

R 104  
JOD JEE  
#2

ROYAL COMMISSION ON THE  
DONALD MARSHALL, JR., PROSECUTION

VOLUME 90

MEDIA POOL COPY

Held: October 31, 1988

At: St. Andrew's Church Hall  
Bentinck Street  
Sydney, Nova Scotia

Before: Chief Justice T. A. Hickman, Chairman  
Assoc. Chief Justice L. A. Poitras, Commissioner  
Hon. G. T. Evans, Commissioner

Counsel: George MacDonald, Q. C., Wylie Spicer, & David Orsborn:  
Commission Counsel

Clayton Ruby, Ms. Marlys Edwardh, & Ms. Anne S. Derrick:  
Counsel for Donald Marshall, Jr.

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

Donald C. Murray: Counsel for William Urquhart

David G. Barrett: Counsel for the Donald MacNeil estate

Jamie W. S. Saunders, & Darrel I. Pink: Counsel for  
Attorney General

James D. Bissell: Counsel for the R.C.M.P.

Al Pringle: Counsel for Correctional Services Canada

William L. Ryan: Counsel for Evers, Green and MacAlpine

Charles Broderick: Counsel for Carroll

S. Bruce Outhouse: Counsel for Wheaton & Scott

Guy LaFosse: Counsel for Davies

Bruce H. Wildsmith: Counsel for Union of N. S. Indians;  
Assisted by Daniel Christmas

E. Anthony Ross: Counsel for Oscar N. Seale, and for Black  
United Front.

Court Reporters:

Sydney Discovery Services

INDEX - VOLUME 90

OPENING REMARKS

By Mr. Spicer .....	15909
By Mr. Ruby (Motion) .....	15909
Reply by Mr. Spicer .....	15913
Ruling by Commission .....	15913

RONALD C. GIFFIN

By Mr. Spicer .....	15916
By Mr. Ruby .....	15933
By Mr. Chairman .....	15934

TERENCE R. DONAHOE

By Mr. Spicer .....	15936
By Mr. Chairman .....	15945
By Commissioner Evans .....	15947

ORAL SUBMISSIONS

By Mr. MacDonald .....	15950
------------------------	-------

1 INQUIRY RECONVENED AT 10:00 o'clock in the forenoon on Monday,  
2 the 31st day of October, A. D., 1988, at Sydney, County of Cape  
3 Breton, Province of Nova Scotia.

3 MR. CHAIRMAN:

4 Mr. Spicer.

5 MR. SPICER:

6 As a result of the decision of the Appeal Court or the Province's  
7 decision not to appeal, we have conducted some interviews with  
8 certain of the cabinet ministers and have decided as a result of  
9 that to call the present Attorney General, Mr. Donahue, and  
10 former Attorney General, Mr. Giffin.

11 We've also been advised by counsel for the Attorney  
12 General's Department that between the period 1971 and 1978, to  
13 their knowledge (And my understanding from Mr. Pink is that he  
14 has interviewed other cabinet ministers and can advise us, and  
15 I'm certainly prepared to rely on what he says.) that there were  
16 no discussions of the Marshall case in cabinet in that period of  
17 time.

18 So with that understanding we call Mr. Giffin and Mr.  
19 Donahue. We propose to start with Mr. Giffin.

20 MR. CHAIRMAN:

21 Mr. Ruby.

22 MR. RUBY:

23 Thank you, My Lord.

24 Let me commence my remarks by indicating just briefly the  
25 history of the matter which I think Your Lordships are familiar

1 with.

2 When Your Lordships originally made a ruling on this matter,  
3 you decided that the cabinet members would, so far as they were  
4 relevant, be required to testify and also that only the general  
5 tenor of the conversations and not "who said what" would be the  
6 subject matter of the evidence that was heard. That was subject  
7 to a motion by the Attorney General of Nova Scotia and by Donald  
8 Marshall, Jr., as you recall, questioning the correctness of that  
9 ruling.

10 The Trial Division of the Nova Scotia Supreme Court felt  
11 that the Attorney General's position was not sustainable and  
12 dismissed that application but that Mr. Marshall's application  
13 was and granted it. That would have compelled Your Lordships to  
14 engage in a different procedure at this point in time.

15 On further appeal -- And I should pause and say, of course,  
16 at that stage, Your Lordships, as a matter of courtesy, waited  
17 and did not deal with the issue until after the court  
18 applications had been concluded. Now once that decision was  
19 rendered by the Trial Division, once again the parties indicated  
20 a wish to appeal further, both your own counsel and counsel for  
21 the Attorney General of Nova Scotia. And again as a matter of  
22 courtesy and propriety, Your Lordships took no further steps to  
23 deal with the subject matter, to actually call the evidence or  
24 hear it while the rights of those parties, including your own  
25 counsel, were being tested in the court. And the object of that,

1 of course, is simply to make sure that no one's rights are  
2 prejudiced at any stage.

3 The Appeal Division, as you know, restored the ruling of  
4 Your Lordships with respect to Donald Marshall's application and  
5 sustained the Trial Court with respect to the substance of the  
6 cabinet privilege issue. And that takes us to the present.

7 On behalf of Donald Marshall, Jr., as Your Lordships know, I  
8 have filed an Application for Leave to Appeal to the Supreme  
9 Court of Canada questioning that aspect of the decision which  
10 touches upon the procedure to be followed before hearing this  
11 evidence. That application can be heard, I would think, in  
12 writing sometime in the next month or two, and I certainly  
13 undertake to Your Lordships to proceed expeditiously with it, and  
14 if leave be granted, with any appeal that follows therefrom. But  
15 in the ordinary course, one would expect that a month or two  
16 would be sufficient to deal with an application of this sort in  
17 writing.

18 The issue then arises, what is our position with respect to  
19 the hearing of this evidence. And I have no objection to it  
20 provided -- (And it's an important provision.) provided that I  
21 have an indication from Your Lordships that the rights of Mr.  
22 Marshall will be respected. And the right I refer to is the  
23 right to apply to the Supreme Court of Canada to have, if that  
24 Court sees fit, a final determination of the rights in this  
25 matter. Our highest court will, I know, deal with the matter

1 expeditiously and fairly, but it is from Mr. Marshall's point of  
2 view readily important that the issue not become academic. For  
3 example, I would ask Your Lordships to give me an indication  
4 that you will not release your final report until the Supreme  
5 Court of Canada has a chance to deal finally with this matter  
6 one way or the other, and to do so on my undertaking to proceed  
7 expeditiously. For example, I would think there'd be no  
8 difficulty in my having the actual written application completed  
9 and filed within thirty days with all the material so that the  
10 court can deal with it.

11 All I'm asking for is exactly the courtesy you accorded to  
12 the Attorney General of Nova Scotia while he was appealing  
13 against rulings that he found unsatisfactory, the rulings which  
14 we found quite satisfactory, and it's the courtesy which, of  
15 course, we had no objection of being extended to him because his  
16 rights are as vitally important as anybody else's.

17 Now, of course, I know as Your Lordships know, that I have a  
18 right to apply to the Supreme Court of Canada for a stay of  
19 proceedings to be granted on a motion by a full panel of the  
20 court, but it would be in my submission, a terrible waste of  
21 money to the taxpayers to have to go through all that when all  
22 I'm asking is, at this stage, an indication from Your Lordships  
23 that you will await the expeditious hearing before finally  
24 concluding the matter. I will not be prejudiced in that event  
25 because you can hear what Your Lordships think it right to hear

1 at this stage. If I'm correct, we'll come back and there will be  
2 another examination of what it is -- was actually said by whom;  
3 that is, who said what in those cabinet meetings. But if I'm  
4 wrong, there will be no need to ever come back at all, but I'm  
5 not prejudiced by hearing what you're going to hear today because  
6 it would in a general sense be relevant in any event. The only  
7 thing I'm concerned about is our rights not be prejudiced from  
8 here on.

9 Thank you very much.

10 MR. CHAIRMAN:

11 Any other counsel to be heard? Well, the only counsel involved  
12 really, I guess, is counsel for the Attorney General and  
13 Commission counsel.

14 MR. SPICER:

15 My Lord, I think in this stage of the game, all that needs to be  
16 said is that an indication to that effect is perhaps premature  
17 since Mr. Ruby has not succeeded in getting his leave application  
18 through yet. We can certainly proceed, and perhaps Mr. Ruby  
19 wants to come back in some future date and ask the question when  
20 it's more than moot would be appropriate.

21 MR. CHAIRMAN:

22 The view of the commission is, number one, it would be  
23 premature for us to give any undertaking at this time, except I  
24 have no hesitancy in giving a clear indication that on the  
25 assumption the Application for Leave to Appeal to the Supreme

1 Court of Canada will be disposed of between now and spring that  
2 you have no fear of any report of this Commission being filed  
3 before that time. I'd be delighted if I thought we could review  
4 the tremendous amount of evidence and submission of counsel  
5 before that, but I am sure realistically we can't and won't be  
6 able to do so.

7 On the assumption, too, and the undertaking of counsel for  
8 Donald Marshall, Jr., that he will, within thirty days, file the  
9 necessary documentation with the Court of Appeal or the Supreme  
10 Court of Canada, rather, to place him in a position where he then  
11 can move forthwith or as expeditiously as possible to have the  
12 application for leave from what, as I recall it, is a judgement  
13 arising out of a decision of the Trial Division of the Supreme  
14 Court of Nova Scotia and the Court of Appeal of Nova Scotia with  
15 respect to an application that came before that Court by way of a  
16 prerogative writ, namely certiorari. So that the issue as to  
17 whether further evidence or further examination of all or any of  
18 the members of the Cabinet of Nova Scotia at the time in question  
19 would be more properly put to us then, that opportunity will be  
20 there. If the application is unsuccessful, as Mr. Ruby has  
21 said, there is nothing to come back for.

22 From the point of view of the Commission, I think it must be  
23 obvious that we are in accord with the decision of the Court of  
24 Appeal of Nova Scotia who have upheld the decision of -- and  
25 ruling, rather, of this Commission. And I would anticipate that



1 it would be the role of Commission counsel to appear on that  
2 Application for Leave to Appeal to the Supreme Court of Canada  
3 and oppose it.

4 But insofar as Mr. Marshall -- Donald Marshall, Jr.'s  
5 rights being prejudiced, it's not conceivable that they could be  
6 unless your Application for Leave to Appeal is not heard before  
7 the middle of next year.

8 MR. RUBY:

9 Would the Commission have difficulty about reconvening the  
10 hearing if it's --

11 MR. CHAIRMAN:

12 I have no difficulty reconvening the hearing.

13 MR. RUBY:

14 Thank you.

15 MR. CHAIRMAN:

16 But I'm not going to -- It's premature for this Commission to  
17 give an undertaking. I'm simply giving you the facts of life.  
18 There will be no report filed before next spring.

19 MR. RUBY:

20 I thought my mother was supposed to give me the facts of life.

21 MR. CHAIRMAN:

22 Well, we do our best to help you people from Upper Canada.

23 Now, Mr. Spicer.

24

25

1 RONALD C. GIFFIN, being called and advised still under oath,  
2 testified as follows:

3 BY MR. SPICER:

4 Q. Mr. Giffin, I believe you indicated to us on the first  
5 occasion that you testified that you'd been a member of  
6 Cabinet since 1987. Is that correct?

7 A. Yes, that's correct.

8 Q. And you've been a member -- you remain a member of Cabinet  
9 to date?

10 A. Yes.

11 Q. Okay. I want to ask you some questions about the Marshall  
12 case and a couple of other things insofar as they were or  
13 were not discussed in Cabinet. Can you indicate to  
14 Commission when the first discussion of anything related to  
15 the Marshall matter took place in Cabinet?

16 A. I can't give you an exact date but it was after I became  
17 Attorney General in November of '83, so I would -- My best  
18 recollection on that would be that I started raising the  
19 matter in Cabinet in November/December, 1983.

20 Q. And at that point in time, what would it have been that you  
21 would have been raising?

22 A. Primarily at that point, the question -- Well, in fact, I  
23 think only at that point the question the compensation for  
24 Mr. Marshall and how we would deal with that issue.

25 Q. Can you tell us what the nature of the discussions were in

1 Cabinet concerning that issue at that time?

2 A. The nature of the discussions involved mainly about how to  
3 proceed, what process to follow in attempting to deal with  
4 the issue of compensation for Mr. Marshall. I think I could  
5 accurately reflect the sentiment of Cabinet when I raised  
6 the matter that there was no question about whether or not  
7 compensation would be paid to Mr. Marshall. It was -- That  
8 was taken as given that compensation would be paid and the  
9 discussion focused on how to deal with the issue.

10 Q. Can you tell us what the discussion was insofar as it  
11 related to how to deal with that issue?

12 A. Well, I advised cabinet that the criminal proceedings  
13 involving Mr. Ebsary were still before the courts and indeed  
14 might remain before the courts for some considerable period  
15 of time, and that the concern that I had as Attorney  
16 General was that we not do anything that would trespass upon  
17 the status of that proceeding before the courts.

18 Q. In March of '84, the Campbell Commission was set up and, I  
19 believe, the Ebsary matter certainly was still before the  
20 Courts. Can you give us any indication of any discussions  
21 in Cabinet as to what changed, why at that point then in  
22 March the question of Ebsary wasn't an issue?

23 A. Well, it certainly was. And it was one that certainly  
24 concerned me throughout my dealings with the entire matter  
25 as long as the Ebsary case was before the courts. And by

1 the same token, however, we did recognize that compensation  
2 should be paid to Mr. Marshall. And we came to the  
3 conclusion as a Cabinet that we had to balance interests.  
4 To delay compensation for Mr. Marshall until the Ebsary case  
5 cleared the courts might very well leave the compensation  
6 issue unresolved for a long period of time. By the same  
7 token, and this was certainly the general tenor of the  
8 discussion in Cabinet, we felt that the Commission of  
9 Inquiry to be conducted by Judge Campbell ought to be  
10 restricted to the issue of compensation. In other words,  
11 that was -- my advice to Cabinet was that we try to restrict  
12 that Inquiry as much as possible to minimize the risk of  
13 trespassing upon the Ebsary case.

14 Q. Can you give us any indication as to why the particular way  
15 of dealing with it was fixed upon; that is, why you chose a  
16 judge from out of the Province to deal with this particular  
17 question of compensation?

18 A. Well, I raised the matter several times in Cabinet as a non-  
19 agenda item. If I may explain that, My Lords, in our  
20 Cabinet meetings, we have a practice that after we complete  
21 the formal Cabinet agenda, the Premier will then ask  
22 Ministers if any of them have any other matters that they  
23 want to bring up that are not on the agenda and -- so that  
24 was where I first raised the matter and for the purpose of  
25 having a discussion in Cabinet which was fairly general,

1 fairly free-wheeling as to how we ought to deal with the  
2 issue. And so it was in that context of a number of  
3 discussions in various Cabinet meetings over a period of  
4 several months that lead us to the conclusion that the best  
5 way to deal with the compensation issue was through a  
6 Judicial Inquiry. Then we discussed various related  
7 matters, such as, who ought to be appointed and that sort of  
8 thing.

9 Q. And you fixed upon a judge from another Province for what  
10 particular reason? Can you give us any help?

11 A. Our main reason for that was simply that the courts of Nova  
12 Scotia at various levels have already been involved with the  
13 Marshall case and there was always the potential if any of  
14 a number of judges, for example, from Nova Scotia that might  
15 have been appointed might have had some conflict of  
16 interest. A number of law firms in the Province had already  
17 been involved with various aspects of the matter, and of  
18 course, the Provincial Government had been involved as well.  
19 So we came to the conclusion that, first of all, it should  
20 be a Judicial Inquiry. We felt that was the appropriate  
21 route to go, given the importance of the matter in terms of  
22 the administration of justice. And secondly, that it ought  
23 to be a judge from outside Nova Scotia, that that would  
24 hopefully remove any suggestion of bias or conflict of  
25 interest.

1 Q. Are you able to tell us whether or not there was a sense in  
2 Cabinet that by the use of the method of a Judicial Inquiry  
3 that Cabinet was concerned that whatever money be eventually  
4 awarded Donald Marshall that that be a fair amount in all of  
5 the circumstances. Was that discussed in Cabinet at the  
6 time?

7 A. I can't recall it being discussed in precisely those terms.  
8 I think the feeling in Cabinet was with the appointment of  
9 Judge Campbell that we had confidence in him that he would  
10 make an appropriate recommendation. We did not discuss  
11 numbers or what would be a fair figure for compensation.  
12 Our concern was to -- was with the appropriate process and  
13 also with the appointment of an appropriate individual to  
14 carry it out.

15 Q. Are you able to tell us whether or not by the use of what  
16 you call "the appropriate process" that one of the things  
17 that Cabinet was attempting to ensure would occur would be  
18 that there would be an element of fairness involved by the  
19 use of that process?

20 A. Yes, we were concerned both that it be fair and that it  
21 appear to be fair.

22 Q. After the Campbell Commission was set-up, Mr. Giffin, and  
23 then fairly shortly thereafter, it became a process of  
24 negotiations, as you know, between --

25 A. Yes.

1 Q. -- Mr. Cacchione and Mr. Endres and then eventually a figure  
2 of two hundred and seventy thousand dollars was agreed upon.  
3 During that process of negotiations, were the negotiations  
4 and the backing and forthing of the negotiations brought to  
5 the attention of Cabinet?

6 A. Only to the extent that I advised Cabinet when the  
7 negotiating process began; that is, when that first arose  
8 during the preparations for the Campbell Inquiry. And my  
9 purpose in advising Cabinet of that was not to seek a number  
10 from Cabinet but to determine whether or not Cabinet wanted  
11 our lawyers to pursue the negotiation, and the direction  
12 that I received from Cabinet was to have our lawyers enter  
13 into the negotiations with Mr. Cacchione and to see what  
14 happened.

15 Q. Was there any discussion of numbers at that time in Cabinet?

16 A. No.

17 Q. No. Was there any discussion at that time that by approving  
18 the negotiation process as opposed to the Judicial Inquiry  
19 process, that the nature of what was going on was changing?

20 A. Yes, I -- The Cabinet was certainly aware that that was a  
21 new element. It came as a surprise to us. We were not  
22 expecting an approach for a negotiated settlement. We had  
23 assumed once we set up the Campbell Inquiry that the matter  
24 would be dealt with through the Campbell Inquiry and, of  
25 course, we had made the interim payment that Judge Campbell

1 had recommended. So it came as a surprise to us that Mr.  
2 Cacchione wanted to negotiated. However, the attitude of  
3 Cabinet was that if that would bring about an expeditious  
4 resolution of the question of compensation that they were  
5 prepared to do that.

6 Q. Was Cabinet made aware that, as we've heard on a number of  
7 occasions, that the negotiation process seemed to have  
8 become from -- certainly from Mr. Endres' point of view and  
9 Mr. Coles' point of view, a question of arriving at the  
10 lowest possible figure? Was Cabinet aware that that was  
11 going on?

12 A. Well, they were just aware that there was a negotiation  
13 going on but they did not inquire into the details. Really,  
14 they left it in the hands of the Attorney General's  
15 Department to conduct the negotiation and to see what came  
16 out of that. The only caveat that Cabinet placed on the  
17 matter was that any negotiated settlement would have to have  
18 the approval of Judge Campbell.

19 Q. I'll come to that in a second. Is it the case then that  
20 during the negotiation process, there was no discussion of  
21 what was going on in Cabinet about that process?

22 A. That's right. Once Cabinet authorized me as the Minister  
23 responsible to carry out the negotiations, then Cabinet did  
24 not become involved in the actual process of the  
25 negotiations. It was left to me to or left to the



1 Department to carry on the negotiation and whatever the end  
2 result of that process was, obviously it would have to go  
3 back to Cabinet for approval because it would involve an  
4 expenditure of government monies which would have to be  
5 approved by Cabinet.

6 Q. Okay. And Cabinet were not advised as it transpired during  
7 the process of how it was going, the dollars and cents and  
8 who was --

9 A. No, no.

10 Q. Okay. There was an interim payment made fairly early on  
11 before the process got put off into the negotiations?

12 A. Yes.

13 Q. A twenty-five thousand dollar payment. Did Cabinet have any  
14 involvement in that figure of twenty-five thousand dollars?

15 A. Well when we received the recommendation from Judge Campbell  
16 to pay the twenty-five thousand dollars, I immediately had a  
17 report and recommendation done up which I took to Cabinet  
18 and which Cabinet approved with very little discussion. I  
19 recommended to Cabinet that we pay the money as quickly as  
20 possible and Cabinet agreed.

21 Q. If I could just ask you -- You've got in front of you  
22 Exhibit 137, if I could ask you to turn to page ten of  
23 that.

24 A. Yes.

25 Q. In the fourth line of the first -- second paragraph, the

1 words, "to pay the sum of twenty-five thousand dollars", are  
2 crossed out and there's a handwritten change, "make an ex  
3 gratia payment in the amount of twenty-five thousand  
4 dollars". Was that change discussed in Cabinet and can you  
5 give us any sense as to why that way of describing the  
6 payment was altered?

7 A. My recollection of that was that it was re-worded. I must  
8 say that's not my handwriting and I'm not sure whose  
9 handwriting it is, but it was re-worded to clarify the point  
10 that the Government of Nova Scotia was not admitting any  
11 legal liability to Mr. Marshall, that it was a more accurate  
12 description; that is, that it was a ex gratia payment.

13 Q. Was the fact that the Government of Nova Scotia was not  
14 accepting any legal liability for Donald Marshall, was that  
15 discussed in Cabinet?

16 A. Well, I'm sure that I advised Cabinet at some point in the  
17 discussions. Now I can't give you an exact time on this,  
18 but I'm sure that I advised Cabinet that based on the  
19 information we had at that time that there was no legal  
20 liability on the part of the Government of Nova Scotia to  
21 Mr. Marshall, and that any compensation paid by the  
22 Government of Nova Scotia to Mr. Marshall would be an ex  
23 gratia payment rather than a payment under a legal  
24 obligation.

25 Q. And that's the reason for the change on page ten?

1 A. That's correct.

2 Q. You indicated to me a couple of minutes ago that it was  
3 important or it was indicated that the two hundred and  
4 seventy thousand dollar figure had to be -- (I think the  
5 word you used was caveat.) it had to be approved to Judge  
6 Campbell?

7 A. Yes.

8 Q. Can you indicate to us was that a direction from Cabinet?  
9 Would that be the case?

10 A. Yes. And that was my own view as well.

11 Q. Can you indicate to us, if you can, what the sense of  
12 Cabinet was as to what approval by Mr. Justice Campbell  
13 meant? What was it that Cabinet thought he was supposed to  
14 do?

15 A. I don't recall if we got into any discussion on that  
16 specific point in Cabinet. The view of the Cabinet as I  
17 recall it was simply that Judge Campbell had been appointed  
18 as the Commissioner to conduct the Inquiry and that any  
19 final resolution of the compensation issue ought to have his  
20 approval but Cabinet did not set out or discuss any  
21 specific procedure by which that approval would have to be  
22 obtained. That was simply the general direction that I had.

23 Q. And did you take it from that direction that you had from  
24 Cabinet by the use of the word "approval" that Judge  
25 Campbell was expected at least to turn his mind to whether

1 or not that figure of two hundred and seventy thousand  
2 dollars was a reasonable figure or not?

3 A. Yes. That was certainly my own thought but we didn't -- by  
4 the same token we did not presume or I did not presume to  
5 offer direction to Judge Campbell. We felt that that would  
6 be up to him as to how he dealt with that point but I have  
7 no doubt whatsoever that if for any reason Judge Campbell  
8 had not approved the settlement, then Cabinet would not have  
9 approved it and indeed I would not have recommended it to  
10 Cabinet.

11 Q. Just to step back for a second, though, my question is more  
12 directed towards the sense that Cabinet had that Campbell  
13 was going to turn his mind to the merits of this two hundred  
14 and seventy thousand dollars. Was that your understanding  
15 of what the direction was and why the approval was required?

16 A. I'm not sure that I could put it in exactly those terms. I  
17 think it was just the consensus in Cabinet that any  
18 settlement would have to have his approval, but I don't  
19 recall any Ministers or Cabinet generally getting into the  
20 question of how Judge Campbell ought to examine the matter  
21 or what information he ought to have in order to determine  
22 whether or not the settlement was acceptable to him. That  
23 -- Cabinet did not get into that discussion.

24 Q. Is it fair to take away from your comments, though, that by  
25 reason of their -- of Cabinet requiring some kind of

1 approval, that it was expected that something would be done  
2 by Judge Campbell?

3 A. Yes.

4 Q. If you could turn to page 13 of Exhibit 137, Mr. Justice--  
5 13 and 14, Justice Campbell's report. This occurs in an  
6 Exhibit that contains what we are told are Cabinet  
7 documents. Are you able to tell us then whether or not this  
8 report from Mr. Justice Campbell would have gone before  
9 Cabinet?

10 A. Yes, it would have accompanied the report and recommendation  
11 that I signed which recommended Cabinet's approval of the  
12 settlement.

13 Q. Was there discussion in Cabinet about Mr. Justice Campbell's  
14 report?

15 A. I don't believe. My recollection of that is simply that the  
16 Cabinet -- once they were satisfied that Judge Campbell had  
17 approved and recommended the settlement, they did not  
18 discuss his report. They just wanted to know that he had  
19 done that.

20 Q. Did you know at the time and was Cabinet advised that -- as  
21 we've heard that the substance of Mr. Justice Campbell's  
22 report was, in fact, written by Gordon Coles?

23 A. I don't recall advising Cabinet of that. Simply the report  
24 just accompanied the report and recommendation to Cabinet,  
25 and really, all Cabinet was interested in was whether or not

1 Judge Campbell approved the settlement.

2 Q. Did you know at the time that it had been drafted in a large  
3 part by Mr. Coles?

4 A. I was certainly aware that Gordon Coles had been involved in  
5 drafting it, yes.

6 Q. But that particular information, if I understand you  
7 correctly, wasn't brought to the attention of Cabinet?

8 A. No, I don't believe it was.

9 Q. Are you able to tell us what if any other discussion there  
10 was at the time that the actual -- that the two hundred and  
11 seventy thousand figure was approved; that is, the time that  
12 you had in front of you Mr. Justice Campbell's report, and  
13 also the report and recommendation finalizing the matter for  
14 two hundred and seventy thousand dollars?

15 A. I don't recall that there was very much discussion at all.  
16 The view of Cabinet was that or their understanding of it,  
17 if I can presume to convey somebody else's understanding,  
18 was that the settlement had been reached. It had been  
19 approved by Judge Campbell and Cabinet approved it. I don't  
20 recall that there was any discussion of the matter at all.  
21 They were satisfied that it had been resolved.

22 Q. During the discussions of the payment of the two hundred and  
23 seventy thousand dollars, and about this time, was there any  
24 discussion of the fact that Donald Marshall, Jr., was a  
25 Native person?

1 Q. Not at that time. Not at the finalization of settlement.  
2 My recollection is that at some point, and I couldn't put a  
3 date on this, but at some point there was discussion in  
4 Cabinet about the -- about whether or not the Government of  
5 Canada had any responsibility with respect to Mr. Marshall  
6 because of the fact that Mr. Marshall is a Native Indian but  
7 I can't recall exactly when that discussion occurred. I do  
8 recall that I advised Cabinet that, based on the information  
9 I had at that time at least, the Government of Canada had  
10 not indicated any willingness to participate in any  
11 compensation for Mr. Marshall.

12 Q. At some later date, (I believe it was in May or so of 1985.)  
13 the Federal Government stepped in and paid a hundred and  
14 thirty-five thousand dollars of that two hundred and seventy  
15 thousand dollar settlement. Was that fact discussed in  
16 Cabinet when the Federal Government actually did that?

17 A. Only to the extent that I advised Cabinet when the Federal  
18 Government made that offer to the Provincial Government and  
19 we accepted it.

20 Q. Was that payment of the hundred and thirty-five thousand  
21 dollars generated by request from Cabinet to the Federal  
22 Government that that be done?

23 A. No, I don't recall ever directing a request to the  
24 Government of Canada to assist in the compensation of Mr.  
25 Marshall. My recollection is that after the change of

1 Government in the -- in September of 1984, that Mr. Crosby,  
2 who was then the Minister of Justice, at some point advised  
3 me that they were considering assisting us or making a fifty  
4 percent reimbursement to us of the cost of the compensation  
5 but my recollection of that is that that initiative came  
6 from Mr. Crosby.

7 Q. Subsequent to the approval of the payment of two hundred and  
8 seventy thousand dollars and up until the time that this  
9 Commission was set up, was there any further discussion of  
10 any matters related to Donald Marshall in Cabinet?

11 A. The only discussions that I can recall were the ones that  
12 related to the setting up of this Commission of Inquiry and  
13 the time in which those discussions took place would have  
14 been the -- somewhere in early fall of 1986.

15 Q. And apart from that particular issue, setting up of this  
16 Inquiry, you have no recollection of any discussions  
17 subsequent to the time compensation was agreed upon in the  
18 fall of '84?

19 A. No. No, I don't.

20 Q. Was there any discussion in Cabinet about the Reference  
21 decision in connection with Donald Marshall, the decision  
22 of the Appeal Court?

23 A. No.

24 Q. Was there any discussion as to whether or not -- arising out  
25 of that decision, whether or not charges ought to be laid



1       against any of the witnesses who gave perjured testimony or  
2       against Donald Marshall?

3   A.   No, those matters were never raised in Cabinet.    We  
4       discussed matters like that within the Department but those  
5       would not -- indeed, I think would have been totally  
6       inappropriate for me as Attorney General to have raised at  
7       any time in Cabinet the question of whether or not charges  
8       ought to be laid against anybody.  That's -- that's a matter  
9       which is entirely the prerogative of the Attorney General.

10   Q.   And I take it then that you specifically did not do that  
11       with respect to any of the actors involved in the Marshall  
12       case?

13   A.   That's correct.

14   Q.   Was there any discussion during the time that you've been a  
15       member of Cabinet in Cabinet of either the Thornhill or  
16       MacLean cases?

17   A.   No.

18   Q.   If I could just ask you to turn to page one and two of that  
19       Document 137, and in particular, page two and you'll see  
20       the last paragraph of the Report and Recommendations crossed  
21       off -- crossed out; one which I guess could be described as  
22       an Omnibus Clause in general power.  Can you give us any  
23       indication as to why that last paragraph is crossed out and  
24       whether there was discussion of that in Cabinet?

25   A.   That was because of the intent of Cabinet and my recommenda-

1       tion to Cabinet that we restrict the Inquiry to the issue  
2       of compensation, that we try as much as we could to limit  
3       it to that issue because of the Ebsary case.

4   Q.   Was there any discussion in Cabinet, when you talk about  
5       restricting of the mandate of the Campbell Commission, as to  
6       whether or not the Campbell Commission should have the  
7       authority to look at issues that may give rise to  
8       compensation that occurred to Donald Marshall before he was  
9       convicted; that is, the prosecution process, the police  
10      investigation, that sort of thing.

11   A.   We didn't look at it in those terms. Our understanding of  
12      it when we -- when Cabinet approved the establishment of the  
13      Commission of Inquiry was essentially to deal with the  
14      question of compensation, if you will, as -- If we were to  
15      put it in civil terms, that there was no questionable  
16      liability here, that what we were looking at was "bottom",  
17      if you will, of the amount that would be appropriate as  
18      compensation.

19   Q.   But was there any discussion in Cabinet as to whether or not  
20      there was a time period from which you started to look at  
21      that issue?

22   A.   No, I don't recall any particular discussion in Cabinet on  
23      that point. Cabinet took it as given that compensation was  
24      going to be paid and they were simply concerned about how  
25      the amount would be arrived at.

1 Q. Are you able to tell us, Mr. Giffin, whether or not there  
2 was any reluctance on the part of Cabinet to pay Donald  
3 Marshall anything?

4 A. No.

5 Q. There was not any reluctance?

6 A. No.

7 MR. SPICER:

8 Thank you.

9 BY MR. RUBY:

10 Q. The payments were specifically styled as ex gratia payments?

11 A. Yes.

12 Q. And that was intended to communicate the view of Cabinet, I  
13 take it, that there was no legal obligation to Donald  
14 Marshall?

15 A. That's correct.

16 Q. And that was the view of Cabinet from the beginning?

17 A. Yes. Yes, I think it was.

18 Q. Through the entire process?

19 A. Yes.

20 Q. To the end?

21 A. Yes.

22 MR. RUBY:

23 Thank you.

24 REMAINING COUNSEL OFFER NO QUESTIONS

25

1 BY MR. CHAIRMAN:

2 Q. Just one or two questions, Mr. Giffin, simply for the  
3 record. I take it that Cabinet in Nova Scotia operates on a  
4 consensus basis?

5 A. Yes, My Lord.

6 Q. There's no such thing as somebody moving and somebody else  
7 seconding that --

8 A. No.

9 Q. -- such and such a thing be done, and then the motion put  
10 and carried?

11 A. No. Every decision of the Cabinet is simply -- it is a  
12 consensus decision that is supported by every Minister.

13 Q. Which culminates in a Minute of Council?

14 A. Yes.

15 Q. Or an Order In Council, or whatever?

16 A. Yes, My Lord.

17 Q. I assume as well that there had been nothing provided in the  
18 estimates of your Department or any other department prior  
19 to negotiations being commenced with respect to compensation  
20 to cover compensation to Donald Marshall?

21 A. No, I don't believe there was every any budgetary -- any  
22 thing budgeted. I -- this would have been an additional  
23 appropriation.

24 Q. So is it fair to -- for us to assume that in order for any  
25 payment to be made, it not having been budgeted there would

