

1 MR. CHAIRMAN:

2 Mr. Bissell.

3 MR. BISSELL:

4 Thank you, My Lord.

5 If it pleases My Lordships, I propose to deal with some of
6 the more important points which we have raised in our brief that
7 we have filed with the Commission. You will have noted that the
8 brief is really in two volumes. The first volume deals with our
9 position on the various issues, and the second volume that we
10 have filed is a volume of the authorities that we referred to in
11 the main body of our brief in volume one.

12 What I propose to do, My Lords, is to deal in oral argument
13 with the 1971 review by the Sub-Inspector Allan Marshall, which
14 is part two of the R.C.M.P. brief, and then to deal with the
15 examination of the justice system in Nova Scotia, part 6, (A and
16 B) the general remarks portion and the Roland Thornhill case.
17 My co-colleague or co-counsel, rather, Mr. Pringle, will speak to
18 the 1982 re-investigation, make a few brief remarks about the
19 Correctional Service/National Parole Board and deal with the
20 Billy Joe MacLean case.

21 Before I start, however, on 1971, I feel compelled to raise
22 one caveat with respect to some of the recommendations that my
23 learned friend for the Attorney General made in terms of his
24 recommendations. And I would have some concern that certain of
25 the recommendations -- not all, but certain of them may be

1 | recommendations that go into the area of Parliament's
2 | responsibility in the area of criminal law and procedure and
3 | that one cannot pick and chose where to cross that line, that
4 | cannot say in one breath, you can't make recommendations with
5 | respect to potential charges because it crosses the line but then
6 | invite you to cross -- perhaps to cross the line in another area.
7 | But I leave that to Your Lordship's wisdom and I don't propose to
8 | dwell on it any longer other than to raise it as a caveat.

9 | MR. CHAIRMAN:

10 | I presume that one way to avoid any constitutional niceties would
11 | be if any areas fell clearly within the jurisdiction of the
12 | Parliament of Canada to recommend to the Attorney General of Nova
13 | Scotia that he make recommendation of the Attorney General of
14 | Canada and his Provincial colleagues.

15 | MR. BISSELL:

16 | That is -- That's one possibility, yes. Yeh. Turning then to
17 | 1971, and that, as I say, is dealt with at page -- beginning at
18 | page 10, part 2 of our brief. I don't wish to nit-pick with my
19 | colleagues, commission counsel, because I feel they are to be
20 | commended for their thorough job; but I feel I must respectfully
21 | disagree with their conclusion, at page 86 of their brief, that
22 | the investigation was -- by Allan Marshall was carried out
23 | incompetently because of exclusive reliance on John MacIntyre and
24 | the polygraph. Please do not misunderstand me. I don't suggest
25 | for one moment that what Al Marshall did was faultless or

1 | executed perfectly. There certainly were inadequacies in what he
2 | did, but I submit that to use the word "incompetent" is an
3 | overstatement of -- in analyzing Al Marshall's performance in
4 | 1971.

5 | At page 9 of the commission counsel's brief, they say the
6 | R.C.M.P. were required to carry out a re-investigation but to
7 | understand what Inspector Marshall did requires a determination
8 | of his mandate. I feel I must respectfully but emphatically
9 | disagree with my friend, Mr. Pink's description of our position
10 | in this regard as being "bureaucratic nicety" because what Al
11 | Marshall was asked to do determines his initial approach. His
12 | mandate, I suggest, determined what his starting point was and
13 | what his finishing point should be, unless somewhere between the
14 | starting point and the finishing point he detected something that
15 | required him to look further.

16 | Now regardless of what he was requested to do, a
17 | professional police force has an obligation and is expected to
18 | carry out an investigation if it feels an investigation into a
19 | criminal act is warranted or justified, so I don't suggest that.
20 | But what I suggest when looking at what Al Marshall was asked to
21 | do, that one scrutinise his activities remembering what his
22 | starting point was, what he was asked to do. Now Marshall
23 | described his mandate when he testified before Your Lordships,
24 | and that appears in paragraph 19 at page 11 of our brief, and he
25 | said when he testified in volume 30 at page 5606:

1 ...I want you to go to Sydney...

2 This is what his interpretation was of what Superintendent
3 Wardrop, the C.I.B. officer, told him to do.

4 ...I want you to go to Sydney, go
5 down to Sydney, and determine if
6 there's any substance to this man's
7 allegations.

8 Now unfortunately his instructions were never given to him in
9 writing, either by his superior officer or from anyone in the
10 Attorney General's Office; but it's useful to look and see what
11 it was that the two people from the Attorney General's office
12 that were involved in this -- what it was that they said that Al
13 Marshall was asked to do. And there are two people who
14 testified, the two people that were involved.

15 The first person was Lou Matheson, the Assistant Crown
16 Prosecutor on the trial. He testified, and his evidence is in
17 volume 27, and reading it from pages 5019 to 5020 when he was
18 being examined by my friend, Mr. Orsborn and he said beginning
19 at around line 22 of page 5019 that:

20 When the police came back...

21 And he's referring there to the Sydney police.

22 ...they indicated that Mr. Ebsary
23 and MacNeil were both willing to
24 take a polygraph test. And I
25 thought, well, I was in enough of a
quandary. I knew that a polygraph
was not admissible evidence in
court; but I was in a bit of a
quandary and I thought, well, it
might be some sort of an
investigative aid along with other
evidence and I thought it would be

1 a good idea if he was done. And
2 since they were both willing in
3 addition to the other matters I
4 mentioned, the only polygraph
5 instrument operative in Nova Scotia
6 at that time to my knowledge was in
7 Halifax. And I phoned -- when I
8 phoned Mr. Anderson I mentioned
9 that to him too if he could get us
a polygraph instrument. (And) I
mentioned about whether
investigations should be done by
another department. I told him my
impressions of the witness and
everything that -- well I told him,
I think, everything that I told the
Court up until now.

10 So the primary request in Lou Matheson's mind was to have
11 somebody come and do a polygraph examination.

12 MR. CHAIRMAN:

13 Mr. Pringle, I have some trouble with the -- Mr. Bissell, rather,
14 paragraph 19, and it says:

15 ... (If you want) to go to Sydney,
16 go down to Sydney, and determine if
there's any substance to this man's
allegations.

17 That's a fairly broad mandate, isn't it?

18 MR. BISSELL:

19 Oh, yes. I -- Any substance to what Jimmy MacNeil was saying.
20 I think that the focal point was the polygraph, but I think that
21 Al Marshall was expected as well to check out Jimmy MacNeil's
22 story. I don't -- I don't -- I wouldn't quarrel with that, My
23 Lord. I would quarrel with the interpretation that he was to do
24 a reinvestigation of the murder. I guess that's what I would
25 quarrel with.

1 MR. CHAIRMAN:

2 Well, would you agree that in order to determine if there's any
3 substance to this man's allegations that interviewing some of the
4 witnesses at least --

5 MR. BISSELL:

6 Yes, I would agree that --

7 MR. CHAIRMAN:

8 -- including Donald Marshall, Jr. would be under --

9 MR. BISSELL:

10 I would agree with you, My Lord, that some of the witnesses ought
11 to have been interviewed, yes. I don't -- I wouldn't for a
12 moment suggest otherwise.

13 COMMISSIONER POITRAS:

14 I just have one question, Mr. Bissell, and that is that I don't
15 have the Marshall report in front of me but it seems to me that
16 in it towards the end somewhere he says that he had got done an
17 exhaustive or a full review of the situation.

18 MR. BISSELL:

19 He uses both the word "review" and "investigation" in the first
20 page of his --

21 COMMISSIONER POITRAS:

22 Did he?

23 MR. BISSELL:

24 Yes, he does.

25

1 COMMISSIONER POITRAS:

2 And I think in his testimony before us, he acknowledged that he
3 had not done that.

4 MR. BISSELL:

5 Oh, yes, he acknowledged that there were deficiencies. I don't
6 -- I don't quarrel for a moment and suggest -- What my problem
7 is, is the description -- is to go so far as to describe what he
8 did as having been done incompetently. There were inadequacies,
9 I agree, but to call it incompetent, I guess, I disagree.

10 MR. CHAIRMAN:

11 I recollect one question put to him by, I think, Mr. Spicer. I'm
12 paraphrasing it now, but I think I have the wording fairly
13 accurate. He turned to Al Marshall and said, "Who do you think
14 is responsible for Donald Marshall, Jr., spending 11 years in
15 gaol for a crime he didn't commit?". My recollection is he
16 said, "It falls on my shoulders. I live with it day and night."

17 MR. BISSELL:

18 Quite admirably, Al Marshall was quite prepared to assume
19 responsibility.

20 MR. CHAIRMAN:

21 And I don't quarrel with that. It is indeed an admirable
22 statement but how can we reconcile that with your position that
23 the description of the investigation as being incompetent?

24 MR. BISSELL:

25 Well, I would suggest that that was not a question that Mr.

1 Marshall was able to answer or ought to have answered. That is
2 really Your Lordships to determine how competently or
3 incompetently, or adequately or inadequately Al Marshall did
4 what he did. I would suggest that when he answered that
5 question, that he was under examination, on the witness stand,
6 prepared to take the full responsibility for what happened to
7 Donald Marshall, the tragic thing that happened to Donald
8 Marshall for which I would agree he was partly -- has to accept
9 part responsibility. But to expect, or to conclude that because
10 Al Marshall when he testified before Your Lordships while he was
11 on the witness stand, that because he felt that all the
12 responsibility rested on his shoulders, that that is not enough
13 for Your Lordships to conclude that he was right. That's your--

14 MR. CHAIRMAN:

15 I won't quarrel with that. That is for us to determine. But you
16 have been put in that position in answer to an allegation made
17 by other counsel.

18 MR. BISSELL:

19 Oh, yes, but I think other counsel are free to conclude what they
20 will from what he testified.

21 MR. CHAIRMAN:

22 Oh, sure. I agree.

23 COMMISSIONER EVANS:

24 You are not prepared to admit that despite what he said, that he
25 was fully responsible for what happened to Marshall?

1 MR. BISSELL:

2 That's correct, My Lord. I'm not prepared to go that far, while
3 at the same time I wish to make it very clear, we recognize as he
4 did, the inadequacies of some of what he did. But I ask Your
5 Lordships to bear in mind what he was asked to do by Lou
6 Matheson, as well what he was asked to do by Robert Anderson.
7 And Robert Anderson made it clear in his testimony and we've
8 quoted at length from his evidence, on page 12 and 13 of our
9 brief, that to his recollection what he asked the R.C.M.P. to do,
10 was to go do a polygraph, to check out the possibility of his
11 (James MacNeil) telling the truth or not telling the truth.

12 Now again as I say, that will not excuse a professional
13 police force if somewhere along the way and looking in -- and
14 looking into what Jimmy MacNeil was saying that they either ought
15 to have done more, or ought to have detected something and gone
16 further and carried on beyond what their original mandate was.
17 But I think that it does put in some context what Al Marshall did
18 and how he approached his task in Sydney in November and December
19 of 1971 because it falls short, I submit, of asking him to do a
20 complete murder re-investigation. Treat James MacNeil as a
21 complainant, as somebody whose brought something new forward.
22 The logical thing to do would be to among -- to interview James
23 MacNeil early on in your investigation of what James MacNeil
24 said, and if that person says -- takes back what he says and
25 says, "Oh, I was lying or I was only joking when I said Ebsary

1 stabbed Seale," then I think that puts a little bit of what Al
2 Marshall's conclusions were into their proper perspective. The
3 person's whose store he was sent to check out retracts his own
4 story.

5 And Corporal Eugene Smith noted that after -- while he was
6 polygraphing James MacNeil, and this is a quote from exhibit 16,
7 page 203 of Eugene Smith, the polygraph operator's report.

8 On a number of occasions James
9 MacNeil was quite ready to admit
10 that he was lying and that he was
only joking when he said that
Ebsary had stabbed Seale.

11 And so I respectfully suggest that that is significant. When
12 you're asked to check out James MacNeil's story and the very
13 person whose story you are to check out says, "Well, I was only
14 joking or lying.", then that is some explanation as to why more
15 was not done. It may not be and is not a complete answer to why
16 more was not done but I think it offers some explanation.

17 It's also important to bear in mind that nobody thought that
18 James MacNeil was particularly reliable. Lou Matheson testified
19 that -- to that effect. He also testified that he was concerned
20 that someone might have put MacNeil up to the story that he was
21 giving to the Sydney Police in November of '71. In fact, as late
22 as the third Ebsary trial, Crown Prosecutor Frank Edwards was
23 having difficulty with the reliable or credibility of James
24 MacNeil. He opted, as my friend, Mr. MacDonald pointed out, in
25 the third Ebsary trial to put Donald Marshall, Jr., on because he

1 thought Donald Marshall, Jr., was, at least in certain aspects of
2 what happened on that night in May of 1971, more believable or
3 credible than James MacNeil.

4 So under these circumstances, the mandate, James MacNeil's
5 own recanting of what he had told the Sydney Police Department, I
6 would submit that it was reasonable for Al Marshall to consider
7 the opinions of John MacIntyre. They had worked together in the
8 past. They knew each other. Marshall considered MacIntyre to be
9 a hard-working, dedicated policeman and he wasn't alone in those
10 thoughts, in that opinion of Mr. MacIntyre. He also thought that
11 John MacIntyre had given him all the relevant file material. He
12 testified in Volume 30, and I believe the page reference is 5615,
13 that when he got there John MacIntyre had a dossier of the file
14 ready for him and said:

15 ...these are the crucial pieces of
16 evidence adduced by witnesses
17 surrounding the eye witness
18 accounts of the murder.

19 So he thought he had everything. Al Marshall has been criticised
20 for over reliance on the polygraph. Ignoring for the moment our
21 view that the polygraph was the principal thing that he was asked
22 to do by the Attorney General's department, I would suggest to
23 Your Lordships that he did not rely solely on the polygraph.
24 I've already referred to MacNeil's own denial of this statement,
25 but he did do other things while he was there in Sydney. Again,
not enough, undoubtedly, but he certainly did do other things.
He examined the witness statements that I've referred to John

1 MacIntyre preparing for him which he thought to be all the
2 relevant statements. He reviewed some of the exhibits. He
3 visited the crime scene. He reviewed the transcripts of the
4 evidence given at the -- of the preliminary. He spoke with the
5 Prosecutor, Donnie MacNeil, and he spoke as well, of course,
6 with John MacIntyre.

7 In hindsight, regrettably, he did not interview Maynard
8 Chant and John Pratico, supposing they were ready then to admit
9 the perjured evidence that they had given a few days earlier.
10 But I would ask Your Lordships to recall that he believed that
11 the eye witnesses, whose statements and preliminary evidence he
12 had read, did not have an opportunity to concoct the story. He
13 had no reason to believe that John -- to disbelieve, excuse me,
14 John MacIntyre on this point.

15 Now Marshall, I suggest, is also an officer who had faith in
16 the system. And he was aware, as he testified, that these eye
17 witnesses had given their story to the prosecutor, to the police,
18 and to the Court at the preliminary, to the Grand Jury and at a
19 jury trial was subject to cross-examination by a respected
20 defence counsel and accepted by the jury.

21 In addition to the foregoing, he must have had in his mind
22 the knowledge that there had existed concerns by both MacIntyre
23 and Matheson that either Donald Marshall, Jr., or some of his
24 friends had attempted to influence witnesses. Whether or not
25 they ever did I don't pretend to pass judgement on, but certainly

1 | there was the suspicion by both John MacIntyre and Lou Matheson
2 | that that had happened earlier.

3 | There's the evidence of Lou Matheson that Mary Ebsary and
4 | Greg Ebsary when interviewed denied the story that James MacNeil
5 | had given and that Detective Norm MacAskill had told Lou Matheson
6 | that Mrs. Ebsary was the anchor of the household and the Ebsary
7 | family would not have been a party to a cover-up.

8 | He thought as well that Donald Marshall had been offered an
9 | opportunity to take a polygraph examination, but either he or his
10 | counsel had refused. On top of all of this Ebsary passed the
11 | polygraph and MacNeil was found to be intestable.

12 | So in view of the foregoing I would respectfully submit that
13 | it was reasonable for Al Marshall, bearing in mind if you accept
14 | that he was never asked to reinvestigate the murder from square
15 | one, to conclude that Ebsary was truthful and that MacNeil was
16 | not and nor, I would suggest, can it be said was the polygraph
17 | the sole determining factor of MacNeil's truthfulness as far as
18 | Al Marshall was concerned. What Al Marshall did in '71 was in
19 | some respects inadequate, yes. It was unsuccessful, yes, and it
20 | was tragic, yes, but I submit that to characterize -- to go so far
21 | as he did to characterize it as incompetent is to overstate the
22 | evidence.

23 | I will make two further points before moving on. In their
24 | brief, commission counsel are unable to conclude if the report
25 | went to the Attorney General's department. We just want to add

1 one point on that, we'll never know I guess. The Attorney
2 General's files were destroyed so it is impossible to tell by a
3 review of the Attorney General's files whether or not they had
4 the report. They were working at that time with a six-year
5 retention period. But Superintendent Wardrop certainly testified
6 that he was certain that he had delivered a copy of the report to
7 either Gordon Gale or Robert Anderson and it would have to have
8 been Gordon Gale given the date on his report. I do acknowledge,
9 however, that Gordon Gale testified that he doesn't recall seeing
10 the report. It may be that he read it and forgot it. When one
11 is in a position like that, one would read a lot of reports or, I
12 suppose, the old adage that "you can't lead -- you can lead a
13 horse to water but you can't make him drink" applies. He may
14 have had a report but not read it.

15 In the final analysis and the second point that I would
16 make, that in November of 1971, the appeal of Donald Marshall's
17 conviction was on its way to the Nova Scotia Court of Appeal, and
18 that that Court and both counsel arguing the appeal ought to
19 have known of James MacNeil's statement. They did not. The
20 Crown neglected what, I would submit, was the duty upon it to
21 disclose that statement. And the Canadian Bar Association, I
22 note in the brief that they have prepared for Your Lordships,
23 suggest that the failure to disclose this and other statements
24 was the key -- is the key to uncovering the injustice done to
25 Donald Marshall.

1 It was not the exclusive mandate of the police to assess the
2 credibility of James MacNeil in 1971 and to determine the impact
3 of what James MacNeil had to say upon Donald Marshall's
4 conviction or the effect that it should have had upon his
5 conviction. And merely because the police and the Crown had
6 concluded that James MacNeil was unreliable did not discharge the
7 Crown of it's obligation to disclose James MacNeil's statements.
8 I referred in paragraph 31 of our brief the a number of people
9 from the Attorney General's Department, all of whom have said
10 that that statement ought to have been disclosed, and so I would
11 -- I think it's obvious and it has been conceded, I think, by all
12 sides that that ought to have been disclosed.

13 If I may then, My Lords, go to the next point -- area that I
14 wish to cover and that is the part dealt with -- part 6
15 beginning at page 44 of our brief. That's the examination of
16 the justice system in Nova Scotia. I wish to make a few general
17 remarks and then to deal with the Roland Thornhill case before
18 turning the podium over to my co-counsel.

19 Mr. Chief Commissioner, you outlined at the commencement of
20 this part of the Inquiry that the purpose of this phase was to
21 examine how the system responds in a variety of situations to
22 determine whether or not the relationships between the police,
23 the prosecutor, and the Attorney General's department are such
24 that an impartial treatment of all individuals is assured. The
25 R.C.M.P. certainly endorses the need for equality of treatment of

1 all citizens for the maintenance of confidence in the justice
2 system.

3 If I may make just a few general remarks before addressing
4 the case of Roland Thornhill. The right to initiate a criminal
5 process, I think all would agree by the laying of an Information
6 is one that is vested in the individual citizen by virtue of
7 section 455 of the Criminal Code. The exercise of that right or
8 that power, however, involves as it must and should the exercise
9 of discretion. A charge does not automatically follow simply
10 because a prima facie case exists.

11 Lord Hartley Shawcross has said in a speech when he was
12 Attorney General in Great Britain to the House of Commons in 1951
13 that:

14 It has never been the rule in this
15 country - I hope it never will be -
16 that suspected criminal offenses
must automatically be the subject
of prosecution.

17 Professor Edwards in his book, "The Attorney General, Politics
18 and the Public Interest", put it thusly at page 404 of his book,

19 Neither the law nor the practice of
20 police forces recognizes an
21 inflexible rule that requires a
22 prosecution to be launched
irrespective of the particular
circumstances surround the crime,
the victim, and the perpetrator.

23 Professor Edwards also points out that this discretion arises
24 from the time of the initial police contact on up through the
25 ranks and into the office of the Attorney General.

1 Now there are a number of factors that may apply in the
2 exercise of a discretion. Mr. Edwards in -- There was evidence
3 on that from Chief Superintendent Feagan but Professor Edwards
4 also deals with that in the chapter in his book on the Exercise
5 of Prosecutorial Discretion and that chapter is found in tab 9
6 of our second volume, at pages 423 to 429. I won't go into those
7 because -- but there are a number of them. But he concludes
8 that it's impractical to lay 41

9 ...down hard and fast rules that
10 will confer a high degree of
11 predictability as to the result of
12 their application.

13 That's the application of the rules of discretion.

14 The nature of discretionary
15 authority requires resistance to
16 any attempt to develop ridged rules
17 that cannot encompass every
18 possible contingency.

19 The same sentiment was referred to by Stenning in his work for
20 the Law Reform Commission of Canada entitled, "Legal Status of
21 the Police", part of the Criminal Law Series, when he referred at
22 page 128 of that work to an inquiry into the activities of the
23 Toronto Police force when they, as well, expressed the difficulty
24 they encountered in trying to define the limits of the proper
25 exercise of discretion. In the exercise of that discretion,
however, the responsibility for its ultimate exercise will
frequently rest with senior officers in difficult, important, and
highly sensitive cases. That is a matter, I guess, of common
sense and one that has been recognized by a number of the authors

1 that I've already referred to and is discussed to some extent in
2 the House of Lords case, Glinsky v. McIver, which is referred to
3 in our brief. But a mature exercise of that discretion also
4 entails consultation with the law officers of the Crown, with
5 those people within the department of the Attorney General who
6 act as Crown prosecutors or senior law officers.

7 A very important -- what I would submit is a very important
8 address concerning the relationship that ought to exist between
9 the law officers of the Crown and the police is that given by the
10 Honourable Roy McMurtry, who was at the time the Attorney General
11 of Ontario, to a conference of the Canadian Association of Chiefs
12 of Police in 1973. The full text of that address is in tab 13 of
13 volume 2, but I've quoted at it, quoted -- excuse me, from it as
14 well at page 49 of our brief. And if I could just refer to
15 certain parts of what Mr. McMurtry said, or the Honourable Mr.
16 McMurtry, because I think it is important and something that sets
17 out some -- some principles that both police and law officers of
18 the Crown should attempt to follow. He said:

19 In a proper working relationship
20 between two professionals who have
21 mutual confidence in each other's
22 professional skills and judgment,
23 it should be fairly rare that any
question should arise as to who has
the final decision to initiate or
not to initiate criminal
proceedings.

24 A little later he says,

25 The oath by which a prosecution is
commenced is the oath of the

1 officer who swears the information,
2 and not the oath of the crown law
3 officer who advises the officer as
4 to the law. And the fundamental
5 principle here is that no one can
6 tell an officer to take an oath
7 which violates his conscience and
8 no one can tell an officer to
9 refrain from taking an oath which
10 he is satisfied reflects the true
11 state of facts.

12 And later,

13 The law officers of the crown in
14 fact have a duty to advise as to
15 the law relating to a contemplated
16 prosecution. The crown law
17 officers also have a similar duty
18 to advise whether it is in the
19 public interest that a prosecution
20 be commenced. And of course, once
21 a charge has been laid the law
22 officers of the crown, as officers
23 of the court, must maintain
24 direction of the course of the
25 prosecution.

16 That inter-relationship between the law officers of the Crown
17 prior to the laying of the charge is -- is, I think, essential to
18 a proper working of our system of justice. And it is important
19 that both parties understand what their role is and what the
20 limits, proper limits, are upon their role.

21 In cases of special importance, unusual complexity,
22 particular sensitivity, or uncertain legal principles, it's
23 natural and proper that police officials will seek, and Crown law
24 officers will provide, advice on a wide variety of aspects in
25 relation to cases that are under their investigation. In each
of the Donald Marshall 1982 re-investigation, the Roland

1 Thornhill case, and the Billy Joe MacLean prosecution, one or
2 more of the foregoing factors existed meriting consultation at a
3 senior level. Such consultation would have ensured that proper
4 principles were applied and knowledgeable advice given. Police
5 acting in good faith ought not to be criticized for seeking and
6 accepting legal advice from the law officers of the Crown, at
7 whatever level, nor should law officers hesitate to give advice,
8 so long as the advice is not given for improper or corrupt
9 purposes or reasons.

10 Now the Roland Thornhill case is dealt with in our brief, at
11 pages 51 to 68. I won't deal in all respects with the Roland
12 Thornhill case. That's in our brief. But I would pick it up
13 with the area that -- with the time in which the Roland Thornhill
14 case is sent to the R.C.M.P. headquarters for review. That
15 action was necessitated by the public position taken by the
16 Deputy Attorney General of Nova Scotia, that no charge would be
17 laid. It is submitted that that action effectively foreclosed
18 any meaningful dialogue between the police and the Crown's law
19 officers in this Province. But I would suggest it did not
20 prevent the police from conducting an independent review of
21 whether or not a charge ought to be laid. The response of the
22 Force, I suggest at this time and in October of 1980 and November
23 of 1980 and the successive months, was appropriate. It was as it
24 should be.

25 Chief Superintendent Feagan referred the dispute between his

1 office and that of the Deputy Attorney General to Commissioner
2 Simonds' office. Commissioner Simonds said this about that,
3 about the referring to Ottawa to the headquarters of the R.C.M.P.
4 He said,

5 ...it provided for an opportunity
6 for a review by very experienced
7 policemen, totally apart from the
8 local scene. And, you know, if
9 there is a value to the way the
10 policing is done through these
11 contracts, that's one of them.
12 Because if there is local heat,
13 which can happen, you know, or
14 perceptions of it can develop,
15 there is another mechanism one step
16 back by police to review it with
17 very senior and experienced people
18 and come to decisions.

19 You had the opportunity of hearing from Deputy Commissioner
20 Quintal. It was also evident from the evidence that Assistant
21 Commissioner Venner also participated in the review. It was a
22 two-person review, primarily of Venner and Quintal, although
23 there was consultation at the November meeting with others and I
24 think that exhibit 165, page 11 offers a bit of a glimpse into
25 the integrity of Tom Venner. Commissioner Simonds spoke of that
individual's integrity, but it's also -- if one looks at page 11,
of exhibit 165, that's where Assistant Commissioner Venner had
sent a memo up because he was concerned that there was in some
jurisdictions an attempt by the Attorney General's department to
direct when charges should or should not be laid. And he
expressed the view that it was important for the police to make
it clear to the various provincial Attorneys General that -- of

1 the role of -- the proper role and functioning of the police in
2 those particular situations. So I think it -- there's enough on
3 the record to indicate that Venner was a man of -- a man of
4 integrity.

5 There is the meeting on the 5th of November, 1980. It
6 clearly was a consensus of that meeting that a strong case
7 existed against Mr. Thornhill, but I would submit to Your
8 Lordships that no final decision to prosecute was taken at that
9 meeting. Staff work followed that meeting. Deputy Commissioner
10 Quintal testified that he wasn't prepared to base a decision on
11 such a complex investigation in a briefing that lasted two to
12 three hours. One may agree or disagree with Quintal decision, a
13 decision, I submit, that he along with Tom Venner made based on
14 their interpretation of the facts; maybe not my interpretation
15 of the facts, or commission counsel's interpretation of the
16 facts, or someone else's, but I submit, it was their
17 interpretation of the facts, not based on any direct
18 intervention by the department of the Attorney General, nor a
19 wish to back down in the face of opposition from the Attorney
20 General. It would have been wrong, very wrong, I submit, for the
21 police to have laid a charge against Roland Thornhill merely to
22 prove a point to Gordon Coles. But they did make their point.

23 Commissioner Simonds in his letter to Attorney General How,
24 which is at page 117 of exhibit 165, wrote:

25 We also maintain as a matter of
principle that police officers

1 have the right to lay charges,
2 independent of any legal advice
3 received, if they are convinced
 that there are reasonable grounds
 to do so.

4 I respectfully disagree with commission counsel's assertion that
5 the R.C.M.P. did not charge Roland Thornhill primarily because
6 the Attorney General opposed it. Quintal's decision was based
7 upon his ultimate view of the facts as well as Venner's view. If
8 they had concluded otherwise, they knew that Commissioner Simonds
9 would have backed them. I think that's apparent from Simonds'
10 own testimony. Quintal's view, rightfully or wrongfully, and I
11 submit the core of his decision, was his belief stated in his
12 letter to Chief Superintendent Feagan that it was the -- that it
13 was unlikely any jury would convict Mr. Thornhill. The internal
14 memo from Tom Venner to Inspector Kozij at page 109 -- excuse me,
15 which is referred to in paragraph 109, page 67 of our brief.
16 Kozij had complained about the decision and Venner wrote him in
17 an internal memo as follows, the

18 ...R.C.M.P. decided not to proceed.
19 It happens that in this particular
20 case, that was the same course of
21 action preferred by the (Attorney
22 General). But it might not have
 been nor might the two positions
 coincide the next time this comes
 up. The decision was based on the
 evidence and lack of it.

23 It's not the decision's rightness or wrongness that is important.
24 It was the process of independent review and analyses, a process
25 which applies whenever there is a dispute between the commanding

1 officer of an "H" division and the Attorney General's
2 department, a process that, I submit, applies regardless of the
3 identity of the accused person. It so happened that in this
4 particular case, the accused person was Roland Thornhill, a man
5 of -- a politician and a Cabinet Minister within the Province.

6 If I may be permitted one more reference to Professor
7 Edwards' book, "The Attorney General, Politics and the Public
8 Interest", at page 428 he said this about decisions to prosecute
9 or not to prosecute:

10 The position of the director
11 becomes more vulnerable where he
12 decides against prosecuting and the
13 proposed charge involves a
14 prominent, public figure.
15 Allegations of bias and protecting
16 the establishment will surface
17 quickly in this kind of situation.

18 They certainly did here. But that does not relieve the police
19 officer of the very heavy responsibility of him to decide, using
20 the best exercise of his discretion, each and every individual
21 case. And I would submit to Your Lordships, that that is what
22 happened in this particular case.

23 Those are all the comments that I have to make and as I
24 have indicated before, Mr. Pringle will address two or three
25 other areas of our brief.

Thank you.

MR. PRINGLE:

My Lords, I'll be brief. I know we have at least two people
waiting behind me to speak and I don't want to put myself in the

1 position of holding them up, and we'll be as concise and brief
2 as we can be.

3 I also would like to congratulate commission counsel on
4 their performance the other day. I thought it saved us all a lot
5 of time because they dealt so thoroughly with many of the issues.
6 As a result of that, I think we can fairly say that many of us
7 were able to reduce the amount of submissions that we perhaps
8 were going to make prior to hearing commission counsel in
9 reading their brief.

10 I'd like to begin with 1982 and the aspect that Mr. Pugsley
11 concluded with the other day -- yesterday when he left here. And
12 Mr. Pugsley made some fairly strong statements, submissions,
13 inferences which are not based on the evidence. And he concluded
14 leaving here yesterday by saying that Staff Sergeant Wheaton
15 showed tunnel vision in the 1982 investigation. His only
16 reference to the evidence for that rather startling proposition
17 was that he had concluded that Donald Marshall may have been
18 guilty as early as February 17th.

19 Now in our brief My Lords, we set out in some detail at
20 pages -- (And I'll just refer to these pages for Your Lordships
21 to read later.) at pages 28 to 38. All the procedural steps
22 that Staff Sergeant Wheaton and Corporal Carroll took in this
23 investigation through February, March, April and into May of
24 1982, 40 some steps; not minor steps, major investigation steps,
25 many of them. Thirteen of those major steps took place before

1 the 17th of February 1982, major ones, including trips to
2 Pictou, including meeting with Mrs. Ebsary, including checking
3 the criminal record of Roy Ebsary, something that hadn't been
4 uncovered in 1971, putting those things together and then seeing
5 that evidence and thinking, "Yes, he may be innocent.", and
6 driving all the way to New Brunswick, Dorchester, in February to
7 interview Mr. Marshall. Hardly tunnel vision.

8 Mr. Pugsley then made the startling submission that Staff
9 Sergeant Wheaton was looking for a villain. We take exception to
10 that. There was no reference to the evidence for that statement.
11 What Staff Sergeant Wheaton, we submit, was looking for was the
12 facts and he found them, and he found the truth, that Mr.
13 Saunders referred to as being so important, and we all agree.
14 Ten years after the murder, Staff Sergeant Wheaton and Corporal
15 Carroll found the truth. Ten years after when the evidence was
16 stale, they got the evidence together to put before the
17 Department of Justice set up the Reference that lead to the
18 acquittal of an innocent man. That should not be condemned as
19 someone looking for a villain. That should be recognized, those
20 officers should be congratulated, I think -- submit, for the job
21 they did and that hasn't happened yet. With respect, I have not
22 heard anyone here say any -- of counsel, that is, say anything
23 really complementary about the work that was done in the unique,
24 complex situation where you solve a murder 10 years after the
25 fact and get an innocent man out of gaol 10 years after the

1 fact. Not tunnel vision, not looking for a villain. Looking for
2 the truth, finding the truth, to be commended. If Mr. Pugsley is
3 looking for a villain, it's not going to be Harry Wheaton. The
4 evidence doesn't show it.

5 We don't submit to Your Lordships what the reason was why
6 the truth was not uncovered in 1971. Others have done that and
7 they've done it very well. There's different versions of it.
8 The basic important point is that the truth was not uncovered in
9 1971 and it was in 1982.

10 Some specific points that my friend, Mr. Pugsley, made with
11 respect to Staff Sergeant Harry Wheaton that I'd like to refer
12 to, Mr. Pugsley said that Wheaton was prejudiced in his
13 investigation, and that that was revealed by Wheaton writing in
14 his first report. (And this is at page 16,160 of the evidence of
15 yesterday.) Wheaton writing in his first report that Chant said
16 he was pressured on that first statement on May 30th, 1971.

17 Well, I've looked at the record, and I submit that the
18 following references to the transcript and the exhibits, My
19 Lords, will show that that's not so. If Your Lordships will look
20 at some time at exhibit 99, at page 11 and at page 14, in
21 particular paragraph 18 of that page, you'll see that in that
22 first report Staff Sergeant Wheaton very accurately and candidly
23 refers to the fact that Chant talked about feeling pressure
24 because he had said, "I saw it all." that first night, and then
25 felt to go along with that story. That's what Wheaton wrote in

1 that first report. Not pressure from the Sydney City police. If
2 you look at Volume 41 of the transcript of the evidence of Staff
3 Sergeant Wheaton at pages 7558 and 7559, you'll see Staff
4 Sergeant Wheaton's testimony in that regard which is not
5 inconsistent with what I just submitted.

6 And also, and perhaps even more importantly, a year later
7 after Gordon Gale had asked the Force to "review", whatever that
8 meant, their files. And in 1983, Staff Sergeant Wheaton sent a
9 report in at that time, and this is found in exhibit 20 at page
10 8. And once again a year later referring to the first Chant
11 statement, Staff Sergeant Wheaton refers to the fact that Chant
12 had put himself in that position by saying, "I saw it all." And
13 the point I'm making -- or submitting, My Lord, is that this
14 submission -- allegation, if you will, that my learned friend
15 made, to try and show prejudice by Staff Sergeant Wheaton, is not
16 born out when one reads the transcripts and the exhibits that
17 have just been referred to.

18 The second point that Mr. Pugsley made in attempting to
19 establish that Staff Sergeant Wheaton was prejudiced as against
20 his client was a reference by Mr. Pugsley to the Gushue and
21 Harriss statements. And Mr. Pugsley said something to the effect
22 in his submissions yesterday, that Wheaton didn't pursue that
23 with Gushue. The following references to the transcript and the
24 exhibits will show that that is not totally accurate. Wheaton--
25 Staff Sergeant Wheaton took a statement from Gushue in 1982,

1 March the 2nd, I think, exhibit 99, page 55. Gushue was the
2 gentlemen that Staff Sergeant Wheaton found to be a bit of a
3 "rounder" -- whatever, whatever that means, but he was drinking;
4 Gushue, that is. And he didn't want to talk to Wheaton, but
5 Wheaton got the best he could from him. And the testimony from
6 Staff Sergeant Wheaton in that regard is found in transcript
7 Volume 41 at pages 7613, 7616.

8 Interesting enough in his submissions Mr. Pugsley at page
9 16,142 yesterday, first referred to the fact that Harriss had
10 volunteered that aspect about Gushue to Corporal Carroll. It was
11 to Wheaton.

12 Another point that Mr. Pugsley -- (I only have one more of
13 these, and then I'm moving on to something else because Mr.
14 Pugsley just made three of them yesterday, as I recall, and I
15 just want to deal with them.) Another point that Mr. Pugsley
16 made yesterday with respect to his submission that Wheaton was
17 prejudiced towards Mr. MacIntyre was Mr. Pugsley's submission
18 that Wheaton didn't believe that Magee was at the June 4th, 1971,
19 Chant statement-taking at Louisbourg.

20 Staff Sergeant Wheaton took Wayne Magee's statement on March
21 the 2nd, 1982 and that's exhibit 99, page 87. On the face of
22 that statement of Wayne Magee, a policeman, the Chief of police
23 for the Town of Louisbourg, that statement that he signed and
24 read and gave on March 2nd, 1982, there are two fundamental
25 errors on the face of that statement arguable.

1 And the first fundamental error in Mr. Magee's statement is
2 that he says that Lawrence Burke was present, or may have been
3 present. Burke gave a statement to Corporal Carroll also on
4 March the 2nd, 1982, exhibit 99, page 86, and his statement
5 indicates that he does not recall being there. That's one, one
6 arguably, fundamentally wrong aspect of Wayne Magee's statement.

7 The second thing that's wrong in Wayne Magee's statement is
8 that he says that everyone signed Chant's statement on June 4th,
9 1971, and that's wrong. If you look at that statement, (I think
10 the typed version is exhibit 16, page 54.) that's just not so.
11 Now this might be something that Staff Sergeant Wheaton could
12 overlook if it was a lay-person. But he's taking this and
13 comparing this, presumably, looking at a policeman that's giving
14 him this, that's read it before he signed it. He's got to ask
15 himself, I submit, why?

16 The only other reference I leave Your Lordships with to
17 think about in that regard is the clear fact that we have the
18 evidence of Wayne Magee that he did discuss this matter with
19 Chief MacIntyre in 1982; that is, Wayne Magee and John MacIntyre
20 discussed the circumstances of the taking of the Chant statement
21 of June 4th, 1971 in 1982. And that evidence is found in
22 transcript Volume 20, at pages 3642 and 3652.

23 We also have Corporal Carroll's testimony at transcript
24 volume 48, pages 8840 and 8890, to the effect that he also, and
25 he was sorry to say it as I recall his evidence, he was sorry to

1 say that he just did not accept that Mr. Magee had remembered it
2 right. Another seasoned policeman that just couldn't accept
3 that.

4 I know I'm talking a bit fast. Part of it's my native
5 accent and heritage, and the fact there's two people behind me
6 but if I'm going too fast and you don't understand me, My Lords,
7 I'll slow down. Thank you.

8 MR. CHAIRMAN:

9 So far, the speed is just right.

10 MR. PRINGLE:

11 Good. I could take that to mean anything.

12 The documents on the floor, we'll spend a few seconds
13 talking about that. It's been so ably canvassed, that is where
14 the evidence is to be found by commission counsel and by Mr. Ruby
15 that I'm not going to get into that again. And I'm not the
16 judge; Your Lordships are as to what you're going to do with all
17 that evidence but the evidence is basically before you through
18 the submissions of Mr. MacDonald, Mr. Ruby, and indeed, Mr.
19 Pugsley.

20 There are just three other references to the transcript that
21 I'd like to leave before Your Lordships that you can consider
22 when you are dealing with that issue, if it's necessary to deal
23 with it.

24 In our brief at page 39, (And there's no need to refer to
25 this, My Lords.) we set out the fact that Inspector Scott

1 testified that he in fact, indeed, was told about the paper-
2 dropping incident by Staff Sergeant Wheaton. And that's the
3 evidence of Inspector Scott at transcript 51, pages 9320, 21.
4 The reason I refer to that is because in commission counsel's
5 brief, I think at page 107, they do make the specific submission
6 that Wheaton never told Scott or anyone about this. With respect
7 that's -- that little piece of evidence I just referred to is to
8 the contrary. I'm not suggesting anything there. It's just
9 another little piece of evidence that's somewhere in the
10 transcript that somebody perhaps didn't look at when they were
11 going through but it exists.

12 Also on page 39 of our brief, and herein I'm referring to
13 commission counsel's brief where they ask Your Lordships that you
14 -- suggest to Your Lordships, that you may want to look at Bruce
15 Outhouse's cross-examination of Frank Edwards concerning Frank
16 Edwards' notes, that you may want to look at that to see if
17 there's anything there about the inaccuracy, or possible
18 inaccuracy of any of Mr. Edwards' notes.

19 In addition to what commission counsel has referred Your
20 Lordships to in that regard, and that's page 107 of their brief,
21 I would like to leave with Your Lordships this further evidence
22 of Corporal Carroll concerning another possible, indeed a stated
23 error in Mr. Edwards' notes as observed by Corporal Carroll.
24 Corporal Carroll's testimony in transcript volume 48 at pages
25 8779 to 80 is to the effect that there's an error in Mr. Edwards'

1 notes for February 21st, 1982, because Corporal Carroll was in
2 court somewhere else, not at a meeting with Mr. Edwards as is set
3 out in Mr. Edwards' notes. And I'll leave that before you. Also
4 the reference 104, exhibit 104 which is Corporal Carroll's notes
5 which confirms that testimony of Corporal Carroll.

6 One further aspect about the paper-dropping matter that I
7 don't believe was put to Your Lordships in oral submissions and
8 that is that there is some evidence that the investigators,
9 Wheaton and Carroll, indeed had the 1971 Al Marshall report and
10 possibly (And I stress possibly.) the statements of Jimmy MacNeil
11 and the Ebsarys as attached to that report. That would be
12 important because Mr. Pugsley, as you'll recall yesterday, spent
13 some time in his submission stressing the fact that how could
14 Wheaton go to the Ebsarys on April the 19th and say --and take a
15 statement from them where they then said, "Tonight you have shown
16 us the statements that we gave in November of 1971."

17 I refer you to the evidence of Superintendent Scott at
18 transcript volume 50, page 9221 where he testified that Al
19 Marshall's report was obtained shortly after Chant's first
20 statement was taken by Wheaton on February 16th, 1982.
21 Commission counsel, George MacDonald, questioned Corporal Carroll
22 at transcript volume 47, page 8729 and 8730 as follows: -- Mr.
23 MacDonald referred to the first report that Wheaton and Carroll
24 had sent in, in 1982. And Mr. MacDonald referred Corporal
25 Carroll to the following recorded item in that report, quote:

1 A. Roy Ebsary was in Wentworth Park
2 accompanied by one James MacNeil.
3 MacNeil and Ebsary were apparently
 approached by Seale and Marshall and an
 attempt was made to rob them.

4 End of quotes. Then Mr. MacDonald asked Corporal Carroll:

5 Q. You wouldn't get that out of the
6 transcript of the trial.

7 A. No.

8 Q. You can only get that out of statements
 of some kind.

9 And further on:

10 Q. I suggest that information can only come
11 from the statements of James MacNeil and
 Ebsary. They were taken on November,
 1971.

12 A. Yes, quite likely.

13 Q. You must've had that information.

14 A. I daresay, yes.

15 That's Volume 47 at page 8730, another reference I'd like to
16 leave with Your Lordships.

17 With respect to the -- I'm moving now to the -- (You'll be
18 pleased to hear.) to the MacLean, Billy Joe MacLean matter and
19 the R.C.M. Police. And as I recall the general statement -- As I
20 recall the general statement or submission by both Mr. Ruby and I
21 believe commission counsel something to the effect that the
22 R.C.M. Police had bowed to pressure from the Attorney General's
23 department. Well, with respect, I seriously take issue with that
24 general statement because it would leave the inference that the
25 whole of the Royal Canadian Mounted Police in the Province of

1 Nova Scotia are bowing and scraping to the whole of the Attorney
2 General's department throughout this Province, and it's just not
3 so. We've got thousands of on-going cases and lots of good
4 relationship and consultation and advice, and all those good
5 things, between the Royal Canadian Mounted Police and the
6 department of the Attorney General. But as Mr. MacDonald
7 pointed out, it's the tough cases that test the system, and it
8 is. And we're prepared to deal squarely with those tough cases
9 and take any little lumps that we might have on them and put them
10 in context with an explanation and learn something from them.
11 And we trust our friends from the Attorney General's department
12 are going to do the same thing and have indicated so in their
13 brief.

14 With respect to 1982, and the issue as to whether or not
15 there ever was anything about hold in abeyance an investigation
16 of the Sydney City Police, I suggest that my friend, Mr.
17 Saunders, is not accurate in his submission that there was never
18 any inference, iota, or whatever, by Gordon Gale to that effect.
19 That's just not the evidence of Frank Edwards. Frank Edwards
20 testified as follows, and I think I'll read you just a bit of
21 this from transcript volume 68, page 12,139, examination by
22 commission counsel to Mr. Edwards.

23 Q. Am I correct in understanding that you
24 saw a need to get to the bottom of why
the three people had lied?

25 A. Yes.

1 Q. During the original investigation?

2 A. That's fair.

3 And further on page 12,139, of volume 68, Mr. Edwards responded
4 to the following question, the question being:

5 And it was your view then in April
6 of 1982, that it was timely to
pursue such an investigation then?

7 A. Yes.

8 Q. In April of 1982.

9 And further on page 12,140, the answer was given as:

10 Yes.

11 Q. Now this view of yours was not shared
12 by Mr. Gale, is that correct?

13 A. No, he didn't feel it was necessary to
14 proceed at that time.

15 And further, Mr. Edwards was referred to his notes, exhibit 17,
16 at page 10, where he noted on April 19th, 1982, that during a
17 conversation with Mr. Gale and Mr. Herschorn, he (Mr. Edwards)
18 had suggested that the investigation now focused -- focused on
19 the Sydney City Police. And Mr. Edwards was questioned in this
regard by commission counsel as follows:

20 Q. Let me then take you to your notes of
21 April the 19th. You were talking to Mr.
22 Herschorn and he and Mr. Gale got back
to you on the conference phone.

23 A. Yes.

24 That's transcript 66, page 11,797-98.

25 Q. You suggested that the investigation
should now focus on the Sydney Police?

1 A. Yes.

2 Q. Now, what were you meaning by that?

3 A. Two things. Number one, that the file
4 should be obtained but more particular
5 then in my view, the time had long since
6 passed when John MacIntyre and Bill
7 Urquhart should've been taken in
8 individually and questioned thoroughly.

9 And it goes on further at page 11,797 and 98 of volume 66, where
10 Mr. Edwards was asked if he agreed with that view of Mr. Gale's,
11 and Mr. Edwards said, no, he didn't agree.

12 Now, we accept that the R.C.M. Police didn't need direction
13 from the Attorney General's department to investigate a Criminal
14 Code offence in the City of Sydney. We submit that that is not a
15 common thing that the R.C.M. Police do. And the evidence is
16 clear that on past occasions when staff sergeant Wheaton had been
17 asked to investigate municipal police forces in this Province on
18 at least two occasions, he had been asked to do so taking advice
19 from the Attorney General's Department. He thought that that's
20 what he should do in this case, too. We take issue with the
21 submission, that I believe commission counsel made, that the
22 sole reason that the R.C.M. Police didn't investigate the Sydney
23 City Police in 1982, was because it was another police force.
24 That's just not what the investigators believed honestly at that
25 time. Wheaton testified, as I said, that on prior occasions, he
had taken advice from the Attorney General's Department.
Transcript volume 41 at page 7,507 -- Actually, all of these
references are in the brief, I think, at page 40, so I'll just

1 refer to our brief at page 40 to save a little time.

2 But I can summarize what the main members from the R.C.M.
3 Police thought at that time, what was in their minds. Wheaton
4 had done it before. The A.G.'s department had been involved.
5 Scott testified he thought it was a question of jurisdiction.
6 "Sydney City Police, they do their own Criminal Code matters; we
7 don't.", roughly. That's wrong. But it's not usual for the
8 R.C.M. Police to get involved investigating a Criminal Code
9 offence in this City, nor should it be.

10 And I submit that armed with those basic feelings that the
11 members had, that in the past it was done a certain way, and
12 that normally -- (As Gordon Gale himself testified.) normally
13 they do not act in a municipality, that it was quite proper for
14 Staff Sergeant Wheaton in this complex -- most complex, most
15 unique, most involved matter, one of a kind (We hope.) when you
16 have to reinvestigate the murder of someone that's in jail for
17 10 years -- In this most unique matter when he (Staff Sergeant
18 Wheaton) did what my learned colleague has referred to, the
19 Honourable McMurtry -- what McMurtry saying should happen,
20 consult, take advise. My learned friend says that that should
21 happen. But yet, in the very case when they need it most, they
22 go and they consult and they seek advice and what do they get,
23 "hold in abeyance". What does that mean? What Gordon Gale
24 should have said in 1982 is exactly what he said on the stand in
25 Halifax, "You don't need us to tell you whether you can go in

1 | there or not. That would be advice." Telling us -- our clients
2 | that they didn't need it but at least setting it straight, not
3 | waiting four years and going on the stand and saying, "Oh, no,
4 | they didn't need to come to us." But when they did go to them,
5 | he should have given them clear advise, not ambiguous advice.

6 | The same thing with respect, we submit, happened to some
7 | extent in the MacLean case. In the MacLean case, initially
8 | Superintendent MacGibbon suggested to the Auditor General's
9 | people that they should get the Deputy Attorney General's office
10 | involved. That came from the R.C.M. Police, that suggestion.
11 | They were looking for advice again and consultation, not
12 | direction. Advice and consultation. And why? I submit that
13 | it's because this -- through that R.C.M. Police officer, there
14 | was something mystique and different about doing an investigation
15 | that involved the Office of the Speaker. And that may sound a
16 | little convenient to say that at this time but it's clear that
17 | there's been case law throughout the centuries dealing with the
18 | history and the evolution of the Office of the Speaker and the
19 | immunities and the privileges of Parliament and the Speaker. And
20 | one of the cases we've set out in -- one of the more recent ones,
21 | in tab 13 of our attachments and it's a very recent decision
22 | where the Chief Justice of the High Court of Ontario in 1967, Mr.
23 | Justice Evans, or later --

24 | COMMISSIONER EVANS:

25 | (inaudible - microphone not transmitting.)

1 MR. PRINGLE:

2 It's Re Clarke v. Attorney General of Canada, My Lord, and I'm
3 sure you remember it. And you went back to 1452 in a case called
4 Strouds case to look at how this sort of thing was treated in the
5 English Common Law and how the House back then had thought they
6 were immune from everything and the King tore up something and
7 changed it all and on and on it went and then you refer to the
8 Ontario Court of Appeal. There's some recent decisions.

9 The point I'm making is that if this issue has been before
10 the courts, at least on some question of the extent of the
11 privileges and the immunities of the Speaker in the House, how
12 can we criticize at first blush Superintendent MacGibbon saying,
13 "Hey, maybe I should get the Attorney General's department
14 involved here." He knows as he's testified that all those
15 expense accounts were monitored by the Office of the Speaker and
16 approved. He knows that the documents came from the Speaker's
17 office. They were safe there but they came from there. He's
18 testified to that effect. So he asks for advice and who does he
19 get, he gets Mr. Coles again. And Mr. Coles said, and the
20 evidence is clear and it's in our brief, -- He was annoyed first
21 but then he said, "You know, we'll take it under advisement.",
22 and he went away and he stayed away.

23 Now we admit that in hindsight we should have pressed,
24 should have followed it up, should have said, "Where's the
25 advice? When are we going to get it?". But we say that it was

1 reasonable to seek that consultation and advice from the senior
2 law officer of the Crown on a matter that wasn't quite the normal
3 every-day investigation. It was reasonable to make that first
4 approach.

5 Superintendent MacGibbon also testified that in addition to
6 waiting for the advice from the Deputy Attorney General, he
7 (Superintendent MacGibbon) was waiting for the 1984 Auditor
8 General's report, the one that came out on April 2nd of 1985.
9 It's in pages six and seven of exhibit 165. So he waited for
10 that, too. Now that report said some things about the Speaker--
11 sorry, the M.L.A. expense claims and so on, but it wasn't really
12 damning of the whole thing. In the earlier report, the year
13 earlier, and this is in exhibit 163 at page eight, I think, had
14 said that there was serious inadequacies with the regulations
15 that the M.L.A.'s expense claims were under. And the only reason
16 I'm making that point is that it was in Superintendent
17 MacGibbon's mind. At some point he testified that Gordon Gale
18 had told him that these things were club rules, house rules, and
19 that's worn out to some extent by that reference in the 1983
20 report that came out in 1984, in exhibit 163 at page eight.

21 I don't want to push this point too much but our basic
22 submission is that there are matters that come before the police
23 that are unique, complex, involved. They should and do consult
24 with the Attorney General's Department, seek advice along the way
25 so it doesn't go off the rails, so it's not wrong, so it gets

1 started right. And when they do that, we hope that they'll have
2 the opportunity to have a full dialogue with the prosecutors and
3 then, if necessary, with the senior law enforcement officers and
4 that they'll get good advice. We don't care if it's advice
5 saying, "No, no, you can't do that.", or "You don't need to even
6 come to us. You can do that investigation yourself.", as long as
7 we get clear advice, not ambiguous advice. Those are our
8 submissions in that regard.

9 Now one minor little point on Correctional Services Canada.
10 Just for the record in our brief at page 42, we set out for Your
11 Lordships assistance and reference, if necessary, the actual
12 dates that Mr. Marshall was eligible for parole and the actual
13 dates that he received parole.

14 An important fact, we submit, that Mr. Marshall was eligible
15 for day parole on June 4th, 1987, and he got day parole in June
16 of 1978 and that's in exhibit 112, pages 113 and 116. Exhibit
17 112 was the Correctional Service -- Parole Board rather, policy
18 on claims of innocence, and that's reasonable, we submit, as
19 commission counsel certainly set out. It's reasonable. It's
20 necessary, and it wasn't abuse. Mr. Marshall was, we suggest in
21 all the circumstances as set out in the evidence and referred to
22 in our brief at pages 42 and 43, treated fairly by the system
23 and -- while he was in it, with respect to parole.

24 Two minor little points that really have nothing to do with
25 our position but to help -- Sorry, My Lord. Two minor little

1 | pains that have perhaps nothing to do with our submission but
2 | they may help the record, and I'll leave these little thoughts
3 | with you.

4 | Commission counsel had addressed the issue of Mr. Poirier
5 | and Mr. Pratico, and how Pratico came to the attention of the
6 | Sydney City Police in the first place. Some further evidence in
7 | that regard is found at exhibit 17, page 66, telephone message
8 | from Staff Sergeant Wheaton to Frank Edwards on that point. And
9 | on exhibit 20 at page 11, paragraph 13, that 1983 report by Staff
10 | Sergeant Wheaton, there's some reference to it there. And
11 | finally at page 97 of commission counsel's brief, they appear to
12 | be saying that Staff Sergeant Wheaton and Corporal Carroll didn't
13 | interview the Sydney City Police members at all in 1982 and I'd
14 | just like to point out that they did, in fact. Wheaton and
15 | Carroll did interview quite a few of the Sydney City Police
16 | members that were involved in the 1971 murder investigation, and
17 | the evidence for that is in exhibit 99, pages 92 to 102 and
18 | Corporal Carroll's testimony at volume 48, pages 8850 to 51.

19 | There was a further submission -- perhaps just a passing
20 | comment, I think, that was made by either Mr. Ruby or Mr.
21 | MacDonald (I can't remember which one.) about the reluctance of
22 | the authorities to let Mr. Marshall out of prison and I suggest
23 | there's no evidence of that and perhaps it was just that, a
24 | passing comment. There's no evidence of any reluctance. What
25 | there is evidence of is that he got out on parole pretty well