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#1

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

**Volume 88**

Held: September 20, 1988, at the St. Thomas Aquinas Church Hall,  
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

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SUBMISSIONS - DISCUSSIONS  
SEPTEMBER 20, 1988 - 9:40 a.m.

1 MR. CHAIRMAN

2 Mr. Ruby?

3 MR. RUBY

4 Thank you, My Lord. There is one matter I'd like to put on  
5 record with the assistance that I've gained from Federal  
6 Government Department of Justice. Superintendent MacGibbon  
7 yesterday indicated that he was certain there was something that  
8 had been done in the file between the date when the Auditor  
9 General's report was released in very early April of 1984 and the  
10 date when Mr. MacLean, the Leader of the Opposition wrote his  
11 letter of April 29, 1985. But we did not have access to the file.  
12 That file has now been searched and I can indicate for the record  
13 the following.

14 Between those two dates, the only thing that happened was  
15 that a letter, a copy of which you'll find at page 37 of our brief,  
16 was received and placed in the file on November 5, 1984, after it  
17 had been released at a press conference on the Friday before that,  
18 publicly released. That letter, you'll see, is dated April 18, 1984  
19 and it's the letter from Mr. Giffin to Arthur Donahoe. No copy was  
20 originally sent to the R.C.M.P. That is the only activity in the file  
21 in that period. Thank you.

22 MR. CHAIRMAN

23 Thank you. Now before we... I want to deal with the  
24 application that was made yesterday.

25

COMMISSION RULING ON MR. RUBY'S APPLICATIONS

1           We've been asked on behalf of Donald Marshall, Jr. to bring  
2 four witnesses to testify before this Inquiry. After hearing  
3 counsel for Mr. Marshall, counsel for the Attorney General of Nova  
4 Scotia, and Commission counsel, we have concluded there is no  
5 necessity to call these witnesses for the following reasons.

6           With respect to Peter Ashman, Director of the British  
7 Organization, Justice, and an expert on miscarriages of justice, we  
8 have had access to his written works on miscarriages of justice  
9 and he has been interviewed by Commission counsel. His work  
10 may indeed assist us as to the report. But while it is relevant in  
11 general terms to the subject matter of this Inquiry, we do not feel  
12 it necessary to have the benefit of his oral testimony.

13           Professor Archie Kaiser, a law professor at Dalhousie  
14 University, has written a paper on compensation which he has  
15 submitted to the Commission for its consideration. Mr. Ruby  
16 would have Mr. Kaiser appear as a witness in order to relate the  
17 general principles of compensation to the specific example of the  
18 Marshall case. Mr. Kaiser's papers will be perused with great  
19 interest and we feel confident that after 87 days of hearings, we  
20 will be able to do the required analysis without hearing from  
21 Professor Kaiser as a witness. However, if we do find that there  
22 are questions which we would like to direct to Mr. Kaiser, we will  
23 certainly do so.

24           There are several reasons why we do not wish to hear from  
25 Mr. Alan Story. We are reluctant to take evidence from

COMMISSION RULING ON MR. RUBY'S APPLICATIONS

1 | journalists for a number of reasons and, similarly, they are  
2 | reluctant to appear before courts and tribunals to discuss their  
3 | stories and their sources. Mr. Story's alleged conversation with a  
4 | juror on the Marshall case took place in 1986, some 15 years after  
5 | the event. Regardless of questions of the limitation period and  
6 | Criminal Code provisions, we do not wish to associate ourselves  
7 | with a process by which we would inquire into the state of mind  
8 | of jury members or the deliberations of the jury. Nor do we feel  
9 | that this is necessary for us to complete our task.

10 |         Finally, counsel for Donald Marshall, Jr. has asked that Staff  
11 | Sergeant Harry Wheaton be recalled on the question of Mr.  
12 | William Joseph MacLean's alleged involvement in a Port  
13 | Hawkesbury fire. Staff Sergeant Wheaton was cross-examined by  
14 | counsel and, in particular, by counsel for the Attorney General on  
15 | this matter in some detail and was re-examined by Mr. George  
16 | MacDonald, Q.C., counsel for the Commission. Further, we have  
17 | been advised by Mr. George MacDonald, Commission counsel, that  
18 | he has seen the files of the Attorney General and the R.C.M.P. and  
19 | is satisfied that there is nothing in those files to indicate that  
20 | anything out of the ordinary was done in the process by which  
21 | this file was handled. We are not concerned with the merits of  
22 | the case in relation to the Port Hawkesbury fire. Our concern  
23 | relates only to the manner or extent to which it might affect Staff  
24 | Sergeant Wheaton's credibility and the process by which the  
25 | decision was made that a charge be laid or not be laid. On the

COMMISSION RULING ON MR. RUBY'S APPLICATIONS

1 former concern, we have sufficient evidence and will hear no  
2 further witnesses on that point. On the latter, we are satisfied  
3 with the conclusions of Commission counsel that the normal  
4 procedure was followed.

5 We have been sitting in public hearings and have heard 109  
6 witnesses. No one can credibly suggest that we have failed to  
7 conduct a full and complete inquiry into the issues raised by our  
8 mandate. We must come to an end of these hearings. The  
9 application on behalf of Donald Marshall, Jr. is denied.

10 Mr. Ross?

11 MR. ROSS

12 My Lord, I have indicated to Commission counsel from time  
13 to time that an application would be made to call witnesses to  
14 highlight some of the concerns of the Black United Front as a  
15 result of the continuing work of the Black United Front and some  
16 studies which were recently carried out by the Front.

17 I must indicate that it was not until yesterday that I  
18 eventually got some material in the hands of Commission counsel  
19 and I'll take this opportunity to thank Commission counsel for  
20 the... for having looked at that material.

21 The application, My Lord, is pursuant to instructions from  
22 my client and, in that regard, I'd like to indicate their position.  
23 The Black United Front is quite concerned that this Inquiry could  
24 wind up its hearings whilst there remains the very real possibility  
25 that the basis for seeking and being granted standing will not be

MR. ROSS - SUBMISSION

1 fulfilled. In this application, the Black United Front advance some  
2 of the reasons...advance as some of the reasons for seeking status  
3 the following.

- 4 • That racism is a major variable in this Inquiry  
5 and participation was sought in an effort to address  
6 this issue from a minority perspective;
- 7 • Further, to underline the importance to the Black  
8 United Front, the importance of the Black United  
9 Front, sorry, and its mandate with respect to taking  
10 a stand in defence of the rights and freedoms of  
11 black people in this province, the same rights which  
12 could be taken for granted by the majority;
- 13 • To stress to this Commission in the strongest  
14 terms the lack of confidence which exists in the  
15 black communities with respect to the functioning of  
16 the legal system;
- 17 • To try to establish that the failings of the system  
18 as an instrument of society as seen by the blacks  
19 has its foundation in the racial attitudes prevalent in  
20 the Nova Scotia society;
- 21 • And to demonstrate that the legal system has  
22 traditionally failed to serve the interests of black  
23 people.

19 The Black United Front was granted full standing and, in  
20 that regard, reference is made to the opening statements of the  
21 Honourable Chairman of this Commission. He made it clear that a  
22 grant of full standing entitled the persons to cross-examine  
23 witnesses, make submissions, and make submissions to the  
24 Commission and participate fully in the hearings. He went on at  
25 page four, he continued that standing has been granted to the

1 Black United Front and the Union of Nova Scotia Indians. Both of  
2 these groups state that minorities in the province are not treated  
3 fairly or equitably by the justice system and suggested that  
4 racism and discrimination may have contributed to the conviction  
5 of Donald Marshall, Jr. These charges must be investigated and  
6 examined to determine if these facts played any part in the  
7 administration of justice in Nova Scotia.

8 With full recognition of the difficulty in proving racism  
9 unequivocally, this Commission, in its wisdom and undoubtedly in  
10 an attempt to put practical limits on the scope, cost, and time for  
11 sittings to hear *viva voce* testimony, and, at the same time,  
12 recognizing and considering the importance and seriousness of the  
13 allegations made by the Black United Front and the Union of Nova  
14 Scotia Indians has, not to the exclusion of the Black United Front,  
15 determined that the questions of racism and discrimination, real  
16 or perceived, could best be addressed through studies and  
17 research.

18 In this regard, Mr. Chairman, and, again, with the  
19 involvement and blessing of the Black United Front, the services  
20 of Dr. Wilson Head, a respected authority on race-related  
21 problems, whose name was actually advanced by the Black United  
22 Front, was engaged to undertake and conduct these studies. The  
23 reliance of Commission counsel and other counsel including  
24 counsel for the Black United Front, on the anticipated  
25 completeness and effectiveness of these studies is demonstrated

MR. ROSS - SUBMISSION

1 to a large degree by the limitations on questioning on racism as  
2 directed to the various witnesses during direct and cross-  
3 examination. This was not by accident, Mr. Chairman. I was  
4 specifically encouraged by this Commission.

5 Pursuant to invitation, counsel for the Black United Front  
6 has had an opportunity to, and did attend workshops directed  
7 toward policing, discrimination against blacks, and discrimination  
8 against Indians in the justice system. As a result of the  
9 involvement in these workshops, the Black United Front has no  
10 alternative but to react to the active noninvolvement of black  
11 people or their concerns in the very important area of policing.  
12 The view of the Black United Front is that a much more  
13 substantial and substantive study of the complaints and concerns  
14 of black people ought to be undertaken by the researchers  
15 retained by the Commission and that all research must proactively  
16 address the problems as envisioned by black people.

17 In an effort to properly address these concerns, and to be in  
18 a position to assist the Commission, the Black United Front sought  
19 assistance from the Government of Canada through the  
20 Department of Secretary of State and with rather limited funds,  
21 and I must indicate the Secretary of State, one of the things they  
22 wanted is that if there was any mention of the funding that they  
23 get their share of mention. The Secretary of State, and with  
24 rather limited funds, conducted some studies from a black  
25 perspective. The research group looked into the circumstances

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1 surrounding the death of five blacks and attempted a comparative  
2 analysis with the circumstances and public reaction to the death  
3 of Sandy Seale, and further, tried to determine and document the  
4 perspectives... Sorry, tried to determine and document the  
5 perceptions and attitudes of the members of these five families  
6 and their communities and, again, to compare these with the  
7 experiences of the Seale family as can be determined through the  
8 testimony of Mr. and Mrs. Seale.

9 The general findings were that, as with the family of Sandy  
10 Seale, there were substantial criticism and great disappointment  
11 with respect to the functioning of the legal system and its capacity  
12 to respond to family and community concerns at times of ultimate  
13 crisis.

14 A comparison has from time to time been made to another  
15 unfortunate death circumstance in this province in which more  
16 than one... Sorry, in which two medical examiners conducted a  
17 joint autopsy for the specific and stated purpose of attempting to  
18 dispel anticipated questions of impropriety. Only because the  
19 matter under examination involved the son of a very important  
20 person.

21 The Black United Front is not suggesting for a minute that  
22 this is the extent to which the medical examiner's office should go  
23 when the death of a black person is being inquired into. But, at  
24 the same time, the Black United Front cannot adopt a laissez-faire  
25 policy in the face of the complaints and repeated complaints of the

1 type and kind made in the past and documented through these  
2 studies.

3 With respect to the three cases which involved... three of the  
4 cases which involved white on black homicide and resulted in  
5 trials, the race and history of the deceased person appeared to  
6 play a much more prominent role than could properly or  
7 reasonably be justified and was, in fact, in all cases overplayed to  
8 the extent that the violent actions of the accused persons  
9 appeared to require little, if any, explanation in order to be  
10 justified.

11 It is a concern of the Black United Front that these or similar  
12 findings are not recorded anywhere in the research on policing  
13 and on discrimination against blacks in the justice system by the  
14 Commission researchers. The Black United Front is not seeking to  
15 have this Commission confirm or reject the facts as a basis of  
16 warranted or unwarranted concerns by black people. But, at the  
17 same time, the Black United Front seeks adamantly to have this  
18 Commission recognize that, for whatever reason, these fears and  
19 concerns are the part of the life of black people in this province.  
20 It is not good enough to speculate that when Indians are involved  
21 with the justice system, they became docile; and when blacks are  
22 involved with the justice system, they become belligerent. The  
23 Black United Front advances the proposition that if Nova Scotians,  
24 regardless of race, colour, creed, or politics are treated equally and  
25 equitably before the law, no particular group of individuals should

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1 have to experience the added burden of fear that the wheel is  
2 rigged. Not because of the accusations to which they must  
3 respond, but because they are members of a racial or cultural  
4 group whose rights have from time to time and could continue to  
5 be infringed or denied with impunity.

6 The Black United Front recognizes the structure and  
7 hierarchy of the different court systems and is not suggesting for  
8 a minute that it is the system which cannot work. But, in the  
9 alternative, the Black United Front merely seeks an opportunity to  
10 put on record certain specific community perceptions. Not so that  
11 the blacks will be beneficiaries of any special consideration when  
12 involved in the justice system, but they not be disadvantaged as a  
13 result of public indifference, abject intolerance, and consistent  
14 disregard for racial and cultural differences having infiltrated the  
15 justice system.

16 In summary, Mr. Chairman, the research undertaken by the  
17 Black United Front supports the proposition advanced on the  
18 application for standing that when blacks are involved in the legal  
19 system, the system doesn't work. Different components of the  
20 system fail at different times and perhaps for different reasons.  
21 It shows, further, that the failure of the legal system to operate  
22 properly, and which ultimately led to this Inquiry being  
23 commissioned, is not an isolated incident. It also shows that the  
24 same, that to the same degree that Sandy Seale was, ten years  
25 after his funeral, tagged as a robber in the face of substantial

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1 uncontested evidence to the contrary, all five victims studied  
2 were tagged with the reputation sufficient to condemn the victim  
3 himself and provide a palatable explanation for the circumstances  
4 of the death.

5 It is the position of the Black United Front that an  
6 opportunity to advance *viva voce* testimony is absolutely  
7 necessary as groundwork in order to give meaning to the research  
8 currently underway. And, finally, that without an opportunity to  
9 advance a a recorded position during these sittings of the Inquiry,  
10 the Black United Front will not be in a position to make a full  
11 submission to this Inquiry.

12 Having said that, Mr. Chairman, I'll say in a nutshell, the  
13 Black United Front is seeking an opportunity to call no more than  
14 two witnesses and take up no more than a half day of the  
15 Commission's time.

MR. CHAIRMAN

17 Number one, who are the two witnesses?

MR. ROSS

19 The first one will Mr. Bernie Jones.

MR. CHAIRMAN

21 All right.

MR. ROSS

23 And by way of... And his current involvement is that he was  
24 the coordinator of the project which looked into the death of these  
25 circumstances surrounding the death. We're not trying to look

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1 into the cases. The cases are closed. It's just the perceptions and  
2 the concerns, the feelings. And the other one is Ken Crawford, a  
3 lawyer.

MR. CHAIRMAN

4 Ken Crawford. Now the investigations that you've referred  
5 to that have been carried out and coordinated by Mr. Jones, they  
6 have been completed?  
7

MR. ROSS

8 The field work has been completed, My Lord. What we're  
9 doing right now is just doing some proofreading, putting it into  
10 final and presentable form. I did circulate extracts to Commission  
11 counsel and I understand they have been fairly widely  
12 distributed. The main studies will be made available to the  
13 Commission researchers.  
14

MR. CHAIRMAN

15 All right.  
16

MR. ROSS

17 Pardon?  
18

MR. CHAIRMAN

19 Yes, I... Yes, I'm... These studies, when they're completed, all  
20 of them will be made available to the, to Dr. Wilson Head and to  
21 any other researchers that the Commission...  
22

MR. ROSS

23 What I suggested, My Lord, is that they be made available  
24 to your research director, Mr. Briggs, and specifically ask that the  
25

1 person heading up the research on policing, rather than leaving it  
2 up to Mr. Wilson Head to look after...

3 MR. CHAIRMAN

4 All right, fine.

5 MR. ROSS

6 Yes, that they all be looked at.

7 MR. CHAIRMAN

8 And these reports will be made available to the  
9 Commission?

10 MR. ROSS

11 Absolutely. Absolutely, My Lord.

12 MR. CHAIRMAN

13 So the procedure that will be followed is that when you  
14 have finalized your proofreading and the report is ready and  
15 printed, you will give it to Mr. John Briggs, the director of research  
16 for the Commission.

17 MR. ROSS

18 Yes, My Lord.

19 MR. CHAIRMAN

20 He, undoubtedly, will then submit copies to Dr. Head, to the  
21 researchers who did the study on policing for us, the workshop,  
22 the very good workshop that was held... Two good workshops, one  
23 on blacks and the law, and the other on natives.... or not... on  
24 policing and attended by you and other representatives of the  
25 Black United Front. And after they have examined it, presumably

1 it will then come to us. Without, because the details have not yet  
2 been formulated, Mr. Ross, but I'm anticipating that there will be  
3 an opportunity to air publicly the findings of your researchers.  
4 What we're going to have to take some time to think about is the  
5 effectiveness of *viva voce* evidence and cross-examination which  
6 is confrontational by its very nature and my limited experience in  
7 inquiries has been that when you are dealing with a researcher,  
8 that type of examination very seldom enures to the benefit of the  
9 very people we are wishing to serve. That you don't get the true  
10 feeling, the emotionalism that so very properly and  
11 understandably flows from the kind of research that, the  
12 commendable kind of research as has been carried out by your  
13 initiative and the initiative of the Black United Front.

10:00 a.m.

14 So that's what we have to deal with, but in...that's only to  
15 indicate to you the problems we have in wrestling with these  
16 kinds of applications. And the decision that was made very early  
17 in the Commission hearings that we would have two strings to our  
18 bow: one the formal hearings; the other the kind of research that  
19 doesn't bind us to, as you say, making findings of fact. How we're  
20 going to deal with that is not an easy problem. But whatever way  
21 we do it it will be done bearing in mind our determination to get  
22 to the very core of these problems that are perceived or real  
23 within the Province of Nova Scotia.

24 Any counsel wish to be heard?

DISCUSSIONMR. RUBY

Thank you, My Lord. I want to associate myself with the remarks of the Black United Front and to endorse the proposal they've made. I agree with it.

MR. CHAIRMAN

Mr. Saunders.

MR. SAUNDERS

We have no position to make, My Lord.

MR. CHAIRMAN

Mr. Bissell.

MR. PRINGLE

We have no position at this point in time, My Lord.

MR. CHAIRMAN

What do you mean at this point in time?

MR. PRINGLE

My only concern is if we were going to get into specific cases I would want to know what cases they were and whether there were going to be allegations that people would have a chance to rebut if there were serious allegations.

MR. CHAIRMAN

That's one of the problems we have to deal with.

MR. SPICER

Mr. Ross had originally contacted Commission counsel in July to inquire about the calling of witnesses and I wrote back to him in July much along the lines that Your Lordship has just

DISCUSSION

1 articulated that we didn't think that the calling of witnesses to  
2 speak to research projects was the method by which we wished to  
3 get that sort of material, get that sort of evidence. I indicated that  
4 to him in July and he then indicated that he would be coming  
5 forth and making this application. In essence, as I understand it,  
6 what the Black United Front has done is, in effect, carried out a  
7 research project. We have not called our other researchers to  
8 speak to the research projects and, as Your Lordship points out,  
9 there are many ways in which one can arrive at facts and  
10 conclusions, and *viva voce* testimony is only one of them, and  
11 the...we've indicated to Mr. Ross that he can, as Your Lordship has  
12 indicated, submit all the material that he has to our researchers  
13 and in that way will become part of the material that's before the  
14 Commission in much the same way as it would if it were called as  
15 *viva voce* testimony. And that's the position that we took with Mr  
16 Ross in July.

MR. CHAIRMAN

18 I take it, Mr. Ross, that what...whether it is by way of  
19 examination and cross-examination, bearing in mind the obvious  
20 constraints that would have to be imposed when dealing with  
21 individual cases that are not before us, and opening up the whole  
22 gamut of cross-examination by all the parties of interest, your  
23 main concern, I suspect is that the results of your research and  
24 the rationale behind it and any interpretation that your clients  
25 would like to bring to our attention that it be done in a public

1 forum.

2 MR. ROSS

3 Very much so, My Lord, very much so.

4 MR. CHAIRMAN

5 Well...

6 MR. ROSS

7 The idea that there should be some evidence from a black  
8 perspective.

9 MR. CHAIRMAN

10 Right. But that can be done without putting a person under  
11 oath.

12 MR. ROSS

13 Well, that might be true, My Lord, and I anticipated a  
14 number of these arguments.

15 MR. CHAIRMAN

16 No, no, I'm not...I just want to get your position.

17 MR. ROSS

18 Yes, I appreciate that it could be done, but I think that a lot  
19 would be lost if there isn't the opportunity for not only  
20 involvement, but obvious public involvement.

21 MR. CHAIRMAN

22 Right. And I say public involvement, but there's more than  
23 one forum to provide that public involvement, more than one  
24 method if that's the word and what we will do is take this under  
25 advisement and some time between now and the conclusion of our

1 public hearings in Halifax tomorrow that you have a...our decision.  
2 I just want to point out to you that I want to be sure of what the  
3 thrust of your argument was and I have it now, and somehow  
4 we've got to find a formula to allow the...to provide a forum,  
5 rather, for the Black United Front to articulate their interpretation  
6 of the findings that arise directly out of their research which they  
7 understandably, and I commend them for it, carried out in this  
8 area of concern. And what I...what we really have to decide  
9 whether, for instance, Mr. Jones sitting over there under oath or  
10 Mr. Jones standing at a public forum under oath with all the  
11 constraints that are...that must of necessity be imposed in *viva*  
12 *voce* evidence, or Mr. Jones or Mr. Crawford standing in a public  
13 forum without any of these inhibitions, and letting it all hang out,  
14 which one is most effective for the Black United Front and most  
15 meaningful for this Commission. So with that caveat, we shall  
16 take it under advisement and get something out between now and  
17 the time we adjourn tomorrow. Thank you very much.

18 MR. ROSS

19 Thank you kindly, My Lord.

20 COMMISSIONER POITRAS

21 I just want to ask Mr. Ross one thing. Would these people,  
22 Bernie Jones and Ken Crawford, would they be called upon to  
23 actually give evidence? I know that they would testify but would  
24 they give evidence? I think you see the distinction I'm trying to  
25 draw.

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1 MR. ROSS

2 Well, I'll tell you about that distinction. I can recall in law  
3 school there was this case of Hughes v. Lord Advocate and Dean  
4 Read all he spoke about a difference without a distinction and a  
5 distinction without a difference and I cannot get the difference  
6 between the evidence and the testimony.

7 COMMISSIONER POITRAS

8 I think you've answered my question, thank you.

9 MR. CHAIRMAN

10 Mr. MacDonald.

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