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# 4

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

**Volume 76**

Held: June 8, 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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	4:12	13621
Examination by Mr. Pink		13633
	4:39	13635

MR. GALE, EXAM. BY MR. MacDONALD

1 JUNE 8, 1988 - 9:30 a.m.

2 MR. MacDONALD

3 Good morning.

4 MR. GORDON GALE, previously sworn, testified as follows:

5 EXAMINATION BY MR. MacDONALD

6 Q. Mr. Gale, could you tell me just generally the involvement  
7 Mr. Coles used to have on a day-to-day basis with criminal  
8 law matters?

9 A. He didn't seem to have any day-to-day involvement with  
10 criminal law matters. He certainly spoke for the Department  
11 at provincial and federal/provincial meetings of deputy  
12 ministers, and generally without any great consultation on  
13 matters. I found that from time to time he would become  
14 interested in some particular aspect of criminal law. He  
15 might go through me or he might go directly to somebody  
16 else on the matter.

17 Q. But his normal practise was to leave it to the other people in  
18 the department.

19 A. The day-to-day matters, yes.

20 Q. Thank you. Do you have Volume 32, please, page 190? And  
21 this is a letter from you to Chief Justice MacKeigan referring  
22 to a telephone conversation with the Chief Justice and with  
23 respect to a newspaper article that was written by Mr.  
24 Donham. Would that be a normal function of the Attorney  
25 General's office to provide legal opinions to the Court?

MR. GALE, EXAM. BY MR. MacDONALD

1 A. No, this was an unusual matter, but the Chief Justice had  
2 called and he was concerned about the matter. He thought  
3 that contempt proceedings should be instituted and his view  
4 was, and it's my understanding also, that contempt  
5 proceedings ex facie are initiated by the Crown.

6 Q. You weren't surprised then that the Chief Justice, what...was  
7 he suggesting to you that contempt charges should be laid or  
8 that you consider whether they should be laid?

9 A. He was suggesting that our Department should look at the  
10 matter and look at it see whether or not we thought  
11 contempt...a contempt charge should be laid.

12 Q. You concluded that the article was borderline, is...

13 A. Yes, that's correct.

14 Q. The article is found on page 178 of this volume, Mr. Gale,  
15 and that's the article that you found to be borderline  
16 contemptuous.

17 A. To the best of my knowledge it's the article, yes.

18 Q. What was it about the article that you considered to be  
19 contemptuous, in the sense of what? Is it un...is Mr. Donham  
20 saying something that is incorrect or untrue or in what way  
21 is it contemptuous?

22 A. I...as you know, I said that at best it was borderline. I didn't  
23 find it to be contemptuous, but it seemed to me that it  
24 skirted on the issue of scandalizing the Court by holding it  
25 out to...up to ridicule.

MR. GALE, EXAM. BY MR. MacDONALD

1 Q. And in that sense contemptuous, scandalizing the Court.

2 A. In that sense of contempt. That was the closest I could come  
3 to it and that...and quite frankly I did not think it fell within  
4 that, that I express myself in terms that it was, at best,  
5 borderline.

6 Q. Well, borderline at least connotes that it could be  
7 contemptuous.

8 A. Yes, some Court might find or some other lawyer might well  
9 find that there is sufficient basis for that. But in my opinion  
10 I did not think it crossed the boundary into the cases that I  
11 had looked at, and I think those were referred to in my  
12 letter of June 9th on page 190.

13 Q. On page 179 of this volume, it's a memo from yourself to Mr.  
14 Coles, where you refer to the fact that you had spoken with  
15 Chief Justice MacKeigan advising him that you would not be  
16 instituting contempt proceedings. But then you note the  
17 Chief Justice referred to a broadcast on the CBC by Mr.  
18 Donham and suggested he may like to look at that to see if it  
19 would warrant contempt proceedings.

20 A. Yes, my recollection why I sent this letter on June 9th, I  
21 think I had... perhaps had gotten back to the Attorney...to  
22 the Chief Justice to tell him that a letter was coming and he  
23 had also indicated that we should look at this broadcast.

24 Q. Did you get a transcript of that broadcast?

25 A. As I recall there was not a transcript made available to us.

MR. GALE, EXAM. BY MR. MacDONALD

1 Q. Following on page 180 is a...

2 A. Well, I guess there is, one was made available to us then.

3 Q. Do you...do you know if you reviewed that transcript to see  
4 if...and respond to the Chief Justice whether you considered  
5 anything in the broadcast to be contemptuous?

6 A. I think I may...I can't tell you with any certainty. I may  
7 have read this. I know I didn't...I'm quite certain I did not  
8 get back to the Chief Justice on this...that particular one. He  
9 didn't phrase it in terms of "get back to me", but simply take  
10 a look at that.

MR. CHAIRMAN

11  
12 And that's referred to in the last paragraph on page 191 of  
13 the letter from Chief Justice MacKeigan.

MR. MacDONALD

14  
15 The request that it be looked at, yes, My Lord.

MR. GALE

16  
17 Yes.

MR. MacDONALD

18  
19 That's in that letter.

20 Q. If you go back to page 190, your final sentence you indicate  
21 that...or you state that, "It is not our intention to launch  
22 contempt proceedings unless you and the members of the  
23 panel in Marshall have different views." What do you mean  
24 by that? Are you going to let them...the Court tell you  
25 whether you should launch contempt proceedings?

MR. GALE, EXAM. BY MR. MacDONALD

1 A. No, I was not going to let the Court tell me whether to  
2 launch or not. I guess I was being extremely deferential to  
3 the Chief Justice on the matter, and also my views saying  
4 that if there's some case that I've missed amongst...my  
5 thought was that if there was some case I had missed among  
6 the ones that I had indicated in my letter that, you know, it  
7 was open to him to draw the Department's attention to a  
8 case that may have been missed.

9 Q. Just so I understand your conclusion though. Having read  
10 the article of Mr...written by Mr. Donham, it was your  
11 conclusion that it was not contemptuous and that it did not  
12 hold the Court up to ridicule.

13 A. Not within the parameters of what I understood to be the  
14 case law.

15 Q. So there would be no foundation for a contempt proceeding.

16 A. That was my...

17 Q. In your view.

18 A. ...view, yes.

19 Q. Thank you.

MR. CHAIRMAN

21 Mr. MacDonald, would you...I'm at a loss to follow the  
22 relevancy of this particular line of questioning.

MR. MacDONALD

24 The relevancy of it.  
25

MR. GALE, EXAM. BY MR. MacDONALD

1 MR. CHAIRMAN

2 Yes.

3 MR. MacDONALD

4 I'm trying to determine what the relationship is between  
5 the Attorney General's Department and the Court, My Lord. There  
6 is a, I understand from Mr. Gale's discussion in the first instance,  
7 or his evidence the other day, the Court may call him from time to  
8 time and say, "What's the latest ruling in this sort of area?" or so  
9 on. I am just trying to determine why the Court would be in  
10 touch with the Attorney General's office to get an opinion on this  
11 type of matter.

12 MR. CHAIRMAN

13 My understanding is that if the Court has reason to believe  
14 that someone may have said something or done something that  
15 may constitute contempt of Court there are several avenues open.  
16 One, the Court may of its own initiative retain counsel at the  
17 expense of the state to be advised in due course that counsel  
18 would, if he or she deemed it appropriate, institute contempt  
19 proceedings. Two, simply draw to the attention of the Attorney  
20 General the areas without comment, the areas that are causing  
21 them concern for an opinion. Three, some people argue that an  
22 Attorney General has an obligation of his or her own initiative to  
23 move. And four, that if it's in a civil action either of the parties to  
24 the action may, again at their own initiative, institute an  
25 application to Court to have the person cited for contempt. And

MR. GALE, EXAM. BY MR. MacDONALD

1 fifth, in the face of the Court, we note, you know, I think there's  
2 some law on that.

MR. MacDONALD

3  
4 Q Is that...Mr. Gale, would you...is that an accurate summation  
5 of the legal system...situation in this Province?

6 A. Yes, it is.

MR. MacDONALD

7  
8 Thank you, My Lord, that was very succinct.

MR. CHAIRMAN

9  
10 You'll find the case in the Newfoundland and P.E.I. Reports.

MR. MacDONALD

11  
12 Yes.

13 Q Just one other topic I want to deal with in this volume, Mr.  
14 Gale, and it's...if you turn to page 203, it's a memo from Mr.  
15 Herschorn to the Attorney General with a copy to you.  
16 We've already discussed in some detail the...whether  
17 charges should be laid against various individuals, and I  
18 don't propose to go into that again. The second point though,  
19 whether a public inquiry ought to examine the role of the  
20 Sydney Police. That was a topic being discussed at the  
21 Attorney General's office in the summer of 1983, is that  
22 correct?

23 A. Yes, it is.

24 Q And it was the position of the Deputy Minister that there  
25 should not be any such inquiry, is that...would you agree

MR. GALE, EXAM. BY MR. MacDONALD

1 with that? Or is that your recollection?

2 A. Well, my recollection is that both the Deputy and the  
3 Minister were of the view that there might well be an  
4 inquiry but that that decision would not be made until all  
5 legal matters that they saw affecting the Marshall case were  
6 dealt with or disposed of.

7 Q. Let me take you to page 272 of this volume, which is a  
8 memorandum from, again from Mr. Coles to Mr. How, and  
9 it's...the second page has a handwritten date on it of October  
10 the 25th of 1983.

11 A. Yes.

12 Q. Have you ever seen that memo?

13 A. Not at the time, no.

14 Q. And...but you have seen it since.

15 A. I can't say that I've seen it since. I think this may be the  
16 first time I've seen this particular memo.

17 Q. Let me ask you then to look at paragraph numbered 3 on  
18 page 2 where Mr. Coles is saying that, "It would appear that  
19 no useful purpose would be served by any such inquiry."  
20 That's an inquiry into police activity. "Nor would the public  
21 interest be served, in my opinion, by such an inquiry." Did  
22 Mr. Coles ever express that view to you, that he did not  
23 believe an inquiry could serve any useful purpose?

24 A. Yes, I have heard him express that opinion that it may not  
25 be. It just seemed to be an opinion that...of the type that

MR. GALE, EXAM. BY MR. MacDONALD

1           you would set up for argument as to whether there should  
2           be or shouldn't be.  Somebody takes the contrary view and  
3           presents an area for argument back and forth.

4       Q.    And is that what you understand Mr. Coles was doing?  He  
5           was just setting up the contrary view so that all areas, all  
6           aspects could be considered.

7       A.    Well, that was my understanding at the time, yes.

8       Q.    Was it your understanding that he did, in fact, support the  
9           view that a inquiry should be held?

10      A.    Well, I cannot say with any definite opinion that he  
11           supported or didn't support an inquiry.  That was certainly  
12           discussed and the pros and cons of an inquiry, or  
13           whether...what would an inquiry do, whether the police  
14           practises had changed sufficiently over that period of time  
15           that there was really no need for one or whether those  
16           practises might still be continuing.

17      Q.    Okay.  Let me ask you to go to Volume 20, please.

MR. CHAIRMAN

18  
19           Before we leave that, Mr. Gale.  Upon reading the  
20           memorandum of the Deputy Minister to the Attorney General I  
21           would assume that, regardless of any discussions that may have  
22           taken place, that this constitutes his formal response to the  
23           request that was very properly made by the Attorney General  
24           right after the Appeal Court's decision came down on the  
25           reference when he listed three areas that he needed advice from,

MR. GALE, EXAM. BY MR. MacDONALD

1 from his officials, one being whether a public inquiry ought to  
2 examine the role of the Sydney police and the prosecuting officer.  
3 And sitting in the chair of the Attorney General upon receiving  
4 the memorandum of...on page 272 from his Deputy Minister, it  
5 seems to me that the only conclusion he could reach would be that  
6 the Deputy Minister is, as the permanent head of the department,  
7 is advising the Attorney General that there should not be a public  
8 inquiry. Wouldn't you...is that a fair assessment on my part?

MR. GALE

9  
10 Yes, I suppose that is a fair assessment, except that I know  
11 that Mr. How would keep thinking about matters, his views from  
12 time to time might well change and he may well have had further  
13 discussions with Mr. Coles and this is a very highly fluid situation  
14 at the time. I don't know that the positions taken were inflexible  
15 but...

MR. CHAIRMAN

16  
17 Would you agree with me that that...that memorandum ...

MR. GALE

18  
19 With the premise that you have put forth, My Lord, yes.

MR. CHAIRMAN

20  
21 Well, I want to be sure that I'm putting forward an accurate  
22 premise. Yesterday we looked at the memorandum from the  
23 Attorney General to his Deputy taken apparently very promptly  
24 following the decision of the Court of Appeal, saying "Please  
25 advise me, one, whether criminal charges are warranted against

MR. GALE, EXAM. BY MR. MacDONALD

1 certain people; two, whether there should be a public inquiry;  
2 three, the question of compensation." And these are all legitimate  
3 questions that I would expect an Attorney General to ask for  
4 advice on from his Deputy. Now, he gets the advice in writing.  
5 Doesn't that place the Attorney General then in a position,  
6 regardless of any discussions that may be going on around the  
7 Department that he's aware of or he's been involved in, in a  
8 position wherein he...if he is to recommend to government that a  
9 public inquiry be initiated that he has to overrule the head of the  
10 department, the department head, which is not a very...

MR. GALE

11  
12 Yes. He would have to overrule the Deputy head of the  
13 department.

MR. CHAIRMAN

14  
15 And that in itself is often fraught with hazards, isn't it?

MR. GALE

16  
17 It can be.

MR. CHAIRMAN

18  
19 Yes, yes. Thank you.

MR. MacDONALD

20  
21 Thank you, My Lord.

22 Q In Volume 20, Mr. Gale, on page 57. This is a memorandum  
23 from Staff Wheaton to the Officer in Charge in Halifax in  
24 1986. And it's the second last paragraph that's of interest to  
25 me, where he says that if he were interviewed on CBC he

1 would undoubtedly cast the Department of the Attorney  
2 General in bad light, and it would also bring forth the fact  
3 that he feels Chief John MacIntyre should be charged  
4 criminally with counselling perjury. Did you...at any time  
5 were you advised by Staff Wheaton that he considered that  
6 such charges should be laid against Chief MacIntyre?

7 9:52 a.m.

8 A. I have never spoken or been in contact with Staff Wheaton  
9 and I have never been advised by the RCMP at any time that  
10 such charges should be considered.

11 Q. No one ever advised you of that.

12 A. No, no one ever advised me.

13 CHAIRMAN

14 Can we assume, therefore, Mr. Gale that you, this  
15 memorandum was not brought to your attention.

16 A. No, this memorandum was not brought to my...

17 MR. MacDONALD

18 Q. Well let me just show you a couple of other documents, Mr.  
19 Gale, and see what was brought to your attention in 1986. If  
20 you start with page 72 of this Volume 20 where, it's a letter  
21 to you from Superintendent Vaughan and we'll come back to  
22 that but you'll see in the first paragraph it says he is  
23 attaching a copy of his memorandum of June 12th, '86 and  
24 the subsequent response from Staff Wheaton. Now can we,  
25 perhaps we'll just go to those documents and see what was

1        advised to you. On page 60 is Vaughan's memorandum of  
2        June 12th, do you see that?

3        A. Yes, I do.

4        Q. And that's what was enclosed in the letter to you.

5        A. Correct.

6        Q. And in the second paragraph it says, "I also wonder why he  
7        would now make a recommendation that Chief MacIntyre  
8        should be charged criminally with counselling perjury." So I  
9        just refresh your memory that obviously you were aware at  
10       that time of Staff Wheaton's view. Correct?

11       A. Yes, by that time I was aware of Staff Wheaton's view but I  
12       had not been aware of it prior to that.

13       Q. I appreciate, I just was concerned, your answer to the Chief  
14       Justice a moment ago may have indicated that you were  
15       never aware of it. You were certainly aware of it in 1986  
16       when you received Superintendent Vaughan's memo.

17       A. Yes. When I received Superintendent Vaughan's memo,  
18       certainly, yes.

19       Q. Thank you. And then if you go to page 63 which is the other  
20       document that was enclosed with Vaughan's letter to you,  
21       that is from Staff Wheaton. Would you have read that  
22       document?

23       A. Yes, I would have read that document.

24       Q. And, in particular, on page 65 the first full paragraph on that  
25       page where it says,

1                   These three people (and he's talking about  
2                   Harriss, Chant and Pratico) all say the same  
3                   thing. That they were counselled to commit  
4                   perjury by former Chief John MacIntyre.

5                   A. Well I read the, Superintendent Vaughan's letter and the  
6                   attachment so I would have read that with it.

7                   Q. Let me direct your attention to the final paragraph of Staff  
8                   Wheaton's letter, or memo. He talks about the investigation  
9                   being divided into three phases, the first being the proving of  
10                  Marshall's innocence, the second Ebsary's guilt and he says,

11                               The third phase, which has not been completed,  
12                               is the investigation of former Chief MacIntyre. I  
13                               respectfully submit that an offence has been  
14                               committed by the former chief and it bears  
15                               further investigation.

16                   Now you were aware at that time of the view of Staff  
17                   Wheaton in 1986 that a further investigation should be  
18                   carried out.

19                  A. Yes, in '86 after receiving Vaughan's letter, yes.

20                  Q. Thank you. Now just before I go to Vaughan's letter while  
21                   we're here, just turn back to page 61 and 62. That's a  
22                   memorandum from Sergeant Bentley to the Chief Officer in  
23                   the RCMP and it's the final paragraph on 62 that I want to  
24                   direct your attention to where he says,

25                               Perhaps I might suggest that the Department of  
                             the Attorney General be approached with the

MR. GALE, EXAM. BY MR. MacDONALD

1 idea that all murder investigations in the City of  
2 Sydney be handled by this force, not the City  
3 police. I believe we, meaning our force, had to  
4 take over another murder investigation since the  
5 Marshall case simply because the Sydney police  
6 did a lousy job.

7 Were you ever approached by the RCMP with the suggestion  
8 that all murder investigations in Sydney be conducted by that  
9 force?

10 A. No, I was not.

11 Q. Have you ever given any consideration within the Department  
12 to such a policy being implemented?

13 A. I recall that Mr. Edwards was very annoyed about an  
14 investigation that had been done on a murder case by the  
15 Sydney Police Department and that he expressed that  
16 annoyance to Mr. Herschorn and that during that he was  
17 suggesting that maybe the RCMP should do all murder  
18 investigations.

19 Q. That was Mr. Edwards' suggestion.

20 A. That is...yes.

21 Q. Yes. But has the Department ever given any serious  
22 consideration to that suggestion, that all murder  
23 investigations in the City of Sydney should be under the  
24 guidance of the RCMP?

25 A. Not to my knowledge has the Department given serious  
consideration to that. The policy of the Department is that  
police forces of municipalities that are cities have and will

1 continue to do their own murder investigations. That certain  
2 towns would be allowed to do murder investigations and  
3 others would not be allowed based on recommendations that  
4 were received from the RCMP.

5 Q. So there, depending on where one lives in the province, a  
6 murder investigation may be conducted by the RCMP or the  
7 local police.

8 A. Yes. That was the...

9 Q. That's the policy you said.

10 A. The position of the Department until we cease to have any  
11 control over policing in the province.

12 Q. That's up until last year. Now your job description said,  
13 includes formulating policies, policy in all matters relating to  
14 policing. Have you ever considered a policy that there should  
15 be, sort of, standard investigative techniques employed in  
16 murder investigations or serious crimes, and that all serious  
17 crimes in the province, say, should be under the direction the  
18 RCM Police.

19 A. No, I have not considered that policy other than to amend a  
20 policy that was in existence that murders, rapes and attempts  
21 of both, except for the three cities in the province, were to be  
22 investigated by the RCMP with the amendment to the  
23 Criminal Code doing away with rape, per se, and changing the  
24 concept of that of sexual assault. It was then decided in  
25 consultation with the RCMP that the policy should be

1           amended so that, well certainly that rapes and attempts rapes  
2           had to be taken out and that sexual assaults would not  
3           replace them.

4       Q. Let me go back to the letter to you from Superintendent  
5           Vaughan which is found on page 72. I take it that was an  
6           unsolicited letter, Mr. Gale, is that correct?

7       A. Yes, I did not solicit the letter.

8       Q. Thank you. And in that letter Mr., or Superintendent  
9           Vaughan is describing why, in his view, a further  
10          investigation should not, is not warranted at this time. Is that  
11          correct?

12      A. That's correct.

13      Q. And you agreed with that, did you, with that conclusion,  
14          having read the reports from Staff Sergeant Wheaton and the  
15          report from, or, and Vaughan's own memo of June the 12th.

16      A. Superintendent Vaughan's memo to me seemed to put the  
17          matter forth in their view and I didn't have any reason to  
18          disagree with it at that particular point in time but I felt that  
19          the matter should go to the Deputy and be dealt with at his  
20          level.

21      Q. So you turned it over to the Deputy.

22      A. Yes, I did.

23      Q. And did you discuss it with the Deputy?

24      A. No, I turned it over to him. I told him this was  
25          Superintendent Vaughan's report that I thought that if it was

1 going to be responded to it should be responded to by the  
2 Deputy.

3 Q. You're the liaison man with Vaughan, why would you put this  
4 up to the Deputy?

5 A. Well in reading it, the press that was going on at the time  
6 seemed to be dealing with "Gale tells RCMP hold in abeyance"  
7 and, quite frankly, I thought there'd be a conflict of interest  
8 in my writing back to Superintendent Vaughan and saying,  
9 "Great, I concur with your letter."

10 Q. Okay.

11 A. So I decided that it should be dealt with at the Deputy's level  
12 and he could go to the Minister if he wished on it, or have  
13 somebody else deal with it but I didn't think it was fit and  
14 proper for me to deal with the matter.

15 Q. Did you ever have any discussions yourself with Vaughan  
16 about your, or about the suggestion that you had told the  
17 police to hold matters in abeyance?

18 A. Well Superintendent Vaughan had interviewed me about how  
19 we were dealing with the matter at that time. How we were  
20 proceeding with it. I would expect that when he interviewed  
21 me that the, it was carried in the press at that time that he  
22 may, we may well have discussed the in abeyance issue.

23 Q. Was that before he wrote this letter to you of August the 1st,  
24 1986?

25 A. Yes, I would say it was because at that time I simply told him

1 my view of what I had said at the time. That there was no  
2 attempt to hold anything in any type of unlimited abeyance.  
3 That, and I've explained that to you yesterday. That if, that  
4 he should deal with the matter and take whatever action he  
5 thought the matter warranted.

6 Q. The, on page 72, Superintendent Vaughan's letter, the second  
7 paragraph where he says,

8           Regrettably your suggestion of (I guess that's the  
9           5th of, or the 20th of May 1982) to hold the  
10          matter in abeyance was unintentionally  
11          misinterpreted to mean that the investigation  
            from a police perspective should be stopped.

12 And he goes on to say in his last sentence, "It should not have  
13 been construed in any way as precluding a police  
14 investigation at a later date if such was deemed necessary  
15 and warranted." Was that just repeating to you what you had  
16 told him earlier in your discussions?

17 A. Well I don't think so. I maintain the position now that I did,  
18 that I explained yesterday that when Mr. Edwards had  
19 suggested that the, certain members of the Sydney Police  
20 Department be interviewed that it was pending getting the  
21 direction from the, the Order from the Attorney General. And  
22 at that time it didn't make sense to me to interview them  
23 until they had gotten the full report, or the full file from the  
24 Sydney Police Department, and had a chance to look at it. The  
25 date that's referred to here I think is where the thing

1 appeared in the correspondence from the RCMP but certainly  
2 it was, I told Superintendent Vaughan basically what I've told  
3 you during this testimony.

4 Q. Okay, thank you. On page 97 of that volume, Mr. Gale, is the  
5 reply to the letter from Superintendent Vaughan to you and  
6 it's signed by the Deputy, Mr. Coles. Did Mr. Coles ever, I  
7 think you've told me he did not discuss with you the contents  
8 of Vaughan's letter, is that correct?

9 A. That's correct.

10 Q. And he didn't ask you if you agreed with the conclusions.

11 A. No, I just told him that I would prefer in this case that  
12 somebody else deal with it. I was giving it to him and that I  
13 would prefer somebody else dealt with the matter.

14 Q. Do you know if he discussed it with any of the other people in  
15 the Department?

16 A. No, I don't know if he did or not. I knew the letter went out  
17 because...

18 Q. Did you agree with....

19 A. He told me.

20 Q. Coles', with the conclusion of Mr. Coles? That the RCMP were  
21 correct and should be supported in their conclusion.

22 A. Well yes, I agreed with it. I had indicated before that it was  
23 my own view that we were accepting their advice as to  
24 whether or not they felt there was a, something to investigate  
25 or whether they would investigate the matter. To that extent,

1       yes, I agreed with their conclusions.

2       Q. Thank you. I want to deal just for a few minutes with  
3       Volume 41, please. Now...

4       COMMISSIONER EVANS

5       What page?

6       MR. MacDONALD

7       I'm going to start at page 1, My Lord.

8       Q. This volume, Mr. Gale, has been assembled and deals with two  
9       issues involving natives. One is the Native Court Worker  
10       program and the other is native policing. And I want to  
11       direct your attention to certain things and get your comment.  
12       Now your job description in 1975 and I understood prior to  
13       that, was that you were responsible for all legal matters  
14       relating to native peoples. That's an accurate statement of  
15       your job description, isn't that correct?

16       A. Well that was in the job description.

17       Q. Now in practice what responsibility did you take for legal  
18       issues involving natives?

19       A. The only legal issue that I ever got involved in to any extent  
20       involving native people was that of policing.

21       Q. The Court Worker program, you had no involvement with at  
22       all?

23       A. I was aware of some bits of it. The only involvement that I  
24       can see that I had was to reply at Mr. Coles' request to letters  
25       that he received.

1 Q. Were you aware that such a program was implemented in the  
2 province for a period of time?

3 A. I was aware that there was some type of Native Court Worker  
4 program going on within the province. The matter seemed to  
5 be dealt with by the Deputy, Mr. Coles, and it seemed to be  
6 being implemented mainly under Mr. Crane's section, that of  
7 Correctional Services.

8 Q. The Exhibit 160 which was the job description for those years  
9 included the job description for Mr. Crane and it made no  
10 reference to the native matters at all. But he took that over,  
11 was it at the, because of Coles, Mr. Coles that...

12 A. Well I presume he did. He was the one that seemed to know  
13 about the matter and but other than having, you know, a  
14 nodding acquaintance with the fact that there was a Native  
15 Court Worker program going on and that there, and being  
16 aware that there were some discussions going on with it, I  
17 really had no knowledge of the matter other than that. I had  
18 no input into it.

19 Q. But it would be a legal matter relating to native people.

20 A. Well, in part it's a legal matter, in part it's a service matter.  
21 The job, as I recall, in some ways was left to the, it would be  
22 performed by a probation officer in our own service.

23 Q. Let me just take you to some of the letters in this volume,  
24 then, and get your, where your name appears, and we can  
25 find out why you were involved.

1 First of all, on page 1, it's a letter to Mr. Pace from the then  
2 Minister of Justice in Ottawa who says that a...in the first  
3 paragraph, "That experience with a Court Worker program  
4 in Alberta has shown that such a program can perform an  
5 extremely valuable service, both for native people and the  
6 legal system generally." Was this letter ever brought to  
7 your attention?

8 10:15 a.m.

9 A. No, I cannot recall ever having had this letter brought to my  
10 attention.

11 Q. Are you able to comment whether the system that was  
12 implemented in Nova Scotia did perform an extremely  
13 valuable service for native people and the legal system  
14 generally?

15 A. No, not of my own personal knowledge of it. I knew there  
16 was some type of program there. I didn't know what fully it  
17 was doing or how much assistance it was being to the two  
18 sectors of...

19 Q. Let's go to page 8. That is a letter signed by you where it  
20 says you have been reviewing the file on the Native Court  
21 Worker program. And you go on to say that, "The Attorney  
22 General had taken the matter to Cabinet and received  
23 approval in principle." Do you recall this involvement, your  
24 involvement in getting...having such a program  
25 implemented?

- 1 A. I don't recall any involvement in getting the program  
2 implemented whatsoever. I think this letter to Mr. Miller is  
3 one that I was asked to write to look at the matter and just  
4 explain the...set out the chronology of events that had  
5 occurred.
- 6 Q. Let's look at page...
- 7 A. The position of the Department.
- 8 Q. Look at page 11. That's a memo from the Deputy to you  
9 enclosing the draft agreement for the program and asking  
10 you to review it and make comments. Would you have done  
11 that?
- 12 A. I would have looked at it. I don't know what comments I  
13 would have made and it would have been from a solicitor's  
14 point of view as to the adequacy or inadequacy of the  
15 agreement.
- 16 Q. On page 23 there is a year-end report setting out what had  
17 taken place during the year 1974 in the program. It's noted  
18 to be submitted to Mr. Crane. Would that have been  
19 reviewed by you?
- 20 A. I doubt it, unless it was necessary to look at it to answer  
21 some letter.
- 22 Q. Would Mr. Crane in the organizational structure, would he  
23 be reporting to you or who would he be reporting to?
- 24 A. The Deputy.
- 25 Q. Directly to the Deputy.

1 A. Yes.

2 Q. How many people were reporting to the Deputy directly?

3 You were the Director of Criminal.

4 A. I was the Director of (Criminal), which I translate...

5 Q. Yes.

6 A. ...into director of criminal law, quite frankly.

7 Q. There was no Director of Prosecutions then.

8 A. No, there was no Director of Prosecutions at that time. That  
9 was part and parcel to the position that I held. Mr. Crane  
10 was Director of Corrections. There was a Director of  
11 Administration, who was Mr. MacDonald. There was a  
12 director, two directors on the civil side. I think one was  
13 called Director of Solicitor Services, I think was Mr. Conrad  
14 at that time, and somewhere along here, I can't recall just  
15 when, but the late Mr. Cavanaugh was director of the...of  
16 civil law for the department.

17 Q. At that time being Director of Criminal, responsible for  
18 prosecution, would you not have had some...some sort of  
19 information going out to your field people that if these court  
20 worker, native court worker staff were taking part in the  
21 process in the courts?

22 A. I think there was something went out, but as I recall it it  
23 was not under my signature. It was...I think it may well  
24 have been Mr. MacDonald's signature.

25 Q. Have you ever looked at the job description for the court

1 worker, and it's on page 31?

2 A. Well, I looked at it the other day, certainly when I was  
3 given this volume to look at. I may or may not have looked  
4 at it at the time. I just can't recall. I was only involved in  
5 this matter in a most peripheral way. Yes, I've written some  
6 letters, but normally my recollection is that I had to go and  
7 find out about things, and I had to consult Mr. Crane to find  
8 out what was going on with the program.

9 Q. Let me take you to page 43. That's a letter from Mr. Coles,  
10 to the Deputy Minister of the Department of Social Services,  
11 but it's copied to various people including you.

12 A. Yes, I note that.

13 Q. And it's referring to a conference he had attended on native  
14 people and the criminal justice system. And he says in the  
15 third paragraph,

16  
17 Perhaps more than anything else the conference  
18 did point out the need for attitudinal changes on  
19 the part of those involved in the criminal justice  
20 system and the need for the system itself to be  
21 more sensitive to native peoples who come in  
22 conflict with the law.

23 Was anything done within the Department to respond to  
24 that need?

25 A. Not that I'm aware of.

Q. Was there any discussions of any kind of any changes that  
could be made to respond to that need?

- 1 A. Not that I was involved in.
- 2 Q. Any...did Mr. Coles ever comment to you as the person  
3 responsible for prosecutors that there was such a need and  
4 there had to be attitudinal changes?
- 5 A. No, he has not...he had never talked to me on that point.
- 6 Q. As the man in...as the man responsible for prosecutors at  
7 that time did you take any step to see that the prosecutors  
8 out in the field could do something to respond to that need  
9 or to make the required changes?
- 10 A. No, there were no active steps that I took on the matter.
- 11 Q. Thank you. That court worker program only existed for a  
12 couple of years, were you aware of that?
- 13 A. I'm aware that there was a program that existed for a while  
14 that there, negotiations that went on afterwards about  
15 expanding that program, that those seemed to my  
16 recollection came to naught, that there seemed to be a  
17 fundamental difference of opinion between the province and  
18 the federal government about funding. That there was also  
19 the view of the Attorney General, based on his  
20 understanding of the position of the Union of Nova Scotia  
21 Indians, as to how the funding was to be allotted. That he  
22 was not prepared to have a program that dealt with only  
23 one segment of the native population. I think there was a  
24 difference as to...between the Union of Nova Scotia which  
25 represented the status Indians, that they had a difference of

1 opinion with the, to my recollection, with the non-status and  
2 métiis. I believe at that point in time that the Union of Nova  
3 Scotia Indians were also taking the view that they did not  
4 want to accept provincial monies, that they...the monies that  
5 were...the provincial contribution was not to be used for  
6 status Indians. That as part of their stance and the only  
7 reason I understand this to this limited degree is because of  
8 my involvement in the policing issue, but part of their  
9 stance was that they...they wanted to deal with their rights,  
10 and they considered to be obligations of government with  
11 the federal government first, and then having dealt with  
12 that they would come back and deal with the provinces on  
13 the pre-Confederation matters.

14 Q. Did any of your prosecutors ever report to you, in any way,  
15 that this court worker program was a good thing, it was  
16 helpful to the Court, it was beneficial to the natives?

17 A. I have no particular recollection of that. Whether or not  
18 any did, I'm not sure, quite frankly.

19 Q. On page 146, Mr. Gale, there's a memorandum for the  
20 Executive Council of the Province signed by Mr. How but  
21 apparently prepared by...

22 A. Mr. Coles.

23 Q. Mr. Coles.

24 A. Or no, I'm sorry.

25 Q. Mr. MacDonald.

1 A. Prepared by Mr. MacDonald.

2 Q. Right. And describing the fact that...or seeking approval for  
3 some money for this program. Did you have any  
4 involvement with the preparation of these documents?

5 A. No, I had no involvement with that at all.

6 Q. And on...and on page 178 is a memo from yourself to Mr.  
7 How. Is this dealing with the court worker program?

8 A. Yes, it was dealing with the court worker program.

9 Q. You were just responding to something that no one else,  
10 someone else was away, is it?

11 A. I presume that Mr. Coles was away or that he may have  
12 come into me and said, "Answer this memo from the  
13 Attorney General for me."

14 Q. Now, the policing, the native policing, you do have some  
15 knowledge about that.

16 A. Yes, I have some knowledge about that.

17 Q. Tell us about that then would you, please, what your  
18 knowledge is and what programs were implemented?

19 A. Well, the...up to a certain point in time the native policing  
20 had been done by Band constables who were constables  
21 appointed by the Band Council. Those people were generally  
22 appointed as special constables under the RCMP Act ,  
23 although, by the Commissioner, they were not members of  
24 the RCMP but it had the long term of supernumerary special  
25 constable. But it didn't give them any rights or give them

1 any membership within the RCMP.

2 There was then a proposal by the federal government,  
3 that seemed to gain some acceptance, that...the one that was  
4 primarily dealt with or that I dealt with was having  
5 reservations policed by special constables who were  
6 members of the RCMP and who would also themselves be  
7 native persons, that those constables would operate out of  
8 the existing detachments and that they would be part of the  
9 detachment covering the area in which the reservation was  
10 located. There was a proposal by the federal government  
11 that that would be a cost-shared policing concept and that  
12 the Province would, in fact, pay the greater portion and the  
13 federal government the lesser, but that there would be a  
14 contribution for training for some period of time which  
15 would, in effect, have the Province paying the lesser amount  
16 and the federal government paying the greater amount of  
17 the policing costs for these special constables. There were  
18 discussions that I attended with the Union of Nova Scotia  
19 Indians about this matter. They were long, protracted, went  
20 over a period of some time.

21 As I recall, the Union of Nova Scotia Indians were not  
22 fully satisfied with this type of policing concept. That they  
23 wanted another concept which had been suggested in a  
24 report from the...prepared for the federal government,  
25 whereby there would be what I could only term to be a

1 municipal type of police force on the reservation, and that  
2 would be appointed by the Band Council, as I understood it,  
3 or in the alternative that there be a sort of province-wide  
4 police force and the concept, there was one of bringing in a  
5 force called the Amerindian Police from Quebec. And they,  
6 in fact, to my understanding, were a native police force in  
7 Quebec that operated on a number of reserves within  
8 Quebec.

9 As I recall it, the Union of Nova Scotia Indians seemed  
10 to feel that they were not in favour at all of the special  
11 constable program, but that they would leave it to each  
12 Band to determine if it wanted to enter into such an  
13 agreement. A number of Bands, and I think probably  
14 three, if memory serves me right, did enter into such an  
15 agreement, and that seemed to work out satisfactorily and,  
16 in fact, later we had requests for...from those Bands to  
17 increase the number of special constables and there were  
18 requests from perhaps two other Bands to institute that  
19 program. By that time the agreement seemed to have  
20 lapsed that we had with the federal government, the  
21 Department of Indian Affairs, and there seemed to be some  
22 difficulty in having them and even when I...the last I've  
23 ever had to do with it they have not come forth with their  
24 position as to what they will do with...in regard to their  
25 participation in policing native lands.

1 Q Well, is there no special policing in effect today on native  
2 lands, at least until the...as far as you know, there isn't any,  
3 is that correct?

4 A. Well, yeah, there is policing on native lands. The Province,  
5 well, the last I had to do with it was still carrying on with  
6 the original number of special constables...

7 Q Okay.

8 A. ...on native lands, but it would not expand the program until  
9 some agreement was reached as to the contribution and  
10 position of the Federal Government on the matter.

11 Q And that now would be in the hands of the Solicitor General.

12 A. That is now in the hands of the Solicitor General and I...I  
13 don't know what has been done since then.

14 Q Okay.

15 A. Except I can say that at a meeting of Deputy Ministers as  
16 late as May there was a request by Deputy Ministers of  
17 other provinces to urge the Deputy Solicitor General and the  
18 Deputy Minister of Justice of Canada to use their best offices  
19 to see if an agreement could be forthcoming in the near  
20 future.

21 Q Okay. I'm going to show you an exhibit that's been marked  
22 161.

23 EXHIBIT 161 - LETTER - MARCH 16, 1987, TO MR. GALE FROM  
24 DEPARTMENT OF JUSTICE, CANADA

25 Q It's a letter to you from the Department of Justice, Canada

1 seeking provincial support for a study to be carried out to  
2 determine the needs of...dealing with natives and the legal  
3 system, and indicating that the federal government would  
4 pay all of the costs of such a study. It's indicated on page 2  
5 in the first full paragraph. What happened with this  
6 request, Mr. Gale?

7 A. The only thing that I can recall on this request is that since  
8 it was a study, what they wanted to...somebody identified  
9 that they could meet with, that I turned it over to the  
10 Deputy Attorney General to have him determine who, in  
11 fact, would be the person dealing with the matter. I felt  
12 that at that point in time that I had another...a number of  
13 other commitments and if it was going to be me that some of  
14 those commitments might have to be transferred elsewhere,  
15 or that the person to meet with them would have to be  
16 somebody else. Quite frankly, my section has been that the  
17 lawyers that work with me are going full out on criminal  
18 appeals and have little time to become involved in other  
19 matters. We have had one lawyer who has been dealing  
20 with some other matters but we have found that it was  
21 causing problems in trying to get the criminal appeals dealt  
22 with and I gave it to the Deputy, and I have not heard back  
23 on the matter. I don't know what has happened to it.

24  
25

1 10:37 a.m.

2 Q. Have you ever responded to the letter other than just to  
3 acknowledge it?

4 A. I may have acknowledged it but other than that I don't think  
5 I've responded to it. I don't have any recollection of having  
6 done so.

7 Q. Mr. Coles, then, would be the one who could tell us what  
8 happened with this, is that correct?

9 A. I would assume that he can. The letter would have been sent  
10 to me because, Mr. Prefontaine is in charge of Policy and  
11 Planning in the Department of Justice in Ottawa and he  
12 contacts people that he thinks are, or that are, have been  
13 attending these federal, various federal/provincial meetings  
14 from the provinces. I have been attending on behalf of Nova  
15 Scotia and now it's myself and Mr. Conrad, but it may be, I  
16 know it's the assistant Deputy Minister, Deputy Attorney  
17 General of Ontario that attends them and...

18 Q. But you turned the document over to Mr. Coles.

19 A. Yes.

20 Q. And he's the only one who can tell us what happened with it.  
21 Thank you.

22 A. Well I can't tell you.

23 Q. Okay. Let's go, finally, to Volume 28, please. Now 28 is a,  
24 and do Your Lordships have Volume 28?

25

MR. GALE, EXAM. BY MR. MacDONALD

1 CHAIRMAN

2 Yes.

3 COMMISSIONER POITRAS

4 What page?

5 MR. MacDONALD

6 I'll be going starting from the beginning, My Lords, moving  
7 along.

8 Q. Now Volume 28, page 1, Mr. Gale is a letter from you to Mr.  
9 Edwards indicating that the Deputy wanted to know, wanted a  
10 report why the police report was given to Steve Aronson.

11 That you were just relating what the Deputy wanted to know,  
12 is that correct?

13 A. That's correct.

14 Q. Now you told us yesterday that you knew that Aronson was  
15 getting those reports.

16 A. Well I had told Mr. Edwards that I had no objection to him  
17 getting the reports that Mr. Edwards thought were necessary  
18 to allow him to be able to conduct the appeal properly.

19 Q. And did you tell that to the Deputy when he wanted to know  
20 what happened, why they were given to Aronson, they were  
21 given with, to assist Aronson in conducting the appeal and  
22 they were given with your knowledge.

23 A. To the best of my knowledge I told the Deputy that Mr.  
24 Edwards may well have given the police reports to Mr.  
25 Aronson to assist him with conducting the appeal and that I

MR. GALE, EXAM. BY MR. MacDONALD

1 had agreed that that would proper. That he should have  
2 access to them, the ones that Mr. Edwards felt he should have  
3 access to to enable him to prepare the appeal properly.

4 Q. Notwithstanding that the Deputy wanted the report from  
5 Edwards, is that correct?

6 A. That's correct.

7 Q. And let's go to Edwards' report which is on page 2. And I  
8 want to direct you, actually, to page 3, some of the comments  
9 of Mr. Edwards. He says on the top of that page that he  
10 believes, "It was proper, given the very unusual  
11 circumstances of this case to give Mr. Aronson a copy of the  
12 report." You would agree with that.

13 A. Yes, it was an unusual case and it turned out that Mr. Aronson  
14 had carriage of the appeal so I think he had to know, in  
15 considerable depth, the case.

16 Q. In the next paragraph he says, "This case has engendered and  
17 continues to engender considerable suspicion about the  
18 disclosure practices of the police and the Crown." Do you  
19 agree with that statement?

20 A. Well there has certainly been considerable comment in the  
21 media about disclosure practices.

22 Q. Let me take you to the next paragraph of Mr. Edwards'  
23 comments.

24  
25 A disclosure of the report should cause us to re-

MR. GALE, EXAM. BY MR. MacDONALD

1           examine the role of the Crown during a police  
2           investigation. In hindsight it is clear to me that  
3           the decision to question or not to question Chief  
4           MacIntyre should have been solely the  
5           investigator's prerogative.

6           Do you agree with that?

7           A. Well it was entirely up to the investigator whether to  
8           question or not to question him, yes.

9           Q. Okay, now Mr., did you, I take it gave that report to Mr. Coles.

10          A. I got the letter in from Mr. Edwards. I looked through it  
11          quickly and gave it to Mr. Coles. He was the one that was  
12          asking the questions and I don't think I spent any time on it.  
13          It was just a matter of glancing at it and sending it up to Mr.  
14          Coles.

15          Q. Did you tell Coles that you agreed with Edwards' position?

16          A. Well I think in, at some stage I had told Mr. Coles that I  
17          certainly agreed with Frank that Mr. Aronson had to have  
18          access to more than might normally be given because of the  
19          nature of the case and the fact that he had the carriage of the  
20          appeal under the reference.

21          Q. Let's go to page 4 which is Mr. Coles' response, Mr. Gale, a  
22          copy to you. You would have read this at the time?

23          A. Yes, I would have read it at the time.

24          Q. And on page 2 of that letter Mr. Coles is setting out a, I take it  
25          to be a policy of the Department. Is that your understanding  
26          that that is the policy?

MR. GALE, EXAM. BY MR. MacDONALD

1           That police reports prepared and delivered for  
2           the use of the Attorney General, his Deputy as an  
3           agent, are not to be copied to other persons  
4           without the expressed authorization of the  
5           Attorney General or your superiors.

6           A. That's correct.

7           Q. That is a correct statement of policy?

8           A. Yes.

9           Q. But Edwards did have the expressed authorization of his  
10           superior, specifically from you.

11           A. I, yes, he was told by me that what he thought was necessary  
12           for Mr. Aronson to be able to conduct the appeal properly  
13           should be made accessible to Mr. Aronson.

14           Q. Now that, there continued to be a flow of letters back and  
15           forth on this. I'm not going to take the time to go through it  
16           but I just want to confirm that you were telling Mr. Coles all  
17           along that Edwards had acted properly and with your  
18           authority in disclosing that report to Aronson.

19           A. Well I recall at the time telling him that I didn't have any  
20           difficulty with Mr. Edwards disclosing matters to Mr. Aronson,  
21           that the nature of the case is the fact that he had the conduct  
22           of the appeal, made it imperative that he understand the case  
23           and if Mr. Edwards thought some of the police reports would  
24           help him do that then he could have access to that.

25           Q. I want to take you specifically, though, to page 9, which is one  
            of the replies from Mr. Coles. My concern is the third  
            paragraph where he's talking about the threat at one time to

1 take, the threat to take Mr. Edwards off the appeal. He says,

2  
3 That my concern in having you continue to  
4 represent the Crown in the hearing under  
5 Section 617(b) resulted upon learning of the  
6 position which you were taking on behalf of the  
7 Crown which, in my appreciation of the situation,  
8 was not the proper position for the Crown to  
9 take, a view concurred in by other senior  
10 members of the Department.

11 Now, the view of Mr. Coles at the time, he wanted to take  
12 Frank off because he was advocating a position that Coles did  
13 not consider to be proper. Was that concurred in by you?

14 A. No, it was not concurred in by me.

15 Q. Was it concurred in by Martin Herschorn?

16 A. I think Mr. Herschorn may have been more sympathetic to  
17 Mr. Coles' position that I was.

18 Q. There was no other senior member of the Department  
19 participating.

20 A. No, not at that meeting, no.

21 Q. Page 16 of that volume, Mr. Gale, sets out what I understand  
22 to be the disclosure policy now in effect for the prosecutors in  
23 Nova Scotia, is that correct?

24 A. I believe that this is the current one, yes.

25 Q. And you're familiar with the contents of that document?

A. Basically, yes.

Q. Under that document would Mr. Edwards be entitled to  
release the police reports to Mr. Aronson if a similar situation

1       arose?

2       A. Well there is also another memo which says that they, the  
3       police reports themselves are not to be released. That what is  
4       to be released is the Crown sheet and any statements and any  
5       documents or copies of documents or exhibits.

6       Q. Under this policy would the defence in the Donald Marshall,  
7       Jr. case have been given copies of the first statements of  
8       Chant and Pratico?

9       A. Yes, if they were in the possession of the...

10      Q. Of the Crown.

11      A. Prosecutor. The Crown as opposed to police.

12      Q. And if there had been such a written policy in effect in 1971,  
13      I take it that the prosecutor in the field would know he's  
14      supposed to give those statements out.

15      A. Yes. Certainly if this policy had been written in 1971 there  
16      would have been no question.

17      Q. You believe they should have been given out.

18      A. Yes, it's my view that they should have been given out if the  
19      prosecutor knew about them.

20      Q. Why wasn't there written policies in those days?

21      A. I don't think there were any written policies anywheres in,  
22      across Canada in those days on the matter. I may be  
23      mistaken about that. Certainly we were a small operation.  
24      The prosecutors were people in private practice who received  
25      an annual retainer to act as prosecuting officer. The position

MR. GALE, EXAM. BY MR. MacDONALD

1 of the director was one of responding to any requests that  
2 they had, most of those people from any recollection I have,  
3 were very independent people and did the job and didn't  
4 really come to anybody in the Department for anything.

5 Q. In all the discussions you've had with other people in the  
6 Department over this Donald Marshall case, all the various  
7 meetings you've participated in, all the discussion, have you  
8 ever heard anyone in the Department say that at least part of  
9 the blame here, part of the reason Mr. Marshall went to jail is  
10 because of the failure of the Attorney General and his agents  
11 in the field to perform their duties.

12 A. I think to be fair that if that has come up in a conversation  
13 that if these things had been given that things would,  
14 undoubtedly, have been different. But it was only along the  
15 lines that, you know, that sort of thing isn't going to happen  
16 anymore because we have disclosure and we've had a written  
17 policy on it since approximately 1980.

18 Q. Only in that sort of context...

19 A. Yes.

20 Q. Has it come up.

21 MR. MacDONALD

22 That's all I have, thank you.

23 BREAK - 10:51 a.m.

24  
25

MR. GALE, EXAM. BY MR. BARRETT

1 INQUIRY RESUMES -11:22 a.m.

2 MR. CHAIRMAN

3 Ms. Edwardh.

4 MS. EDWARDH

5 Yes, My Lord. Mr. Barrett has indicated to me that he just  
6 has a couple of questions to ask, and a matter that he would like  
7 to attend to a twelve o'clock. So, I'm certainly content to change  
8 the order.

9 MR. CHAIRMAN

10 By all means, we encourage... There's a bonus for anyone  
11 who has a couple of questions to ask.

12  
13 EXAMINATION BY MR. BARRETT

14 Q. Yes, Mr. Gale, my name is David Barrett and I represent the  
15 Estate of Donald C. MacNeil. Mr. Gale, you've testified that  
16 the Crown disclosure practises in the early 1970's were not  
17 as complete as they are today.

18 A. That's correct.

19 Q. And these practises of fuller disclosure have evolved over  
20 the past seventeen years.

21 A. Well, I think they've evolved, yes, over the last seventeen  
22 years, and within our department over the last eight or nine.

23 Q. And, sir, my question, as director of criminal prosecutions  
24 did you ever receive a complaint concerning Donald C.  
25 MacNeil's disclosure practises?

MR. GALE, EXAM. BY MS. EDWARDH

1 A. No, I had not.

2 MR. BARRETT

3 Those would be my questions.

4 EXAMINATION BY MS. EDWARDH

5 Q. Maybe more than just a couple. I'd like to pick up, if I  
6 could, Mr. Gale, with a comment that you made at the very  
7 end of your testimony in response to some questions from  
8 Mr. MacDonald. You said that you had occasion in the  
9 department to hear the comment made that the Attorney  
10 General's office or his agents bore some responsibility in  
11 relation to the wrongful conviction of Donald Marshall, is  
12 that correct?

13 A. I had...there had been some indication that if the...some of  
14 the documents, statements had been given out at the  
15 beginning and the defence counsel had been made aware of  
16 some of the matters at the beginning, there...this matter may  
17 have well taken a different turn.

18 Q. Indeed, we can tell from the documents filed that that was  
19 certainly a position that was suggested by Mr. Edwards.

20 A. Yes.

21 Q. That was the effect of non-disclosure as best he understood  
22 it, correct?

23 A. That's my understanding.

24 Q. Now, my question to you, sir, is did you ever hear Mr. Coles  
25 make either of two comments? The first is the Attorney

1 General's office or some of its agents bore some  
2 responsibility for what happened to Mr. Marshall. Did you  
3 ever hear him say anything like that?

4 A. No, not in those terms. The terms were that if, in particular,  
5 the 1971 RCMP report had been made available to defence  
6 counsel, then things would have undoubtedly had a  
7 different conclusion.

8 Q. So, I take it from your conversations with Mr. Coles then, he  
9 took the view that had there been disclosure of that 1971  
10 report, then there might well have been a different result at  
11 the first appeal.

12 A. That was my understanding of his view.

13 Q. And, therefore, that the office of the Attorney General did  
14 bear some direct responsibility because that matter had not  
15 been disclosed prior to the first appeal?

16 A. Well, he discussed it in the terms that I've indicated and I  
17 don't recall him saying that...specifically that the office of  
18 the Attorney General or the Department of the Attorney  
19 General bore some responsibility in it, but...

20 Q. It would flow logically though, would it not, sir?

21 A. It may well.

22 Q. Did you ever hear Mr. Coles suggest at any time that the  
23 alleged conduct of the police officers in their interrogation of  
24 the witnesses was, if not criminal, at least highly improper?  
25 Would you...

1 A. In discussing the matter, he was of the view that the...the  
2 conduct might have been improper but in his view that that  
3 conduct would not have continued to the present day. There  
4 were different personalities there.

5 Q. Well, let's just pursue that. I would take it that forceful and  
6 improper conduct of police officers is a matter of concern to  
7 the Attorney General's office generally?

8 A. Yes.

9 Q. Yes.

10 A. And more particular at that time since we had more  
11 responsibility for policing.

12 Q. And do you know, sir, whether you or anybody else in the  
13 Attorney General's office ever went to discuss this kind of  
14 conduct that was alleged to any body of policing authority,  
15 to the Nova Scotia Police Committee...Commission, to anyone  
16 else who might have some direct contact with municipal  
17 police forces in Nova Scotia?

18 A. There was no formal conversation with the Nova Scotia  
19 Police Commission, but it was our view that under the Police  
20 Act that this sort of matter would be dealt with by the Nova  
21 Scotia Police Commission with the present legislation.

22 Q. Well, one would assume it would only be dealt with, sir, if,  
23 in fact, there was an allegation made or there was conduct  
24 that came to light through some investigation.

25 A. Yes, that's correct.

1 Q Do you know whether anyone conducted any investigation  
2 at any level to determine whether those kinds of methods  
3 were still in use in Nova Scotia, by anyone?

4 A. No, I don't know that anyone did conduct any study.

5 Q So, on what basis, to the best of your knowledge, sir, would  
6 Mr. Coles have come to the conclusion that this was no  
7 longer in issue?

8 A. I suppose on his...whatever basis that he might have had for  
9 thinking that this type of matter was dealt with by the Nova  
10 Scotia Police Commission, however, the Commission is small  
11 and at best has a minimum staff to deal with matters.

12 Q So, in other words, they would not have a great capacity to  
13 deal with those kinds of matters?

14 A. Only on their...no, because...only on their consultations with  
15 particular police forces. I think there are three directors  
16 there and each was a consultant to police within a certain  
17 area of Nova Scotia and whether or not that would be raised  
18 by them or not, I don't know.

19 Q Well, if it was a matter of substantial concern in the  
20 Attorney General's office that this kind of conduct not  
21 continue, would you at least agree, Mr. Gale, that it would be  
22 important to ensure that someone from the Attorney  
23 General's office went out to whatever appropriate  
24 authorities there may be to ascertain whether there were  
25 any complaints and what was being done to ensure that

1 such conduct did not take place again?

2 A. Well, there would have to be some type of information on  
3 which you'd have to base your opinion, and if that required  
4 going out or whatever it required.

5 Q. And I take it from your evidence, sir, you know of no one  
6 going out or making contacts or trying to elicit information  
7 that would establish one way or the other that, in fact, this  
8 conduct was not occurring.

9 A. I know of no one doing it. I don't know who Mr. Coles may  
10 have contacted.

11 Q. I appreciate that. To your...to the best of your knowledge,  
12 no one did it.

13 A. I have no knowledge of anyone doing it.

14 Q. You weren't asked to do it.

15 A. I was not asked to do it, no.

16 Q. Now, Mr. Coles had no experience as a prosecutor in the  
17 field, is that correct?

18 A. That's correct.

19 Q. Did he ever undertake pros...did he ever undertake  
20 appearing on behalf of the Attorney General at the appellate  
21 level?

22 A. No.

23 Q. So, would then it be fair to say he stayed in the office, in  
24 effect? He wasn't involved in...

25 A. He stayed out of court, yes.

1 Q. Stayed out of court. And in terms of his style as the Deputy  
2 head of the department, would it be fair to describe his style  
3 as being certainly hands on in areas that he was directly  
4 interested in?

5 A. If he was directly interested in a matter he'd be taking...

6 Q. He didn't ...

7 A. ...part.

8 Q. ...hesitate to become involved.

9 A. He didn't hesitate to become involved or express his  
10 opinions or at times give directions without any particular  
11 consultation with anyone that I'm aware of.

12 Q. So then, if one were to translate that remark, I take it when  
13 you say he was quite capable of giving directions without  
14 consultation, he would give directions in areas that might  
15 well fall under someone else's bailiwick without  
16 consultation?

17 A. Yes.

18 Q. And would it be fair to say that at least some members of  
19 the department felt that he could be on occasion quite high  
20 handed in his approach to decision making?

21 A. Yes, there are members of the department that have felt  
22 that.

23 Q. And, in fact, if one were to look at his style, would it be fair  
24 to say it is typical of how he dealt with the question of the  
25 prosecution of the shoplifter, which Mr. Edwards was

1 concerned with, so for example, he did not consult with Mr.  
2 Edwards at all in simply ordering him to withdraw the  
3 charge? Is that correct?

4 A. To my knowledge now he did not consult with him. At the  
5 time I was told that he had made inquiries and I was to  
6 contact Mr. Edwards and convey his message to drop it.

7 Q. You were told to convey the result.

8 A. That's right.

9 Q. You had no information that indicated that he had discussed  
10 the matter with Mr. Edwards?

11 A. I had no information that he had discussed it with Mr.  
12 Edwards. He gave me a brief capsule of what the matter  
13 was about and that was it.

14 Q. Would you agree, Mr. Gale, that from the perspective of a  
15 fairly senior Crown working in the field who is in touch with  
16 local conditions, in touch with what the needs of the  
17 community are, that in the ordinary course it would be  
18 viewed as quite high handed to receive such a direction  
19 without consultation?

20 A. Well, one would expect to have some consultation because of  
21 the...I've always found that you have to make some  
22 inquiries to ascertain some information yourself to  
23 determine whether what is being told to you is correct,  
24 because sometimes it's diametrically opposed.

25 Q. Indeed, in other words, representations might be made on

1 someone's behalf at a high level without indicating, for  
2 example, that this person had been before the courts a  
3 number of times in the past or indeed had had charges  
4 withdrawn in the past, correct?

5 A. Oh, yes, I've had people come into me claiming to be  
6 innocent, very innocent people, that are dragged up in the  
7 system only to find that they have a record literally as long  
8 as my arm.

9 Q So, that in order to assess any request, whether on  
10 humanitarian bases or any other basis, and also whether it  
11 is in the interest of the administration of justice to actually  
12 withdraw a charge, you'll agree then that the one person in  
13 the best position to advise in respect to that would be Crown  
14 counsel who had carriage of the case?

15 A. Well, he would certainly be one that you would consult to  
16 find out about it, because he presumably would have the  
17 best knowledge of the matter.

18 Q Yes.

19 A. Although you may not agree with him...his assessment of the  
20 conclusion of it though.

21 Q No quite so, but he's certainly the voice which one would...at  
22 least...

23 A. Would want to hear.

24 Q Would want to hear from. Now, we know that, in fact, Mr.  
25 Edwards from his own testimony, sir, refused to drop the

1 charge in question. In terms of dealing with issues  
2 involving morale of members of the Crown's office or agents  
3 of the Attorney General in the field, will you agree with me  
4 that in order to preserve the integrity of the office of Crown  
5 counsel, that directions of the kind that were given in that  
6 particular case ought not to be given without full  
7 consultation?

8 A. Well, yes, I'll agree that there should be full consultation on  
9 the matter, yes.

10 Q. With the Crown who has carriage.

11 A. With the Crown that has it or the senior prosecutor for that  
12 area.

13 Q. Right. And that was not done in this case to the best of your  
14 knowledge.

15 A. I have no knowledge of it having been done.

16 Q. Other than the direction you conveyed.

17 A. Yes.

18 Q. Would you agree, sir, that such directions emanating from  
19 the Attorney General's office in circumstances where local  
20 Crown counsel may have a quite different policy, for  
21 example, tending to prosecute all shoplifters, give the  
22 appearance at least to the community that there is political  
23 interference from the Attorney General's office?

24 A. I suppose it's capable of that. I don't know that I...at least in  
25 the case of the Attorney General's office became involved in

1           it, but I don't know that I can necessarily follow the latter  
2           part of your proposal. I suppose that depends on the person  
3           viewing it.

4           11:37 a.m.

5           Q. Well when Crown counsel appears in a courtroom and says,  
6           without offering any explanation, "I am directed by the  
7           Deputy Attorney General of the province to withdraw this  
8           charge and have no further comment, Your Honour," don't you  
9           think that would give any observer in the courtroom the  
10          sense that there was interference? And also, distance  
11          established between Crown counsel and the direction he was  
12          getting?

13          A. Oh yes. I can agree with that portion.

14          Q. Now you also stated, and I don't intend to pursue this but I  
15          want to just clarify a couple of questions my friend posed to  
16          you and I don't want to, I don't want you to mention any  
17          names or the individual involved. You discussed, as a result  
18          of a question posed to you by Mr. MacDonald, that there was  
19          one occasion that the Deputy Attorney General had ordered  
20          police reports to go directly to him. Do you recall that?

21          A. To go directly to the Department, yes.

22          Q. To the Department.

23          A. Yes.

24          Q. Not to him personally?

25          A. He wanted the reports to be sent to the Department to be

1 looked at by me. And that he also wanted to be fully, to see  
2 those reports.

3 Q. And I take it in the ordinary course they would have gone to  
4 a Crown prosecutor in the field if the police had wanted  
5 advice.

6 A. In the ordinary course they could have gone to, yes, to the  
7 prosecutor in the field or, as I have on occasion, have come to  
8 people within the Department, including myself for advice.

9 Q. Now...

10 A. But that is usually at the officer level that's coming to me. I  
11 have not dealt with the people below the inspector level in  
12 being requested for advice.

13 Q. I'm trying to understand actually and the purpose of my  
14 question is to identify what was unusual about the process...

15 A. What was unusual...

16 Q. You said there was one...

17 A. Is that normally if one asks, if the police are investigating a  
18 matter then while they will provide us with reports, if it's  
19 considered by them to be a serious matter or a matter which,  
20 for some reason, is going to engender comment, that the  
21 Attorney General might want to have answers for, that in  
22 those cases they will send reports to us but normally any  
23 advice that they want along the way is gotten by having the  
24 investigator approach the prosecutor in the particular area  
25 where the investigation is occurring.

1 Q. Was it made clear to the police in this case, without  
2 mentioning any names, that prior to proceeding with any  
3 laying of charges that they were to have the approval of the  
4 Attorney General's office? Was that implied...

5 A. Well I had thought that it was clear to Superintendent  
6 Christen that the reports were to come to us and when they  
7 were in a position to lay charges to tell us so, that we would  
8 then have a prosecutor appointed and prior to that anything  
9 that they wanted they were to approach our office on.

10 Q. And do I take it from your comment when you thought you  
11 had thought that the police may have misunderstood that  
12 they were to feel free to lay charges when and if they chose  
13 to in relation to the subject matter they were investigating.  
14 They felt some constraint imposed by the Attorney General.

15 A. I, they had reached a point where one of the investigators  
16 had taken the matter to a prosecutor and that that became  
17 known to the Deputy and to the Attorney General and the  
18 Deputy was considerably annoyed that the matter had been  
19 taken to a prosecutor and directed me to call that particular  
20 office, or to call the RCMP and tell them to get that file back  
21 and if they had any questions about proceedings, needed any  
22 advice that they were to deal with me initially and whoever  
23 else in the Department I saw fit to involve.

24 Q. Yes. My question though, Mr. Gale, was was it your  
25 understanding that as a result of that direction that the RCMP

MR. GALE, EXAM. BY MS. EDWARDH

1 no longer felt free to lay a criminal charge when they saw fit  
2 but, rather, felt constrained by the supervision and  
3 involvement of the Attorney General's office. So as to have  
4 your approval, in effect.

5 A. Well I think in that particular case they were looking for  
6 approval but that the RCMP had the view that there should be  
7 a charge laid whereas the, our office had the view that there,  
8 no charge should be laid. That matter was carried to the  
9 Commissioner's office in Ottawa to my understanding.

10 Q. Okay. And I think we'll be dealing with any more details of  
11 that process at a later date.

12 MS. EDWARDH [To Mr. MacDonald]

13 Is that fair? We're going to be looking at that.

14 MR. MacDONALD

15 I think so.

16 MS. EDWARDH

17 Maybe.

18 Q. Now I'd like to go back to a comment you made, sir, as a  
19 result of a question posed by Mr. Barrett[sic]. You made the  
20 remark that disclosure practices were different in 1971. Is  
21 that correct?

22 A. That's correct.

23 Q. And you will agree with me, sir, that although there were no  
24 guidelines in force and the Attorney General had not, indeed,  
25 promulgated any directives nor made perhaps his own

1 personal views known at that time, that it was always clear,  
2 and had been clear from the 1950s that Crown counsel had an  
3 obligation never to suppress evidence that could be of  
4 assistance to the defence.

5 A. That is the law, yes. That was the law in effect at that time.

6 Q. That's not a question of the niceties or discretionary  
7 guidelines, indeed, that was the law governing Crown counsel.

8 A. Yes.

9 Q. And its obligation to the court. And so then statements that  
10 could directly assist the defence in resisting an allegation of  
11 the Crown ought to have been made available to the defence  
12 in 1971. Correct?

13 A. Yes, that's correct.

14 Q. Now, one unrelated matter. As a result of the experience that  
15 the office of the Attorney General has had in relation to the  
16 Marshall case, do I take it it is still, or is now the practice, to  
17 completely destroy files in relation to criminal appeals after  
18 21 years? Is that correct?

19 A. I know that there's a retention schedule. I believe it is now  
20 21 years, I'm not certain.

21 Q. And would you agree, sir, that that may mean, indeed, that  
22 people who are still serving sentence in relation to murder  
23 charges, particularly first-degree murder charges, would have  
24 their files, in effect, destroyed while they were still serving  
25 sentence, while they were still in custody.

- 1 A. That is possible, yes.
- 2 Q. Logical. I mean if you're convicted of first-degree murder,  
3 subject to the review provisions of 15 years...
- 4 A. Well subject to whatever this review position...
- 5 Q. Right.
- 6 A. Takes. The course it takes.
- 7 Q. But as it stands today, in principle one is not eligible for  
8 parole until the 25-year period has passed, correct?
- 9 A. That's correct.
- 10 Q. And so that in the ordinary course, except for this exceptional  
11 review procedure, one would expect to see those individuals  
12 still in custody and just coming up for their first parole in 25  
13 years.
- 14 A. Correct.
- 15 Q. And there will be no files in the Nova Scotia Attorney  
16 General's office, correct?
- 17 A. If the retention schedule is 21 years...
- 18 Q. Assuming it is for a moment.
- 19 A. Assuming it is, yes.
- 20 Q. Do you have any difficulty with that, sir, given this case and  
21 also the nature of the files kept and what use might be made  
22 of them in terms of anything from parole to reconsideration  
23 of a conviction ultimately?
- 24 A. Well, quite frankly, I haven't, until you raised it, really  
25 thought of it. I had always thought, if possible, more, charges

1 of a certain seriousness should be kept for an unlimited  
2 period, quite frankly.

3 Q. Yes. So, in fact, it would be preferable that at least with  
4 respect to that very small class of individuals who are still  
5 within the custodial, or in the penal system, that those  
6 matters should be always available to counsel who might  
7 have to deal with them 25 years later.

8 A. Yes, it would be nice to know you can be sure that they were  
9 there.

10 CHAIRMAN

11 Q. Mr. Gale, in fixing that period of 21 years for the retention of  
12 files in serious cases such, well murder, I guess is the, first-  
13 degree murder, was there any consultation with the other  
14 provinces. Do you know whether Nova Scotia keeps them,  
15 retains them longer than other provinces or not as long?

16 A. No, I don't know, My Lord. The decision to change the  
17 retention schedules was done by our records people. I think  
18 that there is input by the Deputy but I don't know whether  
19 they had any consultation with other provinces as to their  
20 policies.

21 Q. Is there legislation in Nova Scotia governing the retention of  
22 records generally?

23 A. Yes, there is an act and there is a committee set up and  
24 retention schedules have to be approved by that committee  
25 and any changes have to be approved by that committee.

MR. GALE, EXAM. BY COMMISSIONERS

1 Q. And I suspect it's the same as it is in most places, the keepers  
2 of the records want to get rid of them for space reasons and  
3 other people want, the archivists want to keep them...

4 A. The archivists want to keep certain ones but they don't want  
5 to take all the ones that the others wants to get rid of.

MS. EDWARDH

7 The inevitable.

COMMISSIONER EVANS

9 Q. Is there any exception, though, I did not understand, Mr. Gale  
10 that you were fully aware of what the retention schedule was.

11 A. No, I'm not fully aware of what it is.

12 Q. And, therefore, you would not know whether there was an  
13 exemption with respect to murder convictions...

14 A. No, I really, quite frankly, don't because there's one thing that  
15 does not interest me is filing. I send it out with the  
16 understanding that when I want it back I get it. How it  
17 happens I really don't want to know.

CHAIRMAN

19 Well less than that, we can ascertain that without any  
20 difficulty.

MS. EDWARDH

22 Q. One, just to follow up then in terms of an area I raised with  
23 you at the beginning of my cross-examination, Mr. Gale. In  
24 terms of your style as opposed to Mr. Coles, do I take it, sir,  
25 that it was your view and I think you indicated this

1           yesterday when Mr. Edwards was conducting the reference,  
2           that once competent Crown counsel was handling a matter as  
3           far as you were concerned they were largely free to exercise  
4           whatever discretion they had and conducted proceedings as  
5           they saw fit. You wouldn't ask to review a draft factum or  
6           anything like that.

7           A. No, I do not review factums with the people that I have. I  
8           have complete and utter confidence in them and I know that  
9           if there is a contentious matter that they will seek advice on  
10          it and normally I am involved in those.

11          Q. So I take it then that your style of non-interference is in some  
12          way distinguishable from Mr. Coles. You two work differently.  
13          Is that a fair statement?

14          A. Yes, we work differently. We're completely different  
15          personalities.

16          Q. Now what puzzles me and let me ask you to turn to Volume  
17          28 which is the correspondence in relation to disclosure. I  
18          may read it incorrectly and, please, correct any  
19          misunderstandings. It is very clear, sir, that you act as an  
20          agent, in effect, for Mr. Coles by writing to Mr. Aronson, I'm  
21          sorry, writing to Mr. Edwards asking for some explanation of  
22          why the report was made available, correct? That's at page 1,  
23          your letter.

24          A. Well I was acting, yes, at Mr. Coles' request to give us an  
25          explanation as to how, why and under what conditions the

1 report was made available.

2 Q. Now did that request go through you because you were  
3 responsible, in effect, for appellate matters instead of Mr.  
4 Herschorn who would have been responsible for prosecutors?  
5 Why you instead of Mr. Herschorn?

6 A. Well I guess because I had had more involvement with the  
7 Marshall matter than Mr. Herschorn on it and at that time I,  
8 Director of Criminal was still responsible overall for  
9 prosecutors although Mr. Herschorn, as the Assistant Director,  
10 was mandated by the Deputy to deal with prosecutors on an  
11 ongoing basis.

12 Q. So then at page 2 when Mr. Edwards writes back, and if you  
13 look at paragraphs 1 and 2 of his letter to you, you will see  
14 that he says he has no, this is the second paragraph, that he  
15 has no independent recollection of actually giving the report  
16 to Mr. Aronson.

17 A. Um-hmm.

18 Q. Refers to a letter which reminds him that he obviously did  
19 and then he goes on and says he cannot recall the specific  
20 occasion and he can't be specific exactly about what he told  
21 Mr. Aronson. And then he puts forward a general explanation  
22 of his reasons for making the decision he made but he fails to  
23 point out that he, of course, had received express authority  
24 from you as well, although you have testified to that effect.  
25 So it must have slipped his mind. Fair statement?

11:51 a.m.

1 A. Yes, I think it's a fair statement.

2 Q. As a result of that letter, you then, I take it, deliver it to Mr.  
3 Coles, who then writes what I think, in fairness, could be  
4 described as a fairly scathing letter to Mr. Edwards and he  
5 says:

6  
7 I was surprised, to say the least, that you should  
8 think that you have either the authority or  
9 prerogative to release a confidential report to  
Mr. Aronson or anyone else.

10 And then he points out at the very end that there is no  
11 authority to release such documents without approval by the  
12 Attorney General or superiors in the Department. My  
13 question to you, Mr. Gale, is I'm going to suggest that it is  
14 impossible for you to have communicated your views to Mr.  
15 Coles that you, indeed, had given authority to Mr. Edwards for  
16 Mr. Coles to have written this letter, unless he just chose to  
17 completely disregard you.

18 A. Well, after the passage of time, one can never be exact on  
19 what was done. It was my, still is my view that, at the time, I  
20 said that Frank had asked about the matter and I told him  
21 that anything that he thought the, Mr. Aronson should know  
22 about, then access should be given to him on that. I suppose  
23 it was understood that if the police report was simply full of  
24 suppositions by the investigator, that that would not go but...

25 Q. We're not talking about...

1 A. The ones that were factual would certainly, he'd have access  
2 to.

3 Q. We're not talking about a report full of suppositions. You and  
4 everyone else knows that Sergeant Wheaton's report had  
5 much more than just suppositions in it.

6 A. I'm talking if there were any portions of his report that were  
7 purely supposition that those might...

8 Q. Might have been deleted.

9 A. Deleted.

10 Q. But, in any event, if your...

11 A. But Mr... Go ahead.

12 Q. It's your recollection, I take it, though that you, and you have  
13 a fairly clear one, that you conveyed to Mr. Edwards that he  
14 did have authority in the circumstances of the Marshall case  
15 to release such a document.

16 A. Yes.

17 Q. Why didn't you say to Mr. Coles, "Excuse me, sir, if you've got  
18 a problem with what the messenger did, deal with me." Why  
19 leave Mr. Edwards out in the field to get what I think can  
20 only be regarded as a scathing letter from the Deputy  
21 Attorney General? And it goes on.

22 A. Well, it has been my, it has... I have found over the years that  
23 Mr. Coles will formulate his own views, no matter what has  
24 been said to him, and he will take the view that he wants on  
25 the matter. I don't think that there had ever been a real

1 written direction that police reports could never be given out  
2 before. This precipitated it.

3 Q. Is it fair... I'm sorry.

4 A. I guess the difficulty is that both Mr. Edwards and Mr. Coles  
5 are very strong-minded individuals and...

6 Q. No, but, sir, I'm asking you about your responsibility. You are  
7 in charge of, broadly speaking, have some connection and  
8 responsibility for the prosecutors who are working in the  
9 field. They are making decisions and now this, Mr. Edwards is  
10 getting what can only be regarded as a scathing letter from  
11 the Deputy Attorney General, and yet you've authorized him  
12 to do exactly what he did. And my question to you, sir, don't  
13 you have any responsibility, moral or otherwise, to stand  
14 between people like Mr. Edwards in the field and the Deputy  
15 Attorney General, who mistakenly is accusing him of doing  
16 something without reference to his superiors?

17 A. Well, perhaps I should have been more active in the matter.  
18 I had thought that Mr. Coles understood the position and that  
19 this was a typical flash-up between Mr. Coles and Mr.  
20 Edwards, who seemed to have a problem. Whenever they got  
21 together, they conflicted in their views.

22 Q. Would it be fair to say that not only does this flash-up  
23 represent a problem that may have occurred between Mr.  
24 Edwards and Mr. Coles, but, indeed, this is an example, at  
25 least, of Mr. Coles choosing to act regardless of the advice you

1 gave him and the responsibility you were, in fact, taking for  
2 the incident?

3 A. Well, certainly Mr. Coles would make up his own mind on  
4 things and he would, whatever he believed the matter to be,  
5 no matter what he had heard.

6 Q. Regardless of your advice to him.

7 A. Regardless of what I might say to him, he would have a  
8 different opinion, and that's the one he would go with.

9 Q. If I could ask you then to turn your mind, sir, to the issue of  
10 policing. And I may be confused or unclear about the precise  
11 nature of your responsibilities in the Department. But,  
12 broadly speaking, I understand that you received R.C.M.P.  
13 reports but you also had, as a general area of your concern,  
14 particularly because the Solicitor General's office was not  
15 separate, issues of policing policy. Is that a fair statement?

16 A. Yes, but those are dealt with on the basis of an issue would  
17 arise and something would be, and it would be dealt with.  
18 Our Department always seemed to be in the position or  
19 reacting to matters.

20 Q. So would it... And that's one of the questions, in fact, that I  
21 want to deal with you is whether or not there was enough  
22 manpower in the Attorney General's office to take any  
23 proactive positions with respect to policing and standards and  
24 education and what kinds of police misconduct might impinge  
25 upon the prosecutorial process.

1 A. Not in my view there has not been. At that time, there were  
2 six people within head office that had anything to do with  
3 criminal law, aside from the Deputy. And that was myself  
4 and Mr. Herschorn and four appeal solicitors.

5 Q. So your concerns, then, would get prompted, I take it, by  
6 specific incidents or matters that were brought directly to  
7 your attention.

8 A. That's correct.

9 Q. Well, then let me deal specifically with the question of the  
10 competence of the Sydney Police Force. We know, I take it,  
11 from your evidence earlier that you were not appraised of  
12 Bentley's suggestion, which is Volume 20 at page 62 that:

13  
14 The quality of investigation of the Sydney Police  
15 Force was of such a kind or character that they  
16 ought not to be entrusted with any other murder  
17 investigation.

18 Okay, you were not aware of that particular view from  
19 Bentley, but you were aware of that precise view from Mr.  
20 Edwards. Is that the effect of your evidence this morning,  
21 sir?

22 A. Yes.

23 Q. Would you agree with me that it ought to be the subject  
24 matter of grave concern in the Attorney General's office when  
25 a municipal police force is viewed by a senior prosecutor as  
literally incompetent to conduct a homicide investigation?

1 A. Yes, it should be viewed as a serious matter. This particular  
2 one is a matter of not discovering an exhibit that they had  
3 and failing to follow up on three witnesses, who were  
4 peripheral to the matter, but, well, they had tried on a couple  
5 of occasions to contact them and had been unsuccessful and  
6 they had just ceased any further contact and any attempts.

7 Q. Well, when did you have this conversation with Mr. Edwards?  
8 Do you recall roughly in what year he would be expressing  
9 this concern?

10 A. I have the view that it may have been around 1985 that that  
11 particular case was being dealt with. 1985, 1986,  
12 somewheres in there.

13 Q. So it's relatively recent. We're not going back to 1972 or  
14 1973.

15 A. No, we're not going back.

16 Q. Well, so you had then from, at least Mr. Edwards, his view  
17 that in terms of exhibits and following through investigations  
18 and things like that, there were serious problems. You were  
19 aware of the reports that had been filed by Wheaton in 1983  
20 about police practices in Sydney, broadly speaking? That was  
21 critical of...

22 A. Well, yes, the right that... Well, I don't know. I guess it was  
23 '83, the one that I had written and Superintendent Christen  
24 replied to with all the attachments.

25 Q. Now, and you get that, I take it, in 1986, in fairness to you,

1           sir, although it's based on a... It's a May '83 report that is  
2           given to you in 1986, is that correct? Or did you have it in  
3           '83? I'm sorry, there's one report in '86 that you do get. I  
4           think that's clear from your testimony this morning.

5           A. Yes.

6           Q. There's also an earlier report in 1983.

7           A. I think that's where I had written out... Are you referring to  
8           the one where I had written out asking them for their  
9           comments on the practices and procedures?

10          Q. Yes, that's correct. You had obviously had occasion to read  
11          that as well.

12          A. Yes.

13          Q. So, in 1983, you know that the R.C.M.P. have serious concerns  
14          about investigative techniques used by the Sydney Police  
15          Force way back at the time of the Marshall investigation. In  
16          1985 or '86, you know Frank Edwards still had serious  
17          concerns about the Sydney Police Force. Let's try again. You  
18          knew then that there were concerns stemming from the  
19          conduct of the police in '71. You knew, as well, there were  
20          concerns expressed in 1985 about the standards of the  
21          Sydney Police Force and their capacity to conduct a homicide  
22          investigation. And my question to you, sir, is were any steps  
23          taken at all or have there been since to deal with the question  
24          of the education of specifically the Sydney Police Force, any  
25          questions of whether their mandate to conduct homicide

1 investigations should be removed from them. And if not, why  
2 not?

3 A. I'm not aware of any steps that have been taken. Why not?  
4 Because of the view that was taken within the Department  
5 was that the City of Sydney is responsible for the police force  
6 there. That the Nova Scotia Police Commission is supposed to  
7 be available as advisers. That we had received no request  
8 from the City of Sydney to, or that the Police Commission had,  
9 to our knowledge, received no request from the City of  
10 Sydney to conduct any type of an appraisal of the force. That,  
11 in fact, municipal police have been considered by our  
12 Department to fall within the purview of our Police  
13 Commission rather than the Department itself becoming  
14 involved.

15 Q. But you have...

16 A. And there has been... There have been perhaps twice  
17 municipal training, police training plans proposed by the Nova  
18 Scotia Police Commission that Cabinet has not seen fit to  
19 accede to.

20 Q. Did you support them?

21 A. Oh, I cer...

22 Q. The Attorney General's office, did it support those plans?

23 A. Well, the Attorney General submitted them. So I would  
24 presume he supported them.

25 Q. Let's hope so. But you had testified earlier that if the R.C.M.P.

1 were to suggest, for example, that they take over municipal  
2 policing, let's say homicide investigations, then the Attorney  
3 General's office would consider that.

4 A. Yes, if the R.C.M.P. suggested it because, certainly, that would  
5 have an impact on the contract, the number of personnel  
6 required to police.

7 Q. But in light of the concerns expressed by the R.C.M.P., even if  
8 it didn't go so far as to suggest, to your knowledge, that the  
9 Sydney Police shouldn't be doing homicide investigations, in  
10 light of those concerns and in light of what Frank Edwards  
11 said to you, why weren't the R.C.M.P. called in to at least  
12 evaluate whether they ought to conduct homicide  
13 investigations. Or did you understand...

14 A. Because it would not be a function of the R.C.M.P. to make  
15 such an evaluation. It would be a function of the Nova Scotia  
16 Police Commission.

17 Q. Well, how were they supposed to recommend then? You said  
18 if the R.C.M.P. recommended or suggested that they should  
19 take over homicide investigations, the Attorney General's  
20 office would look at that.

21 A. If they made such a recommendation to the Attorney  
22 General's office, then that matter would have been referred  
23 over to the Chairman of the Nova Scotia Police Commission  
24 with the request that his Commission conduct a review, a  
25 study, give us their views as to whether that was necessary

1 or what action should be taken.

2 Q. And so then, logically, the R.C.M.P., if they made the  
3 suggestion, would be making it without any direct mandate to  
4 have reviewed the practices of a force.

5 A. That's correct.

6 Q. And one would then have expected the Nova Scotia Police  
7 Commission to have addressed the question of the  
8 competence of the Sydney Police, if there was going to be any  
9 serious issue about that.

10 A. That's correct.

11 Q. And, to your knowledge, have they?

12 A. Not to my knowledge.

13 Q. Anybody in the Attorney General's office ever bring to the  
14 attention of the Police Commission that they might or ought to  
15 consider doing so?

16 A. I don't know. I haven't myself.

17 Q. Indeed, would it be fair to say that, at least with respect to  
18 Mr. Coles, he felt that that was not necessary?

19 A. That would be my understanding of Mr. Coles' position, that it  
20 was not necessary.

21 Q. Now let me deal with the, specifically with the question of  
22 leaving the investigation of the Sydney Police Force in  
23 abeyance, as we've come to describe the term. I take it you  
24 would agree that it was clear to you that both Mr. Edwards  
25 and Harry Wheaton felt that, and this goes into April and May

1 of 1982, felt that the final remaining part of the investigation,  
2 if it can be called that, was to interrogate or question Chief  
3 MacIntyre and Sergeant Urquhart in relation to what had  
4 happened in 1971?

5 A. Well, I can agree that in April Mr. Edwards thought that... Was  
6 the one that told me that he thought that the R.C.M.P. should  
7 now question Chief MacIntyre and Mr. Urquhart.

8 12:11 p.m.

9 Q. Well, let me just break this down then. You were aware,  
10 were you not, sir, that Mr. Edwards agreed and took the  
11 view that that should be done? That was his view as well.

12 A. I was aware from him that it was his view, that I can recall,  
13 yes.

14 Q. And then were you aware that he was saying that he  
15 concurred in that or took the same approach with respect to  
16 that as the RCMP did?

17 A. No, my recollection of the matter is that he indicated that he  
18 thought that the time had come when the RCMP should go  
19 and question Chief MacIntyre and perhaps Inspector  
20 Urquhart.

21 Q. Certainly there was no suggestion by Mr. Edwards that the  
22 RCMP was resistant to that.

23 A. No, there was no suggestion on his part that they were  
24 resistant to that.

25

MR. GALE, EXAM. BY MS. EDWARDH

1 MR. CHAIRMAN

2 There is a suggestion in Edwards' notes that he earlier urged  
3 the RCMP, Wheaton, to investigate...to go and interview and  
4 Wheaton didn't want to go or...

5 MS. EDWARDH

6 There's a suggestion with respect to the file. There's an  
7 ongoing discussion...

8 MR. CHAIRMAN

9 This is prior to the order of the Attorney General.

10 MS. EDWARDH

11 Yes, yes.

12 MR. PUGSLEY

13 Isn't there a note on February 23rd where he phoned him at  
14 eleven o'clock at night and said, you're not...the investigation is  
15 not complete until you question MacIntyre.

16 MR. CHAIRMAN

17 Yes.

18 MS. EDWARDH

19 Yes, here it is. It's at...

20 MR. CHAIRMAN

21 Maybe I was wrong. I gleaned from Edwards' evidence that  
22 there was a resistance on the part of Wheaton to do that at that  
23 time.

24 MS. EDWARDH

25 Yes. I'm going to suggest there's another cast that one could

MR. GALE, EXAM. BY MS. EDWARDH

1 put on it, but certainly I'm just interested in...

MR. CHAIRMAN

2  
3 Or at least that's Wheaton's evidence. I'm not sure that  
4 Wheaton agrees with Edwards' evidence on that but...

MS. EDWARDH

5  
6 Q. Certainly there was a...from your understanding, Mr. Gale, I  
7 take it Mr. Edwards' said nothing about the RCMP having a  
8 reluctance to proceed with the investigation although they  
9 were concerned with in whose bailiwick they might be and  
10 on whose toes they might step. Is that a fair way of  
11 characterizing the concern expressed to you?

12 A. Well, I have great difficulty remembering the matter in  
13 specific detail. I can recall that Mr. Edwards indicated that  
14 he thought that MacIntyre and Urquhart should be  
15 questioned by the RCMP, and that's where I said I didn't  
16 think that that should happen at that particular point in  
17 time, that they should await the Attorney General's order,  
18 get the full file, look at it and then, before they took any  
19 further action.

20 Q. But my...let me see if I can just break this down though.  
21 From the information as best you recall it today, would it be  
22 fair to say that the reluctance that was articulated by Mr.  
23 Edwards involved a concern, legitimate or otherwise, on the  
24 part of the RCMP that they have very clear authorities  
25 emanating from the Attorney General with respect to the

1 full file. That they didn't want to look as though they were  
2 just walking in and talking over what had been at first, in  
3 their mind, an assistance case.

4 A. Well, I'm not quite sure what was said by the RCMP to Mr.  
5 Edwards. I certainly know that at that time they expressed  
6 to me the reluctance to...because it had started off as an  
7 assistance case and I simply got involved with this...these  
8 questions of it wasn't really their case and they had a  
9 reluctance to go in and demand everything without some  
10 type of order making it clear that it was their case.

11 Q And that was the concern expressed to you by  
12 Superintendent Christen.

13 A. Yes.

14 Q Is that correct? And that is why ultimately the order under  
15 the signature of the Attorney General was issued.

16 A. That's correct.

17 Q Which effectively fully removed the case from the Sydney  
18 Police force.

19 A. That's correct.

20 Q And were you aware of any other reluctance beyond that?

21 A. No, I was not aware of any other reluctance beyond that.

22 Q And I take it at this time, as well, from your evidence  
23 yesterday there was some inter-force rivalry around the  
24 fact that the RCMP had been used on occasions where  
25 municipal police forces were out on strike.

1 A. It had been the policy of the Attorney General that if a  
2 municipal police force went on strike the RCMP were made  
3 available to the municipality. It was my understanding that  
4 that created hard feelings between the members.

5 Q. That were in existence at this time.

6 A. Yes. And not...I'm not sure that it was necessarily Sydney  
7 those feelings were. I'm not sure when Sydney had a strike  
8 or did not have a strike, but certainly the RCMP were  
9 uncomfortable with the position that they had to perform  
10 and the reaction of the unionized municipal police.

11 Q. Now let me just go back. It's your clear understanding, I  
12 take it, as you've described your recollection, that you, at no  
13 time, said anything other than that it would be more  
14 appropriate to conduct an interrogation of Urquhart and  
15 MacIntyre in circumstances where they had fully appraised  
16 themselves of the contents of the file and knew exactly what  
17 was there and what was not there.

18 A. That's the best I can say, to my recollection, that certainly  
19 there were never any other intentions.

20 Q. And I take it there's no question in your mind that there  
21 was a clear context to the statement you made to hold it in  
22 abeyance.

23 A. The context was that of asking the questions before the file  
24 had been fully turned over.

25 Q. And I take it that you recall as well that the file, or that the

1 order signed by the Attorney General was signed around  
2 April the 20th.

3 A. It was signed April 20th.

4 Q. Now was it also clear to you at this time that the questioning  
5 of Chief MacIntyre and Urquhart was to take the, to come at  
6 it from the perspective of finding out why these young  
7 witnesses had lied? To deal with the allegations of actual  
8 pressure, impropriety on the part of the police?

9 A. Well, I assumed that that would be one of the areas that  
10 they may wish to question them on. I really hadn't turned  
11 my mind to all the areas that they might question them on,  
12 or just exactly why they wanted to question them.

13 Q. But it was clear that that one would be part of any question.

14 A. That might well be one of the areas that they would want to  
15 question them on.

16 Q. Now I'd like you turn, if I could, to Mr. Edwards'  
17 understanding, which is... Sorry, I may not have this volume.  
18 It's Volume 66, I'll just read this to you, Mr. Gale. Volume  
19 66 of the transcript, page 11797. Let me just put to you, Mr.  
20 Edwards' recollection, this is 11797.

21 Q. You suggested that the investigation  
22 should now focus on the City Police.

23 A. Yes.

24 Q. Now what were you meaning by that?  
25

1 A. Well, two things. Number one, that the file  
2 should be obtained but more particularly that in  
3 my view the time had long since passed when  
4 John MacIntyre and Bill Urquhart should have  
5 been taken in individually and questioned  
thoroughly on their involvement in that '71  
investigation by Wheaton and Carroll.

6 Q. What was the response from Mr. Gale and  
7 Herschorn?

8 A. Mr. Gale was of the view that that matter could  
9 wait, that the...that it was something that could  
10 be put off. That the main goal now was to get  
11 Marshall before the Court in order to secure his  
12 release, and that the problem with the file could  
13 be expeditiously dealt with because that would  
14 be necessary for the immediate purpose by a  
15 direction under the Police Act.

16 Q. So.

17 A. But I mean I didn't argue further with him on  
18 that.

19 Q. Did you agree?

20 A. No, I didn't agree. I stated what I thought  
21 should happen. He said, "No," he was my  
22 supervisor. I wasn't going to say, well, you  
23 know, well, "I'm going to order them to go  
24 anyway." I didn't have the authority to do that.

25 Do you recall having to tell Mr. Edwards, "No, I'm your  
superior"?

A. No.

1 Q. This is a direction.

2 A. No, there was nothing of that type. It was a discussion  
3 about the matter and my view was that this was too early to  
4 go and ask the questions until the file had been obtained. It  
5 just didn't make sense to me without examining the full file  
6 to go and ask the questions. Why make two or three  
7 attempts? Why not at least have all you could know from  
8 the file before you went and asked them?

9 Q. Which, of course, then could have taken place sometime  
10 shortly after April, 1982.

11 A. Well, in my view, the letter was going to be signed by the  
12 Attorney General and that the, you know, hopefully within a  
13 week or so, they would have everything.

14 Q. In which case, the investigation could proceed.

15 A. Yes. Well it could have proceeded any way they wanted it  
16 to, in any event. I'm not there to direct the investigation,  
17 but when asked that question, it didn't make sense to me.

18 Q. Now Mr. Edwards also had the understanding, which is  
19 described at pages 11799, when he was asked the following  
20 question:

21 Q. How long was it to be delayed? What was your  
22 understanding from Mr. Gale? How long were  
23 you to wait before the R.C.M.P. could be turned  
loose on the Sydney Police?

24 A. At that point in time, I think all of us were  
25 swimming in uncharted water, so to speak, so

MR. GALE, EXAM. BY MS. EDWARDH

1 there was no, to answer your question, there was  
2 no specific time frame mentioned. As far as my  
3 understanding is concerned, it would be until we  
4 had got Marshall before the Court, presumably  
5 acquitted, and then had the Ebsary matter dealt  
6 with.

7 And later on, I think Mr. Edwards points out that by... He  
8 really thinks it was just before, it just involved an  
9 understanding that was before Marshall got before the court  
10 and that an acquittal had been entered. And that's at page  
11 11801. Do you have any explanation, sir, my question to  
12 you, as to how on earth Mr. Edwards got this view, which  
13 was entirely inaccurate?

14 A. I know over some period of time, and perhaps at that  
15 particular conversation, I don't know. I can't say. That  
16 there was the view as to whether there should be an inquiry  
17 into the actions of the Sydney Police, a formalized inquiry,  
18 and it was my view, and I think it was also Mr. Edwards'  
19 view that there be such an inquiry. That was not a matter  
20 for the R.C.M.P. to investigate, only to the extent that it was  
21 necessary for, to understand the role of things for Marshall.  
22 If they felt to investigate for the, to continue their  
23 investigation on the Sandy Seale murder, that they should  
24 talk with those police officers, that was solely within their  
25 prerogative.

Q. No, but I...

A. If it was a matter to prepare for an eventual anticipated

1 inquiry, then those types of investigations were done by the  
2 people of the Nova Scotia Police Commission.

3 Q. Well, do you think that you may have said to Mr. Edwards,  
4 "Listen, we're going to try and get an inquiry under way and  
5 that we'll leave the investigation not to the R.C.M.P. but to  
6 somebody else." Might you have had that kind of  
7 conversation with him?

8 A. Well, if there was an inquiry, then the investigation for the  
9 inquiry in itself may well... would not have been by R.C.M.P.  
10 officers....

11 Q. I appreciate that.

12 A. It would have been by commission people.

13 Q. Precisely the point, sir. So would you have perhaps told Mr.  
14 Edwards that, indeed, that was your view of why the  
15 R.C.M.P. shouldn't proceed? That you were going to try and  
16 get an inquiry under way and there was no point?

17 A. Well, there was certainly the comment that, hopefully, there  
18 would be an inquiry and the R.C.M.P. would not be the  
19 investigators for that. But his view that the... My  
20 understanding of it at the time, and still is, that if they  
21 wanted to question them to further the Seale investigation,  
22 then by all means, but it doesn't make sense to me to  
23 question them until you get the file and look at it.

24 Q. I appreciate that. What I'm trying to do, sir, is try and  
25 identify what might be the basis of this misunderstanding

1 that... I appreciate your view, that they could ahead and do  
2 it any time they wanted. My question is, do you think you  
3 may have had a conversation with Mr. Edwards where you  
4 might have said something to the effect that we will try and  
5 get an inquiry under way. The R.C.M.P. will not be the  
6 investigators in the course of that inquiry, in the ordinary  
7 course, and there's no point in sending the R.C.M.P. out to do  
8 that now, as a direction from the Attorney General's office?

9 A. Well, certainly, that has been conveyed to Mr. Edwards and  
10 I think I have conveyed that to Mr. Edwards that, hopefully,  
11 there would be an inquiry and, as far as the investigation  
12 for the inquiry was concerned, that would be a matter for  
13 the... There would be no point in having the R.C.M.P. do the  
14 inquiry investigation because that was not the way things  
15 were dealt with by the Commission.

16 Q. And you conveyed that to Mr. Edwards at that time, isn't  
17 that a fair statement, sir?

18 A. Well, it may well have been conveyed at that time. It seems  
19 to me that the unfortunate part is that the two got crossed  
20 in his mind in some way.

21 Q. I understand what you're saying, Mr. Gale. I'm just trying to  
22 find out how that may have happened...

23 A. Well, that's the only explanation...

24 Q. What other...

25 A. That I can give for it.

MR. GALE, EXAM. BY CHAIRMAN

1 Q Conversations. And, so if I understand you correctly, sir,  
2 what you're saying now is you may well have had, and  
3 indeed probably did have, a conversation with Mr. Edwards  
4 around this time frame where you discussed not using the  
5 R.C.M.P. because they would not be the investigators of, who  
6 participated in an inquiry, so I understand you correctly.

7 A. Yes, I think that's fair.

MR. CHAIRMAN

9 Q Just one question, so we won't have to go over it again, and  
10 I'll try and clear it up. You had the R.C.M.P. charged with  
11 the reinvestigation of the Sandy Seale murder. And we  
12 have Mr. Edwards' testimony and his notes, the two months  
13 before this conversation or just about, February the 23rd.  
14 He had suggested to Wheaton that his investigation, his  
15 reinvestigation of the murder of Sandy Seale could not be  
16 completed unless Chief MacIntyre was questioned. I  
17 presume for the obvious reason that three witnesses had  
18 said that, had given statements to Wheaton concerning the  
19 method of interrogation that was very vital to this  
20 reinvestigation. So that the interrogator would also have to  
21 be reinvestigated, had to be questioned, rather. Did Frank  
22 Edwards indicate to you during your discussions in April  
23 that back in February, he had suggested to the investigating  
24 officer, Wheaton, that he question Chief MacIntyre  
25 concerning the Seale murder? Now forget the Sydney Police

1 12:29 p.m.

2 Q. Cont'd

3 as a force.

4 A. I have no particular recollection of him saying that. His terms  
5 to me were that it was now time that the R.C.M.P. should turn  
6 their attention to Chief MacIntyre and Inspector Urquhart  
7 and ask, get statements from them.

8 Q. Right, and you said, your recollection is get the file first.

9 A. Well, we were... Yes, get the file first and look at it.

10 Q. But where I'm having difficulty there is that you had  
11 indicated earlier that the R.C.M.P., in their investigation of the  
12 Sandy Seale murder, could have without asking authorization  
13 from anyone, questioned MacIntyre, and presumably  
14 Urquhart, with respect to the statements of Chant, Pratico,  
15 and Harriss.

16 A. Yes, they could have. I would have thought it would be part  
17 of their investigation, and I don't know why they would ask  
18 anyone about it.

19 Q. Well, at the time that you spoke to Frank Edwards in April,  
20 you were aware that they hadn't done this. He had made you  
21 aware of it, didn't he?

22 A. Well, at that time, he was, yes, he was saying he thought it  
23 was time that they went to it. So, yes, I would be aware of it  
24 at the time.

25 Q. So you say... All right, but before they question the police, it's

1 my opinion they should get the file, and they'll have that file  
2 in a few days because the Attorney General is going to order  
3 that it be delivered up.

4 A. That's correct.

5 Q. What we are having difficulty in getting an ans... in sorting  
6 out is why that would be interpreted by anyone that the  
7 R.C.M.P. could not question MacIntyre and Urquhart on the  
8 reinvestigation once they got the file.

9 A. Well, I'm unable to comment on that. I don't know why the  
10 R.C.M.P. would ask if they could. I don't know why they  
11 would...

12 Q. Is it possible..

13 A. Say that, take that attitude.

14 Q. Is it possible that with this loose use of words all the time,  
15 looking at the Sydney Police, that some people interpreted  
16 that as meaning that the R.C.M.P. were now to go in and do an  
17 indepth investigation of the Sydney Police Force as a force in  
18 their capacity to do that kind of work, to investigate  
19 homicides, rather than simply meaning, and in so hearing  
20 that, said, "Well, that also includes questioning him on any  
21 matter relating to the Sandy Seale murder"?

22 A. Well, I suppose that is one explanation of it. If there was to  
23 be an inquiry, it would be on the, I would have thought,  
24 broad enough to deal with the police force, not just the  
25 officers.

MR. GALE, EXAM. BY CHAIRMAN

1 Q. See, there may be... You have Edwards saying, "Question Chief  
2 MacIntyre," in February. You have discussions between  
3 various people talking about holding the questioning of the  
4 Chief of the Sydney Police Force or the examination in  
5 abeyance. And I guess we'll have to sort out if there were  
6 grounds for people to get their wires crossed, but I'm having  
7 great difficulty finding... ascertaining as to what  
8 interpretations were placed with various people on this.

9 MS. EDWARDH

10 My Lord, I will be more than a couple of questions.

11 MR. CHAIRMAN

12 Well, will you be more than a half an hour?

13 MR. EDWARDH

14 Probably about half an hour to 45 minutes.

15 MR. CHAIRMAN

16 Because we have to finish Mr. Gale by 4:30. I have other  
17 fish to fry.

18 MS. EDWARDH

19 Yes, My Lord, we will be done.

20 LUNCH BREAK - 12:30 to 2:08

21 MS. EDWARDH

22 Q. Mr. Gale, let me just go back to the point that we were at just  
23 before we broke for lunch. You had stated that at the time  
24 you told Mr. Edwards to wait until the Attorney General had  
25 issued an order to get the file, that you would probably also

1 have said to him, in any event, the R.C.M.P. were not likely to  
2 be the force that would investigate police misconduct when  
3 an inquiry was held.

4 A. If the inquiry was going to be on the police force, yes.

5 Q. And I take it, at that time, it was also your hope and, indeed,  
6 the hope of Mr. Edwards, that such an inquiry would be held.

7 A. Yes, I think it was, I think the hope of both of us that such an  
8 inquiry would be held.

9 Q. And discussions were ongoing in the Department with a view  
10 to seeing whether or not an inquiry would be an appropriate  
11 vehicle?

12 A. Well, there were some discussions. It was, I think you must  
13 realize that this type of matter was a novel matter for the  
14 Department and we were feeling our way through it. But it  
15 would depend on what the reference was made and  
16 concurrent with that, an inquiry into what areas the inquiry  
17 would have to go.

18 Q. But from your perspective, it was your view, at least, that you  
19 held at that time, that such an inquiry would look at any  
20 allegations of misconduct on the part of the police, or how this  
21 whole thing had transpired.

22 A. Yes, it was my hope that that would be it.

23 Q. So, indeed, from the Attorney General's perspective, as it's  
24 reflected in the notes that Mr. Edwards took, it was, in fact,  
25 the view that the investigation ought to be conducted by

1 someone else at an appropriate inquiry, should it take place  
2 later?

3 A. An investigation for an inquiry purpose, yes.

4 Q. And, indeed, that was the only purpose that, at that time, you  
5 were aware of as being, from your perspective, relevant,  
6 correct?

7 A. Yes.

8 Q. You had already formed the view, in other words, that what  
9 was not clearly available on the record was any indication of  
10 criminality?

11 A. What was available, what I had been led to believe that there  
12 was not evidence of criminality. There had been no  
13 suggestion of that made to me.

14 Q. So from your perspective, all the information that you had led  
15 you to the conclusion that whatever improprieties had  
16 occurred, would be examined through an inquiry process.

17 A. Yeah, that would be the best vehicle for examining those.

18 Q. So I'm going to suggest to you, sir, that given those  
19 parameters of your understanding that it's entirely likely that  
20 Mr. Edwards took your comments as indicating that the  
21 investigation into impropriety on the part of the Sydney  
22 Police ought not to take place by the R.C.M.P.

23 A. Well, he may have understood it in that way. I was not in  
24 any sense trying to preclude any investigation by the  
25 R.C.M.P.... If the R.C.M.P. felt that such investigation was

1 necessary to further their investigation of the Sandy Seale  
2 murder case.

3 Q. No, but at the same time, you weren't resiling from putting  
4 forward your views that such an investigation was not  
5 appropriate at this time because an inquiry would well look  
6 after the matter. You had received no information to indicate  
7 otherwise.

8 A. I had received no information to indicate otherwise.

9 Q. And, indeed, when you got, and I take it you did receive, and  
10 correct me if I'm wrong... Could I ask you to look at Volume  
11 34 at page 88. Did you obtain or did you have passed to you  
12 in your discussions with the R.C.M.P. this report from Staff  
13 Sergeant Wheaton, which is endorsed and forwarded on by  
14 Scott, Inspector Scott?

15 A. As nearly as I'm able to reconstruct, that this report came in  
16 with the so-called "red book".

17 Q. And that would have been in May of '82?

18 A. Yes.

19 Q. And, therefore, I take it it was clear to you, if you turn to  
20 pages... Well, I guess the bottom of page 88, and page 89, that  
21 what was being attributed to you was that the interviews  
22 should be, in fact, held in abeyance and that if the R.C.M.P.  
23 from their perspective were to have any further involvement,  
24 they would wait further instructions, correct?

25 A. Well, I see that there now. I don't really think that, in all

1 honesty, I... I was so happy at that point in time to get the red  
2 book, which had been promised for such a long period of time,  
3 that I think I immediately went to it and just glanced at this.  
4 It did not strike me at the particular time, this paragraph  
5 didn't jump out at me and I didn't latch onto it.

6 Q. Are you saying that you never noted in any way that from  
7 the R.C.M.P. perspective, they were waiting instructions?

8 A. No, I really didn't note it that they were waiting instructions.  
9 I was more concerned with going on to the red book and  
10 looking at it.

11 Q. And so you just missed this entirely.

12 A. Well, it certainly didn't make any impression on me at the  
13 time.

14 Q. And, indeed, I'm going to suggest, Mr. Gale, the reason it  
15 didn't make any impression on you at the time is quite simply  
16 that from the perspective you were working at, you were  
17 quite content to let the R.C.M.P. not investigation because, as  
18 far as you've indicated, you were still contemplating the  
19 inquiry to deal with the matters that the R.C.M.P. would have  
20 investigated, alleged impropriety.

21 A. Well, if there were alleged improprieties, yes. Improprieties  
22 not extending to illegal acts.

23 Q. And it's your evidence that, at this time, in April and May,  
24 you were aware of alleged improprieties, which to the best of  
25 your judgement, did not amount to criminality? That's what

1       you're saying?

2       A. I was aware of practices being commented on by the R.C.M.P.  
3       that I thought should be looked into by an inquiry.

4       Q. So, indeed, if you had read that, given your view of it, it  
5       wouldn't have surprised you at all, because that is, in fact,  
6       what you had just said Mr. Edwards. There was no point in  
7       having the R.C.M.P. investigate that.

8       A. That was no point in having the R.C.M.P. investigate  
9       improprieties, but if they wanted to.. I still wanted to make  
10      certain that it's understood that if they wanted to question  
11      them on the investigation itself, that that, my only suggestion  
12      there was that they await getting the file and looking at it.

13      Q. Now I take it in the course of assessing the nature of the  
14      improprieties that had been described to you, you knew that  
15      there... And don't let me put words in your mouth, sir, but  
16      you knew there were certainly allegations that witnesses had  
17      arrived at testimony with no independent observation after  
18      police interrogation, is that correct? They said they saw  
19      things that they didn't see.

20      A. Well, their subsequent statements say that they saw, said that  
21      they saw things that they had not seen.

22      Q. And that at least one of those individuals suggest that they  
23      made those statements as a result of threats. Threats about  
24      being sent to prison or threats about perjury, do you recall  
25      that?

1 A. I understand that one of them said that, was told that he  
2 could be dealt with by way of perjury.

3 Q. If he didn't say this, that he could be charged with perjury  
4 and then be sent to prison. That was the thrust of what the  
5 witness had said in explaining why he gave false testimony,  
6 correct?

7 A. That is a thrust you can take from it, yes.

8 Q. And why isn't that extortion? Forget counselling perjury.

9 A. At that particular time, I'm not sure that we necessarily  
10 accepted everything that each witness said as to why he or  
11 she gave the original story. And that was one of the things  
12 that we had hoped to be able to bring out in the reference  
13 and one of the reasons we wanted to go under 617 to, in the  
14 hopes of being able to bring out all the evidence from the  
15 police and from the witnesses and try and determine...

16 Q. Well, whether you accepted it or not, sir, did that allegation  
17 raise concerns in your mind at all about criminality?

18 A. No, to be frank with you, at that particular point in time, I  
19 guess my mindset was not that that had, was raising  
20 allegations of criminality. At that particular point in time, it  
21 was hoped that we could go further and examine these  
22 matters as the reference proceeded.

23

24

25

1 Q. So I take it that you did not exclude criminality as being a  
2 possible explanation for the fabricated testimony, is that a  
3 fair statement?

4 A. Well, I guess I didn't exclude anything as being a possible  
5 reason for it and hopefully that the...that would come out in  
6 the course of a reference.

7 Q. But specifically my question though is, if you didn't exclude  
8 anything I take it you did not exclude criminality on the  
9 part of the police officers as being an explanation.

10 A. Well, since I didn't exclude anything then I would not have  
11 excluded criminality.

12 Q. And then I take it though you at no time, having had this  
13 conversation about interrogation of MacIntyre and  
14 Urquhart, at no time after your conversation with Mr.  
15 Edwards did you suggest that any of this matter be picked  
16 up again.

17 A. No, because I did not think that I had excluded it from being  
18 picked up. I'm not an investigator and I have the highest  
19 regard for the RCMP, and I thought that they would follow  
20 through on every possible approach on the matter quite  
21 frankly. I didn't think that they were requiring any  
22 permission to do anything. They had a job to do and I  
23 thought that they would follow through with it.

24 Q. And when you spoke with the RCMP liaison person,  
25

1 Superintendent Christen I think it was at the time, did he  
2 not at any time suggest to you that they were awaiting  
3 further instructions as is indicated in the report of Staff  
4 Sergeant Wheaton?

5 A. No, I don't recall Superintendent Christen expressing any  
6 opinion that they're awaiting further instructions on  
7 questioning MacIntyre or Urquhart.

8 Q. Or investigating the possibility of criminality.

9 A. That's correct.

10 Q. And I take it you merely then acquiesced to letting the  
11 situation stand as you knew it was, without knowledge of  
12 whether there was or was not an investigation.

13 A. I did not know that there was one and I...

14 Q. You didn't know...

15 A. ...at this point time I was leaving it to the RCMP to  
16 investigate whatever they had to investigate. I knew that if  
17 we're going by a reference that we would certainly have to  
18 get this in at some stage.

19 Q. But you made no further inquiries so that you simply  
20 acquiesced as to whether they did or didn't was something  
21 that they could decide.

22 A. Yes, that's correct.

23 Q. And with respect to information about improprieties or the  
24 failure of Crown counsel to disclose, I take it neither you nor  
25 anyone in the Department took any steps to find out what

1           may have transpired that caused Crown counsel to not make  
2           matters available to the defence at any stage of these  
3           proceedings.

4           A.    That's correct. I took no steps and I'm not aware of  
5           anybody else within the Department taking such steps.

6           Q.    Not even request a memorandum of...from Mr. Veniot as to  
7           what he may or may not have known.

8           A.    No, at that point in time, no, we did not request any memo  
9           from Mr. Veniot who was not even with us at that time.

10          Q.    Let me take you back briefly to the meeting you had with  
11          Chief MacIntyre, which is described in Volume 17. Do you  
12          have that there?

13          A.    Yes, I do.

14          Q.    Is that the only occasion that you met or discussed the  
15          matter with Chief MacIntyre?

16          A.    Yes, that's the only occasion.

17          Q.    And I take it from your answers to questions posed to you  
18          by Mr. MacDonald that his visit was unannounced and, as  
19          well, the Chief was not a close associate of yours.

20          A.    That's correct.

21          Q.    And I take it that from the fact that he arrived carrying the  
22          Marshall file it was clear to you that that was the subject  
23          matter he wished to discuss with you.

24          A.    Well, he came carrying a file and he discussed Marshall with  
25          me.

1 Q. Anything else discussed to the best of your recollection?

2 A. No, nothing that I'm aware of.

3 Q. How long was the meeting?

4 A. I would think it was a meeting that may have been about  
5 thirty minutes, maybe forty-five at the most, it was not a  
6 long meeting.

7 Q. And would it be fair to say that during the course of that  
8 meeting that Chief MacIntyre pressed upon his...pressed  
9 upon you his views that Mr. Marshall was, in fact, guilty of  
10 the offence?

11 A. It was quite evident that Chief MacIntyre felt that Mr.  
12 Marshall was guilty of the offence from that meeting.

13 Q. And would it...would it also be fair to say that the thrust of  
14 that meeting was his attempt to satisfy you that the  
15 investigation had been thorough and there was ample  
16 evidence to support the conviction?

17 A. Well, he was pulling out statements and talking in terms  
18 that there had been ample evidence to support the in...the...

19 Q. The conviction.

20 A. The conviction originally.

21 Q. And indeed, his suggestion was the RCMP had, for some  
22 reason, gotten off on the wrong track or were coming to the  
23 wrong conclusions.

24 A. Well, he felt that the RCMP were coming to the wrong  
25 conclusion on it.

1 Q And I take it the purpose of his presence and discussion  
2 with you was to obtain from you some kind of commitment  
3 to review the RCMP reports or their conclusions carefully, to  
4 say the least.

5 A. I think he wished to convey to me his views of the...I would  
6 suspect with the hope that we would look at the RCMP  
7 conclusions closely.

8 Q Did he express to you at all any concern for his own  
9 position?

10 A. No, he did not.

11 Q Would you agree, sir, that it's unusual at least for a  
12 policeman to have gone to the lengths of Chief MacIntyre to  
13 personally put his own private view of the propriety of a  
14 conviction forward?

15 A. I have not had it done before.

16 Q And in that sense it's at least unusual.

17 A. Yes.

18 Q Now when Chief MacIntyre produced the statements you  
19 had not seen, did you request that he leave a copy with  
20 you?

21 A. No, I did not.

22 Q You were aware that those statements were of some  
23 considerable significance. You hadn't seen them before.

24 A. I had not heard of them before. I was under the impression  
25 that the RCMP had the Sydney Police file on the matter, so

1 my main concern was to call them and ask them where were  
2 they and had they heard of them before.

3 Q And I take it you made no suggestion to the Chief at that  
4 time that he just simply leave the file with you.

5 A. No, I did not want the file left with me.

6 Q Did he offer to?

7 A. No, he did not offer.

8 Q Did you raise with him that he should turn over the file that  
9 he had in his possession to the RCMP?

10 A. No, I did not because I did not know at that time whether  
11 they had that file and the statements I was shown, as I  
12 recall, were photocopies so...

13 Q When he produced these statements though that you at least  
14 had not seen, did you suggest to him that these matters had  
15 best be brought to the attention of Wheaton or anybody else  
16 who was involved in the reinvestigation?

17 A. No, I felt that it was better that I contact the RCMP and find  
18 out what they knew about it and if they didn't that they  
19 should take the steps to get that information.

20 Q Now, did Chief MacIntyre seem to you to be fully appraised  
21 of what the RCMP were doing and what some of their  
22 conclusions were?

23 A. He seemed to have a fair understanding of what was  
24 transpiring at the time.

25 Q Did he say from whom he had received that information?

1 A. No, he did not.

2 Q. Did that concern you at all?

3 A. No, it didn't concern me. Police have a habit of talking back  
4 and forth to one another and that did not concern me.

5 Q. Did you have any conversations at all with Urquhart during  
6 this period?

7 2:29 p.m.

8 A. No, I didn't.

9 Q. Did you receive any correspondence from either of them?

10 A. Not to the best of my recollection.

11 Q. Did you keep any memoranda or any written materials at all  
12 in relation to your discussions with anyone in the  
13 Department or with outsiders about the Marshall case?

14 A. No.

15 Q. Is there any reason, sir? Is it your habit to not keep any  
16 written notation of any kind in relation to discussions of this  
17 kind?

18 A. I make notations on my legal pad at the time. I may keep  
19 that for a short period of time until something has...if a  
20 question was asked until I got, to remind me...until I got an  
21 answer back. But, no, it has not been my practise to keep  
22 notations of the fact that I've met with somebody or what  
23 exactly was said at those meetings.

24 Q. And I take it you had no records of any kind in relation to  
25 the Marshall case that you caused to be created.

1 A. That's correct.

2 Q. Let me ask you to turn with me to Volume 28, page 14. I  
3 understand that this is the first written directive, is that  
4 correct, in relation to disclosure and Crown counsel's  
5 obligation to disclose or is there an earlier one?

6 A. Well, there should be an earlier one because it's...the earliest  
7 one arose with Mr. How when he was the Attorney General.

8 Q. And was it in substance quite different than this?

9 A. No, it was not any different. I think this one was updated  
10 because Mr. Giffin had come into the position and perhaps  
11 the words might be different, but the purport of the  
12 disclosure policy is the same.

13 Q. So, in 1980, then...

14 A. 1980-81.

15 Q. '80-81. Defence counsel were entitled to all statements  
16 made by a witness to the proceeding that the Crown  
17 intended to call. Do I have...

18 A. Yes.

19 Q. And before getting into that one again, in terms of the '86  
20 memorandum that again is the case subject to a discretion  
21 on the part of the Crown where it is felt disclosure be  
22 contrary to the interests of justice. Other than...do you see  
23 that, page 16?

24 A. Yes, I do.

25 Q. Other than paragraph number 1, which is "When there are

1 reasonable grounds to believe in the possible destruction of  
2 evidence," et cetera, what other grounds do Crown attorneys  
3 in the Province exercise their discretion against disclosure  
4 when "It would be contrary to the interest of justice"?

5 A. I can't think of any other grounds, and I can only assume  
6 that in drafting this that it was felt that if for some reason  
7 there was something that wasn't covered in grounds one and  
8 two that it would give some opening for prosecuting officers  
9 to refuse this disclosure. But I don't know what other  
10 grounds there could be.

11 Q. Would you have any idea in what percent of cases today  
12 Crown counsels elect to non-disclose under that provision?

13 A. No, because I have not dealt with the prosecuting officers, as  
14 such, for a number of years.

15 Q. Would you have any idea whether or not there is with any  
16 regularity complaints being received by the Department  
17 with respect to non-disclosure by Crown counsel?

18 A. I've been advised by Mr. Herschorn that there have been, I  
19 recall, two or perhaps three cases where that complaint has  
20 been made. In one of them Crown counsel simply did not  
21 have the information. The police had not provided it to him  
22 at that stage. They were not ready. They had not  
23 completed their laboratory tests. Another one I think there  
24 is a difficulty where the prosecutor felt that the witnesses  
25 might be intimidated. I think that the third was on that

1 same vein.

2 Q. I'd like to put to you, and I...the testimony of Judge  
3 Cacchione, who as of 1986... I take it you're aware of who  
4 Judge Cacchione is?

5 A. Yes, I am.

6 Q. You are aware, sir, that he practised as criminal counsel in  
7 the Province of Nova Scotia.

8 A. Yes, I'm aware of his background.

9 Q. And if I could ask you just to bear with me for a moment.  
10 I'm looking at Volume 64, pages 11426. He describes his  
11 experience as being:

12 Q. Were you aware that the policy, at least,  
13 of the Department was to provide full  
14 disclosure?

15 A. There had been rumours that that was the  
16 policy. There had been rumours that there  
17 was a policy manual that espoused full  
18 disclosure. I never experienced full  
19 disclosure, I can assure you of that.

20 And Judge Cacchione in his evidence, if one reads it, does not  
21 distinguish his experience right up to 1986 when he left  
22 practise for the Bench. Can you provide any explanation, sir,  
23 why his experience is so different from the Attorney  
24 General's, as you describe it, directive?

25 A. No, I can't quite frankly. I don't know what Judge Cacchione  
considered to be full disclosure on matters, and if he felt

1 that he wasn't getting full disclosure I don't know why he  
2 didn't make a complaint to somebody in the Department on  
3 the matter.

4 Q. Well, he does say as...I can't, I don't have the page reference  
5 handy, that indeed he did complain and the response he  
6 always got from the Attorney General's office through Mr.  
7 Herschorn, and he says, pages 11426 again.

8 Q. Did you have occasion then to make any  
9 complaints to the superiors in the  
10 Department, either formally or informally?

11 A. I, yes, I recall speaking with Mr. Herschorn  
12 on several occasions, I recall  
13 speaking with Mr. John Wade on several  
14 occasions, I recall speaking with Mr. David  
15 Thomas on many occasions, and the reply  
16 would always be the same. It's up to  
17 the prosecutor to decide. It was a fairly  
18 wishy-washy attitude.

19 So, His Honour's experience with the complaint procedure at  
20 the Department was, at least from his perspective, less than  
21 satisfactory.

22 A. I realize that he has testified to that and I...and I know  
23 comments that Mr. Herschorn has made to me since seeing  
24 that, and Mr. Herschorn said that...he has told me that Judge  
25 Cacchione never spoke to him on the matter except briefly  
asking about Crown disclosure at a seminar at which they  
were both panelists. But you will have to get that really

1 from Mr. Herschorn, but that is what I have been told by  
2 Mr. Herschorn.

3 Q. That raises the, a last point is that there is some suggestion  
4 that on that panel Mr. Herschorn had with him the written  
5 formulation of the guidelines and declined to produce them  
6 to Mr. Cacchione.

7 A. Well, I don't know why he wouldn't.

8 Q. And further that they are not distributed to the defence bar.

9 A. No, they were not distributed to the defence bar to the best  
10 of my knowledge, but there is no doubt that they were in  
11 existence and anytime I was asked about them I simply  
12 pulled the page out of the volume of advice to prosecuting  
13 officers and photocopied it and gave it to whoever wanted it.

14 Q. Can you offer, sir, any explanation why the community in  
15 most need of protection, most in need of being able to waive  
16 the guidelines around and saying "Produce" wouldn't have  
17 had those guidelines distributed to them, and that's the  
18 defence bar?

19 A. No, I can't offer any explanation. I don't know if it was a  
20 decision made by someone in the Department that they  
21 should not have them or what the reason was for that, quite  
22 frankly.

23 Q. As a policy directive would it be considered confidential to  
24 Crown counsel?

25 A. Well, some people considered it confidential but I did not

1 see any way possible that this type of policy directive could  
2 be legitimately withheld from anybody under our Freedom  
3 of Information Act.

4 Q. But it was withheld, was it not?

5 A. Not by me, it certainly...

6 Q. By others.

7 A. ...any time I was asked I gave it.

8 Q. By others in the Department.

9 A. It may have been. I...you have said something about Mr.  
10 Herschorn. I don't know what his stance on that was.

11 Q. Do you know what Mr. Coles' stance on it was?

12 A. No, I don't know what Mr. Coles' stance was on it.

13 Q. Let me then just confirm with you though that it is your  
14 impression that at least some of the senior members in the  
15 Department did take the view that it was confidential, and  
16 further that it ought not to be made public, although you  
17 took a different view.

18 A. Well, I had had raised with me whether or not it was a  
19 confidential document. In my view it was not. I don't know  
20 if they continued to take that stance or not.

21 Q. Who raised it, sir?

22 A. Oh, I think there may have been some discussion by Mr.  
23 Coles...by Mr. Herschorn with me. I may have had some  
24 questions from some prosecutors.

25 Q. Did...

1 A. But only to the extent that I would be answering questions  
2 in Mr. Herschorn's absence on these things. We substitute  
3 for one another.

4 Q. I take it though, sir, you are aware and you have already  
5 said that to the best of your knowledge it was not  
6 distributed. So it...

7 A. I have no knowledge of it.

8 Q. ...would be widely held.

9 A. I have no knowledge of it having been sent out to the Bar of  
10 Nova Scotia.

11 Q. Let me then ask you just a couple of more questions about  
12 the disclosure regime presently enforced. I take it there is  
13 no mention in the disclosure regime that facts otherwise not  
14 held by way of statements that are in the possession of  
15 Crown counsel that are of assistance to the defence pursuant  
16 to these guidelines, the Crown does not have to hand over  
17 but for it's broader legal obligation.

18 In other words, if Crown counsel were aware that a witness  
19 had a lengthy psychiatric history, they may indeed be aware  
20 of that as a result of a police investigation or comments  
21 made that are not reduced to a statement form, and that  
22 would not be made available to defence counsel on the basis  
23 of these guidelines.

24 A. Well, these guidelines don't deal with that particular issue. I  
25 would hope that it would be made available.

1 Q. In light of the experience in this case, where such material  
2 was not made available at the initial trial when one of the  
3 witnesses was involved and did have a psychiatric history,  
4 what's wrong with specifying that those kinds of facts  
5 should be made available and why isn't it...

6 A. Well, I don't know that there's anything wrong with  
7 specifying that those facts be made available. I know that  
8 these were certainly discussed with prosecutors, have been  
9 brought to the attention of prosecutors at the annual Law  
10 Day that the department has for its lawyers, and one section  
11 of that was prosecutors. It certainly...the new memo was  
12 brought to their attention and that our policy was that of  
13 full disclosure unless it was going to intimidate a witness.

14 Q. So, if I understand you then correctly, that is not in any way  
15 intended to detract from the overriding principle of full  
16 disclosure.

17 A. It's not intended to detract.

18 Q. Can you assist in explaining the last portion of the disclosure  
19 regime relating it to Mr. Coles' concern in his letters that I  
20 posed to Mr. Edwards earlier that there is something  
21 obviously of extreme importance in not disclosing police  
22 reports to defence counsel? First of all, would I be correct in  
23 assuming that police reports include also factual  
24 observations by police officers?

25 A. Yes, I suppose police reports can include factual

1 observations by police officers. It can include suppositions  
2 that they're making, some of which later on they have  
3 discarded and adopted another position on a matter. Some  
4 police officers are copious in their memos to file and you can  
5 follow them through and see how their whole approach has  
6 changed through an investigation.

7 Q. Well, I don't understand the term police report to mean a  
8 memo to a file. I would think police officers may make  
9 many notes either in a notebook or elsewhere as they  
10 proceed along in an investigation without that being  
11 formally included in a "police report".

12 A. Well, the police report that we're referring to and that is  
13 commonly accepted around here is that it would be an  
14 occurrence report and there is a continuing running log of  
15 what has happened and their views as they go along on the  
16 matter, expressions of opinion on some matters that are not  
17 within the purview of the police and really have nothing to  
18 do with the investigation that they're handling.

19 Q. But in cases where the police report includes material  
20 observations of a crime scene, of other matters, why not,  
21 and this is the question, why not have a disclosure regime  
22 making that available as long as extraneous opinions that  
23 could be embarrassing to the officer or the police force are  
24 removed.

25 A. Well, that's what the instruction says.

1 Q So, then if I understand this instruction correctly, it is not  
2 intended, I mean it is intended to fundamentally amend the  
3 earlier instruction of the Deputy that said virtually the  
4 police report will not be given out.

5 A. It amends it, yes.

6 Q And, I take it then that the present regime permits a  
7 prosecutor to give out those police reports at their discretion  
8 subject to reviewing it for removing confidential or  
9 extraneous matters. Would that be...

10 A. That gives...the prosecutor has that discretion, yes.

11 Q And so police reports may now be given to the defence.

12 A. They may be, however, it's my understanding that the police  
13 don't like some of their reports, the fact that they could end  
14 up in defence hands so that the report that we get doesn't...it  
15 given to the prosecutor; it doesn't really have to be vetted  
16 that much.

17 Q I don't understand. If the obligation of Crown counsel is to  
18 provide information pursuant to the directive, what does it  
19 matter where the police like it or not? I mean they, the  
20 police officers...

21 A. It doesn't make any difference, but the police have their file  
22 and what they give to Crown counsel is a brief for Crown  
23 which will contain out of their file what they wish to put  
24 into it.

25 Q And that's what's the present practise now.

1 A. That seems to be the present practise to my understanding.

2 Q. Is that expurgated version that doesn't contain the full  
3 occurrence a concern to you in the Attorney General's office  
4 in the sense that Crown counsel is not getting the  
5 information they need?

6 A. I'm not aware of it having caused any particular concern at  
7 the moment. It's possible that it could in the future.

8 Q. The one last area I'd like to go through with you, if I could,  
9 is this question of disclosure to Mr. Aronson. As you  
10 testified yesterday you were well aware of a letter written  
11 by Mr. Aronson to you requesting disclosure, that he wanted  
12 the report done by Staff Sergeant Wheaton, is that correct?

13 A. Yes.

14 Q. And that, as far as you were concerned, there was a policy  
15 position in the department that meant Mr. Aronson could  
16 not have that.

17 A. Yes.

18 Q. I thought you testified this morning, sir, that that policy  
19 position was, in fact, not formulated until Mr. Coles in a  
20 somewhat, well, leaving aside the characterizations, Mr.  
21 Coles wrote the letters to Mr. Edwards and a final position  
22 on, quote, "police reports" was then taken by the  
23 department. Do you recall that testimony?

24 A. At that time the position was put into the...into a written  
25 form. Before that I had understood that the position of the

1 department and the policy was that the police reports would  
2 not be given to defence counsel.

3 Q. I had understood you to say this morning that there was a  
4 more general kind of discretion prior to it being so-called  
5 written in stone by Deputy Coles.

6 A. Well, I suppose there may have been a... slightly more  
7 discretion on it, but at that point in time I was not satisfied  
8 that I had a full police report on the matter and until I was  
9 satisfied that we had a final police report, I was going to  
10 follow the policy of not providing a police report, and I don't  
11 know after that whether I would have given Mr. Aronson  
12 the report, although subsequently I did agree with Mr.  
13 Edwards that the...he be given whatever Mr. Edwards  
14 thought was necessary.

15 Q. Can you explain why you didn't even, sir, have the courtesy  
16 to write Mr. Edwards, I mean, Mr. Aronson, and say to him  
17 that when a final report was prepared you would consider  
18 his request?

19 A. As I recall it, Mr. Aronson was in to see me and he was told  
20 that when the...a final report was considered received then  
21 we would deal with the request.

22 Q. Well, certainly when he writes the federal  
23 government...when he writes to you on March 13th, he then  
24 writes the federal government on March 26th saying he's  
25 got no cooperation from you. Is it your evidence, sir, that

1           you told him during that time period that material would be  
2           made available to him forthwith?

3           2:51 p.m.

4           A. I told him that when we got the final report, then we would  
5           see what material would be made available to him.

6           Q. And during this time period, I take it you were well aware  
7           there were, in fact, statements, but you did not offer those  
8           statements to Mr. Aronson, is that correct?

9           A. That's correct. I did not offer those statements at that  
10          particular time and he didn't ask for statements. He kept... He  
11          seemed to know what was going on. He seemed to know the  
12          existence of things. He was asking for a report. He wasn't  
13          asking for the statements. I assumed that he knew what the  
14          statements were.

15          Q. Did you ask him? Do you recall having any conversation  
16          saying, "Mr. Aronson, I take it you got those statements"?

17          A. No, from the way he was going on, I assumed that he knew  
18          about them. I considered that this matter at this particular  
19          time was at the investigation stage. That a final report in this  
20          particular matter would then determine, in effect, what would  
21          otherwise be whether a charge would be laid. But, in this  
22          case, as to what action would be taken on the matter.

23          Q. But I don't want to misunderstand you, sir. You're not  
24          suggesting that you formed the opinion or conclusion that Mr.  
25          Aronson had the statements?

1 A. No, I formed the conclusion that he was fully aware of what  
2 was going on, but I assumed... If he had asked for the  
3 statements, as such, I might well have dealt with the matter  
4 differently. But I was not prepared to give him the police  
5 report until... or let him see it until such time as we had  
6 received a final report from the police.

7 Q. And I take it that was your position, even though in broadly  
8 defined terms, the Attorney General's guidelines, as they then  
9 were, called for production of witness statements regardless  
10 of whether there was a request or not, in an ordinary criminal  
11 case?

12 A. In an ordinary criminal case, after a charge had been laid,  
13 then there would be the production of it, and I'm trying to  
14 make the analogy in this case that, though this did not lead to  
15 a charge, but the final report would then allow the  
16 Department to determine what it was going to do and that  
17 would be, in effect, the same as a charge and, at that time, the  
18 decision would be made as to what would be provided to him.

19 Q. Well, Mr. Marshall is the one who is now seeking redress  
20 through his counsel and it is not necessarily the Attorney  
21 General's Department that will be the final arbitrator, you'll  
22 agree? It was for the Minister of Justice, in part, to decide  
23 whether some independent action would be taken at the  
24 federal level.

25 A. At that time, you're talking about?

1 Q. Yes.

2 A. Oh, I was quite...

3 Q. Around the time period.

4 A. I was quite aware that the Attorney General was only, a  
5 matter... and it would be as to what recommendation would  
6 be made to the Minister of Justice. It had to be the Minister  
7 of Justice's decision as to what action he would take.

8 Q. So why not give to Mr. Aronson some of the essential tools he  
9 would need to make effective representations to the Minister  
10 of Justice as to what is the best avenue for his own client?

11 A. Only on the basis of what I have told you. I can't tell you  
12 anything more. You can ask the question a thousand times. I  
13 can't give you a different answer to it.

14 Q. Were you aware that the effect of your own decision was to  
15 make it more difficult for Mr. Aronson to make  
16 representations to Ottawa about what ought to transpire?  
17 Surely that would be apparent to you at the time.

18 A. Well, I thought what Mr. Aronson wanted was an  
19 investigation, a review of the whole matter and that's what  
20 we were embarked upon. Our views were not divergent on  
21 that point.

22 Q. Well, he may have taken different conclusions, and let me  
23 take you to Volume 31 at page 38, to his letter to the  
24 Department of Justice to Ottawa, to Mr. Fainstein, where he  
25 writes at the bottom...

1 A. Page 38, did you say?

2 Q. Yes, and turning to the body of the letter at page 40, the last  
3 paragraph:

4  
5 On behalf of my client, I should like you to  
6 consider this letter as an application for a free  
7 pardon. It is my understanding that a free  
8 pardon is given only when the innocence of a  
9 convicted person is established and is in fact a  
10 recognition of his innocence. In support of this  
11 application, the R.C.M.P. reports of March 16,  
12 1982 and subsequent reports by them are called  
13 in aid.

14 He doesn't even have them, Mr. Gale.

15 A. No, he doesn't have them, but they certainly were available to  
16 the federal government, the Minister of Justice.

17 Q. In order for counsel to be effective, sir, would you agree that  
18 one has to have the information so that you can make  
19 representations effectively, which would draw to the  
20 attention of the federal government why, from your  
21 perspective, you felt a free pardon was more appropriate and  
22 justified on the basis of the reports, even if took a different  
23 view of it. Mr. Aronson would have had to have that.

24 A. Undoubtedly, he would at some stage. At this particular point  
25 in time, we, I was of the view that Mr. Aronson knew what  
was going on. He seemed to be fully aware of what was in the  
case and what had been done and I had no problem in

1 discussing it with him. But, and he was not stonewalled by  
2 me, and I really don't understand Mr. Aronson's comments.  
3 But, no, he was not given the reports.

4 Q And when you say that "he wasn't given the reports," you'll  
5 agree, sir, that he was not given the reports at any time prior  
6 to the reference and the form of the reference being  
7 determined.

8 A. That's correct.

9 Q So his contribution was, of course, made without benefit of  
10 knowing what the contents, or the precise contents of the  
11 reports were. That's obvious, correct?

12 A. His contribution was made without knowing the precise  
13 contents of the reports, yes.

14 Q Now once Mr. Aronson had been given the burden of carrying  
15 forward the application of reference to the Court of Appeal,  
16 did you have any discussions at all with respect to his fees?  
17 And I take it you have recalled one occasion where you  
18 suggested to Mr. Coles that he could be treated the same way  
19 one would treat an appeal to the Supreme Court of Canada, in  
20 undertaking to...

21 A. I made that suggestion to Mr. Coles at one stage, but after  
22 that, I did not become involved in the question of what fee he  
23 would be paid or by whom.

24 Q Were you ever consulted in any way about it or was...

25 A. No, I was not.

- 1 Q. Your advice sought in relation to it?
- 2 A. No, I was not.
- 3 Q. With respect to the question of compensation, do you recall  
4 being consulted, given your position in the Department, as to  
5 what the principles of compensation ought to be, how one  
6 would look at the problem, what the different ways of  
7 viewing it, anything? Were there any discussions of that kind  
8 and character that you participated in?
- 9 A. No, did not participate in anything in compensation except the  
10 initial meeting with Mr. Justice Campbell, where he indicated  
11 when he might be starting or what facilities he might need  
12 and I think I wrote for two reports and that was my  
13 involvement in compensation.
- 14 Q. Do you recall there being any discussions at the highest level  
15 in the Attorney General's office that you were either privy to  
16 or aware of dealing with the policy part of compensation and  
17 the obligation of the Attorney General?
- 18 A. Certainly none that I was privy to and I'm not really aware of  
19 any. I really did not know what was going on in the  
20 compensation area of it. Mr. Coles told me that Mr. Endres  
21 was going to handle it and that was it.
- 22 Q. Did you have any conversations with Mr. Endres?
- 23 A. No, I did not.
- 24 Q. You testified yesterday that you would be concerned, I think  
25 was the term you used, that Mr. Edwards formulated the view

MR. GALE, EXAM. BY MS. EDWARDH

1 that in order to quote "sell the Court of Appeal an acquittal in  
2 this case," he would have to take a position that there was no  
3 miscarriage of justice. Do you recall using the term that you  
4 would be concerned about that kind of view? I think you  
5 said it would be better if he wouldn't ask for a new trial.

6 A. Well, I don't know why he... It bothers me that he would  
7 have to take that tact. I think the Crown is there to put forth  
8 a position and if, unfortunately, the Court doesn't buy the  
9 position you're putting forth, you'll have to take what the  
10 Court gives you. But I don't see the purpose of changing just  
11 to have an acquittal. That might have caused some  
12 awkwardness because, at that point in time, if a new trial had  
13 been ordered, the Attorney General would have had to stay it  
14 and make some comment.

15 Q. You... There's, I suppose, a matter of more substance to Mr.  
16 Edwards' concerns which one could read that he was so  
17 concerned at how the Court would view this situation that he  
18 felt he could only go forward reasonably and say, "Well,  
19 really, this was Marshall's own fault, so we've got to live with  
20 an acquittal." Do you view that reading of the Court as correct  
21 or erroneous?

MR. PINK

22  
23 My Lord, how can he say what the... How can he read the  
24 Court? He wasn't present. He's already said that.  
25

MR. GALE, EXAM. BY MS. EDWARDH

1 MR. CHAIRMAN

2 That's a good point. Mr. Edwards' evidence, as I recall it,  
3 was when he was asked that same question, "How did you arrive  
4 at that?" He says it's a feel you get as a trial lawyer and you  
5 won't find it in the transcript. Now I don't know what that means,  
6 but... I think I do.

7 MS. EDWARDH

8 One of those intangibles that...

9 MR. CHAIRMAN

10 Intangibles that, and that he, his main concern was that  
11 there not be a new trial ordered because that would be, would not  
12 give Donald Marshall, Jr. an opportunity to be heard. Because it  
13 obviously then, the Attorney General would have to stay any  
14 further proceedings.

15 MS. EDWARDH

16 Fine, My Lord. I'll leave that.

17 BY MS. EDWARDH

18 Q. One last area, sir, I'd like to address and that is that raised by  
19 your discussions with the Court with respect to the article  
20 written by Mr. Donham at Volume 32, and there's just one  
21 aspect of it I'd like you to comment on. I take it... I'd like  
22 you to turn to page 179. That there really is no dispute that  
23 the Attorney General performs a very important watchdog  
24 role to insure that matters which are contemptuous are dealt  
25 with and whether it's at the request of the Court or something

1 that the office itself has observed. That's certainly part of the  
2 historic functioning of the Attorney General's office. Is that a  
3 fair statement?

4 A. Yes.

5 Q. And my query to you is that after deciding that the article  
6 itself was, at best, borderline, which I take it really means  
7 that at its highest, it's borderline, you're then asked by the  
8 Chief Justice about a broadcast and I want to just raise with  
9 you this comment:

10 The Chief Justice suggested that the Attorney  
11 General might write to the CBC to request a  
12 transcript of that broadcast in the hope that in so  
13 doing it might have some salutary effect.

14 I take it when you say that "writing would have some  
15 salutary effect," that was your suggestion as opposed to the  
16 Chief Justice?

17 A. I think that's my view of the matter, that he might, that  
18 writing to the... Requesting a transcript might have some  
19 salutary effect. I don't know whether... I don't think the Chief  
20 Justice suggested that.

21 Q. And would you agree, sir, that what is not proper for the  
22 Attorney General to do is to, without reason, write for  
23 transcripts so that there can be "a chilling effect" on the part  
24 of the press? That would be quite beyond what the proper  
25 scope of the Attorney General's duties and obligations are?

1 A. Well, it was not a... I think a suggestion that that might have  
2 that effect but, no, it was not that reason. The Chief Justice  
3 had indicated that perhaps we should get a transcript of the  
4 matter.

5 Q. I'm referring to your reasons now, sir. You said that, in fact,  
6 it was our reason that you thought it might have some  
7 salutary effect, leaving aside the Chief Justice. I'm asking you  
8 whether or not it would be proper in your view for the  
9 Attorney General, not intending to proceed or to damage, but  
10 to write and call for transcripts so that it would have a, quote,  
11 "chilling effect" upon the media?

12 A. Well, if the Attorney General has a problem with the media, it  
13 should be taken up in a proper legal position. I guess the.. It's  
14 not a, it's not proper to carry a cudgel just simply to beat the  
15 press, media into submission.

16 Q. And it's not proper to demand transcripts in circumstances  
17 where the only purpose is that it'll have a chilling effect on  
18 the media.

19 A. Well, it was not... I guess it was a view that I expressed at the  
20 time. It was not that it might have that, but the purpose for  
21 writing for the transcript was to review it so we would have  
22 the transcript and review it to see whether or not, in fact,  
23 there was anything of a contemptuous nature.

24 Q. And so your evidence then, sir, is that your purpose was not  
25 to have a chilling effect.

MR. GALE, EXAM. BY MS. EDWARDH

1 A. That was not my purpose. I guess I gratuitously added that it  
2 might have a chilling effect on it.

3 Q. I'm sorry, I...

4 A. I say I guess I gratuitously put in the memo that it might  
5 have a chilling effect on the media. Certainly...

6 Q. And that would be salutary.

7 A. Well, yes.

MS. EDWARDH

9 Those are my questions. Thank you.

MR. CHAIRMAN

11 Mr. Pugsley?

EXAMINATION BY MR. PUGSLEY

12  
13  
14 Q. Mr. Gale, I'm Ron Pugsley and I'm acting for John MacIntyre.  
15 I want you to direct your attention to the meeting you had  
16 with John MacIntyre at the Attorney General's Department in  
17 April of 1982. Do you recall what day that was, sir, what day  
18 of the month it was?

19 A. My own view is that it was April 15th, because it was the  
20 16th that I started making inquiries. So I'm quite, I'm  
21 satisfied in my own mind that it was the 15th of April.

22 Q. And that would be Thursday, the 15th of April.

23 A. Yes, it would have been a Thursday.

24 Q. It's my instruction that Chief MacIntyre came to Halifax for  
25 the purposes of seeing the Attorney General, arrived at the

1 office at nine o'clock in the morning, happened to bump into  
2 you in the hall, had a conversation with you concerning the  
3 reason for his visit and you advising him the Attorney  
4 General was out of town, you inquiring as to what was the  
5 nature of the reason for the visit, and the Chief describing the  
6 Marshall matter, and you saying you had some jurisdiction in  
7 that area, and so that's the reason you happened to meet with  
8 him. Does that sound like a reasonable...

9 A. That is not my recollection. My recollection is that he arrived  
10 and I was told that he wanted to see me and that I saw him.

11 Q. I see.

12 A. My recollection does not accord with his.

13 Q. It's further my instruction that the reason he advanced to you  
14 for his visit was the leaks that had been appearing in the  
15 media and also the criticism of the Sydney Police Force, in  
16 particular, that had been appearing in the media. Do you  
17 recall him expressing concern to you about that?

18 A. Not specifically at that meeting. I know that concern was  
19 expressed at some stage about the leaks in the media, that  
20 there was far too much information going to the media. But  
21 I'm not sure who raised it with me.

22 Q. I see. Are you able to say that he definitely did not bring  
23 that topic up at the meeting, or that you just do not recall?

24 A. I can't say that he, definitely that he did not bring it up. As  
25 I've testified before, the main thing that remains in my mind

MR. GALE, EXAM. BY MR. PUGSLEY

1 from that meeting is the fact that two statements were  
2 brought forth that I had not recalled hearing of before and  
3 that's really what holds that particular meeting in my mind.  
4 If that hadn't occurred, I don't think I could say anything  
5 about the meeting.

6 Q. The statements according to the notes of Frank Edwards were  
7 the statements taken in November, 1971 of Greg and Mary  
8 Ebsary, is that your recollection of the statements that were  
9 referred to?

10 A. I believe that those were the statements. The passage of time,  
11 I've had to reconstruct that and I guess the best I can do is to  
12 accept that Mr. Edwards' note on that is correct, that those  
13 were the two statements. Because going through the file, it  
14 appears that those statements would not have been known to  
15 me at that particular time from the reports that I had gotten.

16 Q. Yes, and you had already received the report of Harry  
17 Wheaton that was furnished some time in March.

18 A. Yes.

MR. PUGSLEY

19  
20 Thank you, Mr. Gale. That's all the questions I have.

MR. MURRAY

21  
22 No questions.

EXAMINATION BY MR. PRINGLE

23  
24 Q. Mr. Gale, my name is Al Pringle. I have a few questions for  
25 you on behalf of the R.C.M. Police. Much less, I can happily

1 say, since my friend, Ms. Edwardh, has examined you. And  
2 we'll try and keep it to new areas, My Lord. With respect to  
3 the matters in 1982, Mr. Gale, I draw your attention to  
4 Volume 34 at page 109.

5 A. Yes, I have it.

6 Q. Have you got that? That's a letter to you of June 3rd, 1982  
7 from Superintendent Christen, correct?

8 A. Yes.

9 Q. And the last paragraph in that reads:

10 As this completes our investigation into this  
11 matter, your further direction will be awaited.

12 Correct?

13 A. Correct.

14 Q. Did you ever give any further direction to Superintendent  
15 Christen with respect to the matters of looking at the Sydney  
16 City Police conduct?

17 A. No, I did not give him any further direction. They told me  
18 their investigation in the matter was complete. I assumed  
19 that they had investigated what they felt had to be  
20 investigated.

21 Q. Did you ever give the R.C.M. Police any further direction with  
22 respect to the matters of the Seale/Marshall matter at all  
23 after June of 1982?

24 A. I think the only advice after that was the, communicating to  
25

1           them that a meeting was held with Mr. Rutherford, that Mr.  
2           Edwards would be looking after the matter.

3           Q.   On the reference.

4           3:15 p.m.

5           A.   On the reference.

6           Q.   Right.

7           A.   I suppose then the next thing is the later letter asking them  
8           to give us their comments on the police practices at the time.

9           Q.   Yes.

10          A.   And also advising them that the Ebsary matter was part and  
11          parcel of their mandate.

12          Q.   No, but before that there was one other time that they came  
13          to see you and asked your advice as to whether there was  
14          any further direction, and I refer you to page 113 of Volume  
15          34. Have you got that?

16          A.   This is the handwritten memo.

17          Q.   Yes. Do you recall having a meeting with the acting CIBO  
18          officer on September of 1982, that would be possibly Mr.  
19          Zinck? Do you recall being asked...

20          A.   Well, I don't recall it. I have met with Inspector Zinck or  
21          now Superintendent Zinck.

22          Q.   Right.

23          A.   From time to time, yes, but I can't tell you the dates.

24          Q.   Okay. The contents of that memo which is for September  
25          24th, 1982, is that the RCM Police were going to discuss with

MR. GALE, EXAM. BY MR. PRINGLE

1 Mr. Gale on September 24th, 1982, as to whether there was  
2 anything further in the...the present standing of the file,  
3 correct? And the note that we see at the bottom, and I'll  
4 just read it to you and ask you to comment on it, is "Spoke  
5 with the acting Criminal Investigation Officer, our file to be  
6 concluded unless further investigation requested by Crown."  
7 Do you recall such a meeting with the acting Criminal  
8 Investigation Officer and do you recall telling him that there  
9 was nothing further to be done unless there was further  
10 investigation requested by the Crown?

11 A. No, I don't recall making that statement.

12 Q. You don't keep any notes.

13 A. On that particular point. No, there are no notes kept of those  
14 meetings.

15 Q. You don't deny that the meeting took place?

16 A. I don't deny it took place. I can't tell you if it did or didn't.  
17 I have no reason to...

18 Q. Suspect that it didn't.

19 A. To suspect that it didn't. If the CIB officer wasn't available  
20 from time to time, the assistant would come over.

21 Q. Okay. Thank-you. You had at this time, I believe, you  
22 testified.

COMMISSIONER POITRAS

23  
24 Excuse me, Mr. Pringle.  
25

MR. GALE, EXAM. BY MR. PRINGLE

1 MR. PRINGLE

2 Sorry.

3 COMMISSIONER POITRAS

4 What is the date of that meeting, please?

5 MR. PRINGLE

6 The date indicated on the memo, My Lord, on page 113 of  
7 Volume 34 which is Exhibit 99 is the 24th of September, 1982,  
8 that's found in the middle paragraph, "Would discuss with Mr.  
9 Gale and advise you on 82-09-24." Now, that's an assumption that  
10 the meeting took place on the same day in fairness to the witness.

11 MR. CHAIRMAN

12 Well, if you move to the next line it would indicate it did.  
13 '82.

14 MR. PRINGLE

15 Yes, that's quite so, My Lord, the next line indicates that it  
16 did take place on that day.

17 MR. CHAIRMAN

18 Or 28th.

19 MR. PRINGLE

20 28th, the 28th.

21 Q. And you have no recall of that, Mr. Gale, at this time?

22 A. No, I have no recall of it. I can only say that if they asked  
23 about it it was my view that the matter was with Frank  
24 Edwards and if he needed more investigation he would tell  
25 them.

MR. GALE, EXAM. BY MR. PRINGLE

- 1 Q. Right. What were you asking the RCM Police to do in May  
2 13th, 1983, and I refer you to Volume 20, page 4?
- 3 A. Volume 20.
- 4 Q. Yeah.
- 5 A. Page 4.
- 6 Q. Yes, please. In particular the third paragraph and you  
7 talked about this yesterday and I must say I was a bit...I  
8 didn't understand exactly what it was that you said that you  
9 were asking the RCM Police to look at in May of 1983 by  
10 that memo.
- 11 A. I was asking them to give us their views as to the nature of  
12 the investigation of their police conduct originally, whatever  
13 views they had on the propriety of the practises and  
14 procedure at the original investigation.
- 15 Q. Yes. And you would have taken care in writing that memo  
16 to use concise words to convey whatever direction you  
17 wanted to the RCM Police?
- 18 A. Well, I had spoken to Superintendent Christen on the matter  
19 and he wanted a letter on it. I'm not sure that I...the words  
20 were chosen with...to stand up under microscopic  
21 examination, because Superintendent Christen had already  
22 verbally been advised as to what we were looking for.  
23 Something...
- 24 Q. What were you looking for? Were you asking them to do  
25 anything besides read their files?

MR. GALE, EXAM. BY MR. PRINGLE

1 A. Well, I was asking them to give us their opinions.

2 Q. No, but were you asking them to do that on the basis of  
3 anything other than reading their files, reviewing what  
4 pieces of paper they had accumulated the previous year?

5 A. I was asking them to give us their opinions. Whether that  
6 be by reading their file or by anything else that they had in  
7 their knowledge.

8 Q. Specifically, were you asking them or do you state here that  
9 you intended to ask them to conduct any further  
10 investigation as a result of that letter of May 13th, 1983?

11 A. I wasn't asking them to conduct further investigation. I  
12 asked them for their...their views on the matter.

13 Q. Fine, thank-you. Because at that time, and I believe you  
14 have testified earlier, you had in mind there would be some  
15 kind of an inquiry and it was your thoughts that possibly  
16 any investigation with respect to conduct would be done  
17 through the Police Commission and not the RCM Police. Is  
18 that correct?

19 A. That's right, because at that time I had no reason to suspect  
20 in my own mind that there had been a...anyone held the  
21 view that there had been any criminal conduct.

22 Q. Exactly. I'd like to refer you to Volume 32 at page 209.  
23 That's Exhibit 125. 209. Now, that's a handwritten note  
24 dated July 8th, 1983. It refers to a meeting between  
25 "Gordon Gale, Martin Herschorn and I", and "I," I believe, is

1 the Attorney General at the time, Mr. How, and I think he  
2 testified to that. Do you recall the meeting of July 8th, '83?

3 A. Well, I know there was a meeting with the Attorney General  
4 to discuss, I think, the memorandum that Mr. Herschorn had  
5 prepared as to...

6 Q. Yes. And the notes reads, in part, "Decided not to press any  
7 charges against Marshall or the other witnesses and will  
8 hold action re the Sydney police force until we know the  
9 outcome of the civil action Marshall has brought against  
10 them." Do you recall that being discussed?

11 A. I know that the Attorney General then had the view that an  
12 inquiry would not be appropriate until such time as all legal  
13 matters affecting the case were disposed of, and I suppose  
14 at that time that that was the action that was...

15 Q. Including the civil action. You thought that was a matter  
16 that should...

17 A. Well, the Attorney General held the view that the...he was  
18 not going to...

19 Q. Okay.

20 A. ...hold an inquiry until any legal proceeding involving this  
21 matter was completed.

22 Q. I'd like to go back in time to 1971 for a bit and just talk  
23 about some of the matters there and some of the evidence  
24 you gave with respect to that. I gather, sir, that you're not  
25 really certain as to exactly when you assumed the duties

1           that Judge Anderson had held as director of criminal. You're  
2           not exactly sure when you started doing that work.

3       A.    I know that when he left after some very little time I asked  
4           what would happen with the...the police matters and the  
5           Deputy told me, well, just continue on and try and deal with  
6           the matters until some decision is made on it.

7       Q.    Who was dealing with it? Who was dealing with it, you or  
8           someone else?

9       A.    Well, there was myself. There may have...I may have  
10          involved one or two other members of the department, and  
11          certainly there was the Deputy.

12      Q.    Uh-hum.

13      A.    Dealing, I...to my recollection, with inquiries on police  
14          matters.

15      Q.    You don't have a clear recall of those days, I take it.

16      A.    No, I have not been born with the facility of recalling that  
17          long ago, quite frankly.

18      Q.    But you did reply to the Chief Justice yesterday on a specific  
19          question that you thought at the time, you understood, that  
20          all the correspondence was going to the Deputy Attorney  
21          General at the time, Mr. MacLeod.

22      A.    Oh, I know that was the practise in the department at that  
23          time that all the correspondence went into Mr. MacLeod's  
24          office and it was distributed out to the members of the  
25          department as he saw fit.

MR. GALE, EXAM. BY MR. PRINGLE

1 Q. And you gave that evidence at Volume 75, page 13341. But  
2 I'd like to refer you to some evidence that's given by Mr.  
3 MacLeod when he testified before the Commission. And this  
4 is found in Volume 39, pages 3718 and 3719. Now, basically  
5 Mr. MacLeod testified that, in fact, when he took over the  
6 job as Deputy, he inherited a situation where all the  
7 correspondence was coming to him. He found that workload  
8 a bit too much, so he set up the director of criminal and the  
9 director of civil, and so on, for the very purpose, in part, of  
10 having the correspondence going through them. So I  
11 suggest to you that at the time in 1971 the mail, indeed,  
12 would be coming in to the various directors and not directly  
13 to the Deputy.

14 A. I can only go by what I recall of the matter and that the  
15 mail coming in went to the Deputy's office and then he  
16 would distribute it originally to...it would be sent off to the  
17 persons dealing with it, and at a later stage, and I don't  
18 know exactly when, he would then have his secretary  
19 give...after he had, perhaps, had seen it, I don't know  
20 whether he looked at it all or not, give the criminal matters  
21 to Mr. Anderson and the civil matters, I believe, to Mr.  
22 Cavanaugh at that time.

23 Q. All right. Were you aware, sir, and I'm referring to were  
24 you aware in 1971, that the RCM Police were called in by  
25 the Attorney General's Department...

1 A. No, I was not aware of it.

2 Q. Judge Anderson testified before the Commission here that  
3 he felt that that occurrence was common knowledge within  
4 the group, the criminal law group at the department. Did  
5 you ever discuss that?

6 A. Well, there was not a criminal law group within the  
7 department.

8 Q. Well, let's take the group then of the senior people like  
9 yourself, Mr. Anderson and the few that you've described  
10 here...earlier here today that would be there. Judge  
11 Anderson thought it was common knowledge within that  
12 group, I assume, that the RCM Police had gone to Sydney.

13 A. Well, I don't...

14 Q. That's in Volume...

15 A. ...have any knowledge of it and I am quite satisfied that I  
16 never knew anything of it. I don't...there is nothing in this  
17 matter that twiggged anything when I first heard of the  
18 reinvestigation and that was a lot closer to the matter then  
19 than it is now, but I found it very difficult to try and  
20 assume, hold the fort position of Judge ...

21 Q. Yes, we're not talking about that.

22 A. When Judge Anderson left, because with criminal matters I  
23 found that he kept those to himself and very...he was very  
24 close...

25 Q. Right.

1 A. to his chest about about them.

2 Q. He also testified, Mr. Gale, and this is Volume 50, page 9150  
3 that he would talk with you three to four times a day about  
4 various matters, do you recall that, having that much contact  
5 with Mr. Anderson in 1971, Judge Anderson?

6 A. Oh, I can't recall having contact three or four times a day  
7 with him about criminal matters. Certainly, there is a  
8 practise of getting together in a coffee break time, Judge  
9 Anderson lived on the way that I took home and he was  
10 with me every evening getting a lift home. I would have  
11 reason to contact him about some provincial summary  
12 conviction matter or about some appeal.

13 Q. Yes. You agree that this matter in 1971 of somebody coming  
14 forward and saying someone else did the murder would be  
15 unusual?

16 3:30 p.m.

17 A. Yes, it would be unusual.

18 Q. Would you expect it to be discussed amongst the senior  
19 people in the Department if they were seeing each other three  
20 or four times a day, driving home with each other, and so on?

21 A. No, I would not have expected it to be discussed by Judge  
22 Anderson, because he was very close-mouthed about what  
23 was going with police investigations. And if I didn't need to  
24 know about it, I certainly wasn't told about it.

25 Q. But it's his testimony, and this is Volume 50, page 9142,

1 9151, 9139, that he thought it was common knowledge and  
2 that it, in fact, had been discussed. But you weren't privy to  
3 any of those discussions, if they did take place.

4 A. If they took place, I certainly did not know about them.

5 Q. Fine. Are you aware or were you ever aware that Judge  
6 Anderson was aware of the results that the Department, the  
7 Attorney General's Department, through Judge Anderson, was  
8 aware of the results of what the R.C.M. Police did in Sydney in  
9 November of 1971?

10 A. No, because I knew nothing of the matter. I knew nothing of  
11 it until the reinvestigation and, at some stage there, of finding  
12 out.

13 Q. You were never told that either, what the results were.

14 A. No, I was not told what the results were.

15 Q. And for my friend's sake, I'm referring to Volume 50, page  
16 9142, 9147, and 9148. Were you ever aware of what the  
17 mandate was? You've talked about discussions with Mr. Coles  
18 and so on about the R.C.M. Police in 1971. Were you ever  
19 aware of what they were asked to do, what Al Marshall was  
20 asked to do in 1971 before he went to Sydney?

21 A. No, I don't know what he was asked to do. I was not aware of  
22 the matter and I haven't been able to find any written  
23 material to indicate what the mandate was.

24 Q. Well, I suggest to you that what he was asked to do, and this  
25 is Judge Anderson's testimony, was to do a polygraph and

1 nothing more, that that witness recalled.

2 MR. PINK

3 My Lord, Mr. Gale has said, I don't know how many times in  
4 the last minute, that he doesn't know anything about what  
5 happened in 1971. How can my friend keep asking him, putting  
6 these propositions when he's already said he doesn't know what  
7 occurred?

8 MR. PRINGLE

9 Well, I think, in part, I keep asking him because I recall  
10 some reference this morning about some discussion that this  
11 witness said he had with Mr. Coles about the 1971 matter and so  
12 on.

13 MR. CHAIRMAN

14 That's subsequently.

15 MR. PRINGLE

16 That's subsequently.

17 MR. CHAIRMAN

18 In the eighties.

19 MR. PRINGLE

20 That's correct, My Lord, and I did ask him if at any time he  
21 knew what the mandate was. However, he's answered that he did  
22 not at any time.

23 MR. CHAIRMAN

24 He didn't know.

25 MR. PRINGLE

1 Know what the mandate was and I won't pursue that any  
2 further and I suppose, in a way, I was trying to get some  
3 reference on the record to what the mandate was. My friend is  
4 quite right in rising.

5 MR. CHAIRMAN

6 That's right. It' just shows how prudent and alert your  
7 learned friend is. He picked it up before I did.

8 BY MR. PRINGLE

9 Q. One further area, Mr. Gale, in Volume 32 and I refer to page  
10 302 and that's Exhibit 125. Actually on page 301, Mr. Gale,  
11 there's a title on this document. It's called "PRESS RELEASE  
12 CONCERNING THE CASE OF DONALD MARSHALL, SECOND  
13 DRAFT, JANAUARY 17, 1984." Did you have anything to do  
14 with the first, second, or third draft press release of January,  
15 1984 by the Department?

16 A. No, I did not.

17 Q. Have you ever seen them before?

18 A. I can't recall seeing it before, quite frankly.

19 Q. You don't recall being consulted in any way with respect to  
20 the matters...

21 A. Oh, I may have been asked questions, but I didn't... I'm not, I  
22 wasn't aware there was a press release. Certainly I'm aware  
23 that the Attorney General made various comments at many  
24 times on the Marshall case. But this, I have no rec... I was not  
25 consulted on this one. I may have been asked questions but

1 it was not a case of doing any... knowing that it was a press  
2 release.

3 Q. One thing that it probably does help us confirm at page 306,  
4 in the third draft of the press release of January 17th, 1984 is  
5 the reference to the Attorney General's files concerning the  
6 prosecution of Donald Marshall being destroyed in January of  
7 1979 after a period of seven years in accordance with the  
8 approved records retention schedule. Were you asked about  
9 that?

10 A. Well, the question was asked by the Deputy Attorney General  
11 and the records people went through and found out that the,  
12 those files had been destroyed at that time in accordance with  
13 the retention schedule.

14 Q. One further reference, and I guess, again, this is probably for  
15 the record, but I think it needs to be put on the record.  
16 Volume 40, which is Exhibit 40. It's the R.C.M. Police contract,  
17 My Lord.

18 A. I don't have it.

19 Q. Perhaps I could just read to you what I have. I'm referring to  
20 page 29. Have you got it now?

21 A. I have it.

22 Q. Okay. Volume 40, page 29, My Lords, is the contract, R.C.M.  
23 Police contract in existence at the relevant time 1982, is that  
24 correct, Mr. Gale?

25 A. Yes, I believe so. It says it's entered into on the third day of

1 November '81.

2 Q Right. Refer to page 33, Paragraph 7. And that reads:

3 The provincial police services shall not without  
4 the consent of the Solicitor General be required  
5 to provide municipal police services in any  
6 municipality having a population of more than  
7 1500.

7 And you understand to be correct?

8 A. Yes, there is this 1500 limit that if a municipality had over  
9 that, then it would have to make some arrangement for  
10 policing, whether it be by the R.C.M.P. or creating its own  
11 police force.

12 Q Yes, and Paragraph... Subparagraphs 2 and 3 of Paragraph 7  
13 also deal with that aspect, is that correct?

14 A. Yes.

15 MR. PRINGLE

16 Those are all the questions I have. Thank you.

17 MR. ROSS

18 My Lords, I assure you I have only a few questions.

19 **EXAMINATION BY MR. ROSS**

20  
21 Q Mr. Gale, I am the Anthony Ross you heard about and I'd like  
22 to ask you one or two questions on behalf of Mr. Seale. It's  
23 about the 1982 investigation. I guess you are aware that Mr.  
24 Seale was particularly concerned about the reputation of his  
25 son?

1 A. Yes, I'm aware of that.

2 Q. And, as a matter of fact, he came to see you about it at one  
3 point.

4 A. He saw myself at one point. He saw the Attorney General, too.

5 Q. Yes, and as a matter of fact, he also called you from time to  
6 time?

7 A. I have received calls from him, yes.

8 Q. And I take it from what we have seen that it was the position  
9 of the Department that there was no reputation to be  
10 protected, is that a fair statement?

11 A. No, I don't think that's a fair statement.

12 Q. Then I take it, sir, then there was a reputation to be  
13 protected, am I correct then?

14 A. I don't...You've posed a question that puts one in a Catch-22  
15 situation. There was the matter of having the matter  
16 reinvestigated. He wanted some type of counsel to act on  
17 behalf of his son because he wanted his reputation protected.

18 Q. I see, and I take...

19 A. And we indicated that we were not in a position to do that,  
20 that the evidence would be called as it appeared. If he  
21 wanted someone there, then perhaps he might ask the Court  
22 on the reference to give him some type of standing so that  
23 counsel could be present on behalf of the Seale family and  
24 Sandy Seale.

25 Q. Sure, and that was actually communicated to Mr. Seale, wasn't

1 it?

2 A. To the best of my knowledge, it was, yes.

3 Q Yeah, but we all recognize that there was no way that he was  
4 going to get standing. Was that a nice way to tell him to go  
5 away?

6 A. I don't think it was... on a reference as we originally thought  
7 of it, there might well be an ability for him to have some  
8 standing.

9 Q I see, and that was the genuine position of the Department?

10 A. It was not a case of trying to deceive Mr. Seale, but Mr. Seale  
11 was a very emotional man and he was quite concerned with  
12 his son's reputation and I could well sympathize with him on  
13 that, but he seemed to, at one point, believe that the  
14 Department would not go out of its way to damage his son's  
15 reputation, but at the same time, he would come in and he did  
16 come in to the Attorney General's office with tape recordings  
17 of media broadcasts and calls that he had from the media. So  
18 Mr. Seale's emotions seemed to be being dragged back and  
19 forth continuously on the matter.

20 Q I appreciate all of that but what I can't get past is the  
21 information, the advice given to him by the Attorney  
22 General's Department to go and get a lawyer and see whether  
23 or not he could get standing. Were you serious?

24 A. I was serious on the view that if the matter was going to go  
25 ahead as we had thought it was, that he might well have

MR. GALE, EXAM. BY MR. ROSS

1 standing in that regard. After that, he saw the Attorney  
2 General and I did not feel it was my right to say anything  
3 more than what the Attorney General had said on it. I guess  
4 that's the best I can answer you on that point.

5 Q. I see. I note in Volume 17, Frank Edwards' notes, at page 15,  
6 that there's a note on November the 8th, 1982 and Mr.  
7 Edwards writes:

8  
9 Gordon Gale called this morning to advise that he  
10 has just spoken with Mr. Seale. Latter concerned  
11 that I was not being straight with him and  
12 wondering what I was going to do to protect his  
13 son's reputation.

14 Now this is November, 1982. I understand the reference was  
15 heard in January of 1983. Consistent with your recollection?

MR. CHAIRMAN

16 December.

MR. ROSS

17 Q. Sorry.

18 A. At which page are you reading from, Mr. Ross?

19 Q. Page 15 of Volume 17.

20 A. 15?

21 Q. Yes. So the reference was in December of '82.

22 A. Oh, yes, I see that.

23 Q. Yeah, but between this inquiry of Mr. Seale about the  
24 reputation of his son and the time of the reference, you would  
25 agree with me there was very little, if anything, could be

1 done.

2 A. There was little, if anything, but he seemed to feel that Mr.  
3 Edwards was not dealing with it properly. And since I was  
4 not dealing with the reference, I asked Mr. Edwards to talk to  
5 Mr. Seale and see what, if anything could be done on the  
6 matter.

7 Q. But isn't it fair that by that time you had known that Mr.  
8 Edwards and Mr. Seale weren't seeing eye to eye and there  
9 was very little that could be accomplished by Mr. Edwards  
10 dealing with Mr. Seale?

11 A. Well, I know that there were times when Mr. Edwards and  
12 Mr. Seale did not see eye to eye. Mr. Seale seemed to  
13 vacillate back and forth on the matter. But Mr. Edwards had  
14 conduct of the matter and I thought he was the one he should  
15 talk to and, if there was some misunderstanding, that that  
16 would hopefully get back, could be dealt with by the Attorney  
17 General, if there was something that could be done.

18 Q. I see. I don't propose to pursue that point. Coming back very  
19 quickly on just two short sections on this disclosure policy.  
20 You indicated that as far as the policy manual, the Attorney  
21 General's policy manual for prosecuting officers, that this  
22 information could be obtained through the Freedom of  
23 Information Act? That was your evidence?

24 A. It was my evidence that I saw no reason not to disclose the  
25 matter because I saw no way that one could properly say that

1 it was protected by the Freedom of Information Act.

2 Q. Wouldn't it be easier just to put two copies in the barrister's  
3 library?

4 A. Well, it may have been easier to put the notice in the Nova  
5 Scotia Barrister Society Law News. Why it wasn't done, I  
6 don't know.

7 Q. I see. And as far as disclosure itself is concerned, it still  
8 appears as though disclosure is discretionary. Something that  
9 is left up to the prosecuting officer. Is there any appeal from  
10 the discretionary decision of the prosecuting officer as  
11 regards to what to disclose and what not to disclose?

12 3:45 a.m.

13 A. Well certainly the Attorney General has the final decision as  
14 to what will be disclosed or won't be disclosed and certainly  
15 one can take it up with the Attorney General.

16 Q. Wouldn't it be a lot more practical, then, to have the Director  
17 of Prosecutors to enclose a list of the items that they do not  
18 propose to disclose so that defence counsel could then know  
19 what they want to argue about?

20 MR. PINK

21 My Lord, my friend, first of all, I think has misrepresented  
22 the terms of the policy. The policy is clearly written in terms  
23 that "shall", the Crown shall make full disclosure and if there's  
24 not going to be disclosure then that has to be referred to the  
25 Director and I think everything else flows from that.

1 CHAIRMAN

2 That's true. What is it you're after, Mr. Ross?

3 MR. ROSS

4 There's just one or two things on disclosure for the benefit  
5 of the practice.

6 CHAIRMAN

7 I realize that. And we've accomplished a great deal.  
8 Everyone, if any defence counsel in Nova Scotia is not aware of the  
9 policy now then they don't deserve to be defence counsel.

10 MR. ROSS

11 Well that might be true, My Lord, but as a matter of fact  
12 some of us practice here and there are some of these intangibles  
13 which...

14 CHAIRMAN

15 Well, the intangibles, we can't make anything on that.

16 MR. ROSS

17 I appreciate that and I'm not going to pursue it, My Lord.

18 Q. Tell me something, Mr. Gale, are you aware of a study that  
19 was done between 1975 and 1979 of the administration of  
20 criminal justice in the Province of Nova Scotia?

21 A. Between 1975 and 1979?

22 Q. Yes. Yes. My understanding is that...

23 A. I have no recollection of one in that time.

24 Q. No recollection of any study.

25 A. Not within that time frame, no.

press

# Margaret E. Graham Discovery Service

298 PORTLAND STREET, DARTMOUTH, N.S. B2Y 1K4  
PHONE: 469-5734

To: All Solicitors

From: Margaret Graham

Re: Daily Transcripts

In Volume 76, the headers at the top of pages 13606 to 13610 should have read EXAM. BY MR. WILDSMITH, instead of EXAM. BY MR. ROSS. Attached are the correct pages for insertion into your volume.

I apologize for any inconvenience this has caused.



M. Graham

MR. GALE, EXAM. BY MR. ROSS

1 Q. I see, I guess then I can't ask you anything about it.

2 MR. ROSS

3 Thank you very much, Mr. Gale.

4 EXAMINATION BY MR. WILDSMITH

5 Q. Mr. Gale, my name is Bruce Wildsmith and I'm here for the  
6 Union of Nova Scotia Indians. I'd like to begin by turning  
7 back to your job description, Exhibit 160, and to Item 3 on  
8 that. You testified yesterday at page 13283 in the transcript  
9 that Item 3, you thought was added at a later date after your  
10 original appointment in 1972?

11 A. Yes.

12 Q. Perhaps you could indicate when it was, to the best of your  
13 recollection, and how and why it came to be added to your job  
14 description?

15 A. The only reason I know it was added to my job description is  
16 because I was starting to deal with matters concerning native  
17 policing.

18 Q. And at whose direction was it added to your job description?

19 A. Well, this is just a list of duties prepared by the Deputy  
20 Attorney General. I presume he put it there, it was prepared  
21 by him.

22 Q. So you believe that it came from the Deputy Attorney  
23 General, Mr. Coles?

24 A. Yes.

25 Q. And can you give me an approximate date?

MR. GALE, EXAM. BY MR. WILDSMITH

1 Q I see, I guess then I can't ask you anything about it.

2 MR. ROSS

3 Thank you very much, Mr. Gale.

EXAMINATION BY MR. WILDSMITH

4  
5 Q Mr. Gale, my name is Bruce Wildsmith and I'm here for the  
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23 General, Mr. Coles?

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25 Q. And can you give me an approximate date?

MR. GALE, EXAM. BY MR. ROSS

1 A. I think it's probably around 1975, quite frankly.

2 Q. And how long did it continue to be one of your duties?

3 A. Oh, it has been stuck on my job description for some time.

4 I'm not quite sure. It's not there anymore. I had long ago  
5 made it plain to the Deputy Attorney General that it was not a  
6 function that I saw myself performing. That I saw myself  
7 acting in the criminal area and that those things dealing with  
8 policing, those things that might be criminally oriented, I  
9 could see him assigning to me, but those matters which were  
10 constitutional or civil in nature, I didn't have the expertise to  
11 deal with them, nor the resources to be able to handle them.  
12 And that whenever those arose, I made arrangements that  
13 they be dealt with the Deputy by people who had some  
14 knowledge in those fields.

15 Q. If I understand you correctly, you're saying that this was  
16 assigned to you without your, without consultation or  
17 agreement on your part.

18 A. That's correct.

19 CHAIRMAN

20 Job descriptions are often prepared to catching the eye of  
21 Treasury Board, I think.

22 A. Well that is more so, My Lord, in regard to the Exhibit 159.

23 CHAIRMAN

24 It sometime...

25 MR. WILDSMITH

MR. GALE, EXAM. BY MR. WILDSMITH

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25 MR. WILDSMITH

1 Fair enough.

2 Q And I think you partly answered one of my other questions  
3 which was when it says all legal matters relating to native  
4 people, it doesn't just include criminal matters but it includes  
5 constitutional matters, family law matters, land claims, treaty  
6 rights, taxation, every matter.

7 A. Yes. And, quite frankly, I made my objections known to Mr.  
8 Coles and whenever any matter came up that was not within  
9 a criminal area, there was no problem in getting it given to a  
10 person who dealt in that area, or had more expertise in it.

11 Q I take it you would agree that it's somewhat anomalous for a  
12 Director of Criminal to have responsibility for all matters  
13 concerning Indians?

14 A. Yes.

15 Q Do you think there was an assumption on Mr. Coles' part that  
16 all Indian legal matters are criminal?

17 COMMISSIONER EVANS

18 Why don't you ask Mr. Coles?

19 A. Well, I don't know what the assumption on Mr. Coles' part  
20 was at the particular time. I think you have to ask him what  
21 that assumption was.

22 Q Fair enough. And can you indicate whether you've had any  
23 contact with native people outside of your official duties?

24 A. No, I have not had any contact with native people outside my  
25 official duties.

1 Fair enough.

2 Q. And I think you partly answered one of my other questions  
3 which was when it says all legal matters relating to native  
4 people, it doesn't just include criminal matters but it includes  
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25 official duties.

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2 Volume 31 at page 126 written by Mr. Edwards to Mr.  
3 Herschorn and, in particular, to the last couple of lines at the  
4 bottom of page 126. There Mr. Edwards is saying that, "The  
5 police investigators certainly were not motivated by malice  
6 toward either the accused or, has been suggested in some  
7 reports, prejudice towards his race." Was that a statement  
8 that you agreed or disagreed with?

9 A. It's a statement made by Mr. Edwards, who is from the  
10 Sydney area, that I accepted. There was nothing to indicate  
11 that there, it was otherwise to me. I...

12 Q. You accepted it at face value?

13 A. I just accepted it at face value. He, in my view, was in a  
14 better position to know that I.

15 Q. Was that one of the subjects in your mind for discussion in  
16 calling Mr. Edwards in for the meeting, I believe January the  
17 25th or 6th?

18 A. No, that, I suppose, is something that might have been raised  
19 at it, but that meeting soon came down to a contest of the  
20 Crown will offer a position, the Crown will offer no position...

21 Q. Yes, and I think you've gone over that in great detail with  
22 other counsel and my only question to you was whether that  
23 was a subject that was on your mind for discussion with Mr.  
24 Edwards to verify or otherwise.

25 A. No, it was not on my mind to verify it at that meeting.

MR. GALE, EXAM. BY MR. WILDSMITH

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24 Edwards to verify or otherwise.

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1 Q. Did you have any knowledge of any investigation or any  
2 information on this subject of possible prejudice by police  
3 investigators?

4 A. No, I had no knowledge of any specific investigation on the  
5 matter. I accepted from Mr. Edwards the statement that he  
6 made because I thought he was...

7 Q. If we assume..

8 A. In a better position.

9 Q. If we assume that Mr. Edwards had no more information that  
10 you had on the subject, would you agree with me that it  
11 would be improper to represent that or make it a point of  
12 emphasis as he suggests in the letter to the Appeal Division?

13 A. Well, if he had no more information than I had on the matter,  
14 I don't think I would have made a representation on the  
15 matter to the Appeal Division. I think I testified yesterday  
16 that I did not understand really why that particular  
17 submission was being made.

18 Q. Thank you. Let's move on the Court Workers Program. You  
19 were asked some information about it by Commission counsel,  
20 Mr. MacDonald and I don't have a transcript of your remarks  
21 on this since it was this morning but I had the sense, which  
22 maybe you can correct or verify, is that you were laying some  
23 blame for the fact the there was not a Court Worker Program  
24 in place today at the doorstep of the Union of Nova Scotia  
25 Indians. Did I misinterpret you about that?

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22 maybe you can correct or verify, is that you were laying some  
23 blame for the fact the there was not a Court Worker Program  
24 in place today at the doorstep of the Union of Nova Scotia  
25 Indians. Did I misinterpret you about that?

1 A. I'm not trying to lay the blame at anybody's doorstep except  
2 to indicate that there seemed to be some difference of opinion  
3 as to which funding should be used where and the Attorney  
4 General having expressed the view that unless it was for all  
5 native people, he was not going to get into, involved in one  
6 that dealt with status Indians as opposed to non-status and  
7 Métis.

8 Q. Perhaps you could take a look in Volume 41 at page 73 and  
9 indicate whether or not this is the kind of matter that you  
10 were referring to in your earlier testimony. In particular, I  
11 think the first paragraph of that letter. It's not written by the  
12 Attorney General, but is it what you were referring to?

13 A. Yes.

14 Q. Now you notice that that was in 1976.

15 3:57 p.m.

16 A. Well, it could be. The copy I have is blurred as far as the date  
17 goes. It may be a "6".

18 Q. You see the third line, they're referring to March the 8th,  
19 1976, in the body of the letter?

20 A. Yes.

21 Q. That part is clear. If you look now to page 148, you'll see a  
22 letter by the same gentleman, Mr. MacDonald, referring to the  
23 re-establishment of the Court Worker Program. And if you  
24 look at page, back a few pages at page 143, you can see  
25

1 attached a memorandum to the Executive Council relative to  
2 the re-establishment of the Native Court Workers program.

3 So would you agree that in 1979, whatever problems might  
4 have arisen with respect to representing non-status Indians  
5 or accepting contribution of provincial monies had dissipated?

6 A. I assume that they must have if the government, if the  
7 Attorney General was recommending that it be re-  
8 established.

9 Q. And if you turn to page 203, you'll see that the Attorney  
10 General at the time was prepared to accept \$5,000 from the  
11 Union of Nova Scotia Indians to be the provincial contribution  
12 to the program. Did you have any knowledge of that  
13 yourself?

14 A. No, I have no knowledge of it. I was not involved with the  
15 matter, other than the, I think two letters and I believe one  
16 memorandum I wrote on it.

17 Q. So in light of the testimony you gave this morning and what  
18 we've just looked at today, can you offer any reason as to  
19 why there is not a Native Court Workers Program in place in  
20 the province?

21 A. I can't answer the question because I have not dealt with the  
22 Native Court Worker Program and I have no knowledge of  
23 why there is or is not one.

24 Q. Thank you. Would you turn to page 198 now in that volume?  
25 This letter concerns a bill for the services of a court

1 interpreter. Did you know whether or not interpreters were  
2 being used with Micmac defendants in Nova Scotia in the  
3 period leading up to October, 1979?

4 A. No, I know that interpreters have been used for various cases,  
5 but those arrangements are made with our administrative  
6 section and I have no reason... I have no reason to know  
7 whether it was with Micmac people or people speaking any  
8 other language.

9 Q. Well, it is referring to Micmac defendants and services  
10 provided by the Union of Nova Scotia Indians.

11 A. Well, I can see that here, but you asked me if prior to that  
12 time did I know if there were interpreters being provided.

13 Q. What I'm wondering is if you had knowledge of the fact that  
14 interpreters were being provided in the Criminal Courts?

15 A. I had knowledge of the fact that interpreters were being  
16 provided but not knowledge as to what groups or what  
17 languages interpreters were being provided because that was  
18 something that was dealt with in our courts and registry  
19 section.

20 Q. So with respect to Indian defendants, you had no knowledge  
21 as to who was providing the services and at whose expense?

22 A. That's correct. Except that I know that if interpreters were  
23 arranged for by our Department, they were normally paid for  
24 by our Department. That was the understanding I had.

25 Q. I'm sorry, did you say if they were requested by your

MR. GALE, EXAM. BY MR. WILDSMITH

1 Department, they were paid for by your Department?

2 A. If a request was made to our Department for an interpreter  
3 and one was obtained, then that service would be provided...  
4 paid for by the Department, was my understanding. Because  
5 I had had requests sometimes from prosecutors that they had  
6 an individual that spoke a certain language and where were  
7 they going to get an interpreter and I would tell them to call  
8 Mr. MacDonald and make the arrangements there because the  
9 Department, as I understood it, had contact sources and that  
10 the Department would pay for those services.

11 Q. Do you have any recollection of ever being contacted with  
12 respect to that concerning a native or Indian accused?

13 A. No, I have no recollection of ever being contacted in regard to  
14 a native.

15 Q. Okay, let me direct your attention to the policing question  
16 now. I think from your earlier testimony, you indicated that  
17 that was an area that you had some activity and some active  
18 responsibility, is that correct?

19 A. Yes, I was involved in that.

20 Q. The major proposal that the Union of Nova Scotia Indians put  
21 forward is, I think, something you referred to as a municipal  
22 type of police force. Is this what you understand to be often  
23 referred to as Option 3A?

24 A. Yes.

25 Q. And could you just elaborate for a moment on what it is you

1 understand Option 3A to be?

2 A. My understanding is that the Band Council would appoint  
3 police officers who would have full police powers and in the  
4 same way that a municipality appoints a police force to police  
5 the municipality.

6 Q. And, therefore, that police force would have some  
7 responsibility to the Indian community?

8 A. Yes.

9 Q. And, as well, that police force and police officers would have  
10 full authority to enforce all laws—federal, provincial, band by-  
11 laws as well on Indian reserves?

12 A. Yes, that's what my understanding was.

13 Q. And their jurisdiction was restricted to Indian reserves?

14 A. Yes, my understanding is that it would be, yes. In the same  
15 way as a municipal force's jurisdiction is restricted.

16 Q. Can you tell us why today we don't have that system in place  
17 on Indian reserves?

18 A. The Attorney General felt that under the Police Act that he  
19 had a responsibility to be answerable for police actions, that  
20 he would not, in fact, be able to exercise any jurisdiction in  
21 regard to such a police force. That if there is, as I understood,  
22 as I recall, there was some suggestion that there be some  
23 financial contribution to such a police force. That since we did  
24 not make any contribution to municipal policing, that we  
25 would not make any to the Indian police force that we're

1 talking of.

2 Q. So the two...

3 A. Those are basically, I think, the reasons.

4 Q. So the two reasons are lack of accountability to the Attorney  
5 General of Nova Scotia and a reluctance, if I can put it that  
6 way, on the part of the province to contribute to financing,  
7 policing, on Indian reserves. Is that correct?

8 A. To financing a municipal type of policing on Indian reserves,  
9 yes.

10 Q. Maybe I missed something in the distinction you're drawing.

11 A. Well, later..

12 Q. What do you mean by...

13 A. On the other option, the province did agree to financing,  
14 partial financing of...

15 Q. R.C.M.P. special constables?

16 A. Yes.

17 Q. Am I correct in saying that under the policing agreement now  
18 with the R.C.M.P. that the province has, Indian reserves are  
19 policed, at least outside of municipal units, outside of cities,  
20 by the R.C.M.P. under that provincial policing service?

21 A. That's correct.

22 Q. And, therefore, am I correct in believing that policing on  
23 those Indian reserves is now being paid for by the province?

24 A. Yes, it's paid. The provincial share, of that contract is paid for  
25 by the province and those policing on the reserves falls to the

MR. GALE, EXAM. BY MR. WILDSMITH

1 detachment having the geographical area on which the  
2 reserve is located.

3 Q. Fair enough. And you just referred to, I think, the provincial  
4 share. Is it the case that the cost of the R.C.M.P. policing as a  
5 provincial police force is not paid for entirely by the  
6 province?

7 A. That's correct. There's a funding formula there where the...

8 Q. Can you tell us what it is?

9 A. I think by 1991, that it rises to the fact that the province  
10 pays 70% of the actual cost of the R.C.M.P. and that that has  
11 been rising, I think, at the rate of 2% a year.

12 Q. Since 1981?

13 A. I believe so, but I... There may have been at a lesser  
14 percentage rate at one...

MR. CHAIRMAN

15  
16 It used to be 40% at one time, years ago.

MR. GALE

17  
18 A. I believe so, it may have been. But under this contract... I  
19 think there is a certain percentage rate for a certain number  
20 of years and then beyond that, it rose at a different rate. But,  
21 in any event, the province each year has been paying a  
22 percentage of the actual cost of the R.C.M.P. under the  
23 contract.

24 Q. Okay. Now coming back to this question of the Attorney  
25 General as being concerned about not having ultimate

MR. GALE, EXAM. BY MR. WILDSMITH

1 authority over the Indian police force. I think I understood  
2 your testimony yesterday, it appears in the transcript at  
3 13329, as you saying the R.C.M.P. was not ultimately  
4 accountable to the Attorney General of Nova Scotia. That,  
5 ultimately, the R.C.M.P. were accountable to the Commissioner  
6 in Ottawa.

7 A. Well, they ultimately, I guess, are accountable to the  
8 Commissioner in Ottawa, but there is an accountability of the  
9 Commissioner to the Attorney General under the contract on  
10 certain issues. There's certainly a satisfaction of the Attorney  
11 General that there is a sufficient administrative set-up within  
12 the R.C.M.P. to insure proper training and monitoring of the  
13 actions of the members of the R.C.M.P.

14 Q. Well, is it your evidence that the R.C.M.P. is ultimately  
15 accountable to the Attorney General of Nova Scotia?

16 A. Well, for those...

17 Q. Services provided for in the R.C.M.P. policing agreement?

MR. PINK

19 My Lord, the contract between the R.C.M.P. and the province  
20 is in evidence and it speaks for itself. And if he's going to ask Mr.  
21 Gale to comment on it, perhaps he could at least put it in front of  
22 him. But I'm not even sure what benefit it is to have him  
23 comment.

MR. WILDSMITH

24  
25 Well, from my stand-point, there is a benefit.

MR. GALE, EXAM. BY MR. WILDSMITH

1 MR. CHAIRMAN

2 What's the benefit?

3 MR. WILDSMITH

4 The benefit is, he's on one hand saying that the problem  
5 with an Indian police force is they're not accountable to the  
6 Attorney General. Now I'll come back to that in more detail but...

7 MR. CHAIRMAN

8 Don't. Don't. Carry on.

9 MR. WILDSMITH

10 ...he gave testimony yesterday that the R.C.M.P. were not.  
11 And I want him to clarify whether there is, in fact, a dual  
12 standard in some sense.

13 MR. CHAIRMAN

14 My understanding is that the R.C... The Attorney General of  
15 the province is responsible for law enforcement within the  
16 province. He or she may discharge that responsibility either  
17 through municipal or provincial or federal, or the R.C.M.P. So I've  
18 always assumed, tell me if I'm wrong, that as far as the  
19 enforcement of law in the province, the R.C.M.P. is accountable to  
20 the Attorney General, is that not correct?

21 MR. GALE

22 They're accountable to the Attorney General for the  
23 enforcement of the law. If they're not enforcing it, they have to  
24 explain to him why...

25

MR. GALE, EXAM. BY MR. WILDSMITH

1 MR. CHAIRMAN

2 That's right.

3 MR. GALE

4 They're unable to do so.

5 MR. CHAIRMAN

6 Their accountability to the Commissioner would be for their,  
7 I suppose, their behaviour as policemen, whether they polish...

8 MR. GALE

9 We hear, under the contract, all disciplinary matters. All  
10 administrative matters are dealt with, remain the responsibility of  
11 the R.C.M.P.

12 MR. CHAIRMAN

13 Right. Does that answer your question?

14 MR. WILDSMITH

15 Q. In part. Perhaps the explanation should be directed to his  
16 comment yesterday. It appears in the transcript at 13329,  
17 and the question asked by Mr. MacDonald was:

18 Q. As the Nova Scotia police force, is the  
19 R.C.M.P. ultimate direction and control of the  
20 Attorney General?

21 And your answer was:

22 A. No, they're under contract to form, to be the  
23 Nova Scotia police but perform that function,  
24 but the ultimate control of the force is still  
25 with the Commissioner in Ottawa.

MR. GALE, EXAM. BY MR. WILDSMITH

1 Q. Cont'd

2 Now could you clarify whether or not the RCMP are ultimately  
3 under the direction and control of the Attorney General?

4 A. If it's matter of..

5 4:12 p.m.

6 MR. PINK

7 Again, My Lord, maybe he could at least have the contract  
8 so he's not just dealing from memory. Page 32 of Volume 40,  
9 Clauses 3 and 4 of the contract spell that out.

10 CHAIRMAN

11 Well, if it does then why do we have to have it repeated?  
12 That's always subject to emergency powers.

13 MR. WILDSMITH

14 Well I'll move on the...

15 Q. Was it your testimony, Mr. Gale, that one of your  
16 responsibilities was to negotiate this contract?

17 A. No, one of my responsibilities was not to negotiate this  
18 contract. I did not negotiate this contract.

19 Q. So coming back to the Indian policing question, I'd like to  
20 direct your attention to a letter written by Attorney General  
21 Pace, it appears in Volume 41 at page 106. Now is this the  
22 letter that expresses the view, I think, that you've just  
23 articulated. It was dated April the 4th, 1978, third paragraph  
24 refers to the concept being really a municipal police force.

25 A. Yes.

MR. GALE, EXAM. BY MR. WILDSMITH

1 Q. And it goes on to say that the Police Act, the province does  
2 not provide for this concept and accordingly the Attorney  
3 General...

4 A. This is the view I was trying to articulate, yes.

5 Q. Was that letter written in consultation with you in any way?

6 A. The Attorney General discussed the policing matter with me.  
7 He had his own view, he wrote the letter.

8 Q. I see. What was your view?

9 A. Well I, at that time, didn't take issue with him that certainly,  
10 that the, if that was the position he wanted to take, I was not  
11 going to take issue with him on it.

12 Q. Did you hold a contrary view?

13 A. I don't know at this point in time whether I did or not. I was  
14 following his directions and doing his bidding.

15 Q. Let me refer you to page 135...

COMMISSIONER EVANS

17 What different would it make if you had a view and he had  
18 a contrary view, he is the Minister and he sets out the policy and  
19 you follow the policy, isn't that it?

20 A. That's correct.

MR. WILDSMITH

22 Well, with respect, My Lord, the reason I'm asking the  
23 question is he's, the Attorney General's expressing a view about  
24 the Police Act and the reasons why a police force could not be put  
25 in place.

MR. GALE, EXAM. BY MR. WILDSMITH

1 COMMISSIONER EVANS

2 Right.

3 MR. WILDSMITH

4 And my interest is in examining the reasons that were  
5 articulated. Now possibly if it's just a question of...

6 COMMISSIONER EVANS

7 Ask the Minister. That's where you get that information.

8 MR. WILDSMITH

9 Well, I asked the Minister when he was here and he had  
10 very limited recollection. Then if you trace these documents, he  
11 ceases to be Attorney General when a response to his letter is  
12 sent. I'd like to direct Mr. Gale to the response that was received  
13 from the Minister of Indian Affairs. It's found at page 135 and  
14 addressed to Mr. Pace's successor.

15 Q. And I direct your attention to the third paragraph in the  
16 letter at page 135. It says, "The RCMP, Department of Justice  
17 and my own Department (meaning Indian Affairs) have  
18 reviewed the matter very carefully and it is our combined  
19 opinion that legislative authority exists to accommodate the  
20 Indian request." And then there's a reference to Section 34 of  
21 the Police Act and the concept of special constables appointed  
22 by the Attorney General of Nova Scotia. Is this a letter that  
23 you saw?

24 A. I may have seen it, I don't know. I can't tell you whether I  
25 saw it or not.

MR. GALE, EXAM. BY MR. WILDSMITH

1 Q. Do you have any view about the correctness of the federal  
2 minister's position?

3 A. Well, certainly there's the ability under the Police Act to  
4 appoint special constables and I suppose if the government as  
5 a policy, wanted to do that, they could so do it.

6 Q. So you're suggesting the power is there under the Police Act if  
7 the will is there to exercise it?

8 A. Yes. There have been special constables appointed for  
9 various provincial enforcement bodies.

10 Q. Thank you. I direct your attention to page 217 in here now.  
11 217. There's a letter written by Mr. Coles referring to the fact  
12 that Attorney General approved in principle the concept of  
13 option 3A that we've been referring to. Was this discussed  
14 with you?

15 A. I think the only thing that I had on this particular matter was  
16 the direction of Mr. Coles to follow up on it. I don't recall  
17 being advised or having this matter discussed with me.

18 Q. Yes. And you'll see your name in the third paragraph saying,  
19 "I'm asking Mr. Gordon Gale of this Department to follow up  
20 on the subject and arrange a meeting." So it appears to me as  
21 though you were being assigned by Mr. Coles the  
22 responsibility to follow-up on this option 3A - policing. That  
23 much is correct, is it?

24 A. He's asking, saying that he's asking me to follow up on it, yes.

25 Q. Now if you turn back a page, two pages really, you'll see a

MR. GALE, EXAM. BY MR. WILDSMITH

1 letter that followed this one from the Union of Nova Scotia  
2 Indians to Mr. Alan Clarke in the Department of Social  
3 Services. Do you understand Mr. Clarke to be the coordinator  
4 for the Province on native issues?

5 A. Yes.

6 Q. And you'll see that, top of page 216, the position of the Union  
7 is that what, all that is required is a letter confirming that  
8 option 3A is considered a valid program.

9 A. Yes, I see that.

10 Q. Do you recall if a letter of that nature was ever sent?

11 A. I have no specific recollection of a letter being sent.

12 Q. And what about with respect to Mr. Gale's instructions to  
13 follow up on this. Do you recall anything being done to follow  
14 up on the notion of option 3A - policing?

15 A. Well, it was Mr. Coles' instructions to follow up and they were  
16 to me. No, I can't specifically recall what was done. I know  
17 that around this time there, I think it was around this time  
18 that there may have been a proposal to consider the  
19 Amerindian Program.

20 Q. That's an example of a 3A, option 3A program?

21 A. Yes.

22 Q. Would you turn to page 233. See if this might help refresh  
23 your memory at all. It's a month or so later than the previous  
24 correspondence and it referred to Mr. Coles and it says,  
25 "Attached (from the Union of Nova Scotia Indians) are our

1 brief comments on option 3A for our report to Policy Board."

2 Now am I correct in thinking that about this time in 1980 the  
3 issue of option 3A - policing, was going to the Policy Board of  
4 the Province of Nova Scotia?

5 A. I can't answer your question. I don't know whether it went  
6 to Policy Board or not.

7 Q. So does this mean that you were not informed of that issue?  
8 It was all Gordon Coles.

9 A. I found that at stages that Mr. Coles was dealing with the  
10 matter and that I was not being advised of what was going  
11 on. That the matter also seemed to be getting involved with  
12 Mr. Clarke's office and with the tri-partite committee.

13 Q. Were you a member of the tri-partite committee?

14 A. No, I was not a member of that. I was asked to attend, I  
15 believe two meetings, because there was a couple of subjects  
16 dealing with the policing on them and to report what the  
17 position of the Attorney General was on those matters.

18 Q. Just to, two follow-up questions. This reference to Policy  
19 Board, could you explain for the record whether Policy Board  
20 was a Cabinet or whether it was an executive branch of  
21 government. What was Policy Board?

22 A. It was considered to be a department but Policy Board itself  
23 was made up of a number of Cabinet ministers who sat and  
24 determined policy questions. There was also a Management  
25 Board that had another group of Ministers who sat and

1 determined financial questions. And sometimes things would  
2 have to go through both and then go to Cabinet before they  
3 would be dealt with.

4 Q. If it did go to Policy Board as this memo suggests, it's likely it  
5 went then to a committee or group composed of Cabinet  
6 ministers?

7 A. It would first, undoubtedly have had the civil servants that  
8 work for Policy Board, but I would normally expect that it  
9 would get onto the agenda of the Ministers and be dealt with  
10 in one way or another.

11 Q. And I direct you to the, one passage on page 234. At the end  
12 of the first paragraph it suggests, "Funding is expected solely  
13 from the federal government for this limited police force on  
14 reserves similar to existing arrangements in Quebec." Was it  
15 your understanding that the Union of Nova Scotia Indians  
16 simply wanted a letter of approval in principle but expected  
17 all the money to come from the federal government?

18 A. Well, at this point in time I'm not really familiar with this at  
19 that point in time. I certainly know that there was, the  
20 position that I had understood the Union was taking was that  
21 they wanted federal funding and they did not want provincial  
22 funding.

23 Q. I turn your attention now to page 275 which is the minutes of  
24 one of these tri-partite committee meetings that you just  
25 mentioned dated June the 13th, 1983.

1 A. Um-hmm.

2 Q. And this was a meeting in which you were in attendance and  
3 you're reported as saying in the second paragraph, "Mr. Gale  
4 indicated the service is not a provincial responsibility but a  
5 federal responsibility but they're willing to assist in the  
6 program stating a preference for 3B," and then saying at the  
7 end, "Apparently if this method of policing (meaning the  
8 Amerindian policing in Quebec, option 3A) was adopted, they  
9 would not be accountable to the provincial Attorney General."  
10 So you are articulating the same reason there, is that correct?  
11 Are these minutes correct?

12 4:25 p.m.

13 A. Yes, I have no reason to doubt that they're not correct and the  
14 position I would have articulated is that that I was told to  
15 articulate by the Minister.

16 Q. By the Minister or Deputy Minister or both?

17 A. Or by the Deputy Minister.

18 Q. Do you recall which?

19 A. It would be one or the other, I don't recall which one it was.

20 Q. Do I take from your evidence the suggestion that in going to  
21 this meeting, you had received instructions or directions from  
22 a superior to put forward the view that 3A was not an option  
23 because...

24 A. I would not have stated it, if I had not received directions on  
25 it. I was simply reporting the position of the Attorney

1 General, according to the directions I had received. Now  
2 whether they came from the Deputy or from the Minister  
3 himself, I can't at this point tell you.

4 Q. Well, you will recall the letter that I referred you to from  
5 Minister Faulkner, expressing a different viewpoint about the  
6 powers under the Police Act. Do you know whether or not  
7 any research or any legal opinion was formed on which was  
8 the correct view about accountability to the provincial  
9 Attorney General?

10 A. Not that I'm aware of, and I can only assume that...Whether  
11 there was or there wasn't, Mr. Faulkner's viewpoint was not  
12 accepted by the Attorney General.

13 Q. Now as I go through Volume 41, I referred you to this notion  
14 that perhaps Option 3A went to Policy Board in and about  
15 early 1980. I've now referred you to some minutes that are  
16 in June of 1983. Can you tell us, and I don't see any other  
17 documentation on this issue between 1980 and 1983. Can  
18 you help us out as to what transpired over that  
19 approximately three-year period on this issue of Option 3A?

20 A. No, I can't help you out on it. I know that, originally, I had  
21 had a series of meetings with the Union of Nova Scotia  
22 Indians and that they were certainly dealing with the matter.  
23 I know that there was a delegation that consisted of some  
24 people from the representatives of the Amerindian police that  
25 were with the Union people and, no, I cannot assist you on it.

1 I know that for a period of time I had some active  
2 involvement in the matter and, at other periods, it was a  
3 matter of just communicating what the Department's position  
4 on the matter was. I can only assume that, in some of these,  
5 Mr. Coles or the Minister must have decided to deal with  
6 them themselves or through others.

7 Q. Is it fair then for me to think that whatever you did in  
8 respect of this, you were not exercising your own  
9 independent judgement, but were relaying the position of Mr.  
10 Coles or the Minister?

11 A. That's quite correct.

12 Q. Fair enough. Two other areas, very quickly. I think you  
13 testified that Mr. MacNeil, Donald C. MacNeil, was in private  
14 practice in about 1971, but was acting as Crown Prosecutor  
15 for Cape Breton County?

16 A. He was under a retainer to act as prosecuting officer, to my  
17 recollection at that time. He had previously been a member  
18 of the Smith government before that, a Cabinet Minister, and  
19 upon his defeat, went back and became the prosecuting  
20 officer. I'm not sure that he, in fact, had any private practice,  
21 but he was on a retainer, to my knowledge, to act in that  
22 capacity.

23 Q. Is this retainer an appointment-at-will?

24 A. Well, the appointment is under the Prosecuting Officers Act,  
25 which provides that the Attorney General appoints, may

MR. GALE, EXAM. BY MR. WILDSMITH

1 appoint a prosecuting officer but the removal of the  
2 prosecuting officer requires a decision of Cabinet.

3 Q. Mr. MacNeil ceased to be Crown Prosecutor at some point  
4 between 1971 and 1978, is that correct?

5 A. Well, I know he ceased to become prosecuting officer. I'm  
6 not... I can't place a date on it at the moment, but it may well  
7 be the...

8 Q. Do you have any knowledge of the circumstances?

9 A. I believe that there were domestic problems.

MR. CHAIRMAN

10  
11 Let's put it another way. Did it have anything to do with  
12 discharge of his duties as Crown Prosecutor, to your knowledge?

MR. GALE

13  
14 Not to my knowledge.

MR. CHAIRMAN

15  
16 That's all we're interested in hearing.

BY MR. WILDSMITH

17  
18 Q. Just one supplementary question. Was he removed through a  
19 Cabinet Order or through resignation?

20 A. I think that he was removed through resignation that it was  
21 requested and, well, that he, in fact, was removed that way.  
22 But I can't be certain.

23 Q. Thank you. And just one other area, have you had occasion as  
24 Director of Criminal to look at the extent to which inquiries  
25 may be made of jury members on any matters?

MR. GALE, EXAM. BY MR. WILDSMITH

1 A. Just through my general knowledge of the law, which, as I  
2 recall it, is that you can only make an inquiry of a jury  
3 member if it's an offence that is being investigated, such as  
4 supporting a juror or bribing a juror in some way.

5 Q. We've had some suggestion that no verification of a juror  
6 making a comment that's been reported in the media. Not  
7 directly about the deliberations in the case, but a later  
8 reflection in 1982, I believe. The quotation attributed to the  
9 juror is, "With one red skin and one Negro involved, it was  
10 like two dogs in a field." We know that this juror was  
11 probably referring to the Marshall case. Do you have any  
12 views or can you assist us at all in understanding whether it  
13 would be an offence to ask the juror to verify whether he  
14 expressed this view?

15 A. Well, it's a view that was expressed outside after the matter.  
16 I don't think there's any, in my view, I don't think there's  
17 anything wrong, any offence in asking him if he's made that  
18 statement. I don't know that you can ask him if he made that  
19 statement during the jury deliberations.

20 Q. But you think that it maybe permissible to ask the juror if he  
21 made the remark to a journalist, "With one red skin and one  
22 Negro involved, it was like two dogs in a field," et cetera?

23 A. My off-the-top-of-my-head view is that I see nothing wrong  
24 in asking him if it was made afterwards, if you're talking  
25 about it having been made in 1982.

MR. GALE, EXAM. BY MR. WILDSMITH

1 Q. Very good.

2 A. I don't see anything...

3 Q. Thank you.

4 A. To prevent it.

5 MR. WILDSMITH

6 Those are my questions.

7 MR. PINK

8 My Lord, Mr. Gale has been on the stand for two and a half  
9 hours. I'm only going to be very short, but does he want a break?

10 MR. GALE

11 No, if you're going to be very short, I'll just bear with it.

12 MR. PINK

13 My Lord, there are a number of areas that my friend, Ms.  
14 Edwardh covered that I'm not going to deal with, the areas of  
15 general policy that have been dealt with by the researchers and I  
16 just wanted to draw that to Your Lordship's attention because I  
17 think there are things that have to be clarified, but hopefully they  
18 will be through the research projects and I won't deal with them  
19 specifically with this witness, who has been interviewed by the  
20 researchers and has made his contribution at that level.

21 EXAMINATION BY MR. PINK

22  
23 Q. Mr. Gale, could you look at Volume 32 at page 273?

24 A. 273?

25 Q. Yes, that's regarding the issue of an inquiry and the apparent

1 views of Mr. Coles. And Mr. MacDonald directed you to the  
2 final paragraph and didn't direct you to the final sentence.  
3 And I just wanted to know if the concern expressed or the  
4 qualification expressed by Mr. Coles regarding the civil  
5 proceedings and the ongoing civil litigation was a matter that  
6 was discussed with you or discussed in the Department?

7 A. There was some discussion within the Department that the  
8 civil suits might well bring forth all the information that was  
9 necessary in this matter and to what extent that might affect  
10 the holding, the calling of an inquiry.

11 Q. And, in fact, you looked earlier at the note of July 8th of  
12 Attorney General How, where there was also reference to  
13 awaiting the outcome of the civil litigation? Do you recall  
14 seeing that earlier today?

15 A. Yes.

16 Q. You were asked some questions by Ms. Edwardh regarding  
17 the shoplifting charge in Sydney. Would you agree with me  
18 that any type of consultation between the Deputy and the  
19 prosecuting officer would be dependent upon time and  
20 whether there was sufficient time to consult?

21 A. Yes, that would be a factor to take into account.

22 Q. You were asked about the competence of the Sydney Police  
23 Department and a review of the competence. That is an issue  
24 that's been dealt with by the research staff. But the case,  
25 particularly, that was involved that Mr. Edwards spoke about,

1 are you aware that Mr. Herschorn and Mr. Edwards met with  
2 the Chief and the officers of the Sydney Police Department  
3 and people from the City of Sydney regarding that case?

4 A. Yes, I am aware of that.

5 Q. What was the outcome of those deliberations?

6 A. To my knowledge, that Mr. Herschorn was satisfied that, to  
7 the extent that there was any problem, the Chief of Police  
8 would insure that it would be rectified and would not occur  
9 again.

10 Q. Thank you. There was some suggestion earlier this afternoon  
11 regarding Mr. Aronson and you said that Mr. Aronson "was  
12 not stonewalled." Can you elaborate upon that? What was  
13 your attitude and how did you feel you were treating Mr.  
14 Aronson as he was looking for information?

15 A. I thought I was being... I thought at the time I was being fair  
16 to Mr. Aronson. That I was quite prepared to discuss the  
17 matter. I just wasn't prepared to give him the written report  
18 at that particular time. I don't know if I can answer it any  
19 more fully.

20 4:39 p.m.

21 Q. Mr. Aronson, in his letter to you of 13th of April 1982,  
22 indicates that he reviewed the facts of the case with Mr.  
23 Fainstein in Ottawa. From your discussions with Mr. Aronson  
24 did you understand that he was familiar with the facts and  
25 what the various witnesses were saying?

1 A. Yes. He seemed to have a familiarity with the facts and what  
2 was going on.

3 Q. Turn your mind if you could, just for a few moments, to the  
4 spring of 1982 while the Attorney General was developing its  
5 position. Mr. Ebsary was before the courts at that time and  
6 there was some concern as the documents reveal regarding  
7 his fitness. What, how was that a factor on the considerations  
8 within the Department as to how this matter was to proceed?

9 A. Well it was a factor to the extent that at that particular time  
10 we were being told that Mr. Ebsary was unfit to stand trial  
11 and might never again become fit to stand trial. But if Mr.  
12 Marshall was not acquitted as such but a new trial was  
13 ordered that we wouldn't be able to proceed with it, we'd  
14 have to stay the new trial of Mr. Marshall and yet we  
15 wouldn't be able to try to Mr. Ebsary.

16 Q. And the...

17 A. And that the full facts might never come out in a way that the  
18 Attorney General felt that he could comment on them because  
19 he can really only comment on the matter to the extent that  
20 evidence has been given.

21 Q. Thank you. You indicated that in April 1982 you were  
22 awaiting a report from the RCMP. Was there any pressure on  
23 you or on the Department to get this matter to a conclusion?

24 A. Well they seemed to be, I was feeling pressure. The Attorney  
25 General was asking when they're going to get the, come to a

1 conclusion on it. When could he make some recommendation  
2 to the Minister in Ottawa. There was certainly a lot of media  
3 contact on it. Pressure is the term I would use. I know I  
4 received many calls from the media and I'm certain that the  
5 Attorney General also did. I don't know exactly what  
6 pressures were being put on the Attorney General from his  
7 colleague in Ottawa but the discussions I, the opinions or  
8 impressions I got from talking with Mr. Fainstein was that  
9 there certainly a desire in Ottawa to see this matter move  
10 along quickly so that...

11 Q. Did you indicate that to Superintendent Christen in your  
12 discussions with him?

13 A. Yes, I had indicated to Superintendent Christen that, you  
14 know, you have, you seem to have reached a conclusion.  
15 Everytime I think you're coming in with your final report I'm  
16 told that there's another witness you want to interview but is  
17 there some stage that you can get the, what is now being  
18 referred to as the "red book" report in which would, at least,  
19 let us follow through as closely as possible.

20 Q. Did you indicate to Mr. Edwards your concern about the time?

21 A. I'm quite certain that I also had expressed those views to Mr.  
22 Edwards, that we would like to be able to get the matter dealt  
23 with with some resolution sooner rather than later.

24 Q. Could you look, finally, at, the last volume I want you to look  
25 at is Volume 34. My friend, Mr. Pringle, pointed you to the

1 letter at page 109 and the notes at page 113.

2 A. Yes.

3 Q. I'd like you to look at the document at page 114 which is a  
4 report authored by Corporal Carroll and on page 115 there's  
5 reference in that report to some further investigation being  
6 undertaken by the RCM Police as it pertained to Mr. Ebsary.

7 A. Yes.

8 Q. Did you seek or were you, did you seek, sorry, were you  
9 requested any specific authorization by the RCMP to carry out  
10 any further investigation as it pertained to that report?

11 A. No.

12 Q. And if you could look at page 123, that's a report from, again,  
13 authored by Corporal Carroll as it relates to the original  
14 Marshall trial and the 1971 re-investigation. Did anybody  
15 seek any specific authorization from you to carry out that  
16 part of the investigation?

17 A. No.

18 Q. Can you tell us, Mr. Gale, when the first request was made, or  
19 when the first suggestion was made that the Police Act be  
20 used as a device to obtain the complete the file from the  
21 Sydney Police Department?

22 A. Well it could have been the 16th of April or it could have  
23 been the 19th. I tend to think on the 16th because they were  
24 still gathering opinions and views on it. Certainly...

25 Q. Do you recall whose suggestion it was?

1 A. Oh, it was my suggestion.

2 Q. The letter themselves, there are two letters that are dated the  
3 20th of April, one to the mayor of Sydney who was the  
4 chairman of the Police Commission and one to the chief of  
5 police. The letters are different in their content. Can you  
6 explain why?

7 A. Under that provision of the Police Act the first subsection,  
8 subsection (1) provides that when the Attorney General  
9 withdraws an investigation from a police force that he shall  
10 inform the chairman of the municipal board of police  
11 commissioners. So the letter to the mayor followed that  
12 section. Subsection (2) provides that then the chief of police  
13 shall deliver the file to such person as he is directed to so that  
14 I then followed the wording of that section and had the  
15 Attorney General direct the letter to Chief MacIntyre that he  
16 was to deliver the file to the RCMP.

17 Q. So each of the letters simply mirror the language of the Police  
18 Act.

19 A. Yes, they were taken using the sections, the language of the  
20 Police Act.

21 Q. We've had evidence about the change from 617(c) which you  
22 and Mr. Rutherford and others had agreed upon to 617(b).  
23 Was there any consultation with you prior to that change?

24 A. No, there was no consultation.

25 Q. And finally, sir, Mr. MacDonald put to you the proposition that

MR. GALE, EXAM. BY MR. PINK

1 the failure to disclose at the time of the original trial was  
2 perhaps contributed to a miscarriage of justice. Are you  
3 aware that there was any evidence before the Appeal Court  
4 regarding whatever, any disclosure that took place in 1971?

5 A. If there is any evidence before the Appeal Court?

6 Q. Yes.

7 A. No, I can't say that I'm aware right now what...

8 Q. And would you agree with me that the...

9 A. That there was such evidence. I don't believe there was but I  
10 haven't, I didn't follow through with the appeal to...

11 Q. And would you agree with me...

COMMISSIONER POITRAS

12  
13 Won't that be a leading question, Mr. Pink?

MR. PINK

14  
15 I won't take it any further then. Those are all my questions.

16 Thank you.

MR. MacDONALD

17  
18 I was waiting for that next question. There would have  
19 been one but I have no re-direct.

CHAIRMAN

20  
21 That's all. Thank you very much, Mr. Gale.

22 WITNESS WITHDREW

23 ADJOURNED TO 9 JUNE 1988 - 9:30 a.m.

24  
25

## REPORTER'S CERTIFICATE

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

  
\_\_\_\_\_  
Margaret E. Graham

DATED THIS 8 day of June

19 88 at Dartmouth, Nova Scotia