

MR. GALE, EXAM. BY MR. MACDONALD

3:42 p.m.

MR. MACDONALD

The next witness is **GORDON GALE**, My Lords.

**GORDON GALE**, duly called and sworn, testified as follows:

**EXAMINATION BY MR. MACDONALD**

Q. Your name is Gordon Gale?

A. Yes.

Q. Mr. Gale, you are the Director of Criminal for the Attorney General's Department for the Province of Nova Scotia?

A. Yes.

Q. You're a practicing barrister?

A. Yes.

Q. Queen's Counsel?

A. Yes.

Q. When did you obtain that designation?

A. 1981.

Q. When did you graduate from law school?

A. 1965.

Q. Just briefly, would you trace for us your work history since that time?

A. In November of 1965, I joined the Attorney General's Department. I went in as a solicitor. I soon became involved in some criminal matters. I also had various departments

1 assigned to me. Gradually, over that period, I guess around  
2 1970, I became senior solicitor. And during that period of  
3 time, I became responsible for criminal appeals and was, at  
4 that time. Then, if my memory serves me right, I think it was  
5 in June of 1971, I became Director of Criminal Law.

6 Q. June of?

7 A. 1971.

8 Q. '71. Did you succeed Robert Anderson?

9 A. Yes, I did.

10 Q. And my understanding is that Robert Anderson was  
11 appointed to the bench in December of '71.

12 A. Yes, he was.

13 Q. Was it June of '72 that you mean to say?

14 A. I'm sorry, June '72.

15 Q. Okay, thank you. Mr. Anderson was appointed to the bench,  
16 the evidence is, on December the 16th of 1971. And he, at  
17 that time, was Director of Criminal, is that a fact?

18 A. Yes, he was.

19 Q. And you were the next Director of Criminal?

20 A. Yes, I was.

21 Q. And your appointment took place when, or effect as of?

22 A. Well, it was effective January 1st of 1972, but I didn't receive  
23 notice of that until June 20th, 1972.

24 Q. Did you act as a... Prior to receiving notice, did you act as  
25 Director of Criminal?

MR. GALE, EXAM. BY MR. MACDONALD

1 A. Well, there was a gradual absorption of that function over a  
2 period of two or three or four months.

3 Q. Okay, we'll come back to that then. Your, from June of '72,  
4 just continue then with your involvement with the  
5 Department to the present time?

6 A. Well, virtually, the Director of Criminal Law was responsible  
7 for all criminal matters. I continued to look after criminal  
8 appeals but, gradually, got out of that, to a large extent,  
9 because of the involvement that I had in attending meetings  
10 and other matters. I think Martin Herschorn was probably  
11 made Assistant Director, I'm not sure of the date. I think  
12 around 1980, perhaps it was later than that. In 19... Once he  
13 became an Assistant Director, there were some changes and  
14 he became responsible for prosecutors and I dealt with the  
15 rest of the matters. And then I think it was in 1986, they  
16 brought forth the Director of Prosecutions, to which Martin  
17 was appointed, and which really made no great change in his  
18 duties, and I continued to oversee appeals and do all other  
19 criminal matters that were in the Department.

20 Q. From an organizational point of view, are you and Mr.  
21 Herschorn at the same level?

22 A. Yes, we are.

23 Q. And your title today is Director of Criminal?

24 A. Yes.

25

MR. GALE, EXAM. BY MR. MACDONALD

1 MR. CHAIRMAN

2 How does that compare, Mr. Gale, with the office of Director  
3 of Public Prosecutions that we find in some places?

4 MR. GALE

5 Well, at the moment, it doesn't compare at all with the office  
6 of Director of Public Prosecutions. I suppose, originally, it was  
7 part of the function.

8 MR. CHAIRMAN

9 Would your office be closer to that of Director of Public  
10 Prosecutions, say, than Mr. Herschorn?

11 MR. GALE

12 At the present moment?

13 MR. CHAIRMAN

14 Yes.

15 MR. GALE

16 No, I would not think so. The office now will have to  
17 undergo some changes, but it has been responsible for dealing  
18 with police. We're dealing with other government departments  
19 and agencies on criminal matters and overseeing criminal appeals.  
20 So it's not, in my view, what is normally thought of as a Director of  
21 Public Prosecutions.

22 MR. CHAIRMAN

23 I assume, therefore, there is no Director of Public  
24 Prosecutions Act in Nova Scotia.

MR. GALE, EXAM. BY MR. MACDONALD

1 MR. GALE

2 No, there is not.

3 MR. MACDONALD

4 My Lords, I've had marked as exhibits two documents. One  
5 is a position description for Director of Criminal, Mr. Gale's present  
6 position. That's been marked as **EXHIBIT 159.**

7 COMMISSIONER EVANS

8 The one I have is 149, but I think it should be 159.

9 MR. MACDONALD

10 No, this is brand new, My Lord.

11 COMMISSIONER EVANS

12 A new one?

13 MR. MACDONALD

14 Just being marked. Also marked as **EXHIBIT 160** is  
15 another sheet. It has job descriptions for three individuals. As of  
16 1975, Mr. Gale is noted to be Director of Criminal at that time as  
17 well. And that's been marked as Exhibit 160.

18 **EXHIBIT 159 - POSITION DESCRIPTION FOR DIRECTOR OF**  
19 **CRIMINAL, PROVINCE OF NOVA SCOTIA, 1985.**

20 **EXHIBIT 160 - THREE JOB DESCRIPTIONS, 1975.**

21  
22 BY MR. MACDONALD

23 Q Let me start with Exhibit 160, Mr. Gale, please, the 1975  
24 document. This was prior to the time, I take it, of Mr.  
25 Herschorn being made an assistant director and taking over

1 responsibility for prosecutions.

2 A. Yes, it is.

3 \*3:50 p.m.

4 Q. And is this the job description that would have been in effect  
5 from the time you took that position until the post of  
6 Assistant Director was created?

7 A. Numbers 1 and 2 on it would have been. I think 3 is  
8 something that was added at some later date, and No. 4 is  
9 something I've had before and have dropped and have had  
10 again. I also had other government departments that I acted  
11 as solicitor for, as well as being Director of Criminal Law.

12 Q. So I understand, though, until... From the time you took the  
13 post in 1972, until Mr. Herschorn would have been appointed  
14 assistant director, you were responsible for all criminal  
15 matters, prosecutions, generally, and all criminal appeals.

16 A. Yes, I was.

17 Q. And that would be your responsibility, then, for all of the  
18 prosecutors out in the field. Ultimately, they would be  
19 reporting to you? Or under your control or ultimate  
20 authority?

21 A. Yes, there was not a very rigid type of reporting system. It  
22 was more one that, if they had a problem, they, I was the one  
23 that was contacted about it. There was no system whereby  
24 we went out and talked to them.

25 Q. Would it be your responsibility, for example, to insure that

1 the prosecutors in the field were complying with the policies  
2 of the Department?

3 A. Well, to the extent that there were any understood policies,  
4 then I would try and see that they adhered to those, but that  
5 would normally be when we had some complaint, rather than  
6 any proactive going out. Because I can't remember any  
7 written policies at that point in time.

8 Q. Specifically, dealing with a policy of disclosure, is there any  
9 written policy from the time you took over the job in 1972  
10 until Mr. Herschorn assumed the responsibility for  
11 prosecuting?

12 A. Well, there was no written policy until around 1980, which I  
13 think was brought about by the then Attorney General, Mr.  
14 How.

15 Q. Okay. Now, in addition, you were responsible for all matters  
16 relating to the R.C.M.P. police, municipal police, police  
17 investigations and reports, and other matters. And that's  
18 just... You were the liaison man, were you, from the Attorney  
19 General's Department and the police?

20 A. Yes. I'm really not sure what "police investigations and  
21 reports" is supposed to mean here, except that we normally  
22 got reports from the R.C.M.P. on a number of matters. We  
23 have never gotten reports from municipal police, unless we  
24 requested them on a particular case.

25 Q. Are you saying then when it says "responsibility for police

1 investigations and reports", that merely means responsibility  
2 to receive such reports?

3 A. Yes.

4 Q. Thank you. And No. 3, you are responsible... The position,  
5 responsible for all legal matters relating to native peoples.

6 A. Well, that was put in as a list of responsibilities. The only  
7 dealings that I had on matters related to native people were,  
8 was in policing on reservations.

9 Q. During, and I'll come back to it in some detail later, Mr. Gale,  
10 but was it during this time from your appointment in '72  
11 until 1980 when Mr. Herschorn took over some of your  
12 responsibility, was it during that period of time that the court  
13 worker program was, the native court worker program was in  
14 effect?

15 A. It was my understanding that the native court worker  
16 program was in effect somewhere, roughly, between 1975  
17 and maybe 1980, or perhaps not quite as late.

18 Q. Was that something that you, as Director of Criminal, were  
19 responsible as a legal matter relating to natives?

20 A. No, I had really nothing to do with the native court worker  
21 program. It seemed to be one that came in under the Deputy.  
22 It was also dealt with by Mr. R. A. MacDonald of our office,  
23 and the prime person, other than the Deputy that seemed to  
24 be involved in the matter, was Mr. Crane, who is now Director  
25 of... Executive Director of Corrections in the Solicitor General's



1 Department.

2 Q. To your knowledge, was there anyone else whose job  
3 description in the A. G.'s Department in the mid seventies,  
4 who had responsibility for any legal matter relating to native  
5 peoples?

6 A. No, there was no one else with that particular job description  
7 given to them.

8 Q. Okay, as I said, we'll come back to that later. Let me take you  
9 to Exhibit 159 now, please. That, I understand, is the current  
10 job description for your position, although it necessarily will  
11 have changed with the creation of the Office of the Solicitor  
12 General, is that correct?

13 A. That's correct.

14 Q. And that took effect as of when?

15 A. December, 1987, as I recall.

16 Q. Let me just then...

17 MR. CHAIRMAN

18 Has the legislation been passed, Mr. Gale...

19 MR. GALE

20 Yes.

21 MR. CHAIRMAN

22 Creating the Department of Solicitor General?

23 MR. GALE

24 Yes, it has. Bill 88, act to amend the Public Service Act.

25

BY MR. MACDONALD

1  
2 Q. Let me take you to the position description then, Mr. Gale, and  
3 ask you for some assistance in understanding exactly what  
4 the job entails. It starts out "General Accountability", where  
5 you are:

6           Accountable for providing advice and assistance  
7           and ensuring consistency, through acquired  
8           expertise, in all aspects of the criminal justice  
9           system...

9           And that's quite a mouthful. What does that mean?

10 A. Well, I think it basically means that I'm to advise the Minister  
11 and the Deputy Minister, and anyone else that needs advice,  
12 on proposed amendments to the Criminal Code by the federal  
13 government, to attend meetings with the federal justice and  
14 provincial justice people. I was also responsible for attending  
15 meetings at the Deputy Minister and Ministerial levels. And  
16 other than that... I suppose also the Uniform Law Conference.  
17 And I have also been on an advisory body to the Law Reform  
18 Commission of Canada on their review of the criminal law.

19 Q. What do you understand the criminal justice system  
20 comprises? Just so I can get a better understanding for your  
21 job.

22 A. I understand it to include matters dealing with, to some  
23 extent, with prosecutions. Certainly with all aspects of  
24 criminal law in itself. To deal with matters involving policing.  
25

1 It seems to be, regardless of how it's phrased there, it's really  
2 a jack-of-all-trades, as far as matters involving criminal law  
3 and quasi-criminal law.

4 Q. Would it be fair for me to suggest that you are responsible  
5 and accountable for all areas of the criminal justice system,  
6 with the exception of prosecutions.

7 A. That's correct.

8 Q. Addressed by Mr. Herschorn.

9 A. That's correct.

10 Q. In addition, the general accountability was with respect to  
11 "formulating policy in all matters relating to policing." That  
12 was part of your job description.

13 A. Yes. As far as municipal police went, a good deal of that fell  
14 under the Nova Scotia Police Commission. With the R.C.M.P., it  
15 would be a matter of determining particular enforcement  
16 modes that they might be using from time to time.

17 Q. Can you give us an example of the type of policy that you  
18 might have been involved with formulating, as it relates to  
19 policing in Nova Scotia?

20 A. I suppose with the R.C.M.P., it would have been, and with  
21 other police forces, in fact, in this case, formulating a policy on  
22 second and subsequent offenders for impaired driving, would  
23 be one of them.

24 Q. With respect to what? What to charge or how to treat  
25 people? I don't understand how that relates to policing.

1 A. Well, we formulated a policy that if a person had been  
2 convicted within the preceding two years, that we would then  
3 proceed against them as if they were, on the basis that they  
4 were a second offender. Which meant an automatic jail term.

5 Q. I see, all right. Would you get involved in policies such as  
6 minimum standards for someone being hired by a police  
7 force?

8 A. No, I was not. That was a matter with, to the extent it was  
9 dealt with by the provincial government, was dealt with  
10 through the Nova Scotia Police Commission.

11 Q. Now if you go down to the next paragraph of your, or  
12 subparagraph under "Structure". It notes that you are, you  
13 report to the Executive Director of Legal Services. Who is  
14 that?

15 A. Mr. Gerald Conrad.

16 Q. Is that still the situation today?

17 A. Yes, it is.

18 Q. You do not, then, report directly to the Assistant Attorney  
19 General?

20 A. Well, there's a Deputy Attorney General.

21 Q. Deputy Attorney General, I'm sorry.

22 A. No, in the structure, it's through Mr. Conrad. In practice, it  
23 depends on what the problem is. I may directly go to the  
24 Deputy or to the Minister.

25 Q. And then it says there are three positions reporting to you-- a

1 senior solicitor, Young Offenders. Next is the solicitor. And  
2 then the prosecuting officer. And they report to you only  
3 with respect to appeals, is that correct?

4 A. That's correct.

5 Q. What's the solicitor? Who is that? Not necessarily the person,  
6 but what role does that person play?

7 A. Well, these are the people that are mentioned under that title  
8 "solicitor", were the four that were doing criminal appeal  
9 work in our Department. It's now five. We receive the  
10 notices of appeal or the recommendations for appeal. I, in  
11 conjunction with others, make the decision whether or not  
12 there's a basis to appeal. The appeals are then handled by  
13 this group.

14 Q. On page three of that document, Mr. Gale, toward the bottom,  
15 it says:

16  
17 Outside of government there is frequent contact  
18 by judges of all levels of courts seeking  
19 assistance and information on various facets of  
20 criminal law.

19 Do you have frequent contact with the judges in our criminal  
20 justice system?

21 A. No, I don't have frequent contact. I have contact from time to  
22 time when they are requesting information as to whether a  
23 criminal law bill has been proclaimed, or where it may be in  
24 the system, or if we have a report of a certain case, or if I'm  
25

1 aware of any cases that might deal with a certain point of law.

2 But that's the only contact I really have with the judges.

3 4:05 p.m.

4 Q. What's the rationale behind having all appeals, virtually all  
5 appeals argued by the office in Halifax?

6 A. Well this was the way the matter was, was when I inherited  
7 the position, but in fact if you looked at it over the years and  
8 have found that it makes sense to have one group of lawyers  
9 who are available. It's efficient. There's no problem about  
10 having to determine who was available for a particular  
11 appeal. It's very easy to go over and we know that one of  
12 those five will be able to take that appeal. It creates a group  
13 of people who have an expertise, who are current on the law,  
14 and it also allows us to determine what appeals are being  
15 taken and what are not, the particular cases, one which  
16 should be appealed. It might seem to have an interesting  
17 point of law but when one looks at it it's not one that is really  
18 going to make any difference in the world or it's, even if it is  
19 one that you wanted to take, you might have such a poor set  
20 of facts that you would perhaps end up with a decision that  
21 you don't want. It also allows us to determine that this is the  
22 case we're going to appeal and we don't have to run that  
23 situation where there are several appeals on that same point  
24 going on.

25 Q. Do you know if the same type of policy is followed in other

1 provinces?

2 A. Well to my understanding it's followed in Alberta. It's  
3 followed, I understand, in Ontario, where they have a special  
4 Crown counsel office that handles a good many of their  
5 appeals. It's not followed in the Province of New Brunswick.  
6 There, I gather, each prosecutor is responsible for his own  
7 appeals. It's one that we have found that seems to work well  
8 and one which the court, to my knowledge, seems to  
9 appreciate in having a group of people that come before them  
10 who they know are well prepared and will be prepared to  
11 argue the cases fairly.

12 Q. Let me go back to the time when you were in charge of  
13 prosecution. How would you define the role of a Crown  
14 Prosecutor?

15 A. I'm not sure what you're trying to get at.

16 Q. What do you say his role is? What's the role of a Crown  
17 Prosecutor?

18 A. Well his role is to prosecute the charges that have been laid  
19 by police. I have always stated, whenever asked, that his job  
20 is to present the evidence. That the prosecutor neither wins  
21 nor loses a case but he has a duty to present the evidence  
22 fairly.

23 Q. What discretion is given to a prosecutor as to, for example,  
24 whether to proceed with a prosecution, the police having laid  
25 an information.

1 A. Well I think the prosecutor has a fair amount of discretion.  
2 He can, if he's satisfied that there is not sufficient evidence to  
3 prosecute even though the charge has been laid, I mean he  
4 may withdraw the charge or enter a stay of proceedings.

5 Q. Does he need approval from your office to do that?

6 A. He does not need approval. There has been a request that if  
7 there's a stay of proceedings that perhaps that should be  
8 discussed with someone on the, up the line, in that we don't  
9 want a stay of proceedings used just because a witness isn't  
10 available and the court refuses an adjournment.

11 Q. Do you have a written policy with respect to that?

12 A. Not that I can recall.

13 Q. What about the exercise of discretion to withdraw, not  
14 present evidence, in a situation where a prosecutor wants to  
15 exercise the discretion on humanitarian grounds or some  
16 other basis, other than not enough evidence.

17 A. Well, the prosecutor has that discretion and they have  
18 exercised it from time to time, there's nothing to, they have  
19 nothing to stop them from doing that. We, I have found in  
20 practice that in most of those cases they will contact someone  
21 else, either the prosecuting officer in charge of their area or  
22 perhaps someone within the Halifax head office, if you will.

23 Q. And if a prosecutor does exercise his discretion not to  
24 prosecute on humanitarian reasons, is he chastised for that or  
25 is there any way of disciplining him at all?



1 A. Well I'm not aware of any way of really disciplining anybody  
2 and I'm not, I haven't seen anybody particularly chastised for  
3 exercising that discretion.

4 Q. When you were director of, including Director of Prosecution,  
5 what type of training was given to a new prosecutor?

6 A. There was no particular training given to a new prosecutor  
7 other than an individual was hired, presumably one who had  
8 had some experience in criminal law. Now that individual sat  
9 in with the more senior prosecuting officer for a period of  
10 time to be determined between the two of them.

11 Q. What was your personal view as, when you occupied the  
12 position with respect to disclosure of information to the  
13 defence?

14 A. Well my personal view has always been to provide disclosure  
15 to the defence but that's been a personal view. There were  
16 no instructions on disclosure at the beginning and I don't  
17 think there are any written ones until about 1980. Certainly  
18 it was always understood that the defence should get, or have  
19 access to the Crown sheet so-called and certainly see the  
20 statements of the accused.

21 Q. What about...

22 A. The Crown sheet basically is a brief of the offence with a  
23 number of names of witnesses on it and "we'll see" sort of  
24 thing, prepared by the police officer.

25 Q. What was your understanding about statements taken from

1 witnesses? Whether those should be made available to the  
2 accused.

3 A. Well there was nothing wrong...

4 Q. Just to the defence.

5 A. There is absolutely nothing on that. I've always, when asked  
6 about it, indicated to people that they can see them if I had  
7 any control over the file. There was no offering of these  
8 things to the defence, it was a matter of the defence asking  
9 for them.

10 Q. And you, in being the person in charge of the Department, if  
11 you were asked by someone in the field what to do, would  
12 that be your answer. If the defence asks you give it to them,  
13 otherwise you do not?

14 A. At that early juncture, yes, our position within the  
15 Department was if they ask for it, give it to them.

16 Q. And do you understand that that would be satisfying your  
17 description of the role of a Crown Prosecutor including the  
18 requirement to be fair?

19 A. I think in most respects it did with the understanding and  
20 proviso that the Crown was not to withhold something that  
21 may be favourable to the defence.

22 Q. I'm sorry, it was not?

23 A. Was not to withhold anything that may be favourable to the  
24 defence.

25 Q. Withhold in what sense, Mr. Gale? If someone came and

1 asked you gave them everything even if it was unfavourable  
2 to the prosecution? Is that what you mean?

3 A. Well if he came and asked for the documents that he would  
4 be given, in my view, whatever we had on it. I suppose that  
5 interpretation may have varied from prosecutor to  
6 prosecutor, quite frankly. But if you, as a prosecutor, saw  
7 something there that was very favourable to, or favourable to  
8 the defence and unfavourable to the Crown then you should  
9 make the motion yourself to advise defence.

10 Q. Should make the motion yourself.

11 A. Yes. In my view. But...

12 Q. But your view, I'm talking now your view as Director of  
13 Prosecutors, what did you do to try and ensure that the  
14 people out in the field were doing what you think is correct.  
15 That there was consistency across the province.

16 A. There was not a thing done that was particularly active in  
17 that regard. The job required you to do a great many things.  
18 At that point in time you might be lucky to be able to call a  
19 meeting of prosecuting officers once every two years to try  
20 and talk to them. I have tried to have meetings established  
21 on a more regular basis but I was generally confronted with  
22 the statement by my superiors that the money was not  
23 available.

24 Q. Okay. No training, I understood you to say no formal  
25 training...

- 1 A. No formal training...
- 2 Q. Just an assignment to somebody who had practised in the  
3 field for a while?
- 4 A. That's correct.
- 5 Q. And what the, and no written policies of any kind.
- 6 A. No, there were no written policies of any kind.
- 7 Q. What a new prosecutor would pick up, then, is what the  
8 practices and procedures were being followed by the person  
9 to whom he was assigned.
- 10 A. Quite frankly, yes.
- 11 Q. Do you have any idea who Mr. Endres may have been  
12 assigned to?
- 13 A. No, I have no idea who he was assigned to.
- 14 Q. Do you know if anyone was assigned to Mr. Endres when he  
15 was prosecuting to get their policies.
- 16 A. No, I don't know if anyone was assigned to him because that  
17 office is run by Mr. Thomas and Mr. Thomas would have  
18 assigned Mr. Endres to somebody in the first instance and  
19 others to Mr. Endres as he became experienced.
- 20 Q. Do you know if there's any training offered today to new  
21 prosecutors who are hired by the Department?
- 22 A. No, there's no training offered today other than to have them  
23 work with an experienced prosecutor for a period of time.
- 24 Q. But there are some written policies today.
- 25 A. There are written policies, some guidelines now.

1 Q. Thank you. What role does the Deputy play in the  
2 Department? I'm thinking only of the criminal law field now.

3 A. Well the Deputy, I suppose, is ultimately the second person  
4 responsible for the criminal matters with the Attorney  
5 General being the person ultimately responsible but I have  
6 found that over the years I suppose the Deputies have  
7 different views of what role they play. Certainly Mr. Coles  
8 attended deputy ministerial and ministerial meetings where  
9 criminal matters were discussed and he made his contribution  
10 to those. If something arose that he took an interest in he  
11 certainly made that quite well known to you, that he had an  
12 interest in what was going on in this particular matter. That  
13 somebody had raised it with him or...

14 Q. Did you have, do you have regular meetings with the Deputy?

15 A. No, there are no regularly-scheduled meetings with the  
16 Deputy. It was on an informal basis. The Department, with  
17 the size it was, it was very easy to walk into the Deputy's  
18 office and mention two or three matters that might be of  
19 interest or to look for instructions on any matters that you  
20 wanted instructions on.

21 Q. Did you, or have you briefed the Deputy on various matters in  
22 order that he can meet with his Minister or, indeed, with  
23 other Ministers?

24 A. Yes, I've briefed the Deputy on various matters so that he can  
25 meet with the Attorney General. And in some of those cases

1 I've briefed the Attorney General personally too, or have  
2 been in with the Deputy when we're talking to the Attorney  
3 General.

4 Q. How many Deputies have you served with?

5 A. Well the original Deputy was a John A.Y. MacDonald, then  
6 there was Innes MacLeod, then Gordon Coles and the present  
7 deputy William MacDonald.

8 \*4:20 p.m.

9 Q. Mr. MacDonald, did he work in the A. G.'s Department for a  
10 while?

11 A. The present Deputy?

12 Q. Yes.

13 A. Yes, he did.

14 Q. Before he became legislative...

15 A. Yes, as I recall, he was in the Prosecutor's office and then he  
16 was within the Department and, I think, working for me for  
17 awhile doing some criminal appeals.

18 Q. Were all of those Deputies, with the exception of Mr. Coles,  
19 what you might call "career civil servants"?

20 A. Yes.

21 Q. Mr. Coles was brought in from practice.

22 A. Yes, he was.

23 Q. There was reference last week in evidence given by Mr.  
24 Giovannetti when he was talking about an experience he had  
25

1 with Mr. Justice Pace. And he said he did not contact Mr.  
2 Coles to discuss his proposed course of action because there  
3 had been a prior association between Mr. Coles and Justice  
4 Pace and he felt that there would be some, there may be  
5 some uncomfortable feeling if he approached Mr. Coles. Are  
6 you aware of any relationship between Mr. Coles and Mr.  
7 Pace?

8 A. Well, to my knowledge, Mr. Coles and Mr. Justice Pace have  
9 been friends for a good many years, long predating their... Mr.  
10 Coles coming into the Department as Deputy. They certainly  
11 had friendly relations when I, when they were both there and  
12 I don't know how, what associations they've had since.

13 Q. You didn't have occasion to socialize with them outside of the  
14 office, or you don't?

15 A. No, I've attended one or two gatherings at Mr. Coles' house  
16 and at a number of ministerial meetings where Mr. Coles and  
17 Mr. Pace would be together and I might be with them for  
18 awhile. But, no, I have not a social relationship with them.

19 Q. Mr. Giovannetti told us about the contact he had with Mr.  
20 Justice Pace. You're familiar with that evidence, aren't you?

21 A. I have read, or I heard Mr. Giovannetti's evidence.

22 Q. Did Mr. Giovannetti ever bring that to your attention when, in  
23 the Department, other than your having read the evidence he  
24 gave here?

25 A. I can recall hearing about it within the Department. I don't

1 recall Mr. Giovannetti particularly advising me of it. I think  
2 that perhaps I overheard him talking to one of the other  
3 appeal lawyers on the matter and I, when I was going into  
4 the office and I heard something of it in that regard.

5 Q. You are responsible, at this stage, for all of the members of  
6 the Department who argue criminal appeals?

7 A. Yes.

8 Q. And that would include Mr. Giovannetti?

9 A. Yes.

10 Q. And you overheard a discussion where he... What did you  
11 understand had taken place?

12 A. Well, I understood that he had a problem about Mr. Justice  
13 Pace sitting on the panel that was to hear the Ebsary appeal.  
14 That this matter had come up in his mind on the weekend  
15 that he called the Attorney General directly at home on the  
16 matter. That as a result of that, the Chief Justice of Nova  
17 Scotia arranged for the matter to be adjourned and to be  
18 heard before a different panel and I heard that, at some  
19 subsequent time, that Mr. Justice Pace had called Mr.  
20 Giovannetti into his office and, to my understanding, made it  
21 plain to him that he didn't appreciate the action.

22 Q. Were you aware of the comment that Mr. Giovannetti  
23 reported here? That during the discussion with Mr. Justice  
24 Pace, reference was made to the latter's belief or his  
25 statement that he always knew from the time Ebsary was



1 charged that he could not be guilty?

2 A. No, I was not aware of that.

3 Q. You've only been aware of that since the evidence was given?

4 A. Yes.

5 Q. Is it unusual for one of your staff to go directly to the  
6 Attorney General to get advice?

7 A. Yes, it's somewhat unusual. But, in this particular case, as I  
8 understood it, this matter arose on a Saturday and that Mr.  
9 Giovannetti felt that he needed a quick reply and that the  
10 simplest way was to try the Attorney General himself, and he  
11 was successful in contacting him.

12 Q. Did that upset you that he went directly to the Attorney  
13 General?

14 A. No, it didn't upset me at all, because if he had raised it with  
15 me, I would have gone to the Attorney General myself.

16 Q. You would have gone yourself. Did you agree with... Or I  
17 guess I can't ask you did you, but would you agree with Mr.  
18 Giovannetti that Mr. Justice Pace sitting on that panel would  
19 at least have the appearance of bias?

20 A. I agree with him that that appearance is there, if he had sat  
21 on that panel, yes.

22 Q. Thank you. The Attorney General, over your career, do the  
23 Attorney Generals, do they come to the office every day, do  
24 they actually participate as law officers of the Crown?

25 A. Well, it depends upon the particular Attorney General at any

1 particular given time. They come to the office. Some of them,  
2 not every day. Some have two ministries that they're  
3 responsible for. So given the fact that they have to divide  
4 their time between two ministries, between Cabinet, and  
5 various management boards or policy boards, you don't  
6 necessarily have a wide area of time on which you're able to  
7 approach them.

8 Q. You said that at times you yourself have been involved in  
9 briefing sessions with the Attorney General.

10 A. Yes.

11 Q. Is that for the purposes of his, advising his colleagues or going  
12 to Cabinet or otherwise?

13 A. Well, I suppose, in some cases, it may have been for advising  
14 his colleagues, but on criminal matters on the whole, it was a  
15 matter of making certain that he was fully aware of what was  
16 going on because there are certain decisions to be made. He  
17 had to make recommendations and take positions. So we  
18 would advise him, brief him on the matter.

19 Q. Anticipate...

20 A. Perhaps suggest courses of action that he could take. It  
21 depends on the Attorney General. Some of them are quick  
22 studies and get to know what the matter is about very  
23 quickly and give you an answer very quickly. Others have to  
24 cogitate for awhile.

25 Q. And one last question that I've forgotten when I was talking

1 about Mr. Giovannetti. If he had contacted you for advice,  
2 you said you would have gone to the Attorney General  
3 yourself. Would you have considered yourself going to Mr.  
4 Coles?

5 A. Not unless I could not get the Attorney General, and probably  
6 for the simple expedience, a matter of expediency that the  
7 Attorney General is the one that makes the decision,  
8 ultimately, and undoubtedly, Mr. Coles might want to contact  
9 the Attorney General himself. I felt if I was to do it, I would  
10 have contacted the Attorney General directly and only Mr.  
11 Coles if the Attorney General was not available. And if  
12 neither of them were available, then I guess I would have  
13 had to make the decision myself.

14 Q. You wouldn't hesitate though to contact Mr. Coles, because of  
15 his prior association with Mr. Pace?

16 A. NO, I would not have hesitated to contact him on that, except  
17 that it would put Mr. Coles in a, I would have thought, if it  
18 were me, I'd be in an unenviable sort of position of somebody  
19 saying that you do it because of whatever your decision was,  
20 you find it hard to talk to, about that matter because your  
21 friend is involved.

22 MR. MACDONALD

23 My Lords, if this is a convenient time. I'm going to move on to  
24 another area.  
25

MR. GALE, EXAM. BY MR. MacDONALD

1 MR. CHAIRMAN


2 Fair enough, until 9:30.

3 4:28 p.m. INQUIRY ADJOURNED UNTIL 9:30 a.m. JUNE 7TH.

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## REPORTER'S CERTIFICATE

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

  
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Margaret E. Graham

DATED THIS 6th day of June 1988 at Dartmouth, Nova Scotia