

MR. HERSCHORN, EXAM. BY MR. SPICER

2:05 p.m. INQUIRY RESUMES.

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

MR. CHAIRMAN

Mr. Spicer?

MR. SPICER

The next witness is Martin Herschorn.

MARTIN HERSCHORN, duly called, testified as follows:

EXAMINATION BY MR. SPICER

Q. Mr. Herschorn, you're sworn as Barrister of the Supreme Court of Nova Scotia?

A. Yes.

Q. You graduated from Dal. Law School in 1970?

A. That's correct.

Q. And you started working the Attorney General's office in January of 1972.

A. Yes.

Q. And you've been there ever since.

A. Yes.

Q. You began appearing in connection with civil matters, is that right?

A. My duties commenced primarily in the civil side of the Department. I believe it was in 1983 that I commenced to do criminal appeal work.

- 1 Q. '83 or '73?
- 2 A. Sorry, '73.
- 3 Q. In the interim, did you do any criminal trial work?
- 4 A. No criminal trial work.
- 5 Q. Have you ever done any criminal trial work?
- 6 A. Very limited. Some exposure during my articles.
- 7 Q. And you started doing criminal appeals in 1973 and for how
- 8 many years did you criminal appeal work?
- 9 A. Approximately 13 years.
- 10 Q. So you would have had a lot of experience in the Appeal
- 11 Court.
- 12 A. I would say so.
- 13 Q. Yes. You would have become a senior solicitor in the
- 14 Attorney General's Department on, what is it, the sixth
- 15 anniversary of your employment?
- 16 A. I believe so. That's the current demarcation line.
- 17 Q. And you became Assistant Director Criminal at some point.
- 18 Can you tell us when that was?
- 19 A. I believe that was in September of 1980.
- 20 Q. September, 1980. And you currently occupy the position,
- 21 Director Prosecutions?
- 22 A. That's correct.
- 23 Q. Can you tell us, we have an exhibit, EXHIBIT 148, which is a
- 24 job description for Director Prosecution. You've had an
- 25 opportunity to review that.

1 A. I'm generally familiar with it, yes.

2 **EXHIBIT 148 - JOB DESCRIPTION FOR DIRECTOR**

3 **PROSECUTION.**

4 Q. Okay. If I could just take you to the last page of it, under the
5 heading of "Specific Accountabilities", and just take you
6 through that and ask you whether or not that's a fair
7 representation of your job:

8 Insure fair and uniform law enforcement
9 throughout the province by effective control and
10 direction of prosecuting officers.

11 Would that be part of your job?

12 A. Yes, it would.

13 Q.

14 Formulation of appropriate policies and
15 procedural directives to prosecuting officers by
16 advising the Attorney General on developments
17 in the law and requirements in relation to the
18 prosecution of criminal and penal matters.

19 A. Yes, that's an accurate statement.

20 Q.

21 Insuring the continued competence of
22 prosecuting officers by monitoring performance,
23 providing specific advice, and overseeing their
24 professional development and training.

25 And lastly,

 Maintaining the credibility of the provincial
 prosecutorial service by responding efficiently to
 queries and complaints from within the criminal
 justice system and from the general public.

1 A. That's correct.

2 Q. Is that a fair summary of the ambit of your job
3 responsibilities?

4 A. That's one expression of it. There are other specific
5 responsibilities that may not be referred to there, but are
6 probably referred to elsewhere in the document.

7 Q. Are there other responsibilities of yours which are important
8 to the job? Or would these be the major ones?

9 A. I play a role with regard to assessment of recommendations
10 for appeals from prosecutors that come to the Director
11 Criminal of the Department, Mr. Gale.

12 Q. You have served under a number of Attorney Generals?

13 A. Under Mr. Pace, Mr. Justice Pace as he now is; the late Allan
14 Sullivan; Chief Judge How, Attorney General How, as he then
15 was; Attorney General Ron Giffin; and now Mr. Donohoe.

16 Q. Perhaps having had those years of experience, if you could, I
17 want you for two separate years, first for 1982 and then
18 currently, if you could provide us with an outline of the
19 structure of the Department. Start at the top and you've got
20 the Attorney General. What's the next level in the
21 Department, or was it in 1982?

22 A. That would be the Deputy Attorney General.

23 Q. Beneath the Deputy Attorney General?

24 A. There would be directors. In 1982, there would be, on the
25 legal side of the Department, there would have been two

1 directors, a Director Civil and a Director Criminal.

2 Q. Okay, in 1982, who would the Director of Criminal have been?

3 A. The Director of Criminal would be Gordon Gale.

4 Q. Okay, and Director Civil?

5 A. R. Gerald Conrad.

6 Q. Just taking the Director Criminal for a moment, who would
7 report to the Director Criminal?

8 A. Myself as then Assistant Director Criminal and, I forget the
9 precise number at that point in time, but a number of
10 criminal appeal lawyers, lawyers whose task it was to argue
11 criminal appeals primarily before the Appeal Division of the
12 Supreme Court of Nova Scotia.

13 Q. Would those criminal appeal lawyers report to you in the first
14 instance and through you to Gordon Gale?

15 A. At that point in time, yes, because I had specific
16 responsibility, I believe, at that time as well for
17 administration of criminal appeals in the Department.

18 Q. What about the prosecutors who worked around the province,
19 who would they have reported to in 1982?

20 A. I'm pausing because I can't recall precisely when I assumed
21 specific responsibility for prosecuting officers and
22 prosecutions. It was at some point during my period as
23 Assistant Director of Criminal. That was formalized in a
24 sense in 1986 with my appointment as Director Prosecutions.

25 Q. So during the time that you were Assistant Director Criminal,

1 one of your responsibilities would have also have been
2 receiving reporting from Crown Prosecutors that worked in
3 the province?

4 A. Yes.

5 Q. Who was the Director Civil in 1982?

6 A. R. Gerald Conrad.

7 Q. All right, you've given us the names of two directors. Were
8 there any other directors under the Deputy A.G. in 1982?

9 A. Without referring to files, the late Gerald Cavanaugh at one
10 point was a Director of the Department, but I'm having
11 difficulty recalling precisely...

12 Q. How many people would there have been in the criminal side
13 of the Department in 1982 who would have been responsible
14 to the Deputy Attorney General for the formulation of policy
15 in connection with criminal law matters?

16 A. I would say basically two people.

17 Q. Yourself and Gordon Gale?

18 A. Yes.

19 Q. Now in 1988, currently, can you describe to us the structure
20 of the Department? Presumably, there's the Attorney
21 General; Deputy Attorney General, who is now Mr. MacDonald.

22 A. That's correct, D. William MacDonald, Q.C.

23 Q. And it was Gordon Coles up until recently.

24 A. That's correct.

25 Q. How many directors are there now?

1 A. There are now four directors--Director Criminal, Mr. Gale;
2 Director Prosecutions, myself; Director Solicitor Services; Bruce
3 Davidson, Q.C....

4 Q. Sorry, Director of what?

5 A. Director of Solicitor Services.

6 Q. Solicitor Services, okay.

7 A. Bruce Davidson, Q.C.; and Director Civil Litigation Reinhold
8 Endres.

9 Q. What position would Mr. Endres have held in 1982/1983?

10 A. I believe Assistant Director, and that was the title, Assistant
11 Director... Well, I'm perhaps not precise there. It was
12 Assistant Director, probably Civil Litigation, I think it was.

13 Q. How many people in 1988 are there in the Attorney General's
14 Department who are responsible for the formulation of policy
15 in connection with criminal law matters?

16 A. Two.

17 Q. Again, yourself and Mr. Gale?

18 A. That's correct. I should qualify that. In 1986 when two
19 additional directors' positions were created, there was also an
20 Executive Director of Legal Services position created. That
21 was and is currently occupied by R. Gerald Conrad, and he
22 also plays a role in the formulation of policy.

23 Q. In criminal law matters?

24 A. Yes.

25 Q. How many full-time Crown Prosecutors are there currently in

1 the Province of Nova Scotia?

2 A. I believe 40.

3 Q. 40?

4 A. Right.

5 Q. And how many part-time?

6 A. My best recollection is 29.

7 Q. Would the part-time ones be solicitors in private practice who
8 carry out prosecuting functions on a part-time basis?

9 A. That's correct.

10 Q. Are you responsible for all 69 of those people?

11 A. Yes.

12 Q. Are the job, the general responsibilities of prosecutors to
13 some extent governed by a statute in this province?

14 A. They are governed by a particular statute, the Prosecuting
15 Officers Act of the province.

16 MR. MACDONALD

17 I've introduced that Act, My Lords, as Exhibit 147. I don't
18 intend to refer to it in detail. I just thought I'd bring it to you
19 attention.

20 EXHIBIT 147 - PROSECUTING OFFICERS ACT, CHAPTER
21 240(1967).

22
23 Q. Can you give me some idea of how the Department works in
24 terms of the relationship between yourself and Gordon Gale,
25 and I'm not thinking in terms of 1982 and 1983, Gordon

1 Coles. Would you meet regularly with respect to criminal law
2 matters or how would the day-to-day life go on?

3 A. Gordon Gale and myself, I then being in the position of
4 Assistant Director to the Director Criminal who was Gordon
5 Gale, met probably on a daily basis to discuss criminal
6 matters.

7 Q. Your offices are fairly close to each other physically?

8 A. At the moment, they adjoin each other.

9 Q. What about in 1982/83?

10 A. Just down the hall.

11 Q. Where was Gordon Coles office in '82/'83?

12 A. In '82/'83, our offices were located on the third floor of the
13 Provincial Administration Building on Hollis Street.

14 Q. You were all together at that point?

15 A. Yes, all on the same floor.

16 Q. What about the Attorney General?

17 A. Same floor.

18 Q. Same floor, okay. Sorry, you were saying that you would
19 meet on a daily basis with Mr. Gale?

20 A. With Mr. Gale to discuss a variety of criminal issues, whatever
21 was current and topical at that point in time. Meetings with
22 the Deputy would be not as frequent as that.

23 Q. Can you give us any estimate of how frequently they would
24 occur?

25 A. No, I can't.

1 Q. When you say you would meet with Mr. Gale on matters that
2 were current and of interest, would those be, would that be in
3 respect of matters for which you perhaps were not directly
4 responsible yourself?

5 A. Could be.

6 Q. Is it fair to say that you would have a pretty good idea of any
7 serious criminal matter that was in the Department?

8 A. Yes.

9 Q. And would you consider it to be one of your responsibilities
10 to be so advised?

11 A. Not necessarily.

12 Q. But as a matter of practice...

13 A. But as a matter of practice, I became aware of most of the
14 significant criminal matters that the Department was
15 attending to.

16 Q. I want to ask you a series of questions concerning the role of
17 prosecutors and your views as the Director in connection with
18 some of these matters. First of all, in connection with
19 decisions to prosecute, can you tell me whether or not the
20 run-of-the-mill decision to prosecute would be of the local
21 Crown Prosecutor or whether you would have some
22 involvement with that?

23 A. Run-of-the-mill? The local Crown Prosecutor.

24 Q. And more serious matters?

25 A. The local Crown Prosecutor.

1 Q Are there any cases where the decision to prosecute is
2 referred to yourself?

3 A. It may be primarily by reference from the local prosecuting
4 officer for the county to my office.

5 Q In what sorts of circumstances would you expect the decision
6 to prosecute to be referred to yourself?

7 A. Primarily a circumstance where the prosecuting officer was
8 unsure of what the most appropriate charge, is one example,
9 would be to proceed with. He might consult with me. I would
10 act as a sounding board and attempt to provide whatever
11 assistance I could.

12 Q It wouldn't be based on necessarily whether or not it was a
13 serious charge.

14 A. No.

15 Q In other words, a local prosecutor could go ahead and make a
16 decision to prosecute in a murder case.

17 A. No question about that.

18 Q Are there any circumstances where a decision would be made
19 not to prosecute, notwithstanding the fact that there may be
20 prima facie evidence which would, in normal circumstances,
21 tend to lead to a decision to prosecute?

22 A. There may be exceptional circumstances of that type, but as a
23 general answer, no.

24 Q Would it then generally be the policy that if there's sufficient
25 evidence to prosecute, one would expect a prosecution to be

1 initiated?

2 A. Yes.

3 Q. Would the sorts of exceptions you were talk... What sorts of
4 exceptions can you think of where a decision would be made
5 not to prosecute?

6 A. One that immediately comes to mind is a circumstance of a
7 charge of sexual assault where the victim may be young,
8 where there may be medical evidence coming to the Crown
9 that the placing of a young victim/witness on the stand might
10 do irreparable harm to that witness. That would be one
11 example.

12 Q. The decision to lay a charge, is that a decision that rests with
13 the prosecutor or a decision that rests with the police?

14 A. In terms of responsibilities, it is unequivocally a decision for
15 the police. In terms of practice day-to-day relationships, the
16 police in the vast majority of cases consult with the Crown...
17 with a Crown Prosecutor to obtain his advice vis-à-vis the
18 laying of criminal charges.

19 Q. But if push came to shove and the prosecutor said, "I don't
20 want the charge laid," and the police officer said, "I do," who
21 gets to make the call?

22 A. The police.

23 Q. The police?

24 A. Yes.

25 Q. In every case?

1 A. Yes.

2 Q. Would you have any involvement in situations where there
3 might be a suggestion that a certain situation ought to be
4 investigated? Would you have any involvement in deciding
5 whether or not an investigation ought to go ahead?

6 A. I might in the context of a complaint of criminal activity,
7 which would be, might be channelled to the Department in
8 the first instance by the complainant. The complainant may
9 be uncertain or ignorant in the sense of which agency of
10 government to complain to and is aware of the general
11 superintendent's role of the Attorney General and would refer
12 a complaint of criminal activity to the Department. The
13 Department would, in turn, refer that complaint, if it is one of
14 alleged criminal activity, to the appropriate police department
15 for investigation.

16 Q. Would you do that automatically, or would the department
17 make a preliminary assessment as to whether or not it even
18 warranted being turned over to be investigated?

19 A. Well, there certainly would have to be a preliminary
20 assessment. One just doesn't automatically pass the buck
21 without assessing a matter and seeing if there's some
22 credence or something to be inquired into.

23 Q. If it's the police's job to investigate, why would you consider
24 it then to be as though to be passing the buck to the police?

25 A. I don't mean to pass the buck. That's perhaps a bad choice of

1 words. What I mean was it's the responsibility of the police
2 to investigate. The Attorney General is not, the Department of
3 Attorney General is not an investigative body.

4 Q. The answer to my question is that you would do a
5 preliminary assessment as to whether or not there was even...

6 A. What I mean by that, Mr. Spicer, is read the letter, read the
7 complaint, listen to the phone call.

8 Q. Right.

9 A. One wouldn't just receive a letter and ask one's secretary to
10 type up a form letter and send it over to the Halifax,
11 Dartmouth Police Department, whatever department it might
12 be.

13 Q. Okay.

14 A. That's the type of situation I'm alluding to.

15 Q. Do you get involved with respect to question of sentencing?

16 A. Yes.

17 Q. In what respect do you get involved?

18 A. Primarily queries from prosecuting officers as to the range of
19 sentence which the Appeal Division, primarily the Appeal
20 Division or other appellate courts have articulated as
21 appropriate for a particular criminal offence. Again, as an
22 advisory, hopefully to provide some assistance to prosecuting
23 officers in the field.

24 Q. Generally speaking, would the prosecutors in the field have
25 the discretion to make up their own mind about what

1 representations are going to be made vis-à-vis sentencing?

2 A. Yes.

3 Q. And would your role then merely be one where they come to
4 you and say, "Look, this is the situation. Can you give me a
5 hand?"

6 A. Primarily.

7 Q. Primarily. In what other situations would it occur?

8 A. I can't really... The other type of situation would be so rare
9 that no example immediately comes to mind.

10 Q. The policy then generally would be that the individual
11 prosecutor makes up their own mind as to whether or not,
12 what the sentencing representation will be.

13 A. That's correct.

14 Q. Are they guided to some extent by that any policy directives
15 from the Attorney General's Department?

16 A. In terms of the representations to made on sentencing?

17 Q. Mmm.

18 A. No.

19 Q. In other words, are there any policies that, say, on the second
20 offence, this is what you look for?

21 A. Yes, perhaps I'm a little hasty in saying no. You mentioned
22 "second offence" and there's a specific policy, for example,
23 with respect to the position to be taken by the Crown
24 Prosecutor with respect to second and subsequent drinking
25 and driving offences. That's common across Canada.

1 Q And would you consider those specific policies to be
2 mandatory insofar as the individual prosecutor is concerned?

3 A. Yes.

4 Q Are there any situations where the conduct of a case would
5 be taken away from one Crown Prosecutor and given to
6 somebody else?

7 A. It could conceivably occur.

8 Q Can you think of a circumstance of where it would occur?

9 A. No, I can't, because I can't recall it ever having had occurred,
10 in fact.

11 Q But it's something that if you felt it was necessary, you...

12 A. It's certainly possible. The legislation provides for it.
13 Prosecuting officers under Section 10 of the legislation, the
14 Prosecuting Officers Act, under that section, the Attorney
15 General prescribes duties for prosecuting officers. He may
16 issue instructions to prosecuting officers and it is the duty,
17 according to the strict words of the Statute, which instructions
18 it shall be the duty of prosecuting officers to observe.

19 Q And follow. Instructions to prosecuting officers in Section 10,
20 would you say that the two volumes of memos and policy
21 directives from the Attorney General's Department to
22 prosecutors will come under the rubric of instructions to
23 prosecuting officers?

24 A. In part. The volumes to which you refer were initiated by
25 me, I believe, in 1985 or 1986 to consolidate all the various

1 memoranda that have been distributed to prosecuting officers
2 from the head office of the department. So that it would be
3 an aid, an ease of reference for prosecuting officers. Instead
4 of having to recall what file they placed it in, they'd have one
5 volume where they could refer for guidance.

6 Q. Would these two volumes contain, in addition to the
7 consolidation of memos, would also contain policy directives?

8 A. Yes.

9 Q. For instance, directive on disclosure.

10 A. That's correct.

11 Q. We'll get to.

12 A. There's one section of the document to which you refer is
13 divided into, if I recall correctly, twelve sections. One section
14 deals with policy statements on a variety of issues.

15 Q. Does the Department have a policy with respect to the amount
16 of evidence to be called by the Crown at a preliminary
17 inquiry?

18 A. No.

19 Q. Are you able to tell us whether the practice in Nova Scotia is
20 for the Crown to call all the available evidence or just enough
21 evidence to get the matter to trial?

22 A. I don't think there is one practice, to my knowledge. I think
23 it may vary with the style of the individual prosecutor, or the
24 Court before which that prosecuting officer is appearing,
25 perhaps the defence counsel who he is dealing with. To my

1 knowledge, there is no set approach. Prosecuting officers, I
2 think generally speaking, would be encouraged to call only
3 the evidence that is necessary to secure a committal for trial
4 so as to not unduly delay judicial proceedings.

5 Q. What do you say as to defence counsel's arguments that one
6 of the purposes of a preliminary inquiry is to permit them to
7 basically discover?

8 A. If that position was taken by a defence counsel, I would hope
9 that a prosecuting officer would be responsive to that type of
10 request and would accede to it.

11 Q. In other words, if the defence counsel made his intentions
12 known in advance and said, "This is what I would like you to
13 do," you would hope they would be responsive...

14 A. That's a possibility.

15 Q. What about plea bargaining? Do you have involvement in
16 that?

17 A. Yes, I do.

18 Q. What's the nature of your involvement?

19 A. One of the policy statements to which I alluded earlier deals
20 with that subject. It's entitled "Negotiations with Defence
21 Concerning Plea and Sentence".

22 Q. Is it the policy in Nova Scotia that plea bargaining is an issue
23 that prosecutors are expected to turn their minds to and
24 engage in where appropriate?

25 A. The policy includes a reference to the fact that the appeal

1 Division of the Supreme Court of Nova has, in a decision that's
2 alluded to there, I can't recall the specific reference or
3 citation, indicated to the effect that plea bargaining is not to
4 be regarded with favour. However, the memorandum goes on
5 to, or the policy statement goes on to indicate that it's a
6 reality, it's a fact of life in the practice of criminal law and the
7 particular context there is for prosecuting officers to insure
8 that if they reach an arrangement with defence counsel that
9 deals with the sentence, that that sentence that the
10 prosecutor is prepared to agree to accords with proper
11 principles of sentencing as enunciated by the courts.

12 Q. Do you get involved with stays of proceedings?

13 A. Yes.

14 Q. And in what sense do you get involved?

15 A. I would say that my position is the key focus point for
16 requests from prosecuting officers to the Department for the
17 entering of a stay of proceedings.

18 Q. And would the entry of a stay of proceedings be something
19 that you would not expect a prosecutor to do on their own
20 initiative?

21 A. In the vast majority of cases, there have been instances
22 where prosecuting officers have entered a stay of
23 proceedings, usually at a level that it's so obvious that the
24 stay is the appropriate vehicle to be employed that they feel
25 they have the authority to do so. Anything that's more

1 contentious or more...that they aren't comfortable with in the
2 context to which I just referred would be referred to the
3 Department for direction.

4 Q. I'd just like to ask you a few questions. If you could turn to
5 Volume 28.

6 A. Yeah.

7 Q. The skinny one. Towards the end of that volume is the 1984
8 and 1986 statements concerning disclosure. If we could just
9 have a look at the 1986.

10 A. Yes.

11 Q. On page 16 of Volume 28. Would it be the practise pursuant
12 to this policy that the Crown would disclose Crown sheets?

13 A. Possibly.

14 Q. Possibly not.

15 A. Possibly, depending upon whether the content of the Crown
16 sheet included items that were not appropriate for disclosure
17 to the defence.

18 Q. What sorts of things would...might be contained in a Crown
19 sheet that might not be appropriate?

20 A. It's possible...I think one first has to define the terms here.
21 There is two terms which are used somewhat interchangeably
22 and I think require definition. One is the term "police report,"
23 which may...which I define to be a report of the complete
24 activities of the police investigator in carrying out an
25 investigation of a criminal offence as distinguished from a

1 crown sheet.

2 Q. Right.

3 A. Which I would define to be a report or instructions
4 to...sometimes referred to as a confidential instructions to the
5 prosecuting officer, it goes by various titles. But in essence
6 it's a document which indicates the evidence which is
7 available, which the Crown would call in support of the charge
8 laid.

9 Q. All right. Using your definition of Crown sheet then, is that
10 something that would normally be disclosed?

11 A. Yes.

12 Q. Would you disclose the statements of the accused?

13 A. Yes.

14 Q. Statements of...

15 A. The policy mandates that.

16 Q. Yes. And witnesses?

17 A. Yes.

18 Q. Statements of persons not to be called.

19 A. Yes, if there...if a statement was taken by the police from a
20 witness, whether or not the Crown intended to call that
21 witness it's encompassed in our disclosure policy. I'd like to
22 inter...I'd like to add that to my knowledge, and while I can't
23 state this definitively, because I haven't researched the
24 policies of the other Departments of Attorneys General across
25 the country, but the policy that you have before you that

1 you're now referring to goes farther than any other policy
2 anywhere else in the country in the context of provision of
3 copies of statements of witnesses. Other provinces, to my
4 knowledge, most other provinces, do not go that far. They
5 provide for the provision of a will-say statement, a summary
6 prepared of the witness' evidence and supplied to the
7 defence.

8 Q. Other than statements of persons not to be called, would you
9 consider that the Crown ought to disclose information that it
10 may have concerning those sorts of persons, notwithstanding
11 the fact that there may not be a statement per se?

12 A. Difficult to answer in the abstract, Mr. Spicer. It requires an
13 examination of the individual circumstances.

14 Q. Well, let's say it's a situation where information has come to
15 the attention of the Crown that a person has certain
16 information that would tend to assist the defence, and so a
17 statement is not taken from him.

18 A. Any information which comes to the attention of the Crown
19 Prosecutor which may tend to help the defence by both policy
20 and by law, in my opinion, must be provided to the defence
21 by the Crown.

22 Q. Would you disclose to the defence or would you expect your
23 prosecutors to disclose to the defence any facts within the
24 knowledge of the Crown which might bring into question the
25 credibility of Crown witnesses?

1 A. Generally...

2 Q. For instance previous psychiatric condition.

3 A. Generally speaking, no.

4 Q. Why would you not disclose to or have disclosed to the
5 defence the fact that a Crown witness may have a psychiatric
6 history?

7 A. I suppose the primary concern, I said generally speaking, the
8 primary concern would be for the welfare of the witness. The
9 Crown Prosecutor is, as a...has a obligation to the Court, to the
10 defence and also to the community. He is the agent of the...of
11 society before the Court.

12 Q. Uh-hum.

13 A. And the interests of the victim, the witness are important for
14 the Crown Prosecutor to keep in mind.

15 Q. If you were satisfied though that the...to take the psychiatric
16 example, the psychiatric history might tend to affect the
17 credibility of that witness, would that be something that you
18 would expect your prosecutors to disclose?

19 A. I think I can only take it as far as saying it may be. Again it
20 would depend on a detailed examination of a particular case.

21 Q. Criminal records of Crown witnesses?

22 A. That information is not...while it's in the possession of the
23 department, it comes to the department primarily through
24 the criminal records section of the R.C.M.P. which maintains
25 such information on a national basis. And, the terms under

1 which the criminal record information comes to a prosecuting
2 officer is generally on the basis that it cannot be released to
3 any other agency or person without the approval of the
4 R.C.M.P. criminal records section.

5 Q. If the criminal record of a certain Crown witness disclosed
6 that he had a couple of convictions for perjury, would that be
7 the sort of thing that you might want to...that you might
8 disclose to defence?

9 A. Possibly.

10 Q. Would you consider that sort of...that sort of a record, a record
11 that might affect his credibility as a witness, as something
12 that should be disclosed?

13 A. Yes, I would.

14 Q. Mr. Giffin, when he was giving testimony earlier, indicated to
15 me that he considered the disclosure obligation to be a
16 positive obligation. That is, that his conception of it was that
17 regardless of a request from the defence it was a positive
18 obligation of the Crown to disclose all the material that we've
19 been talking about to the defence. Would you agree with
20 that?

21 A. I share the viewpoint that and the policy of the department is
22 cast in positive obligatory terms. I think what you may be
23 alluding to is the question as to who initiates the request for
24 disclosure, and there the practise varies. I know of some
25 prosecuting officers who on their own initiative, when aware

1 that there's a defence counsel, will provide a disclosure of
2 information. There are others, and I think this is the...in the
3 vast majority of cases, who await a request from defence
4 counsel. I would go further and say that I don't feel that
5 defence counsel is doing his or her job properly unless they
6 initiate a request for disclosure.

7 Q. Well, let's just say that they fail in their obligation. Do you
8 ...would you agree with the Attorney General that the
9 obligation on the Crown is nevertheless a positive obligation
10 to disclose, notwithstanding the defence's failure to ask?

11 A. It's open to that interpretation. All I can say is I think there's
12 another interpretation based upon practical reality, which
13 ...which is triggered by a request.

14 Q. Right. What I'm searching for, I think, well, I know what I'm
15 searching for, is what is the policy of the department. The
16 Attorney General has said, or the then Attorney General, had
17 told us that in his view, regardless of requests, there was a
18 positive obligation that the Crown ought to disclose.

19 A. Mr. Spicer, the policy is in front of you. It's at page 16 of the
20 booklet.

21 Q. Uh-hum.

22 A. It doesn't deal with...it makes no mention to my recollection
23 and understanding of who initiates a request. That's not dealt
24 with specifically.

25 Q. That's right. And that's why I'm asking and that's why I

1 referred...referred you to Mr. Giffin's comments.

2 A. I can only take you as far as the policy. You have it in front
3 of you. That's what it says.

4 Q. Do you agree with Mr. Giffin?

5 A. Would you repeat his understanding for me?

6 Q. Sure. Mr. Giffin indicated that in his view the obligation was
7 positive and...

8 A. I agree with that aspect of it.

9 Q. Okay. And arose regardless of a request on behalf of defence.

10 A. I have difficulty with that aspect only because of my
11 knowledge of the practical reality of defence counsel/ Crown
12 counsel... Crown Prosecutor liaison.

13 Q. So, do we leave it then that the policy in that respect is
14 ambiguous?

15 A. It may be, and it may be that perhaps as a result of this
16 Inquiry or other initiatives all our policies...none of them are
17 etched in stone. They can evolve over time through
18 representations made and this may be an area which requires
19 clarification.

20 Q. Okay. But certainly insofar as the practise is concerned, it
21 doesn't accord with Mr. Giffin's understanding of the nature of
22 the obligation, is that fair to say? If he says that the nature
23 of the obligation is regardless of a request, you're telling us
24 that, in fact...

25 A. If he did go that far in his testimony then...

1 Q. He did.

2 A. From my knowledge of the day-to-day liaison between Crown
3 and defence, then that would not accord with that day-to-day
4 practise.

5 Q. Okay. And are you satisfied that the day-to-day practise is in
6 accord with the policy directly?

7 A. I am on the standard or gauge, for want of a better term, of
8 the absence of any complaints to my knowledge, coming to
9 the department on this issue. And I can add further that the
10 defence Bar in this province is not a shy one. It will bring to
11 the attention of the department deficiencies with respect to
12 an individual, or deficiencies with respect to an individual
13 employee of the department or a deficiency of a policy and
14 we are receptive to such representations.

15 Q. With respect to the policy itself at the bottom of page 16 after
16 the three exceptions, it says, "In any case in which it is felt
17 full disclosure should not be made, this must be referred to
18 the director for decision and instructions." Is that, in fact, the
19 practise, to your knowledge?

20 A. To my knowledge, yes.

21 Q. And have you, in fact, received this type of referral looking
22 for an instruction as to what should be done?

23 A. Yes.

24 Q. When we started talking about disclosure you wanted to
25 define a police report for me. Would you consider an R.C.M.P.

1 expert's report, to take an example that was used a day or so
2 ago, in connection with a forensic examination at Sackville, for
3 instance, to be that type of report? In other words if they...

4 A. A confidential report not to be disclosed?

5 Q. Yeah, that if an R.C.M.P. report was done out of Sackville, for
6 instance, looking at fibre evidence, would that be the sort of
7 thing that you would expect to be disclosed?

8 A. Yes.

9 Q. Summaries for trial judges. Would you expect those to be
10 disclosed to the defence?

11 A. The...

12 Q. And now that I've seen the look on your face, I was going to
13 ask, can you tell us what the summaries for trial judges are?

14 A. My understanding of the origins of the summary for the trial
15 judge was in the day of the Grand Jury, which has now past.
16 Nova Scotia was the last province in which the Grand Jury
17 was abolished. But as I understand it, it was a document
18 which was at that point in time employed to assist the judge
19 in explaining the proceeding to the grand jurors. That aspect
20 of the matter has vanished with the abolition of the Grand
21 Jury, but the practise remains. It is one which is encouraged,
22 to my knowledge, by the judiciary, by the members of the
23 Trial Division of the Supreme Court and I'm uncertain in my
24 own mind as to the practise of individual prosecuting officers
25 across the province as to whether they disclose that document

1 to the defence. I would have no difficulty if they do.

2 There's...

3 Q. What sort of...

4 A. ...nothing confidential in that documentation which could not
5 be disclosed.

6 Q. Okay. What sort of information generally is contained in that
7 document?

8 A. I haven't looked at one in awhile. My recollection is a
9 recitation of the facts that the Crown intends to adduce before
10 the trier of fact, references to the applicable law, an indication
11 of whether or not...of the projected length of the proceeding,
12 an indication of whether any *voir dices* will be held to
13 determine admissibility of evidence, that's my recollection of
14 the type of document.

15 Q. And you would have no trouble in agreeing that that
16 document should be disclosed to defence counsel.

17 A. No.

18 Q. At what point in time should all this material be disclosed?
19 You say at the earliest opportunity at the end of the first
20 paragraph of the...

21 A. That's right.

22 Q. ...policy statement.

23 A. The canons of ethics of the...which we are...which we are
24 guided by and are subject to talk in terms of timely
25 disclosure. It's left to the prosecuting officer in the individual

1 circumstances. Some disclosure...one might consider it timely,
2 for example, to disclose at first appearance in court stage.

3 The difficulty...the practical difficulty with that often is that
4 one doesn't know who will be the eventual defence counsel at
5 that point, hence the words are, I think, deliberately broad to
6 recognize that reality.

7 Q. Should it be before the preliminary if the information is
8 available and defence counsel has been retained?

9 A. Yes, I would say so.

10 Q. Are there any circumstances where Crown Prosecutors will
11 impose conditions on the way in which information disclosed
12 to the defence may be used?

13 A. Yes.

14 Q. Can you tell us what sorts of circumstances those would be?

15 A. One would be the condition that a police officer, and perhaps
16 the informant police officer, the police officer who swears the
17 information and institutes the proceeding, that he not be
18 subject to cross-examination on the Crown sheet document,
19 that he be prepared...that he prepared. For example, if there
20 were errors, which there can be and often are, in terms of
21 typographical errors or incorrect hours put down in the
22 context of a breathalyzer proceeding or incorrect dates, that
23 he not be caught up and his credibility questioned on such
24 errors which flow out of the Crown sheet document.

25 Q. What about with respect to statements?

1 A. Your question again vis-a-vis statements?

2 Q. As to whether or not, well, for instance, without getting into
3 the details of it, we're both aware of situations where
4 information has been disclosed by prosecutors to defence
5 counsel, including statements, on the condition that they will
6 not be used for the purposes of cross-examination of any
7 Crown witnesses in any Court proceeding.

8 A. That, I think, underlies the practise in the other provinces
9 that I alluded to earlier. It's to avoid that very thing
10 happening that the other provinces have not gone as far as
11 Nova Scotia has gone in disclosure. This area is one that I
12 haven't to date formed a final, conclusive opinion on. It's a
13 difficult area.

14 Q. But if it is the fact that at least a couple of your prosecutors
15 are disclosing information or are disclosing statements on the
16 condition that they not be used for the purpose of cross-
17 examination, are you happy with that situation?

18 A. I wouldn't use the term "happy." I think I would prefer to
19 say it would be a situation I would like to look into, to
20 research further, and to develop a position on on behalf of the
21 department.

22 Q. Surely a defence counsel with a statement in his file, listening
23 to a Crown witness saying something completely different
24 from the statement, ought to be entitled to cross-examine on
25 that statement.

1 A. I have difficulty in disagreeing with you. I share...I think I
2 basically share that concern.

3 Q. And did you know until...

4 A. And I should add in the context of this case in question here,
5 the Marshall case, that it heightens my concern.

6 Q. All right. And in fairness did you realize until I brought it to
7 your attention, I think yesterday, that that practise was going
8 on?

9 A. I wasn't aware of that particular case, as I mentioned to you
10 at the particular instance, as I mentioned to you at the time,
11 there may be particular reasons that a particular prosecuting
12 officer has taken for establishing that position. It might be in
13 reference to a particular defence counsel or a particular
14 practise in a county.

15 Q. Let me ask you about the...when you say a particular, with
16 reference to the particular defence counsel. Why would the
17 identity of the particular defence counsel be an operative
18 factor in terms of the nature of the disclosure that's going to
19 be given?

20 A. I guess only what I was thinking of was if a defence counsel
21 has...if there have been constraints put on items disclosed to
22 the defence and if those constraints have not been observed
23 in the past...have not been respected in the past by a defence
24 counsel, then I think the prosecuting officer might be
25 motivated to...

1 Q. It's really a question of trust is what you're saying.

2 A. That's an aspect of it.

3 Q. Do you ever have discussions with the police concerning the
4 extent of their disclosure to the Crown of the material they
5 have?

6 A. I can't recall having any specific discussions with the police
7 on that subject, but it's entirely possible that I could have in
8 future.

9 Q. In your experience, would you have any reason to have any
10 concern that the police do not disclose their entire file to your
11 prosecutors?

12 A. Could you repeat your question again, please?

13 Q. On the basis of your experience over the years, do you...would
14 you...do you have any reason for...to have any concern that
15 the police would not disclose their entire file to the
16 prosecutors?

17 A. If, for example, there were...there was release of the second
18 category I mentioned, police reports, by the prosecuting
19 officers, I think that might have impact upon the police. The
20 police would be reluctant, number one, to forward that type
21 of report to the prosecutor, which would be an unfortunate
22 development, and further I think they would be...feel
23 reluctant to be as candid as they might otherwise be in the...in
24 the information included in such reports.

25 Q. Are you satisfied at this point in time that the police are

1 candid and open with the prosecutors and disclose their
2 entire file to them?

3 A. To the best of my knowledge, again, gauged on the absence of
4 complaints coming...

5 Q. Complaints.

6 A. ...to the department in this area.

7 Q. Yes.

8 A. Yes, I am.

9 Q. I'm going to ask you a few questions in a different area.

10 What sort of continuing legal education facilities or programs
11 does the Attorney General's Department provide for its
12 prosecutors?

13 A. The Department in recent years has sponsored an annual
14 education conference, a one-day conference for prosecuting
15 officers normally held the first of October of each year.

16 Q. And would you bring in everybody from around the province
17 for that?

18 A. Every full-time prosecuting officer

19 Q. Okay.

20 A. In addition to that the Department attempts within its
21 available resources to sponsor the attendance of prosecuting
22 officers and our criminal field lawyers at conferences on
23 criminal topics, the most notable of which is the annual
24 Federation of Law Society's of Canada advocacy or criminal
25 evidence conferences which are held each year.

MR. HERSCHORN, EXAM. BY MR. SPICER

1 Q. Do you have more requests than you can meet for that sort of
2 meeting?

3 A. Yes, we do usually.

4 Q. There's an Exhibit 149, I think you...do you have that in front
5 of you yet or not, it's the evaluation form.

6 EXHIBIT 149 - EVALUATION FORM OF GOVERNMENT OF NOVA

7 SCOTIA

8 Q. Is there a method for evaluation of the competence of Crown
9 Prosecutors?

10 A. Aside from the form that this exhibit...this is the only
11 formalized aspect of such appraisal and monitoring.

12 Q. And how does the formalized aspect of it work?

13 A. This form, it's my understanding, flows out of the
14 management...in the M's you'll see a reference MCP in
15 brackets, in the title, which is a reference to manage...my
16 understanding is that is a...

17 Q. What is that a reference to?

18 A. An abbreviation to Management Compensation Pay Plan.
19 Hence this appraisal is a part of the pay plan under which
20 professional, they're called exclusionary employees,
21 employees in the civil service.

22 Q. Is a non-bargaining unit.

23 A. Who are non-bargaining unit employees, are remunerated
24 under.

25 Q. And this...then this particular general performance appraisal

1 form would apply to non-bargaining unit employees other
2 than prosecutors, as well, would it?

3 A. No, I think my understanding is this form is adapted to
4 individual departments and groups of employees.

5 Q. Okay. On the second page of that, Mr. Herschorn, are those
6 the criteria that would be used in assessing prosecutors?

7 A. I should clarify, this form, to answer your questions, yes,
8 those are the criteria which were utilized. This form was only
9 employed in one year. The form...the management
10 compensation pay plan, to my recollection, came into effect
11 in...either in 1981 or 1982, and a formal performance
12 appraisal utilizing this format was only employed in one year
13 subsequent to that, to the present date.

14 Q. Is it in current use then?

15 A. It was not utilized this past fiscal year.

16 Q. And is this form, in fact, a form that was used in connection
17 with the implementation of some sort of a merit plan...merit
18 pay plan?

19 A. That's correct.

20 Q. The guidelines currently in use in Nova Scotia, the two blue
21 volumes that we've been talking about, you're aware, I think,
22 that in some provinces those volumes are publicly accessible,
23 for instance in New Brunswick I think they're accessible.

24 Now, do you have any...

25 A. Yes.

1 Q. Do you have any views as to whether or not they should or
2 shouldn't be accessible in Nova Scotia?

3 COMMISSIONER EVANS

4 What are we talking about?

5 MR. SPICER

6 The two...well, the blue volumes that we were talking about
7 earlier, My Lord, that contain the summaries of memoranda
8 on law and also directions to prosecutors, policy guidelines,
9 that type of thing.

10 A. The document in question is entitled "Advice to Prosecuting
11 Officers."

12 Q. Yes.

13 A. As I alluded to earlier, it is a consolidation of the various
14 memoranda that have gone forward in...that are still current
15 and have gone forward in recent...in the recent past to
16 prosecuting officers. It's a reference aid. It contains, as
17 I...undoubtedly some of the components of the document
18 would have...would be such that I would not favour public
19 disclosure of because they are internal, confidential
20 documents. There is probably a good portion of the
21 document, as in other provinces, could be disclosed.

22 Q. Can you tell us from your experience from 1972 forward, how
23 much has the nature of the disclosure policy changed? I
24 mean, is a lot different now than it was when you first started
25 in '72, '73?

- 1 A. I don't have a gauge of what disclosure practises were in '72,
2 '73. It's only since I assumed a particular involvement with
3 prosecutors and prosecutions, which is roughly 1979, '78,
4 forward that my knowledge commences.
- 5 Q. Well, going from that date then? Has there been any
6 substantial change?
- 7 A. I wouldn't...I think it's roughly at that point in time that the
8 department for the first time enun...put in writing a policy on
9 this subject.
- 10 Q. And do you think that I could have asked you more or the
11 less the same questions in 1978 and got more or less the
12 same answers with respect to disclosure?
- 13 A. Perhaps not in '78, but in 1980. The exhibit that you...book
14 that you referred me to earlier.
- 15 Q. Volume 28. Yeah, the one before eighty-six is eighty-four.
- 16 A. And there was an earlier...
- 17 Q. Page 14.
- 18 A. ...statement that you may not have here that, I believe, then
19 Attorney General Harry How, I think it was in his, during his
20 tenure in office that the first, and my recollection is 1981,
21 was the first time that the advice, written guidance to
22 prosecuting officers was issued on this topic.
- 23 Q. One of the matters that is dealt with in your job description
24 on page 3 is the question of dealing with complaints.
- 25 A. Yes.

1 Q. Can you tell us what procedure, if any, there is for dealing
2 with complaints about prosecutors or the handling of cases?

3 A. No formalized procedure. The procedure is...could be outlined
4 basically as a receipt of a complaint, a request to the subject
5 matter of of the complaint for a report concerning the
6 assertions or allegations made against him or her and an
7 analysis of the...once that...a response is received from the
8 prosecuting officer, an analysis of it, and a determination
9 reached as to whether the complaint is justifiable or not.

10 Q. Would the complaints be funnelled through yourself?

11 A. Now, if a complaint deals with a prosecution...prosecution or a
12 prosecuting officer I would say yes.

13 Q. So, if it was directed to the Attorney General, it would be
14 turned over to you.

15 A. Yes, it would be...it would be referred to me.

16 Q. Okay. And for how long has that been the case?

17 A. Formally since 1986, prior to that for a few years, I believe, I
18 was, perhaps since 1982, performing the functions of a
19 director prosecutions without the title, per se.

20 Q. Earlier on I was asking some questions about investigations.
21 In your view, can the Department of the Attorney General
22 order an investigation stopped, police investigation?

23 A. No.

24 Q. In no circumstance.

25 A. I can't envisage a circumstance. The only possibility may be

MR. HERSCHORN, EXAM. BY MR. SPICER

1 in reference to a criminal offence where...which under the
2 terms of the Criminal Code requires the consent of the
3 Attorney General to the institution of proceedings.

4 Q. Right.

5 A. And while I can't...I'm not aware of this having occurred, it's
6 conceivable that an Attorney General may, as a matter
7 of...may reach a determination that there shall be no
8 proceedings. He will not ever grant consent to such a
9 proceeding. In which case it would be equivalent to...it would
10 be a signal to the police that it would be pointless to pursue
11 an investigation in that particular area. But that's...that's not
12 a real current example of anything.

13 Q. Other than that, if the A.G.'s Department, for instance, was to
14 ask the R.C.M.P. to investigate something and they began
15 investigating it, you couldn't conceive of a situation where the
16 A.G.'s Department could say, "Okay, that's enough, stop the
17 investigation."

18 A. No, I could not. As I alluded to earlier, it is the function of the
19 police in our system to investigate allegations of criminality.

COMMISSIONER EVANS

21 Could we get the volume turned up? This is almost a private
22 conversation between you and the witness.

MR. SPICER

23 Q. My question was whether or not there was any circumstance
24 that you could conceive of, other than the situation let's say
25

1 where there is a necessity for consent to prosecute, where the
2 Attorney General's Department could order an investigation
3 stopped?

4 A. No, I could not.

5 Q. Are there situations where you would think that you would
6 not be fully brought in with respect to a serious criminal
7 matter in the A.G.'s Department? Would there be things that
8 you wouldn't know about that would be considered to be
9 serious criminal matters, as far as you know?

10 A. I wouldn't in the context of an intention...sort of intentional
11 act by anyone. It's conceivable one reason would be absence
12 on vacation or away on business.

13 Q. But there would be no policy reason or...

14 A. No.

15 Q. Are there any programs in place in the Attorney General's
16 Department which are directed towards the treatment of
17 either natives or blacks in the...in respect to the justice
18 system in Nova Scotia?

19 A. Not in the component of the criminal justice system that I
20 am...have knowledge of, which is the prosecutions section of
21 the Attorney General's Department.

22 Q. Are you aware of any such programs in any other
23 components of the Attorney General's Department?

24 A. Could you define the type of component again for me?

25 Q. Education program. "Component" was your word.

1 A. I'm sorry.

2 Q ...in the Attorney General's Department.

3 A. Use your word.

4 Q. Well, other than the areas for which you have specific
5 responsibilities, are you aware of any programs that deal
6 with...specifically with minority groups within the Attorney
7 General's Department of Nova Scotia?

8 A. Not to my knowledge.

9 Q. Over the years in the various positions that you've occupied,
10 have you ever been aware of any complaints from racial
11 minorities in connection with the way they were treated by
12 the justice system in Nova Scotia?

13 A. Yes.

14 Q. Are you able to tell us what sorts of complaints those would
15 be?

16 A. I'm reluctant to get into the area because it would identify a
17 specific case, I'm reluctant to do that, if...

18 Q. Are these current matters? I don't want you to get into
19 names, but if you can identify for us the nature...

20 A. It's difficult to allude to it at all...

21 Q. ...of the problem.

22 A. ...without identifying the matter.

23 Q. Perhaps the best way to deal with this, My Lords, at some
24 point we'll have a break and I can ask Mr. Herschorn what it
25 is before we get into it.

MR. HERSCHORN, EXAM. BY MR. SPICER

1 MR. CHAIRMAN

2 Before you move on to another line of questioning, did I
3 understand you to say, Mr. Herschorn, that the question of the
4 nature of the charge and whether a charge should be laid falls
5 within the exclusive area of responsibility of the police?

6 MR. HERSCHORN

7 Responsibility of...yes, of the police, but with the slight
8 caveat that in the vast majority of cases police will often come to a
9 prosecuting officer for assistance with respect to some of those
10 questions, guidance as to the wording of an information, criminal
11 complaint, guidance as to which of a variety of charges would be
12 appropriate in the circumstances.

13 MR. CHAIRMAN

14 How do you guard against charges being laid by a police
15 officer where there is insufficient evidence to warrant it,
16 particularly insufficient evidence at law?

17 MR. HERSCHORN

18 Again, through the liaison which occurs in the overwhelming
19 majority of cases between the police and the Crown and the
20 relationship is not one...is not adversarial. The police, in the vast
21 majority of situations, accept the advice of the prosecuting officer.

22 MR. CHAIRMAN

23 With the...

24 MR. HERSCHORN

25 Excuse me, My Lord.

MR. HERSCHORN, EXAM. BY MR. SPICER

1 MR. CHAIRMAN

2 Would a police officer go to a pros...a policeman go to a
3 prosecuting officer and...Crown prosecutor and say, "I'm
4 investigating an alleged offence, here is what I have. Do you think
5 that's sufficient or can you instruct me as to the kind of evidence
6 that is necessary to sustain a charge in this...in this instance?"

7 MR. HERSCHORN

8 That type of scenario happens regularly, I would think.

9 MR. CHAIRMAN

10 But in...but I gather technically a police officer could go
11 ahead and lay a charge without consulting a Crown Prosecutor.

12 MR. HERSCHORN

13 Yes, sir. A police officer, it's my understanding of the
14 provisions of the Criminal Code, any citizen may do that.

15 MR. CHAIRMAN

16 What protection then would...does a citizen have of being,
17 other than an acquittal, but against being charged where the
18 evidence doesn't warrant it?

19 MR. HERSCHORN

20 In that situation where someone has pressed it to the point
21 of laying a charge without seeking the advice of the Crown, the
22 remedy which is one at the exclusive disposal of the Attorney
23 General, is the stay of proceedings.

24 MR. CHAIRMAN

25 Well, I...

MR. HERSCHORN, EXAM. BY MR. SPICER

1 MR. HERSCHORN

2 To intervene in the proceeding.

3 MR. CHAIRMAN

4 What I suspect that this is used rather sparingly.

5 MR. HERSCHORN

6 Yes, it is these days. I think the tradition has been to use it
7 sparingly. I think increasingly so since the advent of the Charter
8 of Rights out of concerns that the employing of the vehicle of the
9 stay will bring about a challenge to its being employed and
10 further constrict its possibly being employed in future cases.

11 COMMISSIONER EVANS

12 Following up on that. If there is a conflict between the
13 prosecuting officer and the prosecuting attorney and the police, do
14 I understand the police will go ahead then and lay the charge?

15 MR. HERSCHORN

16 No, My Lord, I think in...certainly in the context of R.C.M.P.
17 Crown Prosecutor involvement there are procedures in the
18 R.C.M.P. operational manual which provide guidance to R.C.M.P.
19 members in the event of that situation occurring, and basically
20 they provide for the matter to be...if there is a dispute between
21 the investigating officer and the local prosecuting officer, for the
22 investigating member to refer the matter to his superiors to be
23 referred on to Halifax, to eventually be, I guess it would end up
24 being discussed at one of the regular meetings between senior
25 R.C.M.P. and senior officials of the Attorney General's Department.

MR. HERSCHORN, EXAM. BY MR. SPICER

1 COMMISSIONER EVANS

2 Let's leave aside the R.C.M.P., I'm aware of that. If one of
3 the areas not policed by the R.C.M.P. What is the situation when
4 there is a conflict between the Crown and the police?

5 MR. HERSCHORN

6 I think the same avenue is open to a municipal police
7 officer. It's not formalized as such, but it's there.

8 COMMISSIONER EVANS

9 But you would expect to be advised or at least Halifax would
10 be expecting to be advised of the conflict and then they would
11 presumably...

12 MR. HERSCHORN

13 Yes.

14 COMMISSIONER EVANS

15 ...resolve it some way.

16 MR. HERSCHORN

17 Yes.

18 COMMISSIONER EVANS

19 You just don't let the police run...go ahead without further
20 consultation with the head office or with the A.G.'s office.

21 MR. HERSCHORN

22 That's correct. It would be in part premised on the overall
23 superintendents' role of the Attorney General to avoid abuses of
24 the type I believe you have in mind.

25 COMMISSIONER EVANS

1 Thank-you.

2 MR. SPICER

3 Q. But if the police wanted to, there is no real way, given that
4 they have the final say, to prevent the abuse in the first
5 instance. It has to come at the next stage.

6 A. The police are...

7 Q. As a stay.

8 A. As I mentioned, any citizen, my understanding of the law is
9 that any citizen who goes before a Justice of the Peace and
10 requests that...and has an information laid, the Justice of the
11 Peace is legally obliged to receive that information. The next
12 question, or perhaps more crucial question though is whether
13 that justice issues process to compel the appearance of the
14 accused person in Court.

15 Q. Have you attended the Thursday meetings which we've heard
16 about during the course of these hearings between the R.C.M.P
17 and the A.G.'s Department?

18 A. I do currently and have done so for a number of years. I
19 can't recall specifically when I commenced to regularly attend
20 such meetings. It was within say the last four years, I would
21 say.

22 Q. Following up on the questions from one of the Commissioners,
23 are individual cases, instances of individual cases, discussed
24 at these Thursday meetings?

25 A. They may be.

1 Q. And in what sense would those individual cases be discussed?
2 What sorts of things are talked about?

3 A. It could be any aspect of a case that the R.C.M.P. is aware the
4 Attorney General's Department has an interest in, it may be a
5 matter that was initiated by way of complaint to the Attorney
6 General's Department, forwarded to the R.C.M.P. for
7 investigation and we're getting a follow-up as to the results of
8 that investigation.

9 Q. Is the level of investigation discussed at the meetings?

10 A. Could you...

11 Q. As to what's actually going on at the time?

12 A. I wouldn't think so in the normal course of events, but if in
13 the perception of...in the sharing of information, if it was the
14 observation of the person attending the meeting on behalf of
15 the Attorney General's Department that there should be more
16 attention paid by the police to an avenue of investigation, I
17 would think he would voice that viewpoint.

18 Q. What other sorts of things other than individual cases are
19 discussed at the Thursday meetings?

20 A. A wide variety of issues of mutual concern. That meeting
21 would and does act as a...as a liaison for the, in particular, the
22 R.C.M.P. in gaining access to the services of other government
23 departments. I think in particular of the Registry of Motor
24 Vehicles, Registry of Vital Statistics, as two examples. Prior to
25 the inception of the Solicitor General's Department, matters of

1 complaints against R.C.M.P. members might be the subject of
2 discussion at such meetings.

3 Q. Could it generally be described as an information session?

4 A. Yes. And my view, essential, an essential aspect of a working
5 relationship between the Attorney General and his provincial
6 police force, in this case the R.C.M.P..

7 Q. Well, why do you regard it as essential?

8 A. I think that comment states the obvious. The R.C.M.P. is
9 contract...is under contract to the provincial police force,
10 under the provisions of the provincial Police Act. It's
11 important for the Attorney General to be aware of what the
12 provincial police force is engaged in.

13 Q. And just so that we're clear on this, to take you back to some
14 of your earlier comments, would...do you say the same with
15 respect to an R.C.M.P. investigation that's been initiated at the
16 behest of the Attorney General's Department in terms of the
17 Attorney General's Department's inability to stop such an
18 investigation? You said earlier that the A.G.'s Department
19 does not have the authority to stop an investigation.

20 A. That's correct.

21 Q. And do you include in that statement both the R.C.M.P. and
22 any other police force in the province?

23 A. Yes.

24 Q. So, there is no difference in your mind.

25 A. None whatsoever.

1 Q And, again just to be clear, would your comments as to the
2 final responsibility for laying a charge relate both to the
3 R.C.M.P. and to municipal polices forces as well?

4 A. Absolutely no distinction.

5 Q With respect to some of the matters that I've asked you
6 about, Mr. Herschorn, in fact perhaps disclosure maybe is not
7 a bad example. Are you aware of whether or not the
8 practises actually vary a little bit around the province from
9 prosecutor to prosecutor?

10 A. It's my impression that that is the case.

11 Q Do you regard...

12 A. I should expand on that to indicate that we...we are
13 function...and I think the job description may allude to this,
14 that we work under a system, a decentralized system with a
15 large measure of responsibility resting at the county level
16 on...with the chief, so-called chief prosecuting officer for that
17 county.

18 Q Do you consider it to be a satisfactory situation that, with
19 respect to disclosure, that there is such variation around the
20 province?

21 A. I think it's a matter that requires further examination,
22 research and perhaps a refining of the policy. One of the
23 difficulties in doing that, and I think the creation of the
24 position that I now occupy is a recognition of the need to
25 devote additional attention to such issues. One of the

1 difficulties is that the position is a one-man position, and the
2 day-to-day files that one must attend to don't always give
3 one sufficient time to attend to the type of issue you now
4 raise. That's not...I'm not saying that's the way it should be,
5 but that's the reality.

6 Q That's the way it is.

7 3:15 p.m.*

8 A. Yeah.

9 Q You had some involvement with the Donald Marshall matter.

10 A. Yes.

11 Q What was your first, when was the first time that you knew
12 about the Donald Marshall case?

13 A. I believe the first time I was aware of the case was through a
14 telephone conversation with Mr. Frank Edwards, the
15 Prosecuting Officer for Cape Breton County.

16 Q That would have been in 1982.

17 A. 1982, shortly after Mr. Edwards' meeting with Chief
18 MacIntyre of the Sydney Police Department and with, I
19 believe, Inspector Scott of the R.C.M.P.

20 Q Prior to 1982 during the period '72 to '82, did you have any
21 knowledge at all about anything to do with Donald Marshall?

22 A. No, nor to my knowledge, did anyone in the head office of the
23 Attorney General's Department.

24 Q And your basis for saying that is what? Have you discussed
25

1 that with other people in the Department?

2 A. No, I haven't.

3 Q. Just an assumption on your part.

4 A. It's my impression. Yes.

5 Q. In Volume 17 at page three, and you don't need to turn to it,
6 but those are Mr. Edwards' notes. There's a reference to call
7 to yourself from Frank Edwards on February the 25th. Your
8 actual involvement predates that date of February the 25th, I
9 take it.

10 A. My recollection is of a telephone conversation quite soon after
11 the initial meeting after Mr. Edwards, Chief MacIntyre, and
12 Inspector Scott, which I believe was February 3rd.

13 Q. What was the nature of that call?

14 A. Which call?

15 Q. The call to yourself?

16 A. On which date?

17 Q. The first one?

18 A. February 3rd, it was Mr. Edwards, the Prosecuting Officer,
19 advising me of a unique situation which he had learned of
20 and which was about to be pursued by the R.C.M.P. in terms
21 of a reinvestigation.

22 Q. Was he asking you to do anything at that point?

23 A. Not to my recollection.

24 Q. Did you do anything as a result of that call?

25 A. I recall raising, informing Mr. Gordon Gale, the Director of

- 1 Criminal, of what Mr. Edwards had apprised me of.
- 2 Q. Do you know whether at that point in time Mr. Gale did
3 anything, to your knowledge?
- 4 A. Nothing specific, to my knowledge.
- 5 Q. Mr. Edwards' notes indicate that he called on the 25th and
6 26th of February. Do you have any recollection of those calls?
- 7 A. No independent recollection, no.
- 8 Q. Perhaps if you could just look at then in Volume 17, page
9 four, Frank Edwards' notes, the last dated entry, February
10 26th in the second paragraph: "9:30 a.m. phoned Herschorn.
11 Told him of above." And "above", presumably, is
12
- 13 Harry Wheaton phoned to confirm my opinion
14 that the defence did not know of previous
15 inconsistent statement. I told them in my
16 opinion they did not. Harry Wheaton said he
17 and Scott were going to see Chief MacIntyre this
18 morning.
- 19 Does that refresh your memory at all?
- 20 A. It doesn't refresh my memory, but I have no reason to doubt
21 Mr. Edwards' notes.
- 22 Q. Do you know whether or not Mr. Edwards is doing anything
23 other than just keeping you abreast of what was going on at
24 that point? Was he asking you to do anything?
- 25 A. Not to my recollection.
- Q. In Volume 31, at page 13, there's a letter to yourself from
Steve Aronson.

1 A. Yes.

2 Q And in that letter, he is requesting in the second paragraph a
3 copy of the final R.C.M.P. report of the investigation.

4 A. Yes.

5 Q Did you act on that request?

6 A. No, I would have turned the letter over to, my recollection is
7 that I turned the letter over to Mr. Gale, who was
8 coordinating the efforts of the head office of the Attorney
9 General's Department, vis-à-vis the reinvestigation of Mr.
10 Marshall's conviction.

11 Q Would you have done anything with respect to this letter
12 other than to read it and to turn it over to Mr. Gale?

13 A. I may have, I have a vague recollection of perhaps
14 acknowledging it by telephone to Mr. Aronson.

15 Q I've been unable to find any written response to that letter.

16 A. It may be that Mr. Gale becoming involved, there may have
17 been some response on his... by him.

18 Q Did you have a view in 1982 when you received this letter as
19 to whether or not that R.C.M.P. Report should be released to
20 Mr. Aronson?

21 A. No, I did not.

22 Q In terms of the authority for dealing with this reinvestigation
23 of the Marshall case, what was your role? When you're
24 receiving a letter here from Aronson. Mr. Edwards is calling
25 you. What was your responsibility?

1 A. As it unfolded, I did not play the key, a key role in the
2 reinvestigation phase or really at any stage throughout the
3 Department's dealings with matters that followed.

4 Q. In 1982/1983, what would your position have been? You
5 would have been Assistant Director?

6 A. Assistant Director Criminal.

7 Q. Would Mr. Edwards have consulted with you in connection
8 with his prosecutorial function insofar as it related to the
9 Marshall matter?

10 A. We certainly had many discussions about this and other cases.
11 There were matters he may have consulted me on, vis-à-vis
12 this, the Marshall case or others or other aspects where he'd
13 just be informing me of something. I was not, nor do I now,
14 direct in a hands-on, to use an expression, a hands-on way,
15 the activities of prosecuting officers in counties.

16 Q. Is it your view, though the positions taken by prosecutors
17 should reflect the position of the Attorney General's
18 Department?

19 A. Absolutely.

20 Q. And if you found a prosecutor taking a position that was not
21 consistent with the position of the Attorney General's
22 Department, you would take steps to remedy that, I take it?

23 A. If I was dealing with the matter, yes. I should indicate as
24 well that the so-called head office of the Department, the
25 Attorney General may speak at any given time to a

1 prosecuting officer, either through my position, through the
2 position of the Director of Criminal, through the, currently the
3 Executive Director of Legal Services' position, the Deputy
4 Attorney General's office, or his own office.

5 Q. And in 1982, if a prosecutor wanted some advice of what
6 position he ought to take with respect to case, would you
7 expect him to call him or would you expect him to call Gordon
8 Gale?

9 A. Normally, I think he would call me because I had at that, my
10 recollection is at that point in time I had specific
11 responsibility for prosecutions and prosecutors. But in this
12 particular case, Mr. Gale was coordinating the effort and,
13 hence, most of Mr. Edwards' liaison was with Mr. Gordon Gale.

14 Q. But you were kept advised of what was going on.

15 A. That's my recollection.

16 Q. On page 10 of Volume 17, there's a note, again, on Monday,
17 April 19, Frank Edwards' notes:

18
19 Phoned by Herschorn on an unrelated matter.
20 Told them there were new developments in
21 Marshall. He phoned me back with him and Gale
22 on conference phone. Briefed them thoroughly
23 on above. Suggested that investigation should
24 now focus on City police.

25 Do you have any recollection of that discussion?

A. No, I have no independent recollection of it. Again, I have no
reason to doubt the notes.

1 Q. Do you know whether or not, do you see the next, it says:

2
3 Gale was going to speak with Attorney General
4 re direction to City police under Police Act to
5 turn everything over to the R.C.M.P.

6 And indeed in the next day or so, such a letter was written.

7 Did you have any involvement yourself in the decision-
8 making process that led to that letter coming from Mr. How?

9 A. Not to my recollection. My recollection is that when the
10 matter was broached by Mr. Edwards, Mr. Gale brought to
11 undoubtedly my attention for the first time and perhaps to
12 Mr. Edwards as well, the provisions of Section 30, I believe it
13 is, of the Police Act, whereby what was required could be
14 accomplished by a directive of the Attorney General under
15 that Act.

16 Q. At this time in April, Mr. Herschorn, had you been kept
17 advised as to the progress of the reinvestigation? Did you
18 have any idea of what was going on?

19 A. I believe I did. I believe because of the profile that the case
20 had that I would have, Mr. Gale would have shared and I
21 would have had the interest enough to peruse the various
22 reports that were coming into the Department from the
23 R.C.M.P.

24 Q. Were you aware, for instance, in April that suggestions were
25 being made in the reports and in some of the statements
being filed with them that there had been police pressure on

1 some of the witnesses.

2 A. Yes.

3 Q. Did you advise or are you aware of whether or not the
4 Attorney General at the time was advised of that fact?

5 A. I didn't, I can't answer your...

6 Q. You don't know from your own knowledge whether or not
7 anybody else advised him.

8 A. No.

9 Q. As the matter is progressing from April through the summer
10 of 1982, other than being kept advised of what was going on,
11 did you have any active role in the matter?

12 A. Not that I can recall. I'm just skimming through Mr. Edwards'
13 notes to see if it refreshes my memory of anything. But I
14 don't have any recollection of, through to that point, of any
15 active involvement.

16 Q. The next paper reference really that I was going to draw your
17 attention to doesn't occur until probably October or so of
18 1982. You would say for that summer period you wouldn't
19 have any direct...

20 A. Following the ordering of the reference by then Minister of
21 Justice Mr. Chrétien, Mr. Edwards was mandated to represent
22 the Crown in that proceeding and he had primary carriage of
23 that.

24 Q. Okay, did you have any involvement yourself, any discussions
25 in connection with the way in which the reference was going

MR. HERSCHORN, EXAM. BY MR. SPICER

1 to be framed? In other words, before it was actually handed
2 down in June.

3 A. No, I did not.

MR. SPICER

5 I'm going to get into the reference material, My Lord, It
6 might be a good time to break.

MR. CHAIRMAN

8 Well, before we adjourn, simply to let counsel know where
9 we're going, I think I should note that we've now been sitting for
10 62 days and we've heard 87, this is our 88th witness, and we've
11 managed to accumulate 11,115 pages of testimony. Hopefully,
12 when we resume, we will be able to get through the bulk of the
13 viva voce evidence that is necessary for us as Commissioners to
14 deal with the issues that have been placed in our hands under the
15 mandate. I am not sure if Counsel are fully aware of the very
16 intensive activity that is ongoing by the Commission in research
17 projects dealing with matters that will elicit credible information
18 for us in areas of concern that could not conceivably be elicited by
19 way of the adversarial system. So although we won't be sitting
20 during the next three or four weeks or whatever the time frame
21 is, work goes on apace. And with these immortal words of
22 wisdom, we will adjourn until May 16th, 1988 at 9:30 a.m.

23 3:30 p.m. INQUIRY ADJOURNED UNTIL MAY 16TH AT 9:30 A.M.

24

25

REPORTER'S CERTIFICATE

I, Margaret E. Graham, Court Reporter, certify that the foregoing is a true and accurate transcript of all the evidence taken by way of recording and reduced to typewritten copy.



Margaret E. Graham

DATED THIS 24 day of March 19 88 at Dartmouth, Nova Scotia