

1 MR. TERENCE R. DONAHOE, being called and duly sworn, testified as
2 follows:

3 BY MR. SPICER:

4 Q. Mr. Donahoe, you're currently Attorney General?

5 A. Yes, that's correct.

6 Q. And for how long, sir, have you been a member of Cabinet?

7 A. Since the fall of 1978.

8 Q. Can you tell us from your recollection the first time that
9 the Marshall matter was discussed in Cabinet?

10 A. I think -- I think the first time it was discussed was when
11 my predecessor, Mr. Giffin, brought the matter to the
12 Cabinet generally as it related to the compensation
13 question.

14 Q. And this would have been just some time after Mr. How had
15 left and Mr. Giffin took over. Is that correct?

16 A. Yes.

17 Q. So November or so of 1983?

18 A. Yes.

19 Q. Can you tell us what the nature of that discussion was in
20 Cabinet?

21 A. It was essentially a report from our colleague, the then
22 current Attorney General, Mr. Giffin, that the matter of
23 compensation was before him or on his plate in the
24 Department of the Attorney General when he went there.
25 There had been some communications back and forth as

1 between counsel for Donald Marshall and counsel for the
2 Attorney General's Department. That compensation was a
3 relevant factor and an important issue and that there should
4 be some steps taken to determine and pursue a -- an
5 equitable and appropriate course of action to address the
6 question of compensation, and ultimately effect a
7 compensation payment.

8 Q. Can you give us the sense of what was thought of? You used
9 the word "equitable". What was Cabinet getting at? What
10 was it that you were intending to effect by setting up a
11 process for compensation that would be equitable?

12 A. Well, there was a very genuine sentiment around the table
13 that we were -- we were dealing here with a man who had been
14 proven to be wrongly convicted, having spent considerable
15 time in gaol, having later been established by appropriate
16 judicial process to have been wrongfully convicted and
17 therefore wrongfully having spent that time, that he was in
18 difficult circumstances. Representations were made--
19 being made on his behalf that some financial recompense or
20 compensation be made available, the recognition that
21 unfortunately nobody, but nobody in the world could return
22 him five minutes of that eleven years. And by equitable we
23 simply meant, at least my assessment of the word
24 "equitable", was simply to attempt to come to a conclusion
25 that a particular finite amount of money was a reasonable,

1 fair, or equitable financial response to compensate for a
2 very serious loss having been suffered by Mr. Marshall.

3 Q. Was there any discussion at that point in time around the
4 Cabinet table that Marshall was in fact partly to blame for
5 the fact that he got himself in gaol in the first place?

6 A. I recall at no point any discussion or any comment to the
7 effect that Mr. Marshall's conduct was in any way shape or
8 form a factor pro or con in what should happen in terms of
9 compensation matters.

10 Q. Were you satisfied that the setting up of the Commission
11 with Mr. Justice Campbell as the Commissioner was an
12 appropriate methodology to get the equitable result that you
13 indicate Cabinet was looking for?

14 A. Yes, I did. I supported that proposition. I had some
15 knowledge of Chief Justice Campbell's background and
16 capacity and felt that he would be an able, fair-minded kind
17 of a person, learned in the law, having very extensive legal
18 and judicial background, that he would be in a position to
19 take into account all of those considerations which he, as a
20 thoughtful man, would consider to be the most relevant for
21 him to make to make an honest and complete recommendation
22 to the Nova Scotia Government as to what compensation amount
23 might be appropriate.

24 Q. If I can skip ahead, then, for a moment since you have now
25 described what you thought Mr. Justice Campbell's--

1 characteristics he had that were appropriate. You've heard
2 Mr. Giffin indicate that there was a direction from Cabinet
3 that the two hundred and seventy thousand dollar figure had
4 to be approved by Mr. Justice Campbell?

5 A. Yes.

6 Q. Are you able to give us any sense as to whether or not there
7 was a feeling in Cabinet that Mr. Justice Campbell was
8 expected to turn his mind to those very things that you just
9 talked about, the equitableness, and the equity of the
10 figure, and the reasonableness of it?

11 A. I think, speaking for myself, yes. Yes, I was of the view
12 that -- Let us not forget, as I know everybody in this room
13 knows the background, the Cabinet made the determine -- the
14 determination that Chief Justice Campbell would assist us in
15 the way that's been described. Prior to him writing a
16 report or indeed perhaps even having a very full analysis of
17 the issues at hand, there was a negotiation going on. And
18 Mr. Cacchione, (Now His Honour, Judge Cacchione.) on behalf
19 of Donald Marshall and Mr. Endres on behalf of the
20 Department of the Attorney General, had considerable contact
21 and they, representing the two sides of the issue, came to
22 the point where they negotiated a settlement which they were
23 both prepared to recommend to their principals; Mr.
24 Cacchione to Mr. Marshall, and Mr. Endres to his employer,
25 the Attorney General and the Attorney General then having

1 the responsibility to raise that matter with his Premier
2 and the Cabinet colleagues which he did. It was clearly
3 understood, however, we as a Cabinet having earlier agreed
4 that it would be appropriate and reasonable to ask Chief
5 Justice Campbell to, for lack of a better term, "pass
6 judgement" on any such settlement or any settlement at all,
7 whether it came out of a negotiated process or not, that it
8 would be important for us to refer that to him. We did
9 that, and speaking only for myself, I understood, and still
10 understand, that the point of the reference of that
11 negotiated amount for scrutiny by Chief Justice Campbell
12 was to enable him, having the kind of background and
13 experience and capacities which we've talked about -- for
14 him to be in a position to offer a reasoned opinion as to
15 whether or not, in his view, that represented a fair or an
16 equitable settlement amount.

17 Q. Was Cabinet advised that Mr. Campbell, in fact, or Mr.
18 Justice Campbell had, in fact, done that; that is, given a
19 reasoned look at the figure and decided that it was
20 appropriate?

21 A. I can say without hesitation that Cabinet was certainly
22 advised that Mr. Justice Campbell reviewed the matter and
23 approved. I -- I must confess I don't know whether I can
24 recall conversations that bore on the question of the extent
25 to which Chief Justice Campbell reviewed whatever it was he

1 reviewed, and with whom he might have reviewed them.

2 Q. If I could just ask you to turn to Page 13 of the Exhibit
3 you have in front of you. It's a report (13 and 14) from
4 Mr. Justice Campbell. The evidence that we've had before us
5 is that in large part that report was drafted by the then
6 Deputy Attorney General, Mr. Coles. Can you tell us whether
7 or not Cabinet was advised of that fact?

8 A. I was not. I participated in these discussions. I may have
9 missed some by being away from particular Cabinet meetings
10 but it is only in recent times that I have come to learn
11 that Mr. Gordon Coles had a hand in the drafting of this
12 document.

13 Q. And that, sir, was as a result of further -- the preparation
14 for these hearings?

15 A. Yes.

16 Q. Was there any discussion when you were present in Cabinet
17 about the 1983 decision of the Court of Appeal, the
18 Reference decision concerning Mr. Marshall?

19 A. No, I recall none.

20 Q. Mr. Giffin indicated to us that there was some discussion in
21 the context of Federal/Provincial responsibilities of the
22 fact that Mr. Marshall was Native. Do you recollect those
23 discussions?

24 A. Yes. Those -- the -- That reference had to do with the--
25 with the compensation question and it was raised in the

1 context of whether or not, now, faced with the proposition
2 that there be a monetary settlement, is it possible or
3 appropriate for the Nova Scotia Government to engage in any
4 dialogue with the Government of Canada, which has a
5 constitutional jurisdiction and responsibility in relation
6 to Native Canadians, to determine whether or not there was
7 any potential of participation on a financial basis by the
8 Government of Canada. And that was the only context in
9 which, in my recollection at least, the reality that Donald
10 Marshall, as a Native Nova Scotian, had any bearing
11 whatsoever.

12 Q. Was there any reluctance at all around the Cabinet table to
13 pay Mr. Marshall the two hundred and seventy thousand
14 dollar figure?

15 A. None. Absolutely none.

16 Q. Was Cabinet made aware that the process by which that figure
17 was arrived at, at least from the Government side, which has
18 been characterized by various witnesses as "trying to get
19 the best deal we could and get out as -- for as little money
20 as we could"?

21 A. I don't really recall any of that kind of talk. I truly
22 don't. I -- my recollection is that on the report of my
23 colleague, the Attorney General, I was aware that a -- that
24 a senior solicitor in the Department of the Attorney
25 General, a man of considerable ability and stature, was

1 representing the Government side of those negotiations. I
2 was equally aware that Mr. Cacchione (Now, Judge Cacchione.)
3 regarded universally to be a vigorous and able Counsel, was
4 representing Mr. Donald Marshall. And quite honestly, it is
5 only again, in relatively recent times that, from a personal
6 point of view, this notion that somehow hard lines should be
7 taken during the course of the negotiation were alleged has
8 really come to my attention. It was not -- it was not -- I
9 am sure, it was not the subject of discussion around the
10 Cabinet table to my recollection.

11 Q. And not a direction from Cabinet?

12 A. And not a direction from Cabinet.

13 Q. Was Cabinet advised -- I notice that in Mr. Justice
14 Campbell's report there is reference to the fact that the
15 legal costs were to be paid out of the two hundred and
16 seventy thousand dollars. Are you able to tell us whether
17 or not Cabinet was specifically advised that Mr. Marshall's
18 legal fees were going to come out of that two hundred and
19 seventy?

20 A. I'm sorry, Mr. Spicer, can you put that to me again?

21 Q. Sure. On the second page of Mr. Justice Campbell's report,
22 in -- you'll see the figure of two hundred and seventy
23 thousand dollars about ten lines in.

24 A. I do.

25 Q. Before that there is reached agreement, ex gratia payments

1 including legal costs. That's clear from the document that
2 the legal cost would be paid out of the two hundred and
3 seventy thousand dollars and all I'm wondering is whether or
4 not, in addition to the fact that it's contained in the
5 report, whether Cabinet was advised that that was the fact?
6 In other words in the two hundred and seventy thousand
7 dollars, there will be a figure of about a hundred thousand
8 dollars paid in legal fees.

9 A. Oh, I think the -- my recollection is that the Cabinet was
10 advised as to the substance of this document. I can't -- I
11 can't swear that I was present at a Cabinet meeting when
12 those words were written, but it occurs to me that that is a
13 distinct possibility by way of report to Cabinet as to what
14 the "nuts and bolts" of the settlement actually were.

15 Q. And, all I'm asking really is whether or not there was some
16 oral discussion of that, quite apart from the fact that this
17 document was obviously tabled in Cabinet?

18 A. I truly don't remember any oral discussion of any
19 consequence relative to that -- to that matter.

20 Q. Mr. Giffin has indicated to us that there was no discussion
21 in Cabinet concerning prosecution of any other persons
22 involved in the Marshall matter. What's your recollection
23 of it?

24 A. My recollection is the same.

25 Q. There was no such discussion. Has there ever been any

1 discussion during the time that you've been in Cabinet of
2 either the Thornhill or MacLean cases in Cabinet?

3 A. No. On no occasion.

4 MR. SPICER:

5 Thank you.

6 REMAINING COUNSEL OFFER NO QUESTIONS

7 BY MR. CHAIRMAN :

8 Q. (inaudible - microphone was not transmitting.) ...in the
9 Campbell report and also in the submission to Cabinet or
10 the -- not the submission, the terms of reference of ex
11 gratia payment, apart from the question of being presumably
12 without prejudice, does that have any connotation from the
13 point of view of treasury boards or -- I've forgotten the
14 designation of treasury boards of Nova Scotia. It's --

15 A. Management Board.

16 Q. Yes.

17 A. If -- help me with the reference to the actual document, My
18 Lord.

19 Q. If you'll look at Exhibit 137 on page two.

20 A. Page two.

21 Q. No, not page two. Page -- no, the Campbell report, page
22 14, when he says that -- the first paragraph at the top of
23 the page, about seven lines down, and the Attorney General
24 in the matter of ex gratia payments of compensation, and
25 also, you'll find it on page ten in the Minute of Counsel

1 where that is written in. I -- make an ex gratia payment of
2 twenty five thousand dollars. I have a recollection that
3 treasury board officials are always concerned about -- in
4 some Governments anyway, about the -- apart from the
5 question of legal liability, that payments that are outside
6 the budgetary process not be regarded as a precedent for any
7 future --

8 A. And carry with them no legal liability.

9 Q. Apart from legal liability. If in ten years time someone
10 came to the Government and said, "Well, we know you made a
11 payment to Mr. So and So. We want the same.", that treasury
12 board officials sometimes would be inclined to take shelter
13 behind the phrase "ex gratia" by saying that that was not--
14 that was made without admitting liability and is not to be
15 regarded as a precedent for any other cases. Is that a
16 practice that would prevail in your view, with the board of
17 management officials in Nova Scotia?

18 A. Well I think we were -- If I have my timing correct, My
19 Lord, it's a reference to what is referred as an ex gratia
20 payment in the amount of the twenty-five thousand dollars.
21 The payment was made pursuant to the interim recommendation
22 of the commissioner appointed under the Public Inquiries
23 Act, by Order in Counsel, '84 to '95, dated the 13th of
24 March, '84, to inquire into the ex gratia payments to be
25 paid to Donald Marshall as a result of his incarceration in

1 gaol and so on. And I think I simply read it as an
2 indication that it is indicative of the fact that there was
3 a willingness and a sentiment that there be some
4 compensation payment. There was a suggestion to us that
5 there be, for various reasons, an interim up-front payment
6 to enable certain things requiring resources by Mr. Marshall
7 to be able to be attended to Mr. Marshall. It was not
8 representative of the full report and my view of that was
9 it was simply an acknowledgement and a commitment on the
10 part of the Cabinet of the day, that it was not unreasonable
11 nor unfair, and therefore appropriate to approve that this
12 payment be made at that time in that fashion, subject to
13 the caveat that it be -- that there be "open season" on that
14 twenty-five thousand dollar amount in the event a subsequent
15 report came down in any number of ways so that the twenty-
16 five dollar -- thousand dollar ex gratia payment was not to
17 be considered locking anybody into a legal commitment.

18 Q. You're simply -- you're concurring with the evidence of your
19 colleague, Mr. Giffin, that this was in effect a without
20 prejudice payment?

21 A. Essentially, yes.

22 MR. CHAIRMAN:

23 Thank you very much.

24 BY COMMISSIONER EVANS:

25 Q. Mr. Donahoe, the report and the Inquiry was set up and it

1 was -- Sorry. The Inquiry was set up to make an ex gratia
2 of payment. You're looking at page one of the document
3 before you?

4 A. Yes.

5 Q. To inquire into and report his
6 findings...respecting ex gratia
7 payments of compensation, including
8 legal costs to Donald Marshall...

9 So you started off with the idea that it was going to be an
10 ex gratia payment anyway?

11 A. Yes.

12 Q. So the twenty-five thousand dollars was just a interim
13 payment on that ex gratia payment?

14 A. Exactly, yes.

15 COMMISSIONER EVANS:

16 Thank you.

17 MR. CHAIRMAN:

18 Thank you, Mr. Donahoe.

19 (WITNESS WITHDREW)

20 MR. SPICER:

21 That's all.
22
23
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25

1 MR. CHAIRMAN:

2 No further evidence.

3 Maybe we should take a short break so that counsel can get
4 ready to start their summations.

5 Before we rise, let me say that we've had the opportunity to
6 read the memorandum of October 20th, 1987, a copy of which was
7 sent to all counsel, written by the Commission Executive
8 Secretary indicating an estimate of the time counsel have
9 suggested will be necessary to highlight and emphasize matters
10 that are in the brief; and with that rider and nebulous
11 qualification that we, too, can read and understand, hopefully,
12 what's written therein, that we do hope counsel will not see fit
13 to read with precise delivery what has already been written.
14 That having been said, we will try assiduously in the interest of
15 all concerned, including the taxpayer of Nova Scotia, to maintain
16 that schedule and I'm sure all counsel will assiduously work to
17 accomplish that desirable end.

18 Having said that, we will take a short break.

19 INQUIRY RECESSED AT 10:59 a.m., AND RECONVENED AT 11:17 a.m.

20 MR. CHAIRMAN:

21 Mr. MacDonald.
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