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

Volume 72

Held: June 1, 1988, in the World Trade and Convention
Center, Halifax, Nova Scotia

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

Counsel: Messrs. George MacDonald, Q.C., Wylie Spicer, and David
Orsborn: Commission counsel

Mr. Clayton Ruby, Ms. Marlys Edwardh, and Ms. A. Derrick:
Counsel for Donald Marshall, Jr.

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

Mr. Donald C. Murray: Counsel for Mr. William Urquhart

Messrs. Frank L. Elman, Q.C., and David G. Barrett: Counsel for
Donald MacNeil estate

Messrs. Jamie W.S. Saunders and Darrel I. Pink: Counsel for the
Attorney General of Nova Scotia

Mr. James D. Bissell & Mr. A. Pringle: Counsel for the R.C.M.P.
and Counsel for the Correctional Services of Canada

Mr. William L. Ryan, Q.C.: Counsel for Officers Evers, Green and
MacAlpine

Mr. Charles Broderick: Counsel for Sgt. J. Carroll

Messrs. S. Bruce Outhouse, Q.C. and Thomas M. Macdonald: Counsel
for Staff Sgt. Wheaton and Insp. Scott

Messrs. Bruce H. Wildsmith and Graydon Nicholas: Counsel for
the Union of Nova Scotia Indians

Mr. E. Anthony Ross: Counsel for Oscar N. Seale

Mr. E. Anthony Ross and Jeremy Gay: Counsel for the Black
United Front

Court Reporting: Margaret E. Graham, OCR, RPR

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1 MR. CHAIRMAN

2 Mr. Orsborn.

3 MR. ORSBORN

4 Thank-you, My Lord. The first witness for this morning will
5 be Mr. Justice Leonard Pace.

6 THE HONOURABLE MR. JUSTICE PACE, duly called and sworn,
7 testified as follows:

8 EXAMINATION BY MR. ORSBORN

9 MR. ORSBORN

10 Before commencing, My Lords, I would just point out that
11 Mr. Justice Pace is represented here by counsel for the
12 Department of Attorney General in his capacity as Attorney
13 General which will be the focus of the questioning. Nonetheless I
14 would also acknowledge the presence this morning of Mr. Ron
15 Downie, Q. C., who is representing Mr. Justice Pace in his capacity
16 as a Judge of the Court of Appeal.

17 Q. Mr. Justice Pace, I understand that you are presently a
18 Justice in the Appeal Division of the Supreme Court of Nova
19 Scotia.

20 A. Yes, I am.

21 Q. When were you appointed to the bench, sir?

22 A. I was appointed in...on April 21st, 1978.

23 Q. In '78. If I may just ask you a few questions to get some
24 information about your background, My Lord. When were
25 you admitted to the bar?

- 1 A. February of '54.
- 2 Q. And did you practise law following your admission?
- 3 A. Yes, I did.
- 4 Q. Where did you practise, My Lord?
- 5 A. I practised in Halifax.
- 6 Q. And can you give us an indication of the type of practise
7 that you had?
- 8 A. A general practise. I practised some criminal law,
9 considerable tort law. I think generally, probate, company
10 work, et cetera.
- 11 Q. And, your entire career as a practising lawyer was spent in
12 Halifax.
- 13 A. In Halifax, yeah.
- 14 Q. And do I understand that at some time you decided to get
15 into the political arena?
- 16 A. Yes, yes, I did, in 1970.
- 17 Q. 1970.
- 18 A. '70, yes.
- 19 Q. For what district, sir, did you run?
- 20 A. Halifax-St.Margaret's.
- 21 Q. And were you elected when you ran?
- 22 A. Yes, I was.
- 23 Q. And, did you stay in politics until...from 1970 through to
24 '78?
- 25 A. Yes, I did.

1 Q. And were you elected as a member of government or a
2 member of the opposition?

3 A. No, I was a member of government.

4 Q. And do I understand that during some, if not all, of your
5 time in politics you were Attorney General?

6 A. Part of my time. I had two sessions.

7 Q. Yes.

8 A. As Attorney General. But my first portfolios was Labour
9 and Attorney General.

10 Q. I see.

11 A. I've always had...been dual portfolios.

12 Q. I'm sorry.

13 A. I've always had dual portfolios.

14 Q. I see.

15 A. During the time I was in government.

16 Q. And during what period, sir, were you Attorney General?

17 A. This will be a little rough.

18 Q. Of course.

19 A. Maybe. I think I was there until from October of '70 until
20 August, the end of August or September of '73. Then I came
21 back in '76 and I was there until my appointment...

22 Q. Yes.

23 A. ...to the bench.

24 Q. In the course of your practise you indicated you did some
25 criminal law, was that as a defence counsel?

- 1 A. Mostly as...almost exclusively as a defence counsel, yes.
- 2 Q. So, I take it you did do some prosecutions.
- 3 A. I think one or two in my whole career. They were...had to
- 4 do with the environment.
- 5 Q. Can you give us any...
- 6 A. Oil pollutions. I think I did two or three of those, but...
- 7 Q. I see. Can you give us any indication, My Lord, as to the
- 8 percentage of your practise that may have been devoted to
- 9 defence work, criminal defence work?
- 10 A. This would just be a guess, probably forty, fifty percent.
- 11 Q. Is it...there was a significant portion?
- 12 A. It was a significant portion, but I'm probably...I'm just
- 13 guessing.
- 14 Q. Sure. And would that include a wide range of offences?
- 15 A. Yes, it would.
- 16 Q. And jury trials?
- 17 A. Yes.
- 18 Q. Working with a wide variety of prosecutors?
- 19 A. Yes.
- 20 Q. What can you tell us from your experience, My Lord, as a
- 21 defence counsel of the disclosure practises of the various
- 22 Crown counsel that you ...
- 23 A. In my day there wasn't such thing.
- 24 Q. There wasn't any.
- 25 A. There wasn't any.

1 Q. Even if you asked.

2 A. You always got the same answer, and that was, "No," they
3 didn't... Now, I have to say the odd prosecutor, if there was
4 a witness that he knew was giving contrary testimony to
5 what the Crown's theory was.

6 Q. Yes.

7 A. He would sometimes call him to the stand, he'd tell you
8 about it, he'd call the witness to the stand, ask him his name
9 only and then you were left with whatever you could make
10 of it.

11 Q. And would you be advised ahead of time as to what his
12 inconsistent story was?

13 A. Oh, no, you wouldn't be. So, it was very dangerous.

14 Q. And do I understand that that practise varied by Crown
15 Prosecutor?

16 A. It wasn't practise to a great extent at all. Basically there
17 was just no revealing. If you had a multiple count situation
18 the odd time a Crown prosecutor would say, "Well, if you
19 plead your man guilty to the lesser offence, we'll accept
20 that." And it usually meant that they had rather a poor case
21 all the way, but...as I found in practise.

22 Q. How did you feel about the lack of disclosure as a defence
23 counsel?

24 A. Not very good.

25 Q. Not very good.

1 A. No.

2 Q. Given...

3 A. I thought it was... Well, it put you at a disadvantage.

4 Q. Yes.

5 A. Defending the man.

6 Q. Given that a substantial portion of your practise was defence
7 work, did you have any avenues open to you to improve
8 the situation?

9 A. I don't know what you mean.

10 Q. Well, were there complaints that you could have made to
11 the Department of Attorney General or applications that
12 could have been made to court in various instances?

13 A. I think it those days it would have perhaps gone on deaf
14 ears because I think it was generally practised that way.

15 Q. I see. In the course of your defence work, My Lord, did you
16 have occasion to defend any natives?

17 A. I'm trying to think. I think I have because I used to have
18 a...when I first started I had a Saturday office in
19 Shubenacadie, and... I really can't say for sure.

20 Q. Okay. Are you able to say from your experience then
21 whether or not there may have been any differences or
22 difficulties encountered by defence counsel in defending
23 native accused?

24 A. No.

25 Q. Do you recall?

1 A. No, I recall defending natives here in Halifax in my office in
2 Halifax, before Halifax courts and that I probably did in
3 Shubenacadie, but I'm not sure.

4 Q. You don't recall if there was any language difficulties or
5 difficulties getting instructions, anything of that nature?

6 A. There wasn't with the ones that I defended.

7 Q. Wasn't. I see. I'd like to turn to the time, sir, in which you
8 were Attorney General in '70 to '73, and ask for some
9 general information from you on your view of the
10 responsibilities of that position. How would you describe
11 the responsibilities of the Attorney General in Nova Scotia?

12 A. I suppose you were the chief law officer in the Province.

13 Q. Yes. And, I believe, Mr. Giffin in testifying before the
14 Inquiry testified that he felt you had ultimate responsibility
15 for the administration of justice in the Province.

16 A. Oh, indeed, indeed.

17 Q. Would that be fair? To whom would you be accountable, sir,
18 in that position?

19 A. I suppose the public, you're a public official.

20 Q. Uh-hum. I understand...

21 A. And you'd be accountable, of course, by the Courts and such
22 like.

23 Q. I understand that the position...

24 A. And you'd be accountable in the House under questioning or
25 whatever occurred there.

1 Q. Yes.

2 A. The House of Assembly.

3 Q. Yes. I understand the position also included what in some
4 areas is called a Minister of Justice, is that correct? There
5 was Attorney General and Minister of Justice.

6 A. Well, I don't think in Nova Scotia we were referred to as the
7 Minister of Justice.

8 Q. I...

9 A. I don't know if that's the...historically so or, it was always
10 the Attorney General.

11 Q. Do you draw any distinctions between the Attorney General
12 and Minister of Justice?

13 A. Not really, because in some provinces at that time the
14 Attorney General was called the Minister of Justice.

15 Q. As Attorney General, sir, would you be subject to any
16 direction or instruction from your political colleagues with
17 respect to the investigation of suspected crime?

18 A. Never.

19 Q. Would you be subject to any such direction or instruction in
20 the case of laying charges or prosecuting?

21 A. No.

22 Q. What about with respect to positions to be taken in court?

23 A. I don't recall there being a great deal of...I'm thinking of
24 some constitutional questions, of course, where I was
25 involved, where provincial legislation was in question. And,

1 I can't recall whether I had direction from Cabinet or...

2 Q. Other than that type of case, and I'm thinking perhaps of
3 areas...of the criminal law area, would you be subject as
4 Attorney General to instruction from your political
5 colleagues with respect to positions to be taken in criminal
6 cases?

7 A. No, indeed not, not in criminal cases, but now under some
8 provincial statutes it arises say, for instance, they have to
9 have the consent of the Attorney General to prosecute
10 under...I think there was under the Trade Union Act and
11 some of those statutes.

12 Q. I'd like to turn...

13 A. And that's when another Minister would be involved.

14 Q. Of course. I'd like to turn your view of the general
15 obligation of the Crown with respect to disclosure at the
16 time you became Attorney General. Coming from the
17 defence bar and not feeling terribly good about it, I think as
18 you said, was the issue of disclosure of the Crown of interest
19 or concern to you?

20 A. Yes, it was. And, I think we were...now, I have to say in
21 fairness as far back as in the early or early sixties or so, I
22 think there had been some direction to police officers.

23 Q. Yes.

24 A. Made by Mr. Justice...who is now Mr. Justice Malachi Jones
25 when he was a assistant to the Deputy or something. At that

1 time he did a great deal of their criminal litigation and I
2 think there was some direction that they should give us
3 more insight into...that was the direction, as I recall, was to
4 the police.

5 Q. Yes, but we had that before us, My Lord, and I would
6 propose to discuss that with you...

7 A. Oh, I...

8 Q. ...in a couple of minutes.

9 A. I'm sorry.

10 Q. No, that's all right.

11 A. But, as I say, in fairness, I think there was a letter that went
12 to the police in which Mr. Justice Jones said, well, if a man
13 confessed, certainly that should be ruled...should be open to
14 the lawyer, made known to him. But other than that...

15 Q. In your view, My Lord, as chief law officer of the Crown, as
16 you were in 1970 to '73, what obligations were there, if any,
17 on Crown counsel to supply the statements of witness to
18 defence counsel prior to, say, preliminary or certainly prior
19 to trial?

20 A. Well, of course, your handicapped in this, as late as '72, the
21 rather famous Duke case in the Supreme Court of Canada
22 that said that unless the statute called for it, imposed a
23 responsibility, of course, you didn't have to volunteer. But it
24 seems to me in reading the Duke case, even today, that if
25 counsel went and inquired, I certainly don't think the Duke

1 case is a barrier to that if he asked for the information.

2 Q. Nonetheless, My Lord...

3 A. But I think what we were trying to do, of course, is have full
4 disclosure, but I can't say we were successful at that time. I
5 rather suspect it's probably not fully accomplished even as
6 late as today.

7 Q. You were trying to have full disclosure.

8 A. Yes.

9 Q. Do I take it from that, My Lord, then it was, in fact, your
10 view as chief law officer of the Crown that there was an
11 obligation on Crown counsel to disclose statements of
12 witnesses?

13 A. Well, certainly when it was requested, at least when it was
14 requested, they should reveal what it was.

15 Q. And if there were no requests, was there such an obligation
16 on Crown counsel?

17 A. I think generally where, for instance, where there is
18 completely conflicting statements from witnesses, conflicting
19 with the Crown's theory of the case, then it should be
20 revealed.

21 Q. Yes. Even in the absence of a request.

22 A. Now, it was very difficult working...trying to impress
23 generally on the prosecutors that you wanted it done that
24 way and you couldn't really give a direction because the law
25 was still, as I say, as late as '72 in the Duke case, the law

1 was still in a state of flux, so you couldn't demand they do it
2 this way. It was more a matter of persuasion.

3 Q. Was it your view then as Attorney General that you could
4 not direct Crown Prosecutors to disclose statements?

5 A. I don't think you could because you have to balance what
6 the law was at the time as well as... not what your will is
7 imposing upon Crown Prosecutors. They know a fair
8 amount of the criminal law, or they should anyway.

9 Q. So, do I understand then, and please correct me if I'm
10 summarizing incorrectly, that it was your view as Attorney
11 General that, on request, statements should be provided but
12 that they...but that you could not require Crown Prosecutors
13 to provide those statements in the absence of a request
14 because of the state of the law at the time?

15 A. I think that is a pretty fair summary, Mr. Orsborn.

16 Q. What about with respect to other evidence in the possession
17 of the Crown that may be relevant but the Crown has some
18 question as to the credibility of that evidence? Is there an
19 obligation on Crown counsel to disclose that?

20 A. You're thinking if it's not even credible or...

21 Q. There may be some doubts as to whether it's believable or
22 not.

23 A. Believable. Generally my attitude was inclined to be, to say
24 "Yes" and let the defence use it as they may. Let them
25 evaluate it.

1 Q. That would be consistent with your...with your view of the
2 obligation of Crown counsel.

3 A. Yes.

4 Q. Yes. The wording may be a little trite, My Lord, but it's
5 being suggested that the obligation of Crown counsel is to
6 see that justice is done. Now as chief law officer in '70 to
7 '73, would you agree with that?

8 A. Oh, indeed I would. I've always taken...

9 Q. And would...

10 A. ...the attitude the Crown never wins and the Crown never
11 loses really. If a innocent person goes free, the Crown hasn't
12 lost.

13 Q. I see. So, you would not put Crown counsel then in a
14 position of an adversary?

15 A. Well, that wasn't the way it was practised. I think he has to
16 take some adversarial role because, maybe I'm of the old
17 school, but a good adversarial system tends to bring out, I
18 think, the truth.

19 9:55 a.m.

20 Q. Yes.

21 A. And that's...

22 Q. But it's not adversarial to the extent that you have to win at
23 all costs.

24 A. Oh no, indeed, not. But I think good advocacy is very
25 germane to seeking out the truth.

1 Q. Of course. But it would not be adversarial to the extent that
2 you would...

3 A. Win at any cost? No.

4 Q. Seek to suppress facts that were not consistent with your
5 story.

6 A. No. No. See you have an obl-, as a lawyer, you have an
7 obligation to the court, too. You're an officer of the court.

8 Q. Yes. That is touched on, My Lord, in Exhibit 81, which I
9 believe you have in front of you to your right there, and these
10 three pages represent, I believe the, perhaps the, I'm sorry,
11 My Lord, the letter there...

12 A. Oh, the letter here, yes. All right. I'll just get my glasses.

13 Q. This is, I believe, perhaps the letter to which you were
14 referring. It's a letter from Malachi Jones, as he then was, as
15 a senior solicitor, to the RCMP in 1961. And in this letter he
16 does set out, I believe, what he believes to be the general
17 views of the Department on some issues concerning disclosure
18 and I would like to touch on some of these points with you,
19 My Lord, to see whether or not, as Attorney General in '70 to
20 '73, you agreed with the views that had been espoused from
21 10 years earlier.

22 A. I think I've seen this letter.

23 Q. Yes.

24 A. Both at the time I was Attorney General, and I may have had,
25 I don't know, I may have received a copy of it when I was in

1 practice, I'm not sure.

2 Q. Was Mr. Justice Jones in the Department of the Attorney
3 General at any time when you were there?

4 A. Not when I was there, no.

5 Q. I believe he was elevated to the Bench in 1970, I think. It
6 may have been shortly before you arrived.

7 A. I thought it was before that but...

8 Q. Perhaps. If I could ask you to look, My Lord, at the second
9 paragraph on the first page which reads, "Cooperation
10 between the police..." the second paragraph on the first page.

11 A. Yes.

12 Q. "Cooperation between the police, the Department, and
13 practicing solicitors has always been at a very high level in
14 this province. And needless to say, we have every desire that
15 this should continue. Additionally, the Crown has an
16 obligation to assist the courts in the administration of justice,
17 not only in criminal, but also in civil cases."

18 A. Yes.

19 Q. As Attorney General, My Lord, would you take any issue with
20 that view?

21 A. No. No, I would not.

22 Q. And on the second para-, I'm sorry, the third paragraph, still
23 the first page of the letter, the last couple of sentences in that
24 third paragraph. "Where a person who is not a party to
25 proceedings has given a statement, it can only be used where

1 he gives evidence to the contrary to show that he has stated
2 something different on a previous occasion. This can be very
3 material, of course, on the issue of credibility."

4 A. Yes.

5 Q. Would you take any issue with that as a statement of fact, at
6 least, that inconsistent statements can hurt credibility.

7 A. No.

8 Q. And on the second page, My Lord, of the letter. I guess the
9 third paragraph on that page about halfway down which
10 starts, "In criminal proceedings..." and Mr. Justice Jones
11 writes, "In criminal proceedings, additional considerations
12 apply because the Crown is a party and, accordingly, has a
13 greater duty to see that justice is done." Would I take from
14 what you've said previously that you would not take issue
15 with that view.

16 A. No, I certainly wouldn't.

17 Q. And on the third page, Mr. Justice Jones cites from The Road
18 to Justice Sir Alfred Denning, the second quotation on the
19 page and he writes, "The duty of counsel to see that justice is
20 done is, however, best shown by what is expected of
21 prosecuting counsel. If he knows of a credible witness who
22 can speak of facts which go to show the prisoner's innocence,
23 he must himself call that witness. Moreover, if he knows of a
24 material witness who can speak of relevant matters, but
25 whose credibility is in doubt, then although he need not call

1 him himself, he must tell the prisoner's counsel about him so
2 that he can call him." Again, sir, as a chief law officer, would
3 you take any issue with those sentiments?

4 A. Well, as I spoke a few moments ago about that, that is
5 probably one of the reasons they start putting witnesses on
6 the stand and asking their names and such like. But they, you
7 didn't have the information ahead of time.

8 Q. Would you take any issue with the...

9 A. I don't issue with the statement, no.

10 Q. And finally on this letter, in the following paragraph, the last
11 sentence of that following paragraph reads, "From these
12 authorities, it is clear that the Crown must either introduce
13 evidence which is material to the charge whether for or
14 against the Crown or else make the same available to the
15 defence." And again, as Attorney General, would you take
16 any issue with that approach?

17 A. I think you should make it available to the defence.

18 Q. Mr. Justice Jones is writing in 1961...

19 A. '61, yes.

20 Q. Are you able to indicate whether or not that reflected the
21 views of the Department in 1970, '71, '72?

22 A. Well, judging from what was occurring the '60s, I think we
23 had advanced, you know. And many prosecutors were giving
24 certainly more information in the '70s than we were able to
25 obtain the '60s.

1 Q. Yes. As Attorney General, sir, would you agree that these
2 views are certainly appropriate views?

3 A. I think they're appropriate views, yes. I'm not too sure at
4 that time, the time that that was published, now that was the
5 view of the whole Department.

6 Q. Now as Attorney General you were in charge of the
7 Department?

8 A. Not when that was written.

9 Q. No, I understand but in...

10 A. Yeah.

11 Q. I'm sorry, in '70, '71, '72.

12 A. Yes.

13 Q. Yes. And if you believed these views to be appropriate,
14 would it be your responsibility to see that they were put into
15 practice?

16 A. As best you could.

17 Q. While you were Attorney General, sir, were any problems
18 brought to your attention regarding the issue of disclosure?

19 A. I don't recall any. I don't recall disclosure being, any
20 complaints directed to me about disclosure.

21 Q. In the absence of those complaints then, My Lord, would you
22 be, would you assume that disclosure was being carried out as
23 set out by Mr. Justice Jones?

24 A. Well, that was set out '61 by Mr. Justice Jones and that didn't,
25 that wasn't the rule of what was being carried out. I think

1 what I was attempting to do is impress upon them that that
2 should have been so.

3 Q. I see.

4 A. But I don't know how successful I was in practice.

5 Q. No, but it was...

6 A. To get it over to them so they would do it. And, of course, as
7 I say, they had...

8 Q. Your evidence is and, again, correct me if I'm not
9 summarizing properly that you believed that these disclosure
10 principles were appropriate. That you did your best to see
11 that they were put into place, but you couldn't be everywhere
12 at once seeing that it was actually carried out.

13 A. Yeah, that's right. And if it came right down to it, as I say,
14 with the Duke case, I think, does confine the open book, if you
15 will, to, in law, even though you may desire. And of course,
16 prosecutors make you aware of that pretty quickly if you
17 interfered.

18 Q. I'd like to ask you some general questions, My Lord, about the
19 Department in 1970 to '73. I understand at least that the
20 offices in Halifax were a fairly small, closely knit group of
21 people?

22 A. Yes, it was. And at that, we had a reorganization, not really
23 the office itself but it was lawyers isolated, working for
24 various departments. And we started trying to coordinate it
25 with the AG's Department. Now they, some of them still

1 stayed in their local departments but, no, it was a small
2 group.

3 Q. And do I understand in this time period that your deputy at
4 least for most of the period was Mr. Innes MacLeod?

5 A. Yes. Innes was deputy until '72 or...

6 Q. I think some time in '72 he indicated.

7 A. Yes.

8 Q. And that you had a Director of Criminal, Mr., Judge Anderson,
9 then succeeded by Mr. Gale.

10 A. We had a Director of Criminal, Director of Civil and Director of
11 what they called Administration.

12 Q. And the Director of Criminal was Judge Anderson as he is
13 now.

14 A. That's, Robert Anderson.

15 Q. Succeeded by Mr. Gale.

16 A. Mr. Robert Anderson, yes.

17 Q. And the Director of Civil, I think, was Gerry Cavanaugh.

18 A. That's right.

19 Q. And Administration, Gerry Conrad?

20 A. That's right, yes.

21 Q. Did you regard Mr. Gale as an able Director of Criminal?

22 A. Yes, I thought he was competent because I had appeal cases.
23 He did a number of appeal cases in which I acted as opposing
24 counsel and I thought he did a creditable job.

25 Q. And in your capacity as Attorney General, would he provide

1 you with advice and opinions from time to time?

2 A. Yes, that would be on in '76, of course.

3 Q. Yes.

4 A. '76 to '78, yes.

5 Q. You had no difficulty with his advice or opinions?

6 A. That's a difficult, I may have disagreed with him on some
7 things. I'm not sure.

8 Q. Did you regard Robert Anderson as an able Director of
9 Criminal?

10 A. Robert was competent director.

11 Q. And did you regard Mr. MacLeod as an able Deputy?

12 A. Yes.

13 Q. And did Mr. MacLeod provide you with opinions?

14 A. Innes MacLeod was very familiar with all provincial statutes
15 which you're dealing with, too. I don't think Innes ever had
16 great experience in practice in the criminal law but he
17 certainly was a good administrator.

18 Q. Would he provide you with advice and opinions from time to
19 time?

20 A. Yes, he would.

21 Q. Would you describe the relationship within this group in the
22 Department, My Lord, as an informal working relationship or
23 formal working relationship?

24 A. It was being paid for. It should have been formal. The
25 taxpayer was paying for it.

1 Q. I guess by "informal," I'm not suggesting that the work didn't
2 get done but simply that people, and advice and opinions,
3 floated perhaps freely around the office.

4 A. Well, because it was a smaller group, I think...

5 Q. Yes.

6 A. I think that's true.

7 Q. Were your directors, were you accessible to your directors?

8 A. Yes, I was.

9 Q. They didn't have to go through the deputy to get to you?

10 A. Well, I think they usually did, but I even had junior counsel
11 in. I had pretty well an open-door policy on that.

12 Q. Would you describe your own style as Attorney General, sir,
13 as a hands-on style where you wanted to be involved in
14 everything or a more laid-back style where you let the civil
15 servants do their work?

16 A. The day-to-day work, most of the day-to-day work, was
17 handled by the Department and if there was something in
18 particular they wanted to see me about or, as I say, in
19 constitutional things where provincial legislation was being
20 questioned, I think I was consulted.

21 Q. Matters out of the ordinary, or out of the routine, would they
22 generally be brought to your attention?

23 A. Not really unless they were having some problem with it. I
24 was available. I wasn't always available either because I had
25 two portfolios at the time and, of course, as a Government

1 Minister you have to travel some, too.

2 Q. I'd like to turn, sir, to the effects of the Marshall case in
3 November of '71. Mr. Marshall went to trial and was
4 convicted on November 5th, 1971.

5 A. Yes.

6 Q. As Attorney General, do you have any recollection of the
7 investigation and trial and conviction of Mr. Marshall?

8 A. No, I have absolutely none. As a matter of fact the first time
9 that I was aware of even Mr. Marshall's predicament was
10 when I read it. I was visiting relatives in Cape Breton and I
11 think that was about '82. There seemed to be a little piece
12 that didn't mean very much to me in one of the, in the local
13 newspaper and that was the first I have ever heard of it.

14 Q. In, on November 15, 1971, about ten days after the
15 conviction, a new eyewitness came forward, Jimmy MacNeil,
16 saying that Ebsary, Mr. Ebsary had done the stabbing. Now
17 within the Department of Attorney General, Mr. Matheson
18 who was Prosecutor, or Assistant Prosecutor in Sydney, and
19 Robert Anderson...

20 A. I wasn't aware that he was, but obviously he was.

21 Q. He was, yes. And Robert Anderson, one of your directors,
22 were aware immediately, I think, of this development. I take
23 it from what you've just told us that you have no recollection
24 of that being brought to your attention.

25 A. I know it wasn't brought to my attention.

- 1 Q. Are you able to say, then, that it, as a fact...
- 2 A. Yes.
- 3 Q. It was not, it was not brought to your attention.
- 4 A. As a fact. It was not brought to my attention.
- 5 Q. Would you have expected something like that to be brought
6 to your attention?
- 7 A. Not necessarily. You see the day-to-day operations, and I
8 have to be careful not to reconstruct on what I know now,
9 and that's unfair. No, I wouldn't think so. And I notice, too,
10 that Milton Veniot, who would have been a junior counsel at
11 that time in the Department, I don't know how much
12 experience he had, but he wouldn't have had very much, so
13 he handled the appeal I think, did he not?
- 14 Q. Yes, My Lord, he did.
- 15 A. And obviously there was nothing in the file indicating any
16 difficulty or you'd have had Gordon Gale or someone much
17 more experienced, in my opinion.
- 18 Q. Judge Anderson testified that more likely than not he would
19 have brought it to Mr. MacLeod's attention and Mr. MacLeod
20 had no recollection of it. But Mr. MacLeod did indicate that
21 had it been brought to his attention, he would have most
22 certainly brought it to your attention. I take it from your
23 testimony that Mr. Anderson is simply speculating that he
24 might have brought it to somebody's attention, that he, in
25 fact, did not.

1 A. Well he...

2 Q Because it didn't reach your desk.
10:14 a.m.

3 A. It didn't reach my desk. Now, how it failed to I...

4 Q I'd just like to...

5 A. ...haven't the slightest idea.

6 Q ...I'd just like to read you a portion of the statement that was
7 taken from Mr. MacNeil on the 15th of November, 1971. I
8 won't ask you to turn to it. I'm reading from Volume 16 at
9 page 176. This is the statement of James MacNeil. And he
10 says,
11

12 The Indian put my right hand up behind my
13 back. The coloured fellow said, 'Dig man, dig,'
14 then Roy Ebsary said, 'I got something for you.'
15 He put his hand in his right pocket, took out a
knife and drove it into the coloured fellow's side.

16 Now, I'd just ask you from your experience as defence
17 counsel, My Lord, to put yourself into the shoes of defence
18 counsel preparing for an appeal in Mr. Marshall's case.
19 Would that statement be of interest to you?

20 A. Oh, yes, any statement and then I could evaluate it.

21 Q Yes. You would want to know about that if you were
22 defence counsel.

23 A. I would very much like to know about it. If someone else
24 committed the murder, I...

25 Q Would I understand...

1 A. ...would think he'd want to know.

2 Q. Yeah. That being brought to the attention of defence counsel
3 prior to...prior to an appeal one would, I assume, consider
4 issues of fresh evidence and whether it should be put before
5 the Court of Appeal and whatnot. This would be the issues
6 that come to mind of a defence counsel.

7 A. Yes.

8 Q. The RCMP was then brought in at the request of Mr.
9 Anderson to review or reinvestigate the matter and the use
10 of the polygraph was discussed and authorized. Again, do I
11 take it from what you said that you have no recollection of
12 being involved in the decision to get the RCMP back in?

13 A. No.

14 Q. Bringing the RC...

15 A. That would be done by Mr. Anderson.

16 Q. That was my next question. I was just wondering if a step
17 such as that to bring in...

18 A. I'm sorry, I'm not attempting to get ahead of you. I'm just...

19 Q. To bring in a force such as the RCMP, the sort of provincial
20 source, to reinvestigate a municipal police investigation,
21 would not then, I take it, require your involvement as
22 Attorney General.

23 A. No, it would not.

24 Q. Are you able to indicate whether or not bringing in the
25 RCMP to reinvestigate a murder conviction would be an

1 unusual occurrence, in your experience?

2 A. It's not an unusual occurrence for local police forces to bring
3 in the RCMP.

4 Q. Uh-hum.

5 A. As a matter of fact, I think I had worked it out with Chief
6 Superintendent Mudge that such would...they'd make that
7 service available to us.

8 Q. Yes.

9 A. But that was only, you know, if the local force run into some
10 difficulty.

11 Q. Can you give us any indication in this time period, '70-71
12 what number of murder trials there would be in the
13 Province in the run of a year?

14 A. I can't. It wouldn't be an intelligent guess.

15 Q. It would...

16 A. I would have known at the time, but sixteen years later.

17 Q. Would it be as high as one a month?

18 A. I would suspect it was higher, but...

19 Q. Higher than one a month?

20 A. Look, it's unfair for me to answer that because I'm only
21 gazing in a crystal ball rather than...

22 Q. Is it your evidence then, sir, that although this was a fairly
23 small close-knit informal department, the fact that the RCMP
24 was brought in to look at a murder conviction was not
25 brought to your attention?

1 A. That's right.

2 Q. During the course of that investigation polygraph tests were
3 taken and we've had evidence from Al Marshall, who was
4 the RCMP gentleman charged with this reinvestigation, that
5 Donald C. MacNeil, when the results were made known to
6 Mr. MacNeil, that Mr. MacNeil phoned someone in the
7 Attorney General's Department in Halifax to advise them of
8 the result. Mr. Marshall testified that he was ninety-nine
9 percent sure that Mr. MacNeil called you. Did Mr. MacNeil
10 call you?

11 A. No, Mr. MacNeil did not call me.

12 Q. Did you know Mr. MacNeil?

13 A. Yes, I did.

14 Q. Did you know him well?

15 A. We knew...when I was admitted to the Bar I think there was
16 only three hundred of us so we all knew each other, but I
17 wasn't any personal friend of Mr. MacNeil.

18 Q. Were you on a first-name basis with him?

19 A. I think we were, as I recall most members of the Bar.

20 Q. I see. Again, your evidence is, you're not saying "I don't
21 recall," but you're saying it didn't happen.

22 A. I'm not saying I didn't, ah, I don't recall it at all. I'm saying
23 it didn't happen.

24 Q. I understand. If I could ask you to look...

25 A. I will add this to it, I don't think, in my memory, that one call

1 ever came to me direct from a prosecutor during my term of
2 office, and the reason being, of course, the Department was
3 set up and I really would have had to inquire of the
4 Department, but I can't recall a prosecutor calling me about
5 a case at all, let alone Mr. MacNeil.

6 Q. If I could ask you to look at the red volume that you have in
7 front of you there, My Lord, and page 204. The numbers are
8 at the top, the centre of each page.

9 MR. PUGSLEY

10 Which volume is that?

11 MR. ORSBORN

12 16.

13 HIS HONOUR MR. JUSTICE PACE

14 204.

15 MR. ORSBORN

16 Q. Yes, 204.

17 A. I think we've got the wrong numbers in here, oh, 204, yes.

18 Q. That is a...the report prepared by Inspector Marshall
19 following his review dated December 21st, 1971.

20 A. Yes.

21 Q. Did you ever see that report, sir, while you were Attorney
22 General?

23 A. No, I did not.

24 Q. If that...

25 A. Is this...normally they have a writer there or something.

1 Does this report come in the...the reader, I'm not sure
2 whether it was a reader or a writer. Normally I have a
3 person go over these things and that is indicated.

4 Q. There's no...there's no transmittal slip indicating where
5 it...how it got or what happened to it from the RCMP. But it
6 is signed on page 207 by Inspector Marshall. There is...

7 A. Normally they're signed or at least there's an indication
8 of...by two members of the...

9 Q. Yes.

10 A. ...police. That's the type that I've been used to.

11 Q. Yes.

12 A. The few that I've used or seen.

13 Q. Again, your evidence is that as Attorney General you did not
14 see it.

15 A. I didn't see it.

16 Q. Would you have expected to have seen that report had it
17 arrived in your Department?

18 A. No, I wouldn't expect to see it if it was in the day-to-day
19 work of the Department unless there was...unless staff
20 brought it to my attention.

21 Q. Do I take it then from your answer, My Lord, that the fact
22 that you didn't see it does not mean that it wasn't
23 somewhere in your Department?

24 A. Yeah. The only thing is, as I say, as I pointed out, that
25 normally it's co-signed by a reader or, I don't know what

1 the RCMP...

2 Q. Yes.

3 A. And that is noted on official files when it comes to the
4 Attorney General's Department. I don't notice it on this.

5 Q. That report, in summary, says that the evidence of Mr.
6 MacNeil is, at best, doubtful because of some intelligence
7 problems and it says that their consensus or opinion is now
8 that there was a robbery in place and that the stabbing took
9 place as a result of an argument between Marshall and
10 Seale.

11 A. Yes.

12 Q. Again, putting on your defence counsel hat, My Lord, would
13 this information be of interest to you?

14 A. Any information is of interest to defence counsel and, of
15 course, he in turn has to evaluate it.

16 Q. Yes.

17 A. What effect it may have on a jury or what effect it may
18 have on the judge, of course, that's for the jury or judge to...

19 Q. Yes.

20 A. ...decide.

21 Q. Would you agree with me that defence counsel armed with
22 information such as this, including the statement of Mr.
23 MacNeil, alleged eyewitness, would have an improved
24 chance of a successful appeal on a new trial?

25 A. Well, that is assuming that this is a jury trial we're talking

1 about. You may call this man as a witness and the jury may
2 not believe him.

3 Q. I'm thinking about one step before that.

4 A. Oh.

5 Q. I'm thinking of defence counsel going to appeal and armed
6 with the statement of a new eyewitness and perhaps some
7 information from this report would have, at least, have a
8 better shot of getting a new trial.

9 A. Well, it certainly would fall within the fresh evidence rule if
10 you knew about it.

11 Q. Yes. And, as you say, defence counsel, if properly advised,
12 could go off and evaluate it and make their own
13 conclusions?

14 A. Certainly.

15 Q. Their own investigation?

16 A. Certainly.

17 Q. Yes. I do ask for your view, sir, as chief law officer on
18 particular disclosure issues arising out of the Marshall case.
19 We know that at the time of the trial previous inconsistent
20 statements of Mr. Pratico, Mr. Chant and Miss Harriss were
21 in the possession of the Crown, according to Lou Matheson.
22 The evidence is they were not made available to the
23 defence. Assuming that there was no request by defence for
24 these statements, in your view as Attorney General, should
25 they have been made available to the defence?

1 A. I have to put myself back in what the state of the law was
2 in '70-'72, don't I?

3 Q. Well, the state of appropriate policies as we discussed and as
4 we've reviewed from Mr. Jones' letter.

5 A. As...if you're asking for my opinion on it, that's not very
6 helpful to this Commission, I'm sure, what my opinion may
7 be.

8 Q. Well, with respect, My Lord, you were Attorney General at
9 the time and as you've indicated in charge of the
10 administration of justice and...

11 A. You often have conflicting statements from witnesses, sure,
12 defence counsel should know about it.

13 Q. Sorry?

14 A. Defence counsel should know about it.

15 Q. Should know. I take it then your evidence is as Attorney
16 General it was the obligation of the Crown to disclose those
17 statements in the absence of a request.

18 A. I have to be...I have to be careful of that in law. Yes, I think
19 that's probably true, but I recall a case in Nova Scotia, it's a
20 reported case, in which a trial judge made the Crown
21 produce a contrary statement. It went on appeal and was
22 upset. The Crown tenders the evidence in that case and I
23 don't know in law if I can entirely agree with you.

24 Q. I'm thinking less of...

25 A. In practise...

1 Q. I'm thinking...

2 A. ...as Mr. Jones' letter indicates, that...that should have been
3 known, yes.

4 Q. Yes. And not wanting to press it, but I...do I take it that
5 your evidence is, as Attorney General, that it was your view
6 that these should have been disclosed to defence prior to
7 trial or prior to preliminary as a matter of fulfilling the
8 Crown's obligation of full disclosure?

9 A. Well, that's...because you have contradictory statements. I
10 have no objection to that.

11 Q. Yes.

12 A. To a Crown Prosecutor doing exactly that, making all
13 statements available to the defence.

14 Q. Yes. And you've indicated earlier that you believe that was
15 the appropriate practise to be followed?

16 A. Yes.

17 Q. Although, as you've indicated, you couldn't personally
18 oversee every case.

19 A. No, I couldn't oversee every case and, of course, the...you
20 can't ignore the state of the law at the time.

21 Q. Uh-hum.

22 A. You see, what our practise may be now, sixteen years later,
23 wasn't exactly what was going on then.

24 Q. No. Although Mr. Jones' statement that the obligation of the
25 Crown was, even ten years back before that.

1 A. That's right. But I'm not to...I'm...as I say I'm not certain
2 how much of that was adapted as Department policy at that
3 time.

4 Q. Again, you have indicated that it was your view that that
5 was appropriate policy in '71.

6 A. Oh, I think so.

7 Q. And the...and the fact of Mr. MacNeil coming forward with
8 this eyewitness information on November the 15th, 1971,
9 this fact was known by Mr. Matheson, Mr. MacNeil and Mr.
10 Anderson, all Crown counsel. In your view, leaving aside
11 any issue of the RCMP coming in, but in your view as
12 Attorney General, was there an obligation on the Crown to
13 disclose that information to the defence with the appeal
14 pending?

15 A. I think I've answered that, yes.

16 Q. Yes.

17 A. I think.

18 Q. And that would be an obligation that should be fulfilled
19 even in the absence of any request from defence counsel
20 because they wouldn't have any way of knowing about it,
21 would they?

22 A. They wouldn't have any way of knowing about it, no.

23 Q. And, the evidence is that defence counsel was not aware of
24 that evidence, and is it your view then that Crown counsel
25 were in breach of their obligation to provide that evidence?

1 A. What obligation are you referring to?

2 Q. The obligation to disclose it to defence.

3 A. I'd have to say, yes, because I think that was their general
4 thrust of trying to give full disclosure.

5 Q. And in that sense you would be then in agreement with Mr.
6 MacLeod and Mr. Anderson who have already testified that
7 in their view, yes, it should have been disclosed?

8 A. Yes, I have no difficulty with that.

9 Q. Are you able to indicate, My Lord, who you believe should
10 have disclosed it? We understand that, you know, appeals
11 were not carried by the local Crown, but were forwarded to
12 Halifax at that time, and indeed still are. So, you've got the
13 local Crown aware of it, but the matter being transferred to
14 Halifax, at least one counsel in Halifax being aware of it, but
15 he's not the guy who's looking after the appeal. Can you
16 give us any help and suggest who, on whom specifically the
17 responsibility rested?

18 A. I suppose it would be Mr. Anderson because he's the
19 director and he must designate the counsel who will be
20 doing the work.

21 Q. To summarize then this discussion, My Lord, we have fresh
22 eyewitness evidence coming to the attention of the Crown,
23 the matter is still before the Courts. It's evidence which,
24 certainly if you believe it, which would cast some doubt on
25 the conviction. And I take it from your evidence, it's your

1 view that it was the obligation of the Crown to ensure that
2 that was disclosed to defence and to the Court.

3 A. It should have been revealed to the defence.

4 Q. Yes. And in not disclosing that evidence to the defence, is
5 the Crown not in breach of its fundamental obligation to see
6 that justice was done?

7 A. If it, and in this case it did result in injustice, the wrong man
8 being convicted and the conviction upheld, yes.

9 Q. Yes. And, I guess in our parliamentary system the
10 responsibility for that ends up finally at the desk of the
11 Attorney General.

12 A. Exactly. I have never had any doubts on that, except if it's a
13 criminal matter then, of course, some Crown Prosecutor
14 carries out the criminal deed or act.

15 Q. Of course.

16 A. Then I don't feel that I have to be responsible for that. I
17 may be responsible for the discipline of it but...

18 Q. Yes. But you would agree then, as Attorney General, that a
19 conviction which continued, or at least the appeal was
20 unsuccessful, perhaps because of failure by the Crown to
21 disclose this evidence would be an injustice?

22 A. Would be what?

23 Q. The fact that Mr. Marshall's appeal was unsuccessful in
24 1972, if that can be attributed to a failure of the Crown to
25 disclose this fresh eyewitness evidence.

1 A. No, I...

2 Q. That would be an injustice, you just indicated that.

3 A. Yes, yes, it would be an injustice. But in turn, you're
4 jumping over the fact that a jury has to weigh that evidence
5 and what they reject or what they accept...

6 Q. That they would...

7 A. I've never been able to ascertain with all that certainty until
8 I got the results, but...

9 Q. But they'd have to have that opportunity to assess it?

10 A. Oh, sure.

11 Q. Mr. Edwards, Mr. Frank Edwards, testified that the non-
12 disclosure of the inconsistent statements prior to trial and
13 the non-disclosure of this fresh evidence was really the
14 foundation on which the wrongful conviction and the
15 unsuccessful appeal rested. If one accepts that view, then
16 the basic responsibility must rest with the Crown.

17 A. Perhaps you'd be good enough to repeat that.

18 Q. Yes.

19 A. If you may.

20 10:36 a.m.

21 Q. I say Mr. Edwards, Frank Edwards testified that the, in his
22 view, the foundation on which Mr. Marshall's conviction and
23 his later unsuccessful appeal, the foundation on which those
24 rested, were the nondisclosure problems, the nondisclosure of
25 the statements, and the nondisclosure of the fresh evidence.

1 Assuming one accepts that view, I'll just ask you to assume
2 that for the sake of the question, does it not follow that the
3 basic responsibility for Mr. Marshall's conviction rests with
4 the Crown?

5 A. But you're assuming too much. You're assuming a jury, if
6 they heard Mr. MacNeil, would accept Mr. MacNeil's evidence
7 and I can't tell you that.

8 Q. Well I'm asking you to accept, for the sake of the question,
9 Mr. Edwards' conclusion.

10 A. Well, then I'm not getting the question straight.

11 Q. Mr. Edwards' opinion is that Mr. Marshall's wrongful
12 conviction rested on these issues of nondisclosure and I
13 think...

14 A. Well, that's his opinion.

15 Q. That's his opinion.

16 A. But it's much more important that a jury have similar
17 opinions...

18 Q. Yes, but I think his opinion is that a, as a prosecutor, that a
19 jury faced with the evidence would have somewhat more
20 than a reasonable doubt as to Mr. Marshall's guilt and I'm just
21 asking you, for the purposes of the question, to accept Mr.
22 Edwards' opinion. If one accepts his opinion, does it not
23 follow that the responsibility for the conviction rests with the
24 Crown?

25 A. I don't even know if you can say that. I wouldn't want to

1 venture an opinion on that fact because that would...

2 Q. Can the responsibility for nondisclosure...

3 A. Probably clear conjecture as fair as I'm concerned.

4 Q. Can the responsibility for nondisclosure rest...

5 A. It's pretty hard...

6 Q. Anywhere else than with the Crown?

7 A. Oh, the nondisclosure obviously that, the Crown...

8 Q. Yes.

9 A. Was responsible, I would assume, for the nondisclosure.

10 Q. And if it is, in fact, concluded, if it's concluded that the
11 nondisclosure led to the wrongful conviction, then we come
12 full circle back to the Crown, do we not?

13 A. If you include all those things. But that's jumping over a few
14 very important items along the way.

15 Q. A couple of final issues, My Lord. Did Mr. MacLeod, he was
16 not Deputy throughout your full term in 1973.

17 A. No, no, he wasn't.

18 Q. Who replaced him?

19 A. Gordon Coles.

20 Q. Yes. Was Mr. Coles appointed on your recommendation?

21 A. It would have to be because it happened in my time and I
22 would have to recommend him to the Government.

23 Q. Had you had any previous association with Mr. Coles?

24 A. Yes, I did.

25 Q. In what sense?

1 A. Not an association. I articulated there with his firm, Smith &
2 Coles.

3 Q. Yes.

4 A. Of course, I knew him in law school, but we weren't all that
5 well acquainted in law school, but certainly as an articulated
6 clerk I spent half my time, my nine months there, four and a
7 half months at that firm and I knew him then.

8 Q. Did you practice with him at any time?

9 A. No, I never practiced with him other than the function of an
10 articulated clerk.

11 Q. You do what you're told when you're told and...

12 A. Yes.

13 Q. Did you have any association with Mr. Coles in any of your
14 political endeavours?

15 A. I think he helped me, see, Gordon Coles was never any, I
16 thought he was almost nonpolitical, but I think he did it as a
17 personal friend. In my 1970 election I think he drove a car
18 or acted in some minor capacity.

19 Q. Did you approach Mr. Coles with a view to taking the
20 position?

21 A. I think I did. I think I did. There were several other people
22 at that time. I, one, who I thought was, before I even asked
23 Mr. Coles, Mr. Keith Eaton, we interviewed him and he was
24 moving home from I think the Gowling, MacTavish firm in
25 Ottawa and he was showing some interest. I think we almost

1 came to an agreement but then he later changed his mind and
2 went with a law firm, local law firm.

3 Q. Thank you. If I might back up a bit with Your Lordship's
4 indulgence. You indicated to me that if I were drawing
5 conclusions about the nondisclosure of these statements and
6 fresh evidence and trying to suggest that the conviction was
7 then really the fault of the Crown that I was jumping over...

8 A. Yes.

9 Q. A bunch of things in between, apart from the obvious
10 uncertainty of any jury decision.

11 A. Yes.

12 Q. Clearly. Apart from that, are there any other items that I'm
13 jumping over in that circle?

14 A. Well, of course, in the hearing of fresh evidence, whether it
15 will be accepted by a court.

16 Q. As to admissibility?

17 A. Once you have fresh evidence and you comply with the Rule,
18 of course, but you've got to bring the witness forward and I
19 don't know how even an Appeal Court on fresh evidence may
20 evaluate the particular fresh evidence you're bringing.

21 Q. You would agree with me nonetheless that a defence counsel
22 fully armed with those inconsistent statements, and with the
23 statement of James MacNeil, would have a better shot at
24 raising a reasonable doubt than if he didn't have them.

25 A. Oh certainly, even the poor witness, as a rule, is better than

1 none at all.

2 Q. Sure.

3 A. I don't know if that's, that is necessarily true because
4 sometimes they can be so poor as to not help at all.

5 Q. One final issue, My Lord. The testimony of Mr. Giovannetti
6 before this Commission on Monday past was supplied to your
7 counsel and I presume to you and I simply wish to give you
8 the opportunity should you so desire, to make any comment
9 or to respond to that testimony. I understand that arising out
10 of my giving you this opportunity, that Mr. Downie wishes to
11 make a comment before you perhaps indicate whether you
12 want to respond or not.

13 A. Well, certainly I would love to respond but I think Mr.
14 Downie will do the talking for me.

15 MR. DOWNIE

16 If the Commission pleases, I act for Mr. Justice Pace in his
17 present capacity as a justice of the Appeal Division of the Supreme
18 Court of Nova Scotia and I request of the Commission to be heard
19 on the question put by my friend, Mr. Orsborn, and certain issues
20 which flow from that question and the fact, and the very fact that
21 it has been put to the witness. May I be heard on that now,
22 please?

23 CHAIRMAN

24 Yes.

25

MR. DOWNIE

1 Thank you.

2
3 There has been, My Lords, a procedural agreement or an
4 understanding among Mr. Orsborn, Mr. Saunders, counsel to Mr.
5 Justice Pace as former Attorney General and myself acting for him
6 in his judicial capacity. That agreement or understanding was,
7 and is, that Mr. Justice Pace would appear before this Commission
8 as a witness to respond to questions relating to his tenure as
9 Attorney General. The whole question of his compellability and
10 his competency to appear before this Commission and, for that
11 matter, the appearance of his four fellow justices of the Court of
12 Appeal to respond to questions about the Donald Marshall, Jr.
13 reference was agreed to be put aside until the matter was decided
14 by the courts.

15 That issue, or those issues of competency, compellability, as
16 you know, are now before Chief Justice Glube of the Trial Division
17 of the Supreme Court. She has reserved decision on our
18 application which was only heard last week. It remains to be seen
19 what will be the final disposition of that total proceeding.

20 In my view it is, indeed, a neat question whether, when the
21 procedural arrangement or the agreement was made among
22 counsel, it was intended to cover a situation such as we have here
23 this morning. I don't propose to argue the point one way or the
24 other other than to say that we tried to divide Mr. Justice Pace
25 into two parts. One part was former Attorney General and the

1 other part was justice of the Appeal Division. He was to appear
2 first as, and limited to, his former Attorney General position.

3 Now the fact is that my friend, Mr. Orsborn, has put the
4 recent testimony of Mr. Dana Giovannetti to Mr. Justice Pace and
5 asked him if he wishes to make any comment. My understanding
6 is that if no comment is made, the matter will not be further
7 pursued before this Commission by anyone at this time. I
8 understand further, that if Mr. Justice Pace does make comment,
9 Mr. Orsborn and presumably other counsel, will be considered by
10 this Commission to be at liberty to pursue the matter further by
11 putting additional questions.

12 Mr. Orsborn has made the point to me by letter, bearing
13 yesterday's date, that by taking this position he should not be
14 understood as agreeing that this very area, that is to say, the
15 reported conversation between Justice Pace and Mr. Giovannetti,
16 comes within a category which is or may be judicially immune. I
17 accept that position by my friend. And I don't think it necessary
18 for me to argue here today whether this area, let me call it the
19 Giovannetti conversation is, or is not within the judicial immunity
20 area.

21 It's obvious, or at least in my respectful view it's obvious,
22 that by having put the question today to Mr. Justice Pace, he is
23 placed at somewhat of a disadvantage. The whole question of
24 judicial immunity before this Commission for these justices
25 respecting the Marshall reference is now before the courts. If Mr.

1 Justice Pace does accept the invitation and responds or comments,
2 such action by him might be thought to be a waiver of his judicial
3 immunity in whole or in part. Also, as already noted, we are
4 awaiting a judicial delineation and, quite frankly, if one started to
5 make answer in this area this morning, I am not at all sure where
6 the stop sign is or where the stop sign should be. I'm sure my
7 friend, Mr. Orsborn, has already identified this point and I believe
8 that that is why he has, and quite appropriately, has simply
9 extended the invitation to comment.

10 Now those are the reasons why answer, in my view, should
11 not be made.

12 On the other hand, if Mr. Justice Pace does not accept the
13 invitation and does not comment, it might be thought that he has
14 nothing to say to a matter, or to matters raised in Mr.
15 Giovannetti's evidence. It might even be thought that by not
16 making comment he is indicating acceptance of all of what Mr.
17 Giovannetti has said earlier this week. The fact that this evidence
18 was led on Monday of this week and then this question is put to
19 Mr. Justice Pace certainly does, in my respectful view, place him
20 at somewhat of a disadvantage. It may be that he will be damned
21 if he does and he will be damned if he doesn't.

22 If left on his own, Mr. Justice Pace would accept the
23 invitation as he has already indicated to make comment on the
24 testimony. I am instructed that he does have things to say and, if
25 I may be permitted, it is of his nature to speak out if something is

1 on his mind. To borrow an expression I read in the transcript
2 from Monday, he is somewhat of a hip-shooter and hip-shooters
3 don't back down.

4 However, for the reasons I have mentioned, I have made the
5 decision that at this time he should not accept the invitation to
6 comment. I have, My Lords, so advised and instructed him. He
7 will, therefore, say nothing in this regard and we accept that
8 option.

9 The absence of comment by Mr. Justice Pace should not be
10 taken as acceptance by him of everything as stated and in the
11 manner stated by Mr. Giovannetti. The understanding is that Mr.
12 Orsborn is reserving the right to take the position at a later date
13 that this very area might be pursued by Commission counsel with
14 Mr. Justice Pace at another time.

15 I also reserve the option the seek an appropriate
16 opportunity, if I choose to do so, for Mr. Justice Pace to come
17 forward and volunteer a response or make comments on this
18 testimony.

19 I thank the Commission and I thank my friend for his usual
20 professional courtesy.

21 MR. ORSBORN

22 A couple of comments, My Lord. What Mr. Downie said with
23 respect our agreement or our position is substantially accurate
24 with the exception that I indicated that if Mr. Justice Pace did not
25 wish to avail of the opportunity that I, myself, would not pursue

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1 the issue at this time in view of the current litigation before the
2 court. I'm obviously not able to give that same undertaking with
3 respect to all other counsel, although I would, if other counsel
4 decided to pursue it, I would take the same position that it should
5 not be pursued at this time but I did not make any undertaking
6 on their behalf.

7 I'm not quite sure where Mr. Downie's comments leave us. I
8 think they leave us at bottom with the fact that he has certainly
9 advised his client not to comment. I would suggest that the
10 decision whether or not, the final decision whether or not
11 comment should be made, must rest with Mr. Justice Pace. I don't
12 think counsel can direct what a witness says or does not say and I
13 would simply then repeat the opportunity given earlier. It was
14 simply phrased in terms of an opportunity, it was not phrased in
15 the terms of a question. There was no issue of compulsion and I
16 believe Mr. Justice Pace knows full well that if he does not choose
17 to avail of the opportunity, that's fine. I certainly will not press it
18 any further at this time, and Mr. Downie is correct that not
19 pressing at this time is without any prejudice to raising argument
20 on it at a later date. That it doesn't fall within the rubric of what
21 we're arguing about at this time. But I do feel nonetheless that if
22 it was, if nothing else, fair, to provide the opportunity in the terms
23 in which it's been provided, to allow a comment on that. If Mr.
24 Justice Pace wishes to comment, then he perhaps should be
25 permitted to do so.

DISCUSSIONCHAIRMAN

1
2 My understanding from Mr. Justice Pace's comment a
3 minute ago is that he would like to respond but that he will accept
4 the, and follow the advice of his solicitor, Mr. Downie. Mr.
5 Downie's indicated to us that he has advised him not to respond so
6 the...

MR. ORSBORN

7
8 If that is, indeed, the position, I have no problem with that.
9 10:52 a.m.

MR. CHAIRMAN

10 I don't know if we need to hear other counsel at this time.
11 But if anyone wishes to be heard, anything relevant. The view of
12 the Commission is, and as I understand the position put by Mr.
13 Downie on behalf of Mr. Pace, is not that his...that Mr. Justice Pace
14 is refusing in perpetuity, for want of a better word, to respond to
15 the question or questions which may be put to him with respect to
16 testimony given to this Commission by Dana Giovannetti as it
17 relates to Mr. Pace, but rather that it would be more prudent and
18 probably necessary at law, we'd have to rule on that, to await the
19 outcome of the decision of Madam Justice Glube.

20 We are not ruling at this time as to whether we would have
21 the right to proceed regardless of the decision of Madam Justice
22 Glube. That would depend on the delineation of judicial immunity
23 that would be set forth in her decision. We may conclude that the
24 issue raised by the Giovannetti testimony does not impinge upon
25

DISCUSSION

1 judicial immunity at all. But it would save a lot of time and be
2 appropriate, in our view, to hold this question in abeyance until
3 we have received the decision from the Trial Division of the
4 Supreme Court of Nova Scotia. Mr. Downie also raises another
5 issue, that even if the decision of the Supreme Court of Nova
6 Scotia, Trial Division, is such that the delineation embraces Mr.
7 Justice Pace, then it's a question of whether or not he may insist
8 on waiving that judicial immunity for the purpose of responding
9 to the evidence of Dana Giovannetti as it relates to him. So, these
10 matters will be held in abeyance pending the filing of the
11 judgement of Chief Justice Glube.

12 Now, are you ready, do you have some questions you wish
13 to put to Mr. Justice Pace, Miss...

THE HONOURABLE MR. JUSTICE PACE

14
15 I wonder if...

MR. CHAIRMAN

16
17 Maybe we can...

THE HONOURABLE MR. JUSTICE PACE

18
19 Before we start if we could have a break.

MR. CHAIRMAN

20
21 Yes, fine. The smokers have to be accommodated.

22 BREAK - 10:56 to 11:20 a.m.

INQUIRY RESUMESMR. CHAIRMAN

23
24
25 Miss Edwardh.

DISCUSSIONMS. EDWARDH

1
2 Just so I might put our position on the record. Certainly as a
3 matter of courtesy both to the Commission and Commission
4 counsel and, indeed, to the Trial Division, we at this time would
5 not intend to pursue any questions in relation to the conversation
6 but would simply like to underline that we would like to reserve
7 the right to argue that that particular area of questioning would
8 not fall within the scope of judicial immunity. It may be that it's
9 not covered at all in Her Ladyship's decision when it's rendered,
10 and it may be. We'll all have to take a chance and read it. But I'd
11 just like to reserve that as our position.

MR. CHAIRMAN

12
13 Yes, fine.

EXAMINATION BY MS. EDWARDH

14
15 Q. Just a few questions if I may, My Lord. My name is Marlys
16 Edwardh.

17 A. Yes.

18 Q. I represent Donald Marshall, Jr..

19 A. I know.

20 Q. You have discussed at length issues pertaining to disclosure
21 and your view of the obligation of Crown counsel being, in
22 effect, to provide evidence that would assist the defence, to
23 the defence by way of prior inconsistent statements or
24 others. Is that a fair summary of your...

25 A. Yes.

- 1 Q. ...conclusion, My Lord?
- 2 A. Yes, it is.
- 3 Q. At the same time in your comments, I took it from you that
4 during this time period, 1970 to 1973, you were by no
5 means sanguine that your views were shared by Crown
6 counsel across the Province?
- 7 A. That, I think, is correct.
- 8 Q. So, I take it that it was at least the topic of discussion and
9 concern about the proper duties of Crown counsel as an
10 officer of the Court and to the administration of justice?
- 11 A. That was certainly a concern. I thought we were making
12 progress. As you know, Miss Edwardh, in law sometimes it
13 can be slow. But it had to be...there was improvement in
14 that they were revealing more than when I commenced
15 practise.
- 16 Q. So you...
- 17 A. And...
- 18 Q. I'm sorry.
- 19 A. Yes.
- 20 Q. You, sir, would certainly, from your own experience then be
21 well aware that the practise of Crown counsel was not
22 uniform throughout Nova Scotia.
- 23 A. I think that's correct.
- 24 Q. Now, if I can then just be a little bit more precise than my
25 learned friend. Being aware that it was not uniform and

1 having your own view about the propriety of Crown
2 counsel's policies with respect to disclosure, what steps did
3 you take, sir, between 1970 and 1973 by way of discussion
4 or written directives or memoranda that didn't amount to
5 directives, to bring about the policy which you have
6 indicated you adhered to?

7 A. I can't remember, to be quite truthful. I think my view was
8 pretty well known. I can't recall sending out any directives,
9 and I think within the immediate confines of the office here
10 in Halifax, head office, that my view was generally shared.
11 But how it was being carried out all over the Province...
12 Unless...I have to say this in fairness though, I don't recall
13 any great complaints from defence counsel.

14 Q. Maybe we've just all gotten used to it over the years.

15 A. Well, indeed, if there's...I think that was basically my own
16 attitude, that I got used to it. I knew I wasn't going to get
17 the information and I had to accept it whether I liked it or
18 lumped it.

19 Q. And you yourself had not filed any complaints or addressed
20 the issue in the...

21 A. No, I had not, no.

22 Q. So, if I understand you, sir, then it would be fair to say that
23 although you believe your views were generally well
24 known, you can't assist us by pointing to any memorandum
25 or directive or...

- 1 A. No.
- 2 Q. ...convention of Crown counsel where you would have given
3 an express instruction in that regard.
- 4 A. No, I can't really. I...as I say...
- 5 Q. And would you...
- 6 A. You know, if you had asked me six months after the event
7 I'd have known, but sixteen years later I'd be just...
- 8 Q. It's a long time. We all appreciate that. Would that have
9 also been a matter of direct concern, and really within the
10 bailiwick of the director of criminal prosecutions?
- 11 A. I'm sorry, I didn't follow.
- 12 Q. Would Mr. Anderson also have held a position which would
13 have involved him in policy matters such as disclosure, et
14 cetera, where he would have had a concern about getting
15 that kind of information to Crown counsel around the
16 Province?
- 17 A. On policy matters I usually, I usually worked direct with the
18 deputy because he had to know what was going on in the
19 Department in order to administer the day-to-day work of
20 it. I'm not trying to avoid your question.
- 21 Q. No. No, I appreciate that.
- 22 A. I'm just trying to honestly answer it.
- 23 Q. Do you recall at all ever giving to the deputy this area of
24 concern to draft or come to any more formal position about
25 Crown counsel's obligations?

1 A. No, I can't, I can't say I did.

2 Q. In retrospect, looking in terms of your own involvement as a
3 defence counsel and subsequently as Attorney General,
4 would you agree, sir, that in order to get the message out
5 effectively, there ought to be some fairly clearly defined and
6 formalized rules about disclosure?

7 A. Well, as I say, the law wasn't all that clear on it itself at that
8 time. And it's very hard to...you have to follow the law to
9 start giving directives out of the Attorney General's
10 Department or the...

11 Q. But that...

12 A. And I just mentioned the Duke case, which I'm sure you're
13 totally familiar with.

14 Q. But at its highest one would say that the cases would give a
15 discretion to Crown counsel as opposed to preclude Crown
16 counsel from providing information to defence.

17 A. I think that's perhaps a proper way to put it. It gave them
18 more discretion than perhaps I even like to see.

19 Q. And in the exercise of that discretion, it would also be fair to
20 say that Crown counsel would be informed by, for example,
21 your views as Attorney General in what the proper
22 discharge of their responsibilities were.

23 A. I would think I made my views pretty well known because
24 I traveled to each of the courts and visited the Crown
25 Prosecutors who I could find at the time. I made it a point

1 during my tenure to go around each year to the various
2 courthouses and such like, and in a goodly number the
3 Crown Prosecutors were housed in the courthouse or they
4 were close by.

5 Q. Right. My question, My Lord, though is a little narrower. In
6 light of the diversity of practises that appear to have
7 prevailed and may, indeed, still prevail, would you agree
8 that perhaps a formal set of directives pointing to Crown
9 counsel how their discretion ought to be exercised would be
10 of assistance?

11 A. Well, certainly something akin to what Mr. Justice Jones put
12 out as far back in '61 would have been at least a refresher
13 and I can't say that it ever went out.

14 Q. Right.

15 A. I don't...I have no recollection of...

16 Q. I take it from your evidence, My Lord, that you indeed had
17 no knowledge or contact of any kind with Mr. Marshall's
18 investigation, conviction and the subsequent appeal?

19 A. That's right.

20 Q. As Attorney General. Let me then just ask you, if I could, a
21 couple of general questions. You held a dual portfolio. As
22 Attorney General and as Minister of Labour, I take it,
23 between 1970 and 1973.

24 A. No, I...

25 Q. Did I understand you correctly?

1 A. No, I picked up...I dropped Labour and I picked up, I was
2 A.G. and Highways Minister which was a bit awesome.

3 Q. And as...so you were Highways Minister.

4 A. But when I can't...it seemed to me that that occurred after
5 about a year and a half or two years having Labour.

6 Q. But while you were Attorney General, it's fair to say you
7 also held these other major responsibilities.

8 A. Yes, I did.

9 Q. So, could you just estimate for us in an ordinary week what
10 percentage of your time would have been available to
11 devote to the office of the Attorney General as opposed to
12 the other responsibilities you may have carried, whether
13 that be Labour or Highways?

14 A. Really, my head office was A.G., Attorney General, and from
15 that there was an office in the Labour Department which
16 was a separate building and I would visit there, I can't
17 really tell you how often, but as often as required, and when
18 I had the Highway portfolio, it was just two floors up from
19 the Attorney General's office.

20 Q. Would you spend...would you have spent as much as a third
21 of your time in those other responsibilities?

22 A. See, Highways is a twenty-four hour job, a-day job, in that
23 you'd be called at night and everything else, but it would be
24 just a terrific guess on my part to say how much I spent at
25 one and how much I spent at the other. I...because we

1 had...when I first took the Labour portfolio, they had what
2 you call "wild-cat strikes" here in the Province and such like.
3 So that...those things had to be attended to. I would think, I
4 probably all the time I was Attorney General, I at least gave
5 fifty percent of my time to the Attorney General's job.

6 Q. Thank-you. Let me just ask a couple of other questions
7 about the general relationship of the Attorney General's
8 office to other aspects of the administration, at least, of
9 criminal justice. Did the Attorney General's office when you
10 occupied that position, sir, have any formal relationship with
11 provincial coroners doing forensic examinations or
12 pathologists doing their forensic examinations of deceased?

13 A. You mean where there was death?

14 11:33 a.m.

15 Q. Yes.

16 A. I think so.

17 Q. Were they appointed by, were certain of those pathologists
18 appointed by the Attorney General's office?

19 A. I can't say. I think here in Halifax we have the same man,
20 but I can't remember if we started with him, Dr. Perry.

21 Q. You don't recall any specific institutional relationship between
22 the Attorney General's office and forensic pathologists.

23 A. None, no, I can't.

24 Q. Now with respect to the RCMP I believe I heard you make the
25 remark to a question posed by my friend that you, yourself,

1 had had something to do with arranging for the RCMP to
2 provide certain services to municipal police forces, is that
3 correct?

4 A. I think we had, through Chief Superintendent Mudge, I think
5 we had an arrangement whereby the local police force were
6 able to call them when there was difficulty.

7 Q. And would this then be any local police force being able to
8 call in the nearest RCMP detachment or are you talking about
9 Halifax?

10 A. Well I think they had to investigate some themselves, you
11 know. If they run into difficulty the RCMP service was
12 available to them. That was my understanding.

13 Q. Did you, yourself, arrange for that contract or, I'm sorry, I
14 thought you implied you did...

15 A. It may even be in our federal/provincial contract with the
16 RCMP. I'm not sure.

17 Q. One last question before I sit down. Sir, we have asked at
18 least one other counsel who appeared here whether or not
19 they took the view that Crown counsel's obligations extended
20 to informing, for example, the Court of Appeal, or a court, of
21 an error. And I wonder as Attorney General, whether you
22 would have expected people handling appeals in the
23 Department, if they were to observe what they felt was a
24 significant or substantial error, that the defence had not
25 raised in the notice of appeal, whether you would have

1 expected them, pursuant to their obligation, to draw that to
2 the attention of the court.

3 A. If it wasn't in, perhaps if you wouldn't mind repeating that,
4 Ms. Edwardh.

5 Q. There has been some suggestion that Crown counsel's duty
6 extends to a situation where if they were to have found in
7 examining a transcript, for example, of a trial a substantial
8 error made perhaps by the trial judge, that it would be their
9 obligation to raise this error with the Court of Appeal. In
10 your capacity as Attorney General would you have held that
11 expectation of Crown counsel's conducting appeals?

12 A. Well having my view and saying it in general terms, I don't
13 think the Crown ever loses a case, I would assume that if
14 there was a gross error that they should bring it to the
15 attention the court. They're all officers of the court. Now, and
16 of course you're, I'm sure, more well aware of this than me
17 that you can't dictate what the appellant is going to bring
18 forth as Crown counsel unless you happen to be the appellant.

19 Q. No, I appreciate that, but as your expectation in terms of the
20 conduct of Crown counsel when you were Attorney General, if
21 such an egregious error were available or to be seen on the
22 record you would have expected them to bring it forward to
23 the court.

24 A. I would expect, and I think they would have.

25 Q. The next last question, My Lord, that I would like to ask you

1 is we heard testimony which is in Volume 38 at page 7020
2 from Mr., I'm sorry, 7023, from Mr. Veniot who testified that
3 in the Department there were files which some departmental
4 lawyers did not have access and these files, he believed, were
5 "politically sensitive" files. And that they had a green stripe
6 on them. Were you aware of the existence of such files
7 during your tenure?

8 A. No, I certainly was not. The only ones that I ever recall with
9 a green stripe on it, now how they segregated them in the
10 Department, I'm not sure. But was when it was an ongoing
11 investigation by the RCMP and they had asked our people to
12 give them some direction, that's my only knowledge of that.
13 I'd say it's a very poor place to store political files.

14 Q. So let's, starting with the green-striped files for a moment, I
15 take it that any green-striped files that Your Lordship may
16 have had an opportunity to note would have been just one
17 that designated an ongoing criminal investigation.

18 A. That, I think it was the RCMP's designation of the color or
19 something. That's the only thing that I've ever noticed.

20 Q. And that would only indicate at all that there was a
21 consultation process with the AG's office going on about the
22 investigation.

23 A. Yes. And somebody within the office would have given some
24 direction on it. Now I don't know if they made it available to
25 each other in the office, I don't know. I would assume

1 whoever the director appointed to look after the particular
2 file, now if it was an ongoing investigation I suppose they
3 would want to look after it.

4 Q. And then the last question, My Lord. Were you aware that
5 there was any special category of politically sensitive files
6 and were such files ever kept in the Attorney General's office
7 to the best of your knowledge?

8 A. No. There was none.

9 MS. EDWARDH

10 Those are my questions, My Lord. Thank you very much.

11 CHAIRMAN

12 Mr. Pugsley?

13 MR. PUGSLEY

14 No questions, My Lord.

15 CHAIRMAN

16 Mr. Murray?

17 MR. MURRAY

18 No questions, My Lord.

19 MR. BARRETT

20 No questions, My Lord.

21 MR. GAY

22 No questions.

23 EXAMINATION BY MR. WILDSMITH

24 Q. My Lord, my name is Bruce Wildsmith and I'm here for the
25 Union of Nova Scotia Indians. There's just one letter I wanted

1 to call your attention to and inquire about and as a preamble
2 to this, if you could have Volume 41 in front of you. Volume
3 41? And if you could turn to page 100 in Volume 41...

4 A. Yes.

5 Q. Page 100. This is a letter to you as Attorney General from the
6 Minister of Indian and Northern Affairs, Hugh Faulkner...

7 A. Yes.

8 Q. And I wanted to call your attention to the second paragraph
9 which indicates, and I'll give you an opportunity to read it,
10 that the Union of Nova Scotia Indians had a plan to have
11 Band-employed constables play the primary role for police
12 protection on Indian reserves.

13 A. Yes

14 Q. And it goes on to say that the cooperation with the RCMP
15 would be close. That appointments of the constables would
16 be consistent with whatever law is required in your province
17 and that it's felt that the constables should receive basically
18 the same training as RCMP constables and given the same
19 peace-keeping or peace officer roles and emphasizes with
20 ultimate authority to you as Attorney General.

21 A. Um-hmm.

22 Q. And I wanted to turn from there to your response which is at
23 page 106 and perhaps first ask if you have any recollection of
24 having written this letter. It's some time ago. Ten years. Do
25 you have any recollection of it?

1 A. None at all, I have no...

2 Q. In the normal course of things would somebody else have
3 drafted this letter for your signature?

4 A. Sometimes that occurred. As a matter of fact in the Highways
5 Department we had person who did a lot of that because the
6 correspondence was tremendously heavy and you would
7 check it and either agree or disagree and send it back for...

8 Q. This matter...

9 A. I would assume some of that, if I were particularly busy,
10 would have been done in the Attorney General's Department,
11 too.

12 Q. This letter dealing with the question of policing on Indian
13 reserves, if it had not been drafted by you could you indicate
14 who, in your Department, might have done it? Would it have
15 been the Deputy Attorney General or would somebody else
16 deal more with Indian matters or policing matters.

17 A. It could have been any one of several, I would think.
18 Normally the director of the criminal branch, who'd be
19 dealing with the RCMP et cetera, or it could be the Deputy, or
20 it could be one of the senior people in the...

21 Q. Okay.

22 A. But, you know, that would be done in consultation with the
23 Department because there's a number of things I just note in
24 skimming through it.

25 Q. I wanted to call your attention to the third paragraph...

1 A. Yes.

2 Q. Where you say,

3
4 The concept in your letter (and I think that's
5 referring to the concept that I just referred you
6 to) is really a municipal policing concept and that
7 the members of such a force would not be
8 members of the RCMP and, therefore, not
9 members of the provincial police.

10 And then you go on to say,

11
12 The Police Act of this province does not provide
13 for this concept and, accordingly, I as Attorney
14 General, would not have control over them, nor
15 would the members have the benefits of the
16 Police Act.

17 And then you give a second reason, I take it, for not liking the
18 concept which is,

19
20 That in addition, because of the status of
21 reserves as federal enclaves, I doubt that I, as
22 Attorney General, would have any control over
23 the type of regulations which the Band council
24 might enact.

25 A. I think, now this is a long time of recollection.

Q. Yes.

A. It seemed to me our concern there was that they wanted to
enforce their own Band laws...

Q. As well as what other laws, federal or provincial, that applied
to the Indian reserves.

A. Yes. And it was some concern, now supposing they were

1 trying to enforce some law that was contrary to the general
2 law, now, I recall concern about that.

3 Q. Yes. Is that perhaps why you're referring to Band by-laws
4 and the federal enclave.

5 A. Pardon me?

6 Q. Is that why you're referring to it being a federal enclave and
7 having no control over Band by-laws?

8 A. Well no, of course, reserves are a bit different, as you know.
9 They, under the Indian Act. I run into that situation in
10 dealing with native people on several occasions. One time we
11 wanted to do a road for them in, I think it was Eskasoni, and
12 of course they, the Band council had to agree to convey, of
13 course, to the highway the land.

14 Q. Yes.

15 A. And then it had to be approved by Ottawa under the Indian
16 Act...

17 Q. Yes. There are certainly complications.

18 A. There is complication, Mr. Wildsmith.

19 Q. I'm particularly, would anybody have provided you with a
20 memo or other information that corresponds with the
21 contents of this third paragraph or would this be you
22 expressing your opinion, views and information.

23 A. No. I don't know. As a Minister of the Crown, there's very
24 few times you express all your own views if your any ways
25 wise.

1 Q. Yes.

2 A. Without consulting your Department and the people who are
3 working for you.

4 Q. So you would expect in the normal course that you would
5 have received opinions and advice from other members of the
6 Department before sending out this letter.

7 A. I would assume so, because it's dealing with a number of
8 factors there and I don't believe I'd a just sat down and
9 penned that off by myself.

10 Q. Fair enough. Could I then call your attention to page 135
11 which is the response of the Federal minister to your letter
12 although, I take it, you had been appointed to the Bench now
13 and, therefore, it's addressed to the new Attorney General,
14 Mr. Mitchell. And what I wanted to know is whether you
15 could shed any light on whether the more detailed response
16 of the Federal minister, somewhat critical of your points,
17 would, in fact, be a better representation. For example...

18 A. Of course I don't think we ever made any...

19 Q. Third paragraph...

20 A. Any bones about it, you know. The federal and provincial
21 don't always agree as ministers.

22 Q. Yes.

23 A. They see things in a bit different light.

24 Q. Well the third paragraph in this letter says that,
25

1 The RCMP, Department of Justice and my own
2 department (meaning Indian Affairs) have
3 reviewed the matter very carefully and it is our
combined opinion that legislative authority
exists to accommodate the Indian request.

4 And he goes on to refer to a particular provision in the Nova
5 Scotia Police Act in 1974 dealing with special constables. Now
6 can you offer any insight as to whether...

7 A. Not really...

8 Q. That is correct.

9 11:50 a.m.

10 A. Not really. I wouldn't comment on a letter to another
11 Minister when I wasn't even in the office.

12 Q. You having been appointed, this letter wasn't called to your
13 attention, then, I take it, by the new Attorney General, Mr.
14 Mitchell.

15 A. No, I've never gone near the Department or any Ministers of
16 the Crown after I was appointed.

17 Q. Fair enough. Was this concept of special constables under the
18 Nova Scotia Police Act something you gave consideration to?

19 A. Yes, it used to arise, certainly. I remember, I think, too, and
20 the federal people used to bring this up in federal/provincial
21 meetings and also I think the Native Court Worker Program,
22 which we had into being in this province...

23 Q. Yes.

24 A. Was a federal/provincial agreement.

25 Q. Yes.

- 1 A. Now I'm giving you sort of a very general...
- 2 Q. Yeah, I'm just wondering if there was any...
- 3 A. View of it as best I can, but...
- 4 Q. I was just wondering if there was any reason why we should
5 think that Section 34 in the Police Act would not have been
6 adequate to appoint special constables under your authority
7 as Attorney General to police Indian reserves?
- 8 A. I have no answer for that, Mr. Wildsmith.
- 9 Q. Okay. And on this concept of Indian reserves being federal
10 enclaves, your attention, your successor's attention is called
11 on page 137 to the Cardinal case in 1973.
- 12 A. Well, that may have been poor description, if you will. It
13 wasn't meant to be insulting or anything else, but just to... I
14 wouldn't have caught it or taken it as being that. But you do
15 have to handle reserve matters very different than you do
16 ordinary lands.
- 17 Q. And finally, the last point made at the bottom of page 137 is
18 that if there was a deficiency in the Police Act all the province
19 had to do was amend the Police Act to make provisions for
20 the appointment of Indian constables on reserves. Is that...
21 That's a fair conclusion, I would take it?
- 22 A. I would assume so.
- 23 Q. Yes. Was any consideration given to amending the Police Act
24 at that time to accommodate this request?
- 25 A. You're talking about in 19... Or at page 137?

1 Q. Yes.

2 A. Of this letter?

3 Q. Yes. This would be...

4 A. This is...

5 Q. During the last...

6 A. This is after I'd been appointed to the court. I wouldn't
7 know...

8 Q. Yes.

9 A. If there was any...

10 Q. Fair enough.

11 A. Consultation or anything else in regard to political matters.

12 Q. I'm really referring to the time period in which the request
13 had gone to you as Attorney General and then been refused.
14 And whether, in your refusal, you had given any
15 consideration to the advisability of amending the Police Act so
16 as to accommodate the request?

17 A. I don't know.

18 Q. Fair enough.

19 A. I can't answer that, Mr. Wildsmith.

20 MR. WILDSMITH

21 Thank you, then. Those are all my questions.

22 MR. SAUNDERS

23 We have no questions for His Lordship.

24 COMMISSIONER EVANS

25 Q. Mr. Justice Pace, you were admitted to the Bar in '54 and then

1 you practiced for six years doing... A good percentage of your
2 work was in the criminal law field?

3 A. I practiced 16, yes.

4 Q. And as I understand the, at that time, there was, what one
5 might say, no disclosure by Crown attorneys in defence cases.

6 A. Basically, there was no disclosure by Crown attorneys. There
7 was the odd situation, not that often, where they would put a
8 man on the, introduce a man to the court and say, "My
9 learned friend, he can now have him as his witness." Now
10 some, and I suppose, in fairness, some would tell you that
11 they had a theory contrary to what the Crown's. But that was
12 my recollection. We found that, I don't know as a defence
13 lawyer, I found that many ways the police would give you
14 some information, you know. But, basically, the Crown didn't.

15 Q. That's why I was a little curious because that letter of Malachi
16 Jones on March the 23rd, 1961.

17 A. Yes.

18 Q. That's addressed to the R.C.M.P.

19 A. Yes, it is.

20 Q. It's not addressed to Crown attorneys.

21 A. No, it's not addressed to Crown attorneys.

22 Q. So there may have been a little problem about...

23 A. I think, I think Malachi at that time was expressing a view as
24 a senior counsel, was he not, in the A. G.'s Department. I don't
25 know if he even had become the assistant.

1 Q. He's described as "senior counsel."

2 A. Senior counsel, yeah. And he was giving direction to the
3 R.C.M.P. But I think during the sixties, perhaps it was
4 attitudinal in some ways, the police start giving a bit more
5 information.

6 Q. Well, even back prior to your appointment to government or
7 elected to government, did you find that there was anything
8 wrong with discussing a case with a witness who was going to
9 be called by the Crown?

10 A. Not at all if you knew who the witness was.

11 Q. Yeah, but you'd have to do a little digging to get that.

12 A. But I must say you used caution in that because you didn't
13 want it later to be said... I usually, when I had that occasion
14 to interview Crown witnesses, and I've always taken the
15 attitude there's no property in a witness, but I always had a
16 second person present when I interviewed what was a so-
17 called Crown witness.

18 Q. And you've already told counsel, I believe, that there was a
19 failure, the failure on the part of the Crown counsel to disclose
20 the polygraph test or the evidence of MacNeil. That was
21 incorrect. That was wrong for the Crown not to disclose to the
22 defence.

23 A. Oh, they should have given it to the defence for what it was
24 worth and then the defence could proceed on... Now whether,
25 in turn, the jury would believe that evidence, weigh it and

1 believe it, you know, I really can't say.

2 Q. And you say the same with respect to the conflicting
3 statements of Chant, Pratico, and Harriss?

4 A. Yes.

5 Q. And that's based, really, on the theory that the duty of the
6 Crown counsel is to present all the evidence fairly to the, all
7 relevant evidence to the court and he's not to make a
8 judgement as to what he thinks is relevant on all occasions
9 when there's conflicting statements, certainly. Do you agree
10 with that?

11 A. Yes. Yes, because sometimes that judgement can be rather
12 warped by the evidence...

13 Q. Yeah, the theory the Crown never wins and the Crown never
14 loses is a lovely theory, but in practice, some are a little more
15 aggressive than others...

16 A. Oh...

17 Q. I don't say a Crown shouldn't be aggressive, but there's a limit
18 to the aggressiveness.

19 A. No, I've always taken the attitude, good cross-examination
20 and good examination of witnesses is more apt to reveal the
21 truth than...

22 Q. So you say a good cross-examination or a good examination,
23 no matter by whom it's undertaken, is good for the justice.

24 All right, I have nothing further.

25 A. Fine, thank you.

MR. CHAIRMAN

1 Q. One question I'd like to ask Justice Pace.

2 A. Yes.

3 Q. In Nova Scotia, I'm not sure it's a practice now, but I believe
4 it used to be the practice to retain and/or appoint practicing
5 lawyers as Crown Prosecutors in certain areas of the province.

6 A. Yes, it was and we, in 1970, you had a lot who were just on...
7 Well, they were assisting prosecutors. Yes, they had them on
8 a per diem or on a per case basis. Is that what you're...

9 Q. Yes.

10 A. Referring to?

11 Q. So in your day as Attorney General...

12 A. I don't think they held an appointment as...

13 Q. No.

14 A. I'm just trying to think. Seemed that they were...

15 Q. So I take it in your day, term of office, you may have had two
16 categories of Crown Prosecutors.

17 A. I think...

18 Q. Those who were permanent civil servants.

19 A. Yes, we had the permanent... That came in later. I'm not too
20 sure that didn't come in in the mid-seventies or something
21 like...

22 Q. For instance, Donald MacNeil...

23 A. Was a civil...

24 Q. He was not a public servant, was he? Or was he?
25

1 A. Yes, he was.

2 Q. Was he?

3 A. I think he was.

4 Q. I see. I didn't realize that.

5 A. I think he wasn't in the first years after 1970, but then they
6 brought in this situation where they became, if they were
7 permanent, you know, they were made civil servants.

8 Q. Thank you very much.

9 A. Fine, thank you.

10 COMMISSIONER EVANS

11 Q. I have one other question I'm going to ask you. In your
12 Department, do you have a clipping service, the Department
13 of the Attorney General, do they have a clipping service of
14 cases throughout the region, throughout the province?

15 MR. CHAIRMAN

16 You mean newspaper clippings?

17 COMMISSIONER EVANS

18 Q. Newspaper clippings.

19 A. They may have, but I wasn't aware of it.

20 Q. If they did, they must have just filed them, is that it?

21 Because...

22 A. Well, this, I imagine, was what they did. Now Innis MacLeod
23 could have, of course, answered that much more fully than I
24 can. I was not aware of it.

25

1 MR. CHAIRMAN

2 Thank you very much, Mr. Justice Pace. Do you have
3 another witness to start now?

4 MR. ORSBORN

5 We have another witness, My Lord. He would not be
6 finished before lunch.

7 MR. CHAIRMAN

8 There's no point in starting him before lunch, is there?

9 MR. JUSTICE PACE

10 Am I..

11 MR. CHAIRMAN

12 Yes, thank you very much.

13 MR. JUSTICE PACE

14 Thank you very much.

15 MR. CHAIRMAN

16 How long do you... Who is the next witness?

17 MR. ORSBORN

18 The next witness is Superintendent Al Vaughan, My Lord. I
19 would expect his direct examination would be around an hour.

20 MR. CHAIRMAN

21 All right, well, let's go ahead. We want to get as many, all
22 the other witnesses out of the way this afternoon... today.

23 MR. ORSBORN

24 We'll break at 12:30, in any event?
25