 that,

> It is usual and proper to have counsel appointed

> to assist in the inquiry but that does not imply that he alone has the right to call witnesses or to determine what witnesses are to be heard.

And in that case the counsel for the local superintendent of the Children's Aid Society was therefore held to be entitled to call witnesses and to examine them in chief in the interest of the fullest inquiry possible which is what we are seeking before Your Lordships.

In the Re Public Inquiries Act and Shulman, also an Ontario Court of Appeal case, a public inquiry in that instance as well, the essential object was to inquire into allegations made by a former government employee which was Dr. Shulman of misconduct in office on the part of senior government officials.

And the court held that, "Dr. Shulman having made allegations was liable to be discredited if the allegations were proved to be unfounded." And I submit to you that that's an issue of reputation. He was therefore held to be entitled to have his evidence elicited in chief by his own counsel. And that reference is found on page 378.

The final case I wish to refer Your Lordships to is the, Re the Crime Commission ex parte Feeley and McDermott, again the Ontario Court of Appeal. This was a Royal Commission inquiry investigating the existence of certain alleged crime conditions in Ontario and there were grave allegations of serious criminal involvement certain named individuals.

The Court of Appeal observed that the commission was not

bound to observe the strict rules of evidence or all of the niceties of practice and procedure which I submit has been the case here. And they went on to say at page 896, and because of the quality of the photocopying I apologize, that is, in fact, the third page from the back for ease of finding it.

In that first paragraph the court said,

> It is true that they (the individuals) are not being tried by the commissioner but their alleged misconduct has come under the full glare of publicity and it is only fair and just that they should be afforded an opportunity to call evidence to elicit facts by examination and cross-examination of witnesses and, thus, being able to place before the commission of inquiry a complete picture rather than incur the risk of its obtaining only a partial or distorted one. This is right to which they are, in my view, fairly and reasonably entitled, and it should not be denied them. Moreover, it is no less important in the public interest that the whole truth rather than half truths or partial truths should be revealed to the commissioners.

And I submit to Your Lordships that this is directly on point with our submissions. That Donald Marshall, Jr. testifying through his own counsel in chief is the best way to ensure that the Commission is not left with a partial or distorted picture of the truth.

Finally, there is precedent in other Royal Commissions in Canada with respect to this issue and I just wish to refer Your Lordships to the Grange Inquiry where Susan Nelles' evidence was

1 elicited through her own counsel, John Sopinka, in that instance.
2 In the Chamberlain Inquiry which took place in Australia, Mrs.
3 Chamberlain who was alleged to have killed her own child was
4 called and testified through her own counsel. In what's commonly
5 known as the Stevens' Inquiry, both Noreen Stevens and Sinclair
6 Stevens testified in chief through their own separate counsel. I
7 referred you already to the case involving Dr. Shulman and in the
8 Estey banking inquiry, the inspector of banks was called and
9 testified through his own counsel. And I believe in all those
10 instances, with respect to all other witnesses called to testify
11 before the commission, they testified through commission counsel
12 but the individuals against whom there were allegations were
13 entitled, were held to be entitled to testify through their counsel.
14 And, in fact, in the Grange Inquiry there were no outstanding
15 allegations, in fact.
16 I would submit, therefore, that there is ample precedent for
17 Your Lordships exercising your discretion in permitting this
18 variation of what's been the customary practice in this inquiry
19 and that it is in the interests of the fullest and best evidence
20 coming out before Your Lordships that Mr. Marshall be able to
21 testify in chief through his own counsel. Thank you.
22 MR. MURRAY
23 My Lords, on behalf of Ronald Pugsley for John MacIntyre
24 and myself for William Urquhart, we have no problem with our
25 friend's application. We've discussed it with them. Our

1 understanding would be that it would be evidence in chief and not
2 cross-examination but in those circumstances we have no
3 objection.
4 CHAIRMAN
5 Prior to asking Mr., let me go through, counsel for the RCMP?
6 MR. BISSELL
7 I guess we'd like to hear with Commission counsel had to
8 say first, if that's...
9 CHAIRMAN
10 All right. Well we'll hear from Commission counsel then.
11 MR. SPICER
12 My Lord I did a check this morning and to date, including
13 this morning's evidence, Commission counsel have conducted
14 direct examination of 102 witnesses. I don't want to tell you how
15 many pages of transcript that that takes but it's been 102 witness.
16 Many of those witnesses have been represented by counsel with
17 standing at this inquiry and I'm certain that some of those would
18 have much preferred to have had their direct examination
19 conducted by their own counsel.
20 Indeed, Commission counsel has refused on other occasions
21 to accede the requests of counsel who have made such requests to
22 examine their own witnesses.
23 Commission counsel view it as our responsibility to conduct
24 the direct examination of witnesses so that the Commission hears
25 the full story from a witness during that witness' first

1 examination. That is, that the first evidence that is heard by the
2 Commission is not the evidence that that person necessarily
3 wishes to tell but it is, in fact, Commission counsel's attempt to
4 elicit the full picture from that witness.
5 It's our view that that procedure also benefits the other
6 counsel who having then heard Commission counsel elicit the
7 story from the witness may decide that they don't have any
8 questions to ask.
9 Ms. Derrick's argument would make sense if they weren't
10 allowed to examine Donald Marshall. To say that you're only to
11 get the full story if they are entitled to conduct the direct
12 examination of Mr. Marshall, with all due respect to her, really
13 doesn't make much sense. It would make sense if that was the
14 only, if there was to be no opportunity by anybody else and, in
15 particular, by their counsel, by Donald Marshall's counsel, but
16 that's not the case and, in fact, they get to examine last. So if
17 they're concerned about Mr. Marshall's story as seen from their
18 perspective being told to this Commission, then they are in
19 absolutely no jeopardy in the facts of, in the circumstance of this
20 Commission because they do get to go last.
21 In preparing to conduct direct examinations, Commission
22 counsel has naturally met with as many of the witnesses as
23 possible in advance. And as counsel responsible for the
24 examination of Donald Marshall, Jr. I've met with Mr. Marshall on
25 a number of occasions in Sydney and in Halifax. And I'm not at all

1 worried about the possibility of eliciting testimony from Mr.
2 Marshall on behalf of the Commission.
3 My friend's referred to the Shulman case. I think it's
4 important to note in the Shulman case that there are a number of
5 factors which distinguish that case from this one. First of all, Mr.
6 Shulman was the person who made the allegations in that case.
7 He was the person who, in the words of the Ontario Court of
8 Appeal, "The Commission itself was, in essence, if not all together
9 directed to those allegations." That's at page 375 of the Ontario
10 Court of Appeal decision. And more importantly in the Shulman
11 case, counsel for Mr. Shulman would not have had any
12 opportunity at all to examine his own witness had it not been for
13 that application. Examinations were conducted exclusively by
14 commission counsel and the opportunity for Mr. Shulman's case to
15 be put from his perspective, through questioning by his own
16 counsel, was therefore not a right that he had.
17 That information is contained in, I have the Ontario Reports'
18 version of the, yes, it's the same one that Ms. Derrick has given
19 you. If you look at the material on page 376 in the small type,
20
21 Any person being examined may be
accompanied by his own counsel. If any
22 evidence is given which alleges any misconduct
that person's counsel may request the
23 commission counsel to further examine the
witness or request the commission to accord him
24 the right to examine the witness with respect to
25 such allegations. When commission counsel has

examined all the witnesses whom he proposes to call commission will hear and examine any further witness.

It's the impression that from that situation is far, far different from the situation before Your Lordships.

We have not been persuaded by the representations that were made to us by counsel for Mr. Marshall that the circumstances of his testimony, the giving of his testimony, should be done in any other way than through Commission counsel and it's our intention as with the previous 102 witnesses to try and elicit the full story from all perspectives, not from the perspective of one party, and that's the perspective that we would intend to adopt with Mr. Marshall as with everybody else.

CHAIRMAN

Mr. Spicer when you're interviewing perspective witnesses are the interviews conducted in the presence of counsel, with their counsel?

MR. SPICER

Yes, if those witnesses have representation they are.

COMMISSIONER POITRAS

So that in this case you would not be examining Mr. Marshall cold you would have seen him beforehand.

MR. SPICER

Yes, in the presence of Ms. Derrick on a number of occasions.

COMMISSIONER POITRAS

And if you had to see the witness again between now and

1 next Tuesday, you would not be adverse to having Ms. Derrick
2 with you throughout those examinations.
3 MR. SPICER
4 No, quite the contrary.
5 COMMISSIONER POITRAS
6 Thank you.
7 MR. SAUNDERS
8 We support the submission made by Commission counsel,
9 My Lord. I thought that the application by my friend, Ms. Derrick,
10 was going ahead on Monday and so hearing it today for the first
11 time I haven't had the opportunity to review the cases which she
12 cited.
13 In listening to comments by her and by my friend, Mr.
14 Spicer, my concern was that Mr. Spicer might have, or sense some
15 difficulty in his ability to question on direct, Mr. Marshall. Having
16 heard the submission of Mr. Spicer and the number of times that
17 he's met with the witness, I foresee no such difficulty and so on
18 that basis I say that he ought go forward as we have with the
19 other 106-odd witnesses to this point.
20 MR. BISSELL
21 On behalf of the RCMP, My Lords, I would also support the
22 position that has been taken by Commission counsel on this
23 particular matter.
24 The only other thing that I would point out, it would seem to
25 me that Mr. Marshall would have the benefit of protection under

SUBMISSION - COUNSEL

1 Section 13 of the Charter respecting the evidence that he gives
2 here on anything that might jeopardize him or threaten him with
3 a criminal sanction.
4 CHAIRMAN
5 Mr. Ross?
6 MR. ROSS
7 My Lord, I would rise to support the position taken by
8 Commission counsel. While the reasons as given by counsel for
9 Donald Marshall, Jr. revolves around the question of whether or
10 not there might have been an attempted robbery and I would
11 respectfully submit that that puts him in a very similar category
12 to Sandy Seale. Recognizing that I could not call Sandy Seale
13 personally it might very well be that according to the evidence of
14 Mr. Marshall if brought out by his own counsel, it might very well
15 put us in a position where I would be requesting that other
16 witnesses be called that I can take through personally. I think it
17 pretty well opens a Pandora's box. I've got no difficulty with the
18 way Commission counsel has conducted all examinations to date.
19 The other thing is the question of notice. I do not know
20 what was the notice as given in the Shulman or other cases. I do
21 not know whether or not there was any attempt to reach an
22 agreement between the different solicitors and counsel but at this
23 late date, before the final witness is to be called for the Halifax
24 phase, to be learning of this application I think that it's catching
25 some of us by surprise and I do not know that it can serve any

1 real useful purpose.

2 CHAIRMAN

3 I think my recollection is Ms. Derrick gave notice to this
4 Commission when we were sitting, at least two days ago, of her
5 intention of raising this argument on, she didn't. She just gave it
6 to us.

7 MR. ROSS

8 Oh, I see. Thank you very kindly, My Lord.

9 MR. WILDSMITH

10 I guess, My Lords, I'm in the minority position here again
11 supporting the application. It seems to me that your objective
12 ought to be to obtain the best evidence from Junior Marshall that
13 he's capable to giving. And it seems to me that the record has
14 been quite clear, Ms. Derrick pointed this out, that every other
15 time that Mr. Marshall has given evidence there have been
16 difficulties. And it's been part of my submission to the
17 Commission that Mr. Marshall suffers the same kind of difficulty
18 that many native people suffer when giving evidence in a kind of
19 formal setting like a court or before this Commissions. And so it
20 seems to me that Your Lordships should keep in mind the fact
21 that he is a native person and ask yourselves the question of how
22 it is that you could best obtain evidence from this native person.
23 Obviously Mr. Marshall is a key person, a vital person, and
24 that his evidence is going to be extremely important. Perhaps
25 more important than those other native witnesses who've given

1 evidence. And it seems to me, at least in my submission, that the
2 kind of trust or rapport that exists between Mr. Marshall and Ms.
3 Derrick and his own counsel will be of great assistance to him in
4 terms of coming over the formality and the hostility of the kinds
5 of proceedings that are going on here. And for that reason I think
6 that he will able to give better testimony to this Commission if it's
7 done in this fashion.

8 I should also comment on what I think is a central point in
9 the evidence or in the position being given by Commission
10 counsel, this fact that 102 other witnesses have been treated in
11 one particular way. I think what this assumes is that justice and
12 equality is achieved by treating everyone in the same fashion.
13 And, of course, the essence of what the Union of Nova Scotia
14 Indians is doing here and what our position has been is that there
15 are reasons for treating different cases differently. And that the
16 position of the native witnesses is a difference, and a vital
17 difference. And, therefore, makes all the sense in the world to me
18 at least to treat a native witness in a different way than the 102
19 other witnesses have been treated. And, indeed, if I can add the
20 editorial comment that to take that position seems to me has
21 indicated the futility of my appearance in front of the Commission.
22 12:05 p.m.
23 MR. SPICER
24 Well, in fairness, I was the person who has handled all the
25 native witnesses, and I think that's really not a particularly

1 appropriate comment to make.

2 MR. CHAIRMAN

3 Do you wish to say something? Yes, go ahead.

4 MS. DERRICK

5 Thank-you, My Lords, just very briefly I'd like to respond to
6 some of the comments that were made. Perhaps I could say, first
7 of all, that this issue, in my recollection, that is the issue of us
8 calling Mr. Marshall ourselves and examining him in chief was
9 raised some considerable time ago with counsel by us indicating
10 that we wished to reserve our right to do so, commission counsel.

11 Also, with respect to the issue of the remaining counsel,
12 almost all remaining counsel were informally canvassed earlier
13 this week concerning this issue, so I believe everybody did have
14 notice. It may be that Mr. Ross was missed in that canvass, and if
15 that is the case I certainly sincerely apologize. There have been
16 periods of time when he has been absent and perhaps as a result
17 of that we, you know, missed speaking with him.

18 I'd like to point out that there has certainly never been a
19 request brought forward to this Commission of this type. It may
20 well have been that there were some informal discussions with
21 Commission counsel but certainly nobody has ever made an
22 application to your Lordships. So, I don't feel that that position by
23 Commission counsel has any merit with the greatest respect.

24 With respect to the issue of bringing out areas of concern to
25 Commission counsel, we're certainly respectful of the need to do

that, and as a result have discussed with Commission counsel what areas they would seek elicit or would be interested in eliciting from Mr. Marshall and are certainly prepared to undertake to explore those areas. So that that should not be a concern.

It is our position that this application makes sense because of the distinct possibility that Mr. Marshall will become upset and agitated by this experience, which will be, I believe, his seventh time testifying concerning these issues. And we do believe that this will be modified by his talking to someone, in the first instance, that he knows well and has developed a bond of trust with.

It is certainly not our concern that we would not get to question him at all. Of course we understand that whatever the process we would have our opportunity to question him. But it is our concern that his story will not unfold as fully or as effectively because of the barriers of some strangeness and distance that he will experience if he is examined by Commission counsel. And certainly Mr. Spicer has spent some time with Mr. Marshall, but I respectfully submit that it is insignificant by comparison with the time and the quality of time that Mr. Marshall has spent with his own counsel.

And our...the purpose of our application, if I may just reiterate, is to assist the Commission in obtaining the fullest and most effective evidence from Mr. Marshall and so we believe that it is in the interests of the public inquiry and Mr. Marshall

himself. Thank-you.

MR. CHAIRMAN

We'll rise for about twenty minutes.

BREAK - 12:09 p.m.

INQUIRY RESUMES - 12:31 p.m.

MR. CHAIRMAN

Counsel for Donald Marshall, Jr., asked that the Commission depart from its well-established practise of having all witnesses who have or who will testify before this inquiry examined first by Commission counsel, and that she, as counsel for Donald Marshall, Jr., be permitted to conduct the examination-in-chief of her client when he testifies before this Commission with the right of all counsel, including Commission counsel, to cross-examine Mr. Marshall.

The grounds advanced inter alia by counsel for Mr. Marshall, in support of her application, is that in order to obtain the best and most effective evidence from Donald Marshall, Jr., that he will be more comfortable and productive if she first examines him. She expressed the view that Mr. Marshall's reputation is at risk, but in our view that same risk may apply to several witnesses who have already testified and whose examination-in-chief was conducted by Commission counsel.

Commission counsel are under an absolute obligation to bring before us all relevant evidence. Up to this time we are satisfied that Commission counsel have fully discharged their

1 responsibilities in that regard. We have no reason to believe that
2 Mr. Marshall will receive other than the full and scrupulously fair
3 treatment and examination which has been afforded by
4 Commission counsel to all other witnesses.

5 The object of this Commission is to elicit all relevant facts
6 and not to try anyone appearing before it. We are satisfied that it
7 is in the best interest of all concerned that Commission counsel
8 first examine Donald Marshall, Jr., and that the first evidence of
9 Mr. Marshall's shall be a full picture of all relevant facts elicited in
10 a manner which will ensure a broad perspective of the issues
11 before us.

12 This Commission is conscious of the difficulties which may
13 have been experienced by Donald Marshall, Jr., when giving
14 evidence in prior proceedings which were more adversarial in
15 their nature than the hearings before this Commission, which has
16 none of the attributes of a trial. We note that Mr. Spicer, who will
17 conduct the examination-in-chief, has met with Donald Marshall,
18 Jr., on several occasions, and that between now and next Tuesday,
19 when Donald Marshall, Jr., will appear Mr. Spicer will meet with
20 him, in the presence of Miss Derrick, which in our view should
21 ensure that such examination-in-chief will be conducted in a
22 manner which will not unduly inhibit Donald Marshall, Jr., in
23 giving his testimony.

24 For these reasons the application on behalf of Donald
25 Marshall, Jr., is denied.

1 Now, can Commission counsel indicate where we stand with
2 respect to witnesses.
3 MR. MacDONALD
4 With respect to Monday, My Lord, we will be calling...
5 MR. CHAIRMAN
6 Well, firstly, are there any other witnesses to be called
7 today?
8 MR. MacDONALD
9 No, My Lord.
10 MR. CHAIRMAN
11 All right.
12 MR. MacDONALD
13 There are not. Monday we may be having Michael Harris, a
14 cameo appearances, the...
15 MR. CHAIRMAN
16 I didn't get that.
17 MR. MacDONALD
18 He will...
19 MR. CHAIRMAN
20 All right.
21 MR. MacDONALD
22 We will also be calling evidence from the Sydney police, two
23 members of the police, the Chief of Police and the sergeant or
24 Inspector Woodburn. As we had indicated earlier or when
25 these...some Sydney police witnesses were giving evidence, when

they were being questioned about the current state of affairs, they were stopped and told that we would deal with that at a latter date. We propose dealing with that topic on Monday. And, that will be the extent of the evidence. And then the only evidence remaining to be called will be Mr. Marshall himself.

MR. CHAIRMAN

For the benefit of counsel, it is the intention of the Commission to conclude this phase of our hearings on Tuesday next at 4:30 p.m.. We will hear the witnesses that you have indicated, Mr. MacDonald, will be called on Monday on that date and we will set aside all of Tuesday to hear the evidence of Donald Marshall, Jr.. We will adjourn until... If our...we will most likely, in fact, it is our intention, unless we're convinced otherwise to start...to sit on Tuesday commencing at 9:00 in the morning. Miss Derrick has given notice of an application on Monday with respect to television lights and/or cameras. That will be heard first at 9:30 when we sit on Monday morning and then we will follow the evidence. So, we stand adjourned until Monday next at 9:30.

INQUIRY ADJOURNS - 12:37 p.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 22 day of June 1988 at Dartmouth, Nova Scotia