

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

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3

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Held: June 9, 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

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MR. CHAIRMAN

1 June the 9th.

2 MR. SPICER

3 My Lords, the witness this morning is Gordon Coles.

4 MR. GORDON COLES, duly called and sworn, testified as follows:

5 EXAMINATION BY MR. SPICER

6 Q. Mr. Coles, you're member of the Nova Scotia Bar?

7 A. Yes.

8 Q. And in what year did you graduate from law school?

9 A. 1952.

10 Q. And from law school where did you go to article?

11 A. With the late Kenneth S. Smith, Q.C.

12 Q. And did you stay at that office after you completed your
13 articles?

14 A. I did.

15 Q. And did you practise continuously from the time you were
16 admitted until the time you became Deputy Attorney
17 General?

18 A. I did.

19 Q. And that would be a period of twenty years.

20 A. Approximately.

21 Q. Approximately twenty years. Can you describe to me the
22 nature of your practise?

23 A. Well, it was a small law firm and we did general practise of
24 law. The emphasis, I would think, would be in the field of
25

1 civil, commercial, what is now known as family law, did our
2 share of criminal cases in a sense that we defended people
3 who retained us in criminal matters. Being the junior
4 member of the firm, I suppose it fell on me to deal with
5 most of those. We did not have a large criminal practise, but
6 like all small general law firms, you responded to whatever
7 clients saw fit to retain you.

8 Q. How many lawyers were there in the firm?

9 A. Just the two of us.

10 Q. And you would have remained a junior...

11 A. You're talking initially.

12 Q. Initially, yes.

13 A. Yes, yes.

14 Q. And as years progressed?

15 A. Well, we didn't have other partners of the firm but we
16 would have...we continuously had articled clerks and we had
17 other lawyers from time to time associated with us in the
18 practise.

19 Q. But the heart of the matter was the two of you, was it,
20 basically?

21 A. Yes, yes.

22 Q. Could you give me any idea in percentage terms what the
23 percentage of, say, your civil practise would have been to
24 your overall practise?

25 A. Oh, it would be...are you including what I would refer to as

1 family law in civil practise?

2 Q. Yes.

3 A. You're make a distinction between criminal and non-
4 criminal.

5 Q. Yes.

6 A. Yes. Oh, I would think probably ninety percent as a...would
7 be on the non-criminal side.

8 Q. Can you give us an indication of the most serious criminal
9 offences that you were ever involved with?

10 A. Oh, I would think probably in the range of dangerous
11 driving cases, criminal negligence cases.

12 Q. Did you ever have occasion to appear in the Appeal Court in
13 connection with criminal matters?

14 A. No.

15 Q. Civil matters?

16 A. Yes.

17 Q. Frequently?

18 A. No, not frequently.

19 Q. Did you ever have any experience yourself, I take it you
20 were acting as defence counsel, were you, in these criminal
21 cases?

22 A. Yes.

23 Q. Did you ever act as prosecutor?

24 A. No.

25 Q. In connection with your criminal practise, did you ever have

1 occasion to experience any problems with disclosure from
2 the Crown?

3 A. No.

4 Q. Can you tell us what your experience was with the nature of
5 disclosure during the time that you were practising?

6 A. Well, I always considered I had good rapport with the
7 people prosecuting in this area, Halifax-Dartmouth area, and
8 my recollection is that I would approach them for
9 information concerning the case against my client and I
10 don't recall ever having any difficulty in what I thought was
11 a full disclosure in the sense that they made known to me
12 what the Crown's case was and who they planned to call in
13 support of the Crown's case. I don't recall any particular
14 difficulty, but it was in response to a request on my part.

15 Q. Right. Would you have requested statements, for instance,
16 from the Crown, statements of witnesses?

17 A. I don't recall requesting statements. I recall being shown
18 statements but I don't recall requesting statements, per se,
19 no.

20 Q. You were satisfied having been shown the statement?

21 A. Yes.

22 Q. Do you recollect whether you were ever provided material
23 by the Crown without it having been requested by yourself?

24 A. No.

25 Q. You became Deputy Attorney General in what year?

1 A. 1972, the fall of '72.

2 Q. And you were appointed by Mr. Justice Pace, is that correct?

3 A. No.

4 Q. No.

5 A. I was appointed by the Executive Council.

6 Q. Mr. Pace was Attorney General at the time?

7 A. Yes.

8 Q. Did Mr. Justice Pace article at your office?

9 A. Yes.

10 Q. I believe he indicated in his testimony that in the 1970
11 election campaign, I think his words were that you drove a
12 car or something for him. Do you have any recollection of
13 that?

14 A. Yes.

15 Q. Did you work for him politically in that campaign then?

16 A. No. I should...I didn't drive a car for him. I made myself
17 available at a polling booth.

18 Q. Right.

19 A. At which I drove a car.

20 Q. Did you have any other involvement on his behalf in
21 connection with that election campaign?

22 A. Yes, I think the...I think the Saturday before the election
23 day, my wife and my family and four children, we went
24 down to visit the Paces and we found that they were getting
25 ready for a caravan through the area and so we joined in the

1 caravan and went along for the ride and had great fun. I'm
2 not sure that Mr. Pace knew that I was in the caravan but
3 we enjoyed the outing.

4 Q. And that was the extent of it.

5 A. That's right.

6 Q. Did you consider yourself to be friends with Mr. Justice
7 Pace?

8 A. Yes.

9 Q. Can you tell us who it was that approached you in
10 connection with the position of Deputy Attorney General?

11 A. My recollection is I got a telephone call from Mr. Pace, who
12 was then the Attorney General, and asked if I were
13 available to meet with the Premier, and I'm not...and I think
14 on a certain time whether I would meet with the Premier,
15 and I said, "Yes." And, at that time I had no idea of what the
16 purpose of the meeting was but... and I'm not sure now
17 whether it was the day of the call or a day subsequent to
18 the call, but in response to that call I met with the Premier.

19 Q. Was the nature...did you have any idea what the nature of
20 the position of Deputy Attorney General entailed at that
21 time?

22 A. Oh, not in detail but I had been in practise for
23 approximately twenty years. I had considerable knowledge
24 of the operation of the office.

25 Q. What was the extent of your...what was the extent of your

1 knowledge of the operation as a result of your years in
2 practise?

3 A. Well, I had known most of the people, or not most, but the
4 senior people in the Department of Attorney General. I
5 would meet them on various occasions, mostly law functions.
6 I knew the then Deputy, John A. Y. MacDonald, personally,
7 as his senior staff, Mr. Muggah, Mr. Malachi Jones, and
8 through normal conversation and acquaintance and
9 knowledge of the role of the Attorney General of the
10 Province, I don't think I knew much more beyond that.
11 That's my general appreciation of the office and the
12 responsibility of those in it.

13 Q. At the time you met with the Premier, was the nature of the
14 job explained to you at all?

15 A. Oh, I don't think in any particular. He made...he made it
16 known that he was considering appointing a person as
17 Deputy Attorney General and I concluded, for whatever
18 reasons, he invited me and interviewed me and inquired
19 whether or not I would be interested and in the normal
20 course of that kind of an interview and I don't think
21 anything more than that.

22 Q. Did you have...did you have any apprehensions at all when
23 you took the job as to whether or not you were suited to it?

24 A. Certainly.

25 Q. What were the nature of those apprehensions?

1 A. Well, I think my general concern was the administrative
2 component of the office. My experience had been in a small
3 law office and this opportunity, in my appreciation, involved
4 a larger administrative organization and, I suppose, that was
5 really the major anxiety I had. But I...and if I may continue.

6 Q. Go ahead.

7 A. This was raised by me with the Premier at the time and I
8 understood from him that, you know, the office was...the
9 department was staffed by people competent in the field of
10 administration and that this ought not to be a major concern
11 of mine.

12 Q. Other than administration, sir, did you have any concern
13 about your expertise in the area of criminal law?

14 A. No, I knew there were, you know, people in the department
15 experienced and competent in that field and I was being
16 asked to consider the position of Deputy and I expected to
17 find those kinds of people in the department, and I didn't
18 have any concern in that area.

19 Q. And, when you say expected to find those kinds of people in
20 the department, would those then be people who you would
21 hope would be able to advise you in particular areas of the
22 criminal law that you perhaps weren't up on?

23 A. Oh, certainly, and, in fact, they did.

24 Q. And did that advice continue over the term of your tenure
25 as Deputy Attorney General?

1 A. Yes.

2 Q Do you remember when you actually took the position, when
3 it was in 1972?

4 A. Well, I think the appointment was September, '72, but I
5 don't think I actually closed down or made arrangements to
6 leave my law practise until the following month. I think it
7 was October, '72, a month or so after the effective date of
8 the appointment.

9 Q When you took over as Deputy Attorney General, you were
10 taking over from Innes MacLeod.

11 A. That is correct.

12 Q Did you have any discussions with Mr. MacLeod as to what
13 you were getting yourself into?

14 A. No.

15 Q No. Was Mr. MacLeod there when you came in?

16 A. Well, he was on his way out of the Province on a meeting
17 when I...the day I joined and I...I had known Mr. MacLeod
18 over the years and I had met with him prior to...prior to my
19 joining or coming into the office and we had a chat
20 generally, but, beyond that, the answer would be no.

21 Q When you say you had a chat with him prior to joining or
22 coming into the office, would that have been prior to your
23 accepting the appointment?

24 A. No, it was subsequent to that.

25 Q What was the nature of that discussion?

1 A. Well, it was more out of courtesy. I made an appointment to
2 see him and we had a cordial discussion. I asked him, I
3 suppose, I don't recall the conversation, but I asked him
4 generally about the department and the people in it and I
5 don't think we got into...as I recall, we didn't get into any
6 other detail.

7 Q. When you came to take over the office in September or
8 October, was there any, for lack of a better phrase, turnover
9 of files or responsibilities from Mr. MacLeod to yourself?
10 Did he discuss anything with you?

11 A. No, not that I recall.

12 Q. And as you came to take over the job, what did you
13 understand the role of Deputy Attorney General to be?

14 A. Oooh, that's a biggy. Well, I was Deputy Minister, I was
15 Deputy to the Attorney General and understood from that
16 that I was responsible for implementing the policies of the
17 department and accounting for the work of the department.
18 I was...I was 2 I.C. and in charge of the administration of the
19 department and its...and its operations.

20 Q. Innes MacLeod indicated in his testimony at page 7318 that
21 his notion of the job was that it was the day-to-day
22 administration of the overall department and all the
23 functions of the department. Do you agree with that?

24 A. Yes.

25 Q. Could you tell us...

1 A. I think it was more than that, because the...you had the
2 responsibility vis-a-vis the Minister, and the department at
3 that time was attending on inter-governmental matters of a
4 legal nature so that you had...you had a responsibility
5 towards...to the Premier and his colleagues, on inter-
6 governmental matters in the legal sense.

7 Q. Can you give us an idea of the breakdown of civil versus
8 criminal responsibilities and tasks in the Attorney General's
9 Department when you took over?

10 A. Well, I'm not sure I fully understand your question, but...

11 Q. What percentage of your time did you spend dealing with
12 matters related to criminal law?

13 A. Oh, I would have no idea.

14 Q. Would it be a large part of your day, small part of your day?

15 A. Oh, it would be the smaller portion of my day.

16 Q. What would you be doing the rest of the day?

17 A. Well, I...in those days it was a small department the...in
18 terms of staff. The services were...included both attending
19 on the civil litigation for and against the Crown, the
20 direction, operation, managing, staffing, funding of all the
21 public offices throughout the Province, responsibilities in
22 other areas, Joint Stock Companies. We are involved, of
23 course, with the courts, not only in the physical provisions of
24 courts and facilities, which in this Province had a municipal
25 involvement, the staffing, support staff, furniture for Judges,

1 prosecutors. The...we also, of course, in addition to...have the
2 responsibility of the...of the prosecutorial aspect in the
3 system. We did all of the criminal appeals out of our head
4 office staff, which was never overly staffed as a section. The
5 correctional services, in those days, of course, municipalities
6 maintained the correctional institutions throughout the
7 Province. We had in the department the responsibility for
8 an inspection service. We developed the, what is now, the
9 correctional services department, which in those days, as I
10 recall, consisted of one full-time and one part-time
11 probation officer. Police services, we did not have any
12 direct involvement with municipal police. The provincial
13 police, which provided the...or the RCM Police rather, which
14 under contract provided the provincial police services.
15 These were all part and parcel of the responsibility of the
16 office in a general way.

17 Q Did you have occasion as Deputy Attorney General to ever
18 appear in court?

19 A. Only on one occasion.

20 Q And what was that in respect to?

21 A. Well, I represented the Province on the reference before the
22 Supreme Court of Canada, a reference.

23 Q Which reference?

24 A. That was a reference that challenged the right of the federal
25 government to unilaterally patriate the Constitution.

MR. COLES, EXAM. BY MR. SPICER

1 Q Other than that, did you appear in Court at all during your
2 time as Deputy Attorney General?

3 A. No.

MR. CHAIRMAN

4
5 Mr. Coles, do you still have in Nova Scotia the...any municipal
6 responsibility for correctional facilities?

MR. COLES

7
8 No, My Lord, that now has been taken over by the Province.

MR. CHAIRMAN

9
10 Your little county jails are no more?

MR. COLES

11
12 No, the municipalities have the continued responsibility for
13 lock-ups, for police lock-ups. But all the correctional facilities now
14 are provincial institutions. And, of course, that now is no longer
15 the responsibility of the Attorney General. With the creation of
16 the Solicitor General's Department, that has passed over to the
17 Minister responsible.

MR. CHAIRMAN

18
19 Thank-you.

MR. SPICER

20
21 Q Who would have been the senior people in the Attorney
22 General's office when you took over in 1972?

23 A. Mr. R. G. Conrad, Q.C., he was not then, Mr. Gordon Gale, Q.C..

24 Q What was Mr. Gale doing at that time, sir, in '72?

25 A. He was the director of criminal.

1 Q And Mr. Conrad?

2 A. Director of civil.

3 Q Okay. Anybody else?

4 A. You mean the other senior members of the department?

5 Q Yes.

6 A. Yes, there was Mr. Herschorn, Mr. Davison.

7 Q Mr. Herschorn in '72 would have been relatively new,
8 wouldn't he?

9 A. Well, he was there...he preceded me. He was there prior.

10 Q Was he?

11 A. I don't know...I don't recall how long he was there. There
12 were two or three others. I have some difficulty in recalling
13 who they were now.

14 Q Can you give us some indication of what the role of the
15 Attorney general's office, I mean other than the Attorney
16 General himself, would have been in the development of
17 policies? Perhaps you can take one as an example. Take the
18 formulation in later years of the disclosure policy.

19 A. Well, the...my recollection on that in respect to the
20 formalizing of a directive to the prosecutors, it really...it
21 really resulted from some meetings that were held at the
22 Deputy Minister's level, Deputy Ministers of Justice and
23 Deputy Attorneys General federal/ provincial, in the early
24 eighties. They at that particular time, ah, there was a
25 number of concerns. One was about the so-called or I don't

1 mean to imply that in any derogatory sense, but the backlog
2 in the court system, and the Deputy Attorneys General, we
3 were addressing that, and part of this discussion gave rise,
4 well, maybe...maybe preliminaries, preliminary inquiries
5 ought to be considered, and the discussions on the full
6 disclosure really were wrapped up with an attempt to try to,
7 not necessarily eliminate, but reduce the need for
8 preliminary inquiries. And the disclosure discussions arose
9 out of that, as I recall.

10 Q. And in general terms would it be fair to say then that that
11 policy, at least, would have come from the department up to
12 the Minister?

13 9:52 a.m.

14 A. Well, in this particular instance, yes, but I don't want to let
15 it... I don't want to sound that the Ministers that I served
16 under were not always of the view that there should be
17 disclosure.

18 Q. Right.

19 A. I remember quite distinctly Mr. How when he was Attorney
20 General, and he had quite a long practice in the bar as defence
21 counsel and I suppose that's why he was particularly
22 interested in it and... So I think at the ministerial level, there
23 is always an understanding that there was disclosure,
24 although I must admit it was, to my knowledge, it was not
25 formalized in the way in which it became formalized.

1 Q. Was Mr. Gale involved in discussions concerning the
2 formulation of the disclosure policy?

3 A. I think so.

4 Q. Who were the Attorney Generals that you've served under?

5 A. Well, there was Mr. Pace, now Mr. Justice Pace; the late Allan
6 Sullivan, who then became a Judge of the County Court; and
7 then Mr. Pace, I served under Mr. Pace on two different
8 occasions. Mr. George Mitchell, Q.C., and he was followed by
9 Mr. Harry How, now Chief Judge How.

10 Q. Do you recollect what years Mr. Mitchell was A.G.?

11 A. Well, it was just prior to the change of administration
12 between Mr. Regan's administration and Mr. Buchanan's
13 administration. Mr. Mitchell, my recollection is that he was
14 A.G. less than two years. It was a relatively short term. Mr.
15 How was followed by Mr. Giffin and the current Minister, The
16 Honourable Terence Donahoe, Q.C.

17 Q. With respect to Mr. How, can you give us some feeling of the
18 way in which he ran the Department? Was he sort of a
19 hands-on Attorney General, or did he rely on you greatly or...

20 A. Well, I felt I had the confidence of all the Ministers and I was
21 always very impressed with the, you know, the hours that
22 they would put in and the commitment they made to the
23 office. I don't know if I... I don't know if I could single out
24 any particular difference in serving under Mr. How than the
25 others. I think perhaps, and it may again be part of his

1 background and his interest as a former defence counsel, he
2 read more transcripts of cases that were being considered for
3 appeal than I recall the other Attorneys Generals who were
4 more inclined to prefer to be briefed by staff and accept the,
5 or consider the recommendations of staff.

6 Q. Mr. Giffin indicated at 10350 that matters got to his attention
7 if senior staff deemed it to be of sufficient importance. Would
8 that be more or less the way Mr. How handled things as well?

9 A. My recollection is yes. I have difficulty in identifying any
10 particular differences among them. I thought they all were
11 very good, conscientious and hard-working.

12 Q. You're not able to isolate any real difference, substantial
13 differences in style, say, as between Messrs. How and Giffin?

14 A. Oh, yes, I think as far as style is concerned, I think Chief
15 Judge How, when he was Attorney General, was perhaps a
16 more flamboyant, a little more colourful individual. I don't
17 see that necessarily as a characteristic of he as Attorney
18 General. I think if you, and I'm sure most here have seen Mr.
19 How and will understand what I'm saying. By his nature, he
20 is a very different type of individual.

21 Q. I take it that on occasion recommendations of yours would be
22 overruled by Attorney Generals?

23 A. Yes, probably on many occasions, which is the way it should
24 be. I always had the feeling, however, that they considered
25 the advice that was given to them. So to the extent that I was

1 overruled, I never really took that in any personal sense that
2 that was, that my advice was not considered.

3 Q. Sure. Would I take it, though, that if you were given a
4 direction to do something by an Attorney General, you would
5 consider it your job to see that that direction was carried out.

6 A. Oh, of course.

7 Q. During the time that you were Deputy Attorney General, can
8 you tell us what, if anything, you did to increase your own
9 knowledge of criminal law?

10 A. Well, I suppose on-the-job training is still acceptable. It's
11 difficult to be in that office, and remembering it grew from a
12 relatively small office to its present size. Not that it's a large
13 office now, compared to some. But being in that office over
14 the years, I had to become involved in criminal law,
15 generally, and I, of course, realizing my own lack of
16 experience, availed myself of the opportunity to go to
17 meetings like the Uniform Law Conference, Criminal Law
18 Section. I was quite active in that. I was president of the
19 conference at one point, as well as Chairman of the Criminal
20 Law Section. So I became very much exposed to the criminal
21 law and the criminal law procedure and that I considered to
22 have been a use and help for me to understand the processes
23 of law.

24 Q. By the early 1980's, would you have considered yourself to
25 have an expertise in criminal law?

1 A. No.

2 Q. Can you give us some idea of what your role would be when
3 you were faced with a new Attorney General? Would it be
4 part of your function to bring them up to speed on what was
5 going on in the Department and what the policies were?

6 A. Yes, we always went through the exercise of having each
7 section in the Department develop a briefing material that
8 would be informative as to the role and function of that
9 Department, the staffing, its budgeting, funding arrangements.
10 Also a summary of things that were current and this material
11 was prepared on each such occasion and then I would meet
12 with the Attorney General, together with the director or the
13 head of that particular section, as the case may be, and go
14 over the briefing material with him and deal with any
15 questions and elaborating on the material. It was a regular
16 process.

17 Q. Other than the functioning of the Department itself, would
18 you discuss with incoming Attorneys General such issues, for
19 instance, as, if they weren't already aware of it, their role vis-
20 à-vis prosecutions in the Cabinet and that sort of stuff?

21 A. I don't think on a regular basis. I think I did on the majority,
22 in the majority of cases. Some instances, I didn't think there
23 was a need to. For instance, in the case of Mr. Pace, it didn't
24 seem to me to be any need to instruct him. He had been
25 there before I and had served there previously. I had some

1 material that I made available to them for their reading as to
2 the role of the Attorney General.

3 Q. Would...

4 A. I should say, if I may, that in addition to departmental
5 briefing, briefings will be arranged for the other members of
6 the Department, like the police, we would arrange a briefing
7 with the police, that the Attorney General then would be
8 appraised of the organization of the police, and then have an
9 update on their intelligence in matters of crime, trends.

10 Q. Would the route to the Department for the A.G., for the most
11 part, be through yourself if he wanted advice?

12 A. No, it varied. It varied. The Attorney General quite often
13 would learn of who was handling a particular case and if he
14 had need for information, he would contact that person
15 directly and meet directly.

16 Q. As the most... You would consider yourself to be the most
17 senior nonpolitical person in the Department, I take it.

18 A. Yes.

19 Q. Directly below the A.G.

20 A. Yes.

21 Q. Would Messrs. Gale and Herschorn, for instance, then report
22 to you?

23 A. Yes. Well, yes, not directly in the case of Mr. Herschorn.

24 Q. Would you consider yourself...

25 A. Well, it depends on the time we're talking about. Right now,

1 there's an Executive Director of the Legal Services Division
2 that encompasses the civil and the criminal side and the
3 reporting is through the Executive Director to me, but that's as
4 far as the organization is concerned but...

5 Q. Let's say then...

6 A. They still, when I was in the Department, they, I would deal
7 directly with them on occasion, sure.

8 Q. And in particular, let's take the years that we're going to be
9 discussing for the most part, '82 to '84, '85.

10 A. Mr. Gale would have been reporting directly to me and Mr.
11 Herschorn would then be reporting directly to Mr. Gale.

12 Q. And through Mr. Gale to yourself.

13 A. Yes.

14 Q. And would you, at that time and in those years, '82 to '85,
15 have considered both those gentlemen to be the persons with
16 expertise in their particular areas.

17 A. Yes.

18 Q. And would you then, unless you held a strong view otherwise,
19 take their advice on matters?

20 A. Well, I always, unless there was a matter I didn't see any
21 need to, I always sought their advice and I think I always
22 took their advice. I may not necessarily have taken the action
23 that they may have been recommending, but I think the
24 answer to that is yes.

25 Q. Mr. Gale, yesterday, in answer to some questions from my

1 friend, Ms. Edwardh, made this comment and said at page
2 13522:

3 ...Coles will formulate his own views, no matter
4 what has been said to him, and he will take the
5 view that he wants on the matter.

6 Do you subscribe to that...

7 A. Well, I was surprised with reading that statement and a few
8 others. I hardly recognize myself as I read Mr. Gale's
9 description. No, I have difficulty with that. If he held that
10 view, he certainly never made it known to me and I never
11 really, I never really sensed that was the position I was
12 taking in the Department, and if I was, it was certainly never
13 brought to my attention directly or indirectly and I'm not
14 aware that it was ever expressed to any of the Ministers
15 under whom I served and if it was, they didn't see fit to bring
16 it to my attention. So I was quite surprised in hearing Mr.
17 Gale express those views.

18 Q. Other than not having heard the views expressed to you
19 directly, would you disagree with his characterization that
20 you would formulate your own views, no matter what was
21 said to you?

22 A. No, I would not.

23 Q. You would disagree or...

24 A. No, I would form my own views, but not in respect to
25 notwithstanding what was said to me. The formulation of my

1 views would be based on the sources of the information that I
2 had available to me, including the advice of people in the
3 Department.

4 Q. Mr. Gale also indicated that Coles didn't, and this is not exactly
5 a quote, but it's from 13507, Coles didn't hesitate to become
6 involved or express his opinions, and he goes on to say on
7 that same page, "In areas under other people's responsibility."

8 A. Well, I think I would agree with that, the first part of it,
9 anyway. Areas under other people's responsibility. I always
10 considered myself the person responsible ultimately to the
11 Minister for the activities of the Department. So I suppose it's
12 a matter of understanding what he meant by that. I'm not
13 taking issue with him, but, yes, I don't quarrel with his
14 assessment that I involve myself.

15 Q. And just one other comment that I perhaps should give you
16 an opportunity to respond to that Mr. Gale made yesterday,
17 again at 13507. "Some members," I think he's talking about
18 members of the Department, "feel that he," that's you, "was
19 quite high-handed." What would you say to that?

20 A. Well, it would be self-serving, I suppose, for me to say I
21 wasn't. I wasn't consciously aware that that was the way I
22 was administering the Department or that people were
23 perceiving me as being that. All I can say is that if anyone
24 felt that way, they certainly never expressed it to me nor, to
25 my knowledge, to any of my Ministers, because if they had

1 and the Ministers didn't see fit to speak to me... I would have
2 thought that a Department, you know, of our size, it's a
3 medium-sized Department now, but back in the eighties, it
4 wasn't that large. I'm a little surprised to hear that kind of
5 statement because, if that were the case, I would have
6 thought I would have been made more aware of that kind of
7 concern. And I certainly was not. This came as complete
8 surprise to me, what I read in the report of the papers.

9 Q. On the criminal law side of the Department in '82, the senior
10 staff, it really is a relatively small operation, isn't it?

11 A. Yes.

12 Q. there's Mr. Gale, Mr. Herschorn. Would you consider Mr.
13 Thomas to be part of, to be a senior member of the
14 Department or not?

15 A. Well, he was certainly a senior of the Department but he was
16 a prosecuting officer for Halifax County in the field. I would
17 not include him in the sense that I understand your question.

18 Q. Right. Would he be... Would Mr. Thomas have been at the
19 same level as Mr. Edwards was for Cape Breton County?

20 A. Well, they were both prosecuting officers.

21 Q. Right.

22 A. I don't know whether their classifications were the same,
23 because that introduces elements of experience and the size
24 of the operation and I'm not sure that they were equated.

25 Q. The people that you met with most frequently, though, on the

1 criminal law side would be Messrs. Gale and Herschorn, is
2 that...

3 A. Yes.

4 Q. Anybody else?

5 A. Oh, yes, I would meet with other members who were
6 handling specific appeals.

7 Q. Right, but on the more general issues, Mr. Gale and Mr.
8 Herschorn.

9 A. Yes.

10 Q. Just one point that came up yesterday, do you have any
11 knowledge concerning the retention schedule for files in the
12 Department?

13 A. Well, in a general way, yes.

14 Q. Do you know whether or not it's 21 years?

15 A. I don't know those details.

16 Q. You don't know the details, okay.

17 A. I know we have retention and destruction procedures.

18 Q. But you're not able to help us out as to whether or not it's
19 more than 21 years in murder cases, for instance?

20 A. No.

21 Q. Would there be circumstances where you would expect
22 personnel in your Department, if they were seeking
23 instructions, to by-pass you and go directly to the Attorney
24 General?

25 A. Would I expect it?

1 Q. Yes.

2 A. I think, yes. I would not think anything particular about that.

3 Q. I just wanted to mention to you one incident that's been
4 discussed in the last couple of weeks involving Mr.
5 Giovannetti, an instance involving whether or not Mr. Justice
6 Pace ought to have sat on one of the Ebsary cases. And at
7 12467 when Mr. Giovannetti was explaining why he went to
8 the A.G., he said: "Thought Coles would be uncomfortable if he
9 asked Coles about Pace." Did that comment of Mr. Giovannetti
10 surprise you?

11 A. Yes, and it concerned me. It concerned me.

12 Q. In what sense?

13 A. Well, you know, I don't know why he would have concluded
14 that he would by-pass me for that reason. I mean the, you
15 know, Mr. Pace was the Attorney General in the Department
16 on two different occasions. There is, you know, the fact that
17 we had an association didn't seem to me to be, per se,
18 sufficient grounds for by-passing me. There may have been
19 other grounds, but I thought that it implied a concern that I
20 have difficulty in understanding and I would have thought
21 that, not that I would question his right to go to the Attorney
22 General if he saw fit, but I question the reasons that he gave
23 for doing that and I thought that precluded me from an
24 opportunity to exercise the responsibilities that I think are
25 properly mine as Deputy Attorney General in advising the

1 Minister or taking, advising the staff on such matters, but...

2 Q. Mr. Gale was asked to comment on the same issue at page
3 13304. The question was:

4 Q. You wouldn't hesitate, though, to
5 contact Mr. Coles because of his prior
6 association with Mr. Pace.

7 A. No, I would not have hesitated him on
8 that except that it would put Mr. Coles in a,
9 I would have thought, if it were me, I'd be
10 in an unenviable sort of position of
11 somebody saying that you do it because
12 of whatever your decision was. You find it
13 hard to talk to about that matter because
14 your friend is involved. A similar
15 sort of...

16 A. I don't understand that. I don't know of any instance in the
17 Department that would give rise for any such comment of
18 that kind.

19 Q. That was going to be my next question, whether or not you
20 could think of any reason that would give rise to those
21 concerns.

22 A. No.

23 Q. Having said that, would you have agreed with, if you had
24 been asked, with the position that Mr. Giovannetti was taking
25 with respect to asking Mr. Pace not to sit?

A. Well, I don't know. I don't know what reasons he had.

Q. The fact that Mr. Pace was Attorney General at the time.

A. Well, I haven't addressed the question, but I think I would

1 have been equally concerned about any members of the Court
2 who sat on the Marshall reference sitting on the Ebsary case.

3 Q. Why?

4 A. Well, I think that having sat on the Marshall case, they were
5 all made familiar with the evidence that was before them and
6 in respect to Marshall and it may or could have influenced
7 their evaluation of evidence that was advanced on behalf of
8 Mr. Ebsary. So I, in answer to your question, my immediate
9 response would be, I would have personally had some
10 concern about the same court, or the panel being composed of
11 people sitting on both cases. I don't, in the case of Mr. Pace, I
12 don't know what knowledge he would have had about the
13 circumstances, apart from his sitting on the Marshall appeal.
14 I honestly don't know. I think I... It's a serious matter to
15 challenge the, a member of the court and I think one would
16 have to have sufficient reasons to do so.

17 Q. I think Mr. Pace would have indicated that he had no
18 knowledge of the Marshall matter when he was Attorney
19 General. He's indicated that to us. And Mr. Giovannetti's
20 position, I think is that, notwithstanding that, the fact that he
21 was Attorney General, per se, raises a reasonable
22 apprehension of bias, the possibility.

23 A. Well, I have some difficulty with that because we're talking
24 about an event that happened at a point in time that he was
25 Attorney General, but the charges for, against Mr. Ebsary

1 were laid, you know, at a time subsequent to he being
2 Attorney General. And I suppose if you carried that concern
3 to its logical conclusion, you would say that anything that
4 happened during the time of a person's office as Attorney
5 General, no matter what time in the future they may give
6 rise to criminal proceedings, notwithstanding that person
7 had knowledge of, and assuming he had no knowledge of it,
8 would make him liable to be challenged. And I find that a
9 difficult proposition to accept.

10 10:15 a.m.

11 Q. Do I take from what you're saying, without wishing to
12 characterize it improperly, and tell me if I'm wrong, that the
13 mere fact that Mr. Justice Pace was Attorney General at the
14 time of the original Marshall prosecution, assuming that he
15 knew nothing about it.

16 A. Yes.

17 Q. Would have...wouldn't give you any concern as to him sitting
18 on the bench in the Ebsary matter?

19 A. Personally I would agree. I would not think that would be
20 grounds to challenge him sitting on that appeal.

21 Q. With respect to your other comment that you might have
22 some concern about the same panel sitting on the Ebsary
23 matter as sat on the Marshall reference, other than your
24 supposition that that is...that that may be problematic, do
25 you have any information that it would give you any reason

- 1 to think that?
- 2 A. Oh, I make that as a general proposition that I would think
- 3 that.
- 4 Q. I just want to ask you a few questions about the hiring of
- 5 staff in the Attorney General's Department. Did you ever
- 6 have occasion to be in a position to consider the hiring of a
- 7 person for a senior position in your department?
- 8 A. Well, I don't know off the record. I may have. I may have.
- 9 Q. On the record.
- 10 A. On the record. I don't know. I may have. I would be
- 11 involved. I would be involved in the selection process of all
- 12 staff, all professional staff, that is, and if we hired a senior
- 13 person... We've hired some senior solicitors. I don't know if
- 14 that...if you mean if...
- 15 Q. I'm talking above that, say a...
- 16 A. You're talking about at director's level...
- 17 Q. Yes.
- 18 A. ...or that...
- 19 Q. Yeah.
- 20 A. No. I was involved in the promotion of people to those
- 21 positions, but they were in, you know, in-house promotions.
- 22 Q. But during the time you were Deputy Attorney General,
- 23 there wasn't an occasion when you had to fill one of those
- 24 senior spots, directors.
- 25 A. Not from outside, not to my recollection.

1 Q. With respect to the persons who are hired as prosecutors,
2 did you have any involvement in that process?

3 A. Well, I would be involved in the selection process to a
4 limited extent, yes.

5 Q. Can you tell us what that selection process is?

6 A. Well, I don't know what it is now. I understand there may
7 have been some changes in the department since I've been
8 there.

9 Q. Let's talk about the time when you were there.

10 A. When I was there, we normally always had a large number
11 of people who would apply for positions in the department,
12 some of whom would specify prosecutorial roles, others
13 would not. And, under the Prosecuting Officers Act, as you
14 undoubtedly know, the Attorney General has a statutory
15 authority to appoint people as his agents. And so we
16 would...we would canvass the names of the people that had
17 applied and, in this particular case we're talking about
18 prosecutors, Mr. Gale or Mr. Herschorn would reduce the
19 numbers down to two or three candidates and my
20 understanding of the practise would be that they would
21 have those candidates interviewed by the prosecuting
22 officer, particularly if they were for the Halifax area, then
23 this would...

24 Q. That would be Mr. Thomas.

25 A. ...be Mr. Thomas.

1 Q. Right.

2 A. To get his assessment of them, and then the names would go
3 forward to ...through me to the Attorney General and he
4 would decide among those who were thought to be eligible,
5 qualified and in Mr. Thomas'...in his case, proper candidates
6 to be considered, he would make the selection. Then there
7 would...then there are, of course, there is a process that
8 appointing them required an involvement of the executive
9 council because the salary and the benefit package was all
10 set and determined by order-in-council.

11 Q. Right. There was some discussion, I think, Frank...Mr.
12 Edwards was, in response to a couple of questions from Mr.
13 Justice Hickman, was talking about the difference between
14 an order-in-council appointment and civil service position.
15 Can you enlighten us at all as to what that distinction is?

16 A. Probably not. I think it's a difference without too much
17 distinction. The Civil Service Commission, in my experience,
18 did not normally get involved in hiring of professional staff
19 in our department. Now, there had been...from time to time
20 we may have used the Commission to assist us in the
21 screening or selection process of names of people who
22 applied. Some would apply through the Commission, others
23 would apply directly to us. The...the civil service benefits
24 normally were made available to those appointed by order-
25 in-council, by the order-in-council.

1 Q Right. In the same sense as they would to people appointed
2 otherwise.

3 A. That's right. So, that in a real sense I don't think there is,
4 you know, a great distinction between the two.

5 Q Why do the two...why do the two process...or why do the
6 two...why does the distinction exist then? Is it...why is it
7 that some people have one sort of appointment and some
8 people have another?

9 A. Well, I think...I think one would have to look at the history
10 of the Prosecuting Officers Act. Under that Act prosecuting
11 officers were appointed as agents of the Attorney General,
12 you know, not as...not as, if you like, as employees of the
13 civil service. And I don't know the history of the Act or the
14 reason for it, but that's the way the Act reads and it's still in
15 effect.

16 Q And during the time that you were Deputy Attorney
17 General, were there, in fact, then prosecutors who were
18 appointed pursuant to this order-in-council route and
19 prosecutors who were appointed otherwise?

20 A. Well, certainly the former is the case. There may have
21 some...there may have been some appointed by the
22 civil...through the civil service, I honestly can't remember
23 that. I should say that we also from time to time had an
24 inter-change of people in our office doing non-criminal
25 work, wanting to do criminal work and they would normally

1 be civil servants, appointed through the civil service route,
2 and so when they became prosecutors, they continued to be
3 civil servants but... And, correspondingly we had people in
4 the prosecuting office who decided, for whatever reason,
5 they wanted a career change, they would come into the
6 department to do non-criminal work and some of those
7 would have been...because the positions they were then
8 occupying were civil service positions would automatically
9 become civil servants. So, there was a tendency of...for an
10 administrative mix that...

11 Q. Would the norm then be, if somebody who is hired
12 specifically as a prosecutor, would the norm be order-in-
13 council?

14 A. My recollection is the answer to that would be yes.

15 MR. CHAIRMAN

16 Mr. Coles, is there any difference in the sense of security of
17 tenure between a public servant, you know, civil servant and an
18 order-in-council appointment?

19 MR. COLES

20 No. Ah, well, I should...technically there may be, My Lord. I
21 think that order-in-councils are at pleasure, but in practise I
22 know of none that have ever been asked to resign other than for
23 cause.

24 MR. CHAIRMAN

25 You say in Nova Scotia, which I suspect is the practise of

1 many provinces, Public Service Commissions are not asked to
2 screen or inter...to assess applications to fill professional positions.

3 MR. COLES

4 That is correct, My Lord, except when they're
5 requesting...from time to time we did ask their assistance because
6 of the expertise they had there for interviewing.

7 MR. CHAIRMAN

8 Normally a Public Service Commission would not have the
9 expertise to hire doctors or engineers or lawyers.

10 MR. COLES

11 Normally that's correct.

12 MR. CHAIRMAN

13 This type of thing. All right.

14 MR. SPICER

15 Q. Has the situation arisen in the department where the
16 department has identified a need for a prosecutor in a
17 specific area, let's take commercial crime, for instance, and
18 gone out to specifically hire somebody for that?

19 A. Yes, I think we have done that.

20 Q. And would that sort of need, I'm just using that one as an
21 example, would that sort of need be a need that's identified
22 by yourself or by somebody else in the department?

23 A. That would be primarily by somebody else in the
24 department.

25 Q. Would that be Mr. Thomas?

1 A. He through Mr. Gale and it may even originate with the RCM
2 Police who may identify a particular...particular professional
3 need that they see lacking and would raise that with us.

4 Q. Has the RCM Police, in fact, identified that kind of need and
5 come to the department?

6 A. My recollection is they have, yes.

7 Q. In which areas?

8 A. Commercial crime.

9 Q. And was that need responded to?

10 A. Not fully. Not fully. I think we responded in part, but I
11 don't think we were able to respond fully to what they had
12 requested.

13 Q. What was it that they were looking for?

14 A. Well, I think they wanted more dedicated staff available to
15 them in the commercial crime area.

16 Q. Dedicated in the sense of not having other responsibilities?

17 A. That's right.

18 Q. Mr. Gale indicated yesterday that he was of the view, I
19 think, that you had some role in drafting job descriptions in
20 the department, is that correct? And, in particular, his,
21 which is Exhibit 160. Does he have 160? If we just wait for
22 a second I'll show you it.

23 A. I had to sign off them, but I don't think I had any...

24 Q. I understood that to be Mr. Gale's job description from 1975.

25 A. Well, the numbers...the document I have is number 160 is

1 not a job description of...

2 Q. What is it?

3 A. Well, it's a summary...this looks like it came from a briefing
4 book. It's a summary of what his responsibilities are, but
5 that's not what I would understand is a job description.

6 Q. I think we're using job description because that was, my
7 recollection is that that was what was given to us on the
8 basis that it would be a job description in a general sense of
9 what...describing what his responsibilities are.

10 A. Well, it does that. It describes his general res...areas of
11 responsibility, but this is not what I would understand to be
12 a job description.

13 Q. Okay.

14 MR. CHAIRMAN

15 I believe there is another document.

16 MR. SPICER

17 Yes, later on. Exhibit 161.

18 MR. CHAIRMAN

19 I believe, Mr...

20 MR. COLES

21 A. But I may very well ...I may very well have prepared this
22 document because it looks to me that it's taken out of a
23 briefing book prepared for the Ministers.

24 Q. Yes.

25 A. Or maybe it's a briefing book on the department for

1 information, general information purposes.

2 COMMISSIONER EVANS

3 161.

4 MR. SPICER

5 No, it's 159, I think, is the other job description.

6 MR. COLES

7 A. Yes, I...this is what I would understand...

8 Q To be a job description. That's 159 and that was some years
9 later.

10 A. But certainly I would not have prepared this.

11 Q Let's go back to 160.

12 A. I would be required to approve of this.

13 Q Yes.

14 A. Which I see I did.

15 Q If I could just direct your attention back to 160 for a
16 moment. Do you recollect whether or not you would have
17 consulted with Mr. Gale prior to drawing up this description
18 of his responsibilities?

19 A. Well, I'm not certain I did draft up this, but it, you know, I
20 may have drafted this.

21 Q If you did, do you think would it...

22 A. If I did I...no, I don't think I would have felt the need to
23 consult with him on this.

24 Q With respect to...

25 A. ...summary.

- 1 Q. Sorry.
- 2 A. No, in respect to this summary, I'm sorry.
- 3 Q. Thank-you.
- 4 A. With respect to item 3, "Responsibility for all legal matters
5 related to native people, (Indians)," Mr. Gale indicated to us
6 yesterday that he objected...made his objections known to
7 you insofar as this was intended to cover all matters related
8 to Indians. Do you remember that?
- 9 A. No, but he may have.
- 10 Q. Do you have any recollection as to why Mr. Gale, as director
11 of criminal, would have been assigned the responsibility for
12 all legal matters related to native people?
- 13 A. No.
- 14 Q. No. Do you remember Mr. Gale speaking to you about his
15 concern that he shouldn't be dealing with matters other than
16 criminal matters, so far as they affected Indians?
- 17 A. I think...I think he...I recall him raising the matter. I don't
18 know that I...I don't know if I understood it as a concern,
19 but I think he made it clear that he didn't think he was the
20 appropriate person to have that responsibility, but my
21 recollection is that, you know, I don't know the date of this
22 particular document, but it must go back some time
23 because...
- 24 Q. 1975, I think.
- 25 A. Yes, well, you know, in those days it was not a particularly

1 onerous responsibility and I don't...I don't think that...I don't
2 think it was a matter of any great consequence as far as I
3 was concerned. Somebody had to handle the
4 correspondence and deal with...deal with the legal issues and
5 everybody in the department was sort of doubling up. We
6 didn't have the luxury in those days to dedicate everybody
7 to specific assignments.

8 Q. Would it have been your understanding though at the time
9 that you prepared this summary of his responsibilities that,
10 indeed, he was the person who was...had undertaken
11 responsibility for all legal matters related to native people?

12 A. Yeah, having the responsibility didn't imply that he had to
13 do everything that arose under that responsibility.

14 Q. In other words he could delegate it.

15 A. Well, certainly.

16 Q. Did you have any role yourself in the manner in which cases
17 get assigned to prosecutors?

18 A. No.

19 Q. Are you able to tell us whether...what generally...the manner
20 in which that would occur, in other words, how would a
21 prosecutor become seized with a particular case?

22 A. Well, the normal...normal usual situation, I would think, the
23 police would contact the prosecuting officer in the county in
24 which the case arose and inform him of the charges that
25 were to be laid or were laid and the prosecuting officer

1 would make his own decision whether...who in his office
2 would attend on the case. That's what I would understand
3 to be the normal procedure.

4 Q. Would there be any circumstances, to your knowledge,
5 where that would not be the procedure?

6 A. Yes.

7 Q. Where the prosecutor would be appointed by the Attorney
8 General's Department?

9 A. Yes.

10 Q. What sorts of circumstances would those be?

11 A. Well, the cases that were...where the police were reporting
12 directly to me or to someone designated in the department,
13 in those kind of situations which were not many, but it
14 would be more in the nature of commercial crime
15 investigations, sometimes these kind of activities are not
16 totally centred in one area, but the expertise may be in an
17 area other than where the...you know, where the case
18 originated and we would..and the police would ask us or
19 expect us to assign counsel in those cases. Other cases the...

20 Q. Just let me stop you for a sec there on that particular one.

21 A. Yeah, sure.

22 Q. Would that...that situation where you said the police would
23 expect you to assign somebody, was that a policy that you
24 understood to be well known by the police, that's what they
25 would do in this sort of case?

1 A. Well, I don't know that it was a policy well known. It was a
2 practise that I was aware of. I don't know how well known
3 it was. I...certainly it was...I considered it was an acceptable
4 practise that was known to them. I don't know how well...

5 Q. Practise in the sense that it happened in more than one
6 case?

7 A. Yes.

8 Q. Were there any circum....were you involved in any
9 circumstances where prosecutors would be...having been
10 assigned to a case, would be removed?

11 A. No.

12 Q. You're not aware of any circumstances where that would
13 occur?

14 A. Where a prosecutor was removed from a case?

15 Q. Removed from the case.

16 A. No.

17 Q. Would the prosecuting officer for the counties, let's say, take
18 Mr. Edwards as an example, Cape Breton County. Mr.
19 Edwards seems to consider himself, from reviewing his
20 testimony, to be fairly autonomous in terms of decision
21 making. Would you agree with that characterization of his
22 job?

23 A. Yes, uh-hum.

24 Q. What sorts of circumstances would there be where that
25 autonomy would be countermanded by the Attorney

1 General's office in Halifax? What sorts of things would cause
2 that to happen?

3 A. Well, you know, if...if the Attorney General's office was
4 contacted directly in respect to a matter and as a result of
5 that thought an appropriate response ought to be given to it,
6 that would be the kind of situation. And after all, you know,
7 everyone in the department and on the criminal side from
8 the Deputy down are all agents of the Attorney General, and
9 I suppose it's a case of the superiors having a responsibility
10 to discharge and to...and I'm not sure I...I'm not sure that
11 answers your question. I'm not sure I fully understand it.

12 Q. Well, I think it raises one particular case that there has
13 been some discussion about, and that's the case involving
14 Mr. Edwards and a shoplifting case...

15 A. Yes.

16 Q. ...in Sydney. Are you familiar with that?

17 A. Yes, well, I am. I made myself familiar. I must admit
18 I...until I heard reference made to it, I had forgotten about
19 it, but I am familiar in the general way with it, yes.

20 Q. What did you do in order to familiarize yourself with it?

21 A. Well, I called Mr. Gale and asked him if he remembered
22 anything involving this particular case.

23 Q. And when did that occur?

24 A. Well, after I read...after I read Mr. Edwards' statement in
25 respect to it.

1 Q. Okay.

2 A. And, he refreshed my memory and I quickly remembered
3 after he made reference to the case. I had forgotten about it.
4 I hadn't remembered.

5 Q. But your memory has been refreshed.

6 A. In a general way. I know the circumstances under which I
7 had Mr. Edwards contacted.

8 Q. And is...this is a case where the prosecutor was pursuing a
9 course of action and was then told by Halifax not to pursue
10 that course of action?

11 A. That's correct.

12 Q. Okay. Tell us what happened?

13 A. Well, my recollection is that I received a phone call from a
14 senior lawyer in Sydney who represented himself to be...to
15 be a friend of the family and this particular woman who was
16 charged and was to appear in court that day on a shoplifting
17 charge. And, I understood from his representations that this
18 woman was suffering from kleptomania, and that she and
19 the family were committed to move out of the province to
20 take up a position in the United States within a short time
21 after the...after that particular time, I'm not sure now how
22 long it was, but it was shortly after the trial, and he called
23 me to bring it to my attention and ask whether there was
24 anything to be done so that she would not have to face this
25 charge. And, I don't know what I said to him. I probably

1 said something to the effect, well, leave it with me. And I
2 called Mr. Gale in and I acquainted him with the
3 conversation and I expressed the view that I thought under
4 the circumstances this was a proper...appropriate case for us
5 to exercise our discretion and not proceed and would he call
6 Mr. Edwards and so advise him. And, I don't recall I ever
7 heard anything more about it after that. Certainly, I was a
8 little surprised to hear that Mr. Edwards expressed concern
9 about this because he never, ever raised it to me in any
10 subsequent meeting that I ever had with him and I was not
11 aware that there was anything about it that troubled him.

12 10:38 a.m.

13 Q. Was Mr. Edwards' view as to whether or not the charge ought
14 to be proceeded with solicited by yourself?

15 A. No.

16 Q. Did you do anything independently to verify the facts that
17 were given to you by the senior lawyer in Sydney?

18 A. No.

19 Q. Why not?

20 A. Well, I had no reason to do that. I accepted the
21 representations that were made. They seemed to me to be a
22 proper basis to exercise discretion and when I communicated
23 this to Mr. Gale, my recollection is he didn't express any views
24 to the contrary and when I asked him to so advise Mr.
25 Edwards, I must admit, I didn't think further about it. But I

1 would presume that if he spoke to Mr. Edwards and Mr.
2 Edwards expressed some opposition to the position, that I
3 would have heard about it and presumably would have
4 talked to Mr. Edwards, or Mr. Gale would have. I think the
5 matter would have been dealt with. This is all speculative
6 because none of this transpired, to my knowledge.

7 Q. Mr. Gale indicated here at page 13510 yesterday, I think,
8 that, or perhaps the day before, that in his view there should
9 have been consultation with Mr. Edwards.

10 A. Well, that's his view. If he felt that way, I would have
11 thought he would have made an effort to do so. Time was
12 always of the essence here. I mean my recollection is I got
13 the call in the morning and I'm not sure at what time of the
14 day, but the charge was to be dealt with and if Mr. Gale had
15 felt that way, I would have expected him to do so.

16 Q. Weren't you, in effect, though, telling Mr. Gale to get ahold of
17 Mr. Edwards and tell him to either stay or withdraw this
18 case?

19 A. Yes, but that doesn't.. I wouldn't have thought that that... That
20 was based on the information that I had, but if he had
21 contacted Mr. Edwards and there was other facts that ought to
22 be considered, I would have expected him to ascertain that
23 and they would have been considered.

24 Q. Do you not think, in retrospect, that it would have been
25 reasonable for you to check the validity of the statements

1 that were being made to you by the senior lawyer in Sydney
2 before directing that the matter be withdrawn?

3 A. I think that's always advisable if you have an opportunity to
4 do.

5 Q. Well, why didn't you have an opportunity in this case?

6 A. Well, I received the, I received the representation. I thought
7 it was one that thought to be acted upon. I so informed Mr.
8 Gale. I asked him to so communicate this to Mr. Edwards.
9 Now I didn't think further of that on the issue and I would
10 have presumed that if he felt that there should be further
11 consultation with Mr. Edwards or the police, as the case may
12 be, I would have expected him to attend on that.

13 Q. It was your direction, though, to Mr. Gale.

14 A. Oh, yes. Well, direction, my instructions, yes.

15 Q. Have you ever had...

16 A. But that doesn't, you know, that doesn't rule out the fact that
17 he, you know, he's a senior person in the Department, the one
18 to deal with Mr. Edwards, and I would have thought that if he
19 had any concern, which he certainly never expressed to me
20 that he had any concern, that he would have attempted to
21 speak to Mr. Edwards.

22 Q. Is it news to you then, Mr. Coles, that Mr. Gale is now saying
23 that he thought there should have been consultation with Mr.
24 Edwards?

25 A. Yes.

1 Q. The first you've heard of it?

2 A. Yes, if he thought that, I would have expected him to have
3 such consultation.

4 Q. Have there been any other situations where you have
5 received calls in connection with withdrawing or staying of
6 cases that you have acted on?

7 A. Well, I was involved in one other, but I'm not sure that it was
8 a case of my acting on it. It was a situation that was *
9 considered by the Minister of the day and myself and Mr.
10 Gale. And as a result of representations, it was decided that
11 certain charges would not be laid. That's the only one I can
12 recall offhand.

13 Q. Okay, other than that one, though, no others?

14 A. Well, not to my recollection.

15 Q. Did Mr. Gale, generally, I'm just thinking of this particular
16 case in Sydney when you say, well, you directed...

17 A. May I interrupt you a moment?

18 Q. Sure, by all means.

19 A. You know, I'm a little troubled by the reference that this
20 constitutes interference. Unquestionably, it was interference
21 in the sense that instructions came from Halifax to Sydney.

22 Q. Yes.

23 A. But, you know, I like to put in the caveat that I have the
24 responsibility as the Deputy Minister and being the superior
25 agent under the Attorney General. So the fact that I may, in

MR. COLES, EXAM. BY MR. SPICER

1 this instance, have overruled the process that Mr. Edwards
2 was in, I'm not sure it's proper to describe that as
3 "interference."

4 Q. Well, I don't want to characterize it pejoratively as
5 interference but all I was trying to do was establish the basis
6 upon, you acted on by which you exercised that authority.

7 A. Well, I appreciate. I wasn't really directing to you, but it's
8 been called interference in other places and I'm not sure that
9 that is a fair characterization of it.

COMMISSIONER EVANS

10
11 What would you prefer to characterize it as?

MR. COLES

12
13 A. Well, my exercising my responsibility in the circumstances
14 that I had the responsibility for making that decision and I
15 had the authority to make that decision. Now the fact that it
16 may have, it may have overruled a decision taken by a
17 person accountable and responsible to me, is so. But I mean I
18 don't think... Interference means that I would have injected
19 myself in his responsibility, and he did not have the exclusive
20 responsibility in that matter or any other prosecutorial
21 matter.

COMMISSIONER EVANS

22
23 Looking back on it now, do you think it might have been
24 better for you to have consulted with Mr. Edwards?
25

13690 MR. COLES, EXAM. BY MR. SPICER

1 MR. COLES

2 A. Certainly for either Mr. Gale or I to consult with Mr. Edwards.

3 I'm not sure that, which one of us needed to do it. One of us,
4 sure.

5 COMMISSIONER EVANS

6 Would you have been more familiar with the facts than Mr.
7 Gale, after all, the representation was made to you?

8 MR. COLES

9 Well, there was a very, you know, it was a very brief
10 representation but, no, I had, I take your point. Either one of us...

11 COMMISSIONER EVANS

12 Should have.

13 MR. COLES

14 Should have, if we had an opportunity to, sure. I have no
15 difficulty...

16 COMMISSIONER EVANS

17 Was it followed up afterwards? Did the lady leave the
18 country?

19 MR. COLES

20 Yes, yes.

21 COMMISSIONER EVANS

22 So there was some follow-up on it.

23 MR. COLES

24 Oh, I'm sorry, I don't know that there's any follow-up. My
25 information was subsequently that that commitment they had,

1 they carried through. I'm not sure how I came to that knowledge.

2 COMMISSIONER EVANS

3 Thank you.

4 BY MR. SPICER

5 Q. Did you have any idea at the time whether or not, for
6 instance, the woman had a record?

7 A. No.

8 Q. You didn't know whether it was her first offence, second,
9 third?

10 A. No.

11 Q. Could the witness be shown Volume 28, please? Mr. Coles,
12 the last couple of pages on page 16 and 17 of that volume, the
13 1986 Policy Directive on Disclosure. Did you have any
14 involvement in that document being produced and prepared?

15 A. Well, I didn't prepare the document, but I certainly had some
16 involvement in it, yes.

17 Q. And you're generally familiar with its terms and what it
18 speaks to?

19 A. Oh, yes, yes.

20 Q. Are the policy directives on disclosure produced by the
21 Attorney General's Department made available to defence
22 counsel? Or were they, sorry, in 1986?

23 A. I don't know.

24 Q. You don't know whether or not they would be generally... If a
25 prosecutor...sorry, if a defence counsel phoned up and asked,

1 would it have been the policy of the prosecutors in your
2 Department to say, "Sure, you can have this document"?

3 A. I would presume so, but I can't speak to that question.

4 Q. As far as you're aware, there wasn't any policy which would
5 have said "You cannot have these documents"?

6 A. No.

7 Q. No. In the years '82 through to '86, what did you understand
8 the obligation of Crown counsel to be with respect to
9 disclosure?

10 A. What was the period again, I'm sorry?

11 Q. From, say, '82 to '86.

12 A. Well, the... I had assumed that there was disclosure. They
13 certainly... I recall attending one of the workshops that we
14 had on an annual basis for prosecutors and speaking, and I'm
15 not sure of the period exactly, but it was during that period of
16 time and what prompted me to raise this subject was the
17 views that the then Attorney General, Mr. How, on this
18 subject and I recall stating there quite clearly that the
19 Minister had expected the prosecuting officers to make full
20 disclosure to defence counsel. And we had a discussion
21 around the, you know around the table at that time. There
22 were some expressions made that it should be left at the
23 discretion of the prosecuting officers, to which I made my
24 position known that that was not to be a discretionary matter,
25 although I recognized there were some instances where some

1 particulars could and ought not to be disclosed. But I was not
2 aware of any complaints. No one... I have no recollection of
3 anyone ever calling either me or calling someone and it being
4 relayed to me that they were having any disclos...
5 nondisclosure problems. And so that I really wasn't aware
6 that there was a problem out there.

7 Q. So when Judge Cacchione refers to the time when he was in
8 practice, says that he never got full disclosure and that he did
9 speak to Messrs. Herschorn, Thomas, and Wade from time to
10 time, would that have been news to you?

11 A. Yes.

12 Q. Other than the complaint procedure; that is, other than a
13 defence counsel making a complaint, was there any other way
14 by which lack of disclosure could have come to the attention
15 of yourself or other senior members in your Department?

16 A. I don't... I have difficulty in thinking how.

17 Q. Did you ever discuss it with them at meetings and say, "Well,
18 what's your practice? What's your practice?" to the various
19 prosecutors?

20 A. Not that I recall. Actually the system would only work if the
21 defence counsel, and this assumes knowledge of the policy on
22 their part. If they weren't having compliance with the policy,
23 to bring that to the attention of people in the Department. I
24 mean they have to police it in the sense that they have to
25 insist that the policy be... given effective. And I, as I say, I'm

1 a little surprised to hear, basically through what Mr.
2 Cacchione said, that if he had these concerns, that he didn't do
3 something about them. Because certainly there's no question
4 in my mind, then or now, that this clearly represented the
5 Minister's view and the policy of the Department.

6 Q. And is it fair to say that the notion of disclosure; that is, that
7 the Crown makes known to the defence basically everything
8 in its knowledge or possession,

9 would that have been the position of the Department
10 throughout the time that you served as Deputy Attorney
11 General, in general terms?

12 A. Yeah, I would think so. Now where you say "everything in its
13 possession," I should qualify that.

14 Q. Sure.

15 A. Because, you know, police reports, per se, may be in the
16 possession of the Crown, but the disclosure policy did not
17 extend to and include the making available of police reports.

18 Q. Yeah, we'll get to police reports later. Other than police
19 reports, are any other documents that you would think should
20 not have been made available?

21 A. Everything that's relevant to the case before...in which the
22 defence lawyers involved wish it be made available, yes.

23 Q. Sure. And if, for instance, in... If there were statements in the
24 possession of the Crown that were not disclosed to defence,
25 and the presence of those statements contributed to a

MR. COLES, EXAM. BY MR. SPICER

1 conviction, would you consider that to be a breach of a
2 fundamental obligation on the part of the Crown to disclose?

3 A. Well, I'm not so sure that... I think we have to put that in a
4 time context, because I'm not so sure that there is a duty
5 imposed on prosecuting officers prior to this kind of an
6 instruction being given to them. I'm not, you know, I fully
7 expected that they would make for closure, but when you talk
8 now about a breach of an obligation, I think you're talking
9 about something else, you know. I'm not sure that prior to
10 this kind of a communiqué, I'm not sure what direct
11 instructions were given to prosecuting officers that would
12 constitute a breach of duty if they failed to comply with it.

13 10:54 a.m. BREAK

14 11:24 a.m.

15 Q. Mr. Coles, in connection with the disclosure matter that we
16 were talking about before the break, what would be your
17 view if the Crown was in possession of contradictory
18 statements of witnesses? And I'm now talking, to be specific
19 about it, we'll talk about the Chant and Pratico statements in
20 the Marshall matter. If the Crown was in possession of those
21 and did not disclose them to the defence, would it be your
22 view that that would be a breach of their obligation to
23 disclose?

24 A. Well, you must remember I was not in the Department...

25 Q. Let's say '72 then. You were just about there.

MR. COLES, EXAM. BY MR. SPICER

1 A. Yes, but that's... Okay. You know, I'm not, I was not aware of
2 what instructions may have been given to the Crown on the
3 question of disclosure. My personal view is I would have
4 expected them to make them available.

5 Q. Right.

6 A. But whether or not that was the policy or the instructions
7 given to prosecuting officers, I cannot speak to because I
8 simply do not know.

9 Q. And your personal view was that you think they should have
10 been disclosed...

11 A. Yes.

12 Q. Having not been disclosed, I take it again it would be your
13 view that that failure would be a breach of their obligation to
14 disclose, assuming they had that obligation?

15 A. Well... No, I can't say that. Because I don't know what their
16 obligations were at that time. In the sense of having a duty
17 to disclose.

18 Q. Right. With respect to the new evidence, again on the
19 disclosure issue that was, came to light ten days after Mr.
20 Marshall was convicted, if that evidence was not disclosed by
21 the prosecutor to defence counsel; that is, the evidence of
22 Jimmy MacNeil, would you consider that to be improper?
23 That's information that should have been disclosed to defence.

24 A. Well, I think my answer would be the same to that question
25 as the earlier question.

MR. COLES, EXAM. BY MR. SPICER

1 Q. Are you not able to say whether in 1972, when you were in
2 the Department, whether or not you thought that the Crown
3 would have had an obligation to disclose new evidence?

4 A. No, I'm not able to say that. I did not address myself to the
5 question of disclosure in '72.

6 Q. When did you first turn your mind to the question of
7 disclosure?

8 A. Well, I think it was in the mid-eighties when I was involved
9 in the discussions that I alluded to earlier at the Deputy
10 Minister's level.

11 Q. Mr. Gale, at 13445, and Mr. Justice Pace, at 12815, in
12 connection with the new evidence issue; that is, the MacNeil
13 business, indicated that if that material was not disclosed to
14 the defence, that that would constitute, I believe the words
15 used by Mr. Justice Pace was an "injustice." Do you have any
16 reason to disagree with that view?

17 A. I don't think I would have any comment on that.

18 Q. Do you have a view?

19 A. Well, it certainly would be today, in the light of the
20 instructions. But, again, I think it goes to the same question
21 that you put earlier. I don't know what the obligations, if
22 there were any on the part of the Crown, to make disclosure
23 at that time.

24 Q. Were you involved yourself in questions involving decisions
25 to appeal in criminal cases?

MR. COLES, EXAM. BY MR. SPICER

1 A. Some.

2 Q. And what would the nature of your involvement be?

3 A. Well, I would meet with, at the request of Mr. Gale or one of
4 the lawyers who was conducting the appeal, and if there was
5 a question.. I'm having difficulty here recalling specific cases,
6 but that it was a marginal question whether or not
7 technically, yes, it was thought that there may have been an
8 error of law that ought to have been the subject of an appeal.
9 But whether or not this was the appropriate case to make that
10 issue, and it was sort of a judgement call. You flip your coin.
11 Maybe you should, maybe you shouldn't. And, in cases like
12 that, I would be involved and offer my views.

13 Q. Would you for the most part in that type of process take the
14 advice of Mr. Gale and the people directly involved?

15 A. I think those instances were more the case that we had a
16 discussion among ourselves with an effort to try and reach a
17 consensus and reach a decision on it. I don't think it was a
18 case of accepting advice or rejecting advice. It was a case of
19 discussing what the concerns were and what the parameters
20 of the appeal may be.

21 Q. What about with respect to representations made by the
22 Crown concerning sentencing?

23 A. I don't...

24 Q. Were you ever involved with that...

25 A. I don't recall being involved in that, other than I think in a

MR. COLES, EXAM. BY MR. SPICER

1 general sense. I'm thinking, for instance, at one point in time,
2 there was a lot vandalism in one part of the province,
3 particularly a lot of store-front windows were being smashed
4 and there was a real concern because the merchants were
5 affected by their insurance rates. And, as I recall, at one
6 instance, a merchant wasn't even able to get insurance
7 because of this. And I think, in that particular instance, I
8 asked that the prosecutor be specifically informed of this kind
9 of public concern and the implications and consequences of
10 this kind of activity and to, the first opportunity, to address
11 the court on the issue in an expectation that the Court would
12 respond with what we thought was a more satisfactory
13 penalty, what might serve as a deterrent. But, apart from
14 that type of involvement, the answer would be no.

15 Q. That's a general sort of policy.

16 A. Yes.

17 Q. With respect to a particular issue. Are you aware of any
18 cases where the Attorney General has got involved with
19 respect to the nature of the representation to be made on
20 sentencing?

21 A. I don't recall specifically, although I have a general
22 recollection that there was a case or two that we discussed
23 the appropriateness of whether the Crown should ask for a
24 term of incarceration or a fine. But I don't recall the specifics
25 of it.

MR. COLES, EXAM. BY MR. SPICER

1 Q. Do you know whether or not Mr. Gale would have been
2 involved in those discussions?

3 A. Yes. Well, I would expect that he would.

4 Q. Expect he would have been?

5 A. Yes.

6 Q. Generally, would you get involved with the prosecutor in
7 determining what position the Crown is going to take with
8 respect to a particular case?

9 A. Not as a rule, no.

10 Q. Other than the Donald Marshall matter, and I guess we'll get
11 to your discussion with Mr. Edwards about...

12 A. Yes.

13 Q. His position in that case.

14 A. Sure.

15 Q. Other than that case, was there any other case where you got
16 involved in discussions with the prosecutor as to the
17 representation to be made vis-à-vis disposition?

18 A. Not that I recall.

19 Q. Mr. Gale indicated at 13310 as a person who has been
20 involved in hundreds of cases and hundreds of appeals, that
21 the only case in which he was involved that, where the
22 suggestion was made that a position not be taken, was the
23 Marshall matter. Are you aware of any others?

24 A. No, but may I say that, if you're alluding to my position, my
25 position was not that no position was taken. There is a

MR. COLES, EXAM. BY MR. SPICER

1 difference of opinion as to the position I was advancing. But
2 it was, I don't think it's properly described as "no position."

3 Q. Have there been other cases other than the Marshall matter
4 in which you have discussed the position that the Crown
5 prosecutor is going to take with the Crown prosecutor?

6 A. No, I recall an instance in respect to an appeal before the
7 Supreme Court of Canada.

8 Q. What was the nature of that discussion?

9 A. Well, it was a case involving the jurisdiction of military police
10 to effect an arrest off the military establishment. And our
11 Court had found the jurisdiction in the officer of the military
12 police and the implications of the appeal was to confer a
13 jurisdiction on the military police which, in my opinion, was
14 one that we were not advocating and we were in the position
15 of upholding the conviction, which in effect, identified us with
16 endorsing the jurisdictional aspect of the military police. And
17 that caused me some concern with finding ourselves in that
18 position because we had, in other forums, taken the position
19 to the contrary in respect of the jurisdiction of military police.

20 Q. A policy matter.

21 A. Yes.

MR. CHAIRMAN

22
23 Mr. Coles, if, for instance, there was general public concern
24 over the incidents of crime in a certain area. A good example that
25 we hear so often is impaired driving and the number of deaths

MR. COLES, EXAM. BY MR. SPICER

1 that are directly attributable to that each year on the highway.

2 Would it not be the duty of the Attorney General to direct Crown
3 prosecutors, in the event of convictions, to bring this matter to the
4 attention of the courts with a view that the courts would take the
5 deterrent factor into account in sentencing?

MR. COLES

6
7 Certainly, and we have over the years done that through the
8 agency of the prosecuting officer, yes.

BY MR. SPICER

9
10 Q. Is there not a policy in connection with second convictions for
11 drunk driving?

12 A. Yes.

13 Q. And is that a policy that was developed during the time that
14 you were in the Department?

15 A. Yes.

16 Q. And that's a policy that's contained in the blue volumes, the
17 prosecutor's manuals?

18 A. Well, I would expect it to be there, yes.

19 Q. I want to ask you some questions concerning decisions to
20 prosecute. Can you tell us your view as to whether or not the
21 decision to prosecute is generally the decision of the local
22 Crown prosecutor?

23 A. Yes.

24 Q. Are there circumstances where it would not be the decision of
25 the local Crown?

1 A. Yes.

2 Q. And what would those circumstances be?

3 A. Well, where the Attorney General or his Deputy took charge
4 of that decision in instructing the police to contact them in
5 furtherance to their criminal investigation and the police
6 understanding that the decision as to whether the
7 investigation supported the laying of charges would be
8 made by that person, that kind of a situation.

9 11:37 a.m.

10 Q. With respect to the laying of charges, if there was a conflict
11 between the prosecutor and the police on that issue, and
12 that is, the police wanted to go ahead.

13 A. Yes.

14 Q. And the Crown didn't. In your view, who has the ultimate
15 say?

16 A. The police.

17 Q. Would there be any circumstances where the police would
18 not have the ultimate say in that?

19 A. Well, in a circumstance that I just described where it was
20 understood that they would seek the advice of law officers
21 of the Crown in determining whether their investigation
22 gave rise to the laying of the charge, and the advice of the
23 Crown as to what those charges would be in those
24 circumstances.

25 Q. But to take this...

MR. COLES, EXAM. BY MR. SPICER

1 A. That would be by agreement, not by...

2 Q. Yeah. But to take your example then, even if that
3 circumstance, if there was then disagreement as to what
4 ought to be done.

5 A. Oh, sure, they would have the jurisdiction to proceed with
6 laying the charge and then the decision then would be a
7 prosecutorial one rather than an investigative one.

8 Q. Yes, but the decision to lay the charge would always rest
9 with the police.

10 A. In this province.

11 Q. Yes.

12 A. That's not the case, I understand, in all provinces.

13 Q. Yes. And so I take it it wouldn't be your view that the
14 person who has the prosecutorial responsibility would be
15 faced with deciding any difference of opinion. It wouldn't
16 be his shot to call as to whether or not the charge ought to
17 be laid?

18 A. No.

19 MR. CHAIRMAN

20 How do you guard against an overzealous police officer
21 laying a charge based more on suspicion or gut feeling than on the
22 evidence or that's been acquired through an investigation?

23 MR. COLES

24 Well, I think if that came to our attention, you would take it
25 up with his superiors and express the concern and the difficulty

MR. COLES, EXAM. BY MR. SPICER

1 that that kind of action was causing the Attorney General, because
2 the Attorney General would then have to resort to one of several
3 options, either staying the proceeding or withdrawing the charge
4 and that would be a, you know, a position that he would prefer
5 not to be put in, simply because on the premise of your question,
6 a police officer was not in his judgement exercising his proper
7 responsibility.

MR. CHAIRMAN

9 My concern is with the innocent victim who has been
10 charge, albeit the charge has been stayed, the damage to his or
11 her reputation has been done.

MR. COLES

13 I share that concern, My Lord. And, I think, you know,
14 the...if I may continue, I think the only way you can help
15 safeguard against that event, because I think...I agree the laying
16 of the charge itself may be more damaging than the disposition of
17 the charge in some circumstances, is to...as is a case, I believe, in
18 New Brunswick. I'm not advocating it, but I understand that they
19 have an understanding that the police do not lay the charges
20 without prior consultation with the Crown, and I think that is one
21 way of at least introducing an element to eliminate the
22 arbitrariness of a police officer who, for whatever reason, may be
23 laying charges which are not properly founded in evidence.

MR. CHAIRMAN

25 I suppose that would create some logistic problems...

1 MR. COLES

2 Yes.

3 MR. CHAIRMAN

4 ...wouldn't it, with...

5 MR. COLES

6 Yes.

7 MR. CHAIRMAN

8 If a police officer had to consult a Crown prosecutor on
9 every impaired driving charge and simple thefts. Is there any
10 merit, in your view, in there being a policy that certain offences,
11 investigations involving certain offences, should be subject to
12 scrutiny by a legally-trained Crown prosecutor before a charge is
13 laid?

14 MR. COLES

15 I think there is a lot of merit in that, My Lord. I think, as
16 you indicated, from a practical point of view there may be some
17 logistical problems there, but I think those are the kind of
18 problems that ought to be and can be overcome in the interest of
19 fairness to the person being charged.

20 MR. CHAIRMAN

21 Thank-you.

22 MR. SPICER

23 Q. Mr. Coles, can you indicate to us what your view would be as
24 to whether or not the Attorney General has the authority to
25 cause a police investigation to be stopped?

1 A. To be stopped?

2 Q. Yes.

3 A. Well, I suppose he has the authority, the ultimate authority,
4 in a police investigation, particularly if it's one that is at his
5 instance, I suppose he could say he's satisfied with the
6 reports at whatever stage it may be in and suggest that he
7 has no further need or desire to have the investigation
8 proceed. That's a hypothetical answer to a hypothetical
9 question. I don't...

10 Q. Well, I guess I'm asking you...I'm asking you the question to
11 get an idea of where you think the ultimate authority then
12 resides in that sort of situation. And what I'm hearing is, I
13 think, is that it resides in the Attorney General.

14 A. That would be my view.

15 Q. I take it then that you would disagree with the views of
16 Messrs. Herschorn and Gale, both of whom have said, Mr.
17 Herschorn at 11281 that the Attorney General cannot order
18 an investigation to be stopped, and Mr. Gale who made
19 similar comments at page 13330.

20 A. Well, maybe we're talking about different kind of
21 investigations.

22 Q. What type are you talking about?

23 A. You're talking about...well, I was talking about an
24 investigation into a police force or into a police...I wasn't...I
25 wasn't referring to a criminal investigation.

1 Q. All right, well...

2 A. Certainly if it's a criminal investigatio,n then my view is
3 that, no, the police have the jurisdiction in that area and...

4 Q. Okay. So your answer then with respect to the normal
5 criminal investigation would be that the Attorney General's
6 Department would not have the authority to say "Stop."

7 A. Yes.

8 Q. Okay.

9 A. Yes.

10 Q. Now, let's take the other example that you used, that is an
11 investigation into another police force.

12 A. Yes, or disciplinary proceedings under the Police Act or an
13 investigation into a police force. I think those...those kind of
14 investigations I would think, if they were initiated by him,
15 he would be able to satisfy himself at some point that there
16 is no further need to proceed.

17 Q. Are you aware of any instances of that happening during
18 the time that you were Deputy Attorney General?

19 A. No.

20 Q. And what do you see the difference being and why do
21 you...why do you think that once the investigation is started,
22 the Attorney General should be able to stop it?

23 A. Well, it may be that, again, it's difficult to answer a
24 hypothetical question like that. But it may be, for instance,
25 there is some public complaints about the manner in which

1 a police force is functioning. That there may be allegations
2 that, in a hypothetical situation, of police harassment and
3 the Attorney General may think it's an appropriate matter
4 to cause to be investigated. In the course of the
5 investigation, the evidence doesn't seem to be showing up to
6 support the general allegations.

7 Q. Right.

8 A. And there may not be any purpose served by continuing on
9 and he may say, "I'm satisfied at this point that there is no
10 need to proceed," or it may reach a point where he may say,
11 "I think at this point it ought to become a criminal
12 investigation, that there is evidence of wrongdoing" and,
13 therefore, refer the matter to a police authority rather than
14 the kind of investigative group that may be conducting the
15 other investigation, which would probably in this province
16 be under the auspices of the Police Commission.

17 Q. I just want to conclude this with a couple of more questions
18 on your example then. If, in the event that type of
19 investigation, that is, the Attorney General initiated
20 investigation by, let's say, the RCMP of another, of a
21 municipal police force, if the RCMP comes along and says,
22 "Look, we think there is sufficient evidence here to lay
23 criminal charges," in some connection, say, the activities of a
24 force or an individual member of the force. Do you still say
25 that the ultimate call on whether or not that ought to

1 proceed is the Attorney General's?

2 A. No, no. I think you're talking about a change of
3 investigation there. I think...I think if another police force
4 or members of a police force are being investigated
5 pursuant to a request by the...or direction of the Attorney
6 General under the Police Act and in the course of that
7 investigation they uncovered a matter that in their opinion
8 was of a criminal nature, I think they have the jurisdiction
9 to deal with that at that time. I don't think they need to
10 wait for that investigation to be terminated. I think they,
11 you know, they are peace officers and they would have the
12 authority of their office.

13 Q. And they wouldn't need to be told to go ahead.

14 A. No.

15 Q. Are there situations, I believe that you adverted to it a little
16 bit, but I just want to be specific about it. Are there
17 situations where police reports would not go to local
18 prosecutors but would go directly to the AG's office?

19 A. Oh, yes, many.

20 Q. And have there been situations where you...where you have
21 requested that that be done, that the report go to the
22 Attorney General's office?

23 A. Yes.

24 Q. And have there been more than one of those cases?

25 A. There have been more than one that came to our office as

1 distinguished from a local prosecutor's office, but I can only
2 recall one where I...it was at my request.

3 Q. Is there then...is there or is there not a policy in connection
4 with complex cases where police reports would go directly
5 to the...to your office?

6 A. Oh, I think my recollection is that all complex cases, quite
7 apart from who was going to be involved in the
8 prosecutorial decision, they were all copied to our office.
9 There may have been exceptions, but generally speaking
10 they would come into our office.

11 Q. And that would be the policy and that would be just a
12 matter of routine then for the police to copy your office on
13 reports that would be going somewhere else, as well, is that
14 correct?

15 A. Yeah, I'm not...I don't know what distribution would have
16 been made of their reports, but they would be addressed
17 to...and almost invariably they were addressed to me as
18 Deputy Attorney General, attention Mr. Gale, but that was
19 the normal...

20 Q. And was there a particular type of case where that...

21 A. No.

22 Q. ...situation would obtain?

23 A. No, I would say that more in the serious cases, you know.

24 Q. Serious.

25 A. Where there was a...where there was a police investigation,

1 and particularly an ongoing police investigation. I think Mr.
2 Gale would be best...the person that can best answer that
3 because he would be the one dealing with the receipt of
4 those reports.

5 Q. Were you involved yourself in the negotiation of the RCMP
6 contracts in the province?

7 A. Yes.

8 Q. Can you tell us what the nature of those negotiations was?
9 What sorts of things would you be talking about?

10 A. Oh, these would not be done on a one-to-one basis. They
11 were done by the representatives of the contracting
12 provinces with the representatives of the federal
13 department of Solicitor General. All aspects of the contract
14 were discussed. We...over the years we've had great
15 discussions about the appropriate split of the costs of police
16 services, both at the provincial level and the municipal level
17 because some municipalities contract for the RCM Police.
18 The percentages kept going up as far as the provinces were
19 concerned, and we were never convinced that we were
20 really getting that much of the constables' time in
21 proportion to the percentage that we were paying. There
22 was always a question of trying to identify the amount of
23 police time attributed to federal policing as opposed to
24 provincial policing. And that... the accountability, the...what
25 constituted internal management was always a difficult

1 area, questions about trying to control the base costs of
2 these services, because there were a lot of...a lot of items
3 that were, in the opinion of the provinces who were
4 contracting, were included and broken out on a per-man
5 basis, as it were, that seemed to us were more appropriately
6 the total responsibility of the federal government in
7 discharging its federal policing responsibility.

8 Q Were there...

9 A. So, they were...the whole range of those kind of issues.

10 11:50 a.m.

11 Q. Were there ever any discussions during those negotiations as
12 to the responsibility as between the Attorney General's
13 Department and the R.C.M.P. with respect to the kinds of
14 matters that I've been asking you about? That is, the
15 authority to lay a charge or investigate?

16 A. No.

17 Q. No.

18 A. Not to my recollection.

19 Q. Talking dollars, cents, and manpower.

20 A. Yes, and the method under which they were respond to the
21 requirements or requests of the provinces.

22 Q. Did you participate, sir, in any of the meetings that we've
23 heard of, the Thursday meetings in the A. G.'s office with the
24 R.C.M.P?

25 A. No.

1 Q. That would be Mr. Gale from your Department?

2 A. And possibly Mr. Herschorn from time to time.

3 Q. Were you advised of the nature of the discussions that took
4 place at those meetings?

5 A. Not generally.

6 Q. Were there occasions when you would be?

7 A. Yes, matters, some matters, particularly some of the
8 commercial crime investigations that involved departments of
9 government or agencies of government. I would be briefed
10 by Mr. Gale on the progress of the investigation.

11 Q. So is it fair to say, then, from your understanding of what's
12 discussed at those meetings, that amongst other things, the
13 actual progress of a particular investigation may be one of the
14 matters that would be discussed?

15 A. I would assume so, although I can't speak of any knowledge
16 of it.

17 Q. No, just from the advice you received from Mr. Gale.

18 A. Yes. There were... My understanding is they were generally
19 intelligence type of meetings. And I suspect in the course of
20 that, they may have put questions to Mr. Gale seeking out his
21 legal advice on certain aspects of the investigations. Question
22 about access to prosecutors for getting aids in their
23 investigations, such as search warrants and wiretaps. Those
24 kind of subjects I would expect to be raised in those meetings
25 although, as I say, I'm not privy to what their agendas were.

1 Q. Before I leave the nature of the Department and your
2 meetings and organization, we've had a lot of questions back
3 and forth from various witnesses about the existence or lack
4 of it of these "green-striped files". Have you heard that
5 testimony referred to?

6 A. Yes.

7 Q. What's your comment on that?

8 A. I have no particular recollection of seeing files marked that
9 way. And if they were, it would not have meant anything to
10 me because, and I'm really reading back what I have heard
11 said here, that they were...That was the Forces' way of
12 identifying files for whatever purposes they had. But we
13 never adopted that way of, in our records management
14 system.

15 Q. And there was no differentiation in terms of the security of
16 filing in your office between that type of file that the R.C.M.P.
17 may have been indicated as particularly sensitive than any
18 other type of file?

19 A. Not that I'm aware of. All our files are in a secure place, you
20 know. I don't draw any distinction in the level of security
21 that was attributed to those files as opposed to other files.

22 Q. I want to ask you a few questions about the liaison between
23 the Attorney General's Department and the courts and the
24 judges. You indicated early on this morning that there is
25 some back and forth, I think it was mentioned, furniture and

1 a few other things.

2 A. Uh-huh.

3 Q. Can you give us an overview of what the nature of the
4 relationship is between the Attorney General's Department,
5 and let's talk about the federally appointed judges. What
6 sorts of services do you provide for them?

7 A. Well, it's a responsibility of the province to provide all the
8 support services for the federally appointed judges and, you
9 know, that includes office, it includes courtrooms, it includes
10 secretarial, clerical, staff, office equipment, furniture.

11 Q. Other than...

12 A. And administration in the sense of, you know, to the extent
13 that there is budgeting procedures involved to get estimates
14 approved to provide the money. That whole administrative
15 function is that of the Attorney General.

16 Q. Do you provide any other assistance to the federally
17 appointed judges?

18 A. We provide, we have in our articling program, we have an
19 arrangement whereby article students spend a certain
20 number of months with them and, I suppose to that extent,
21 that's assistance. We like to think it's of assistance to them.
22 It certainly is to the students.

23 MR. CHAIRMAN

24 This is as law clerks?

25 MR. COLES

1 No, My Lord, as article students.

2 MR. CHAIRMAN

3 No, but I mean when they're serving the judge, are they
4 serving in the capacity of...

5 MR. COLES

6 My understanding is simply as research students. But it's
7 not the law clerk program that I think Your Lordship is familiar.

8 MR. CHAIRMAN

9 No, not the one that you would find in some of the more
10 affluent provinces but they would do the same work during that
11 period of their articling.

12 MR. COLES

13 I would think so, although I can't speak. I mean it's a
14 matter, I suppose, what judge they are assigned to and what that
15 particular judge or judges require of them.

16 MR. CHAIRMAN

17 After they're called to the Bar, is there any provision
18 whereby they could stay on as a law clerk for a while?

19 MR. COLES

20 Not in this province. There have been representations made
21 to the Ministers from time to time by the court that the court
22 have this facility and consideration has been given to it. It's
23 always been a dollar-and-cent issue and, to my knowledge, the
24 Minister has not yet been able to respond to that request.

25 MR. CHAIRMAN

1 Who has the ultimate control over the Prothonotary?

2 MR. COLES

3 The Attorney General. It's a public office.

4 MR. CHAIRMAN

5 Not the Chief Justice?

6 MR. COLES

7 Not in this province. Now that's not to say the Chief Justice
8 would not be the person in respect to some of his functions. The
9 Chief Justice, in respect to his role as Prothonotary of the Court,
10 the Chief Justice would certainly have the authority as to how he
11 functions and discharged that. But the office, per se, is part of the
12 administration of justice in the province and he is an employee of
13 the Department and comes under the direction of the
14 Administrator of Courts and Registries.

15 BY MR. SPICER

16 Q. Perhaps if I could just direct your attention specifically to one
17 matter in Volume 32, Mr. Coles, at page 178. 178?

18 A. Yes.

19 Q. There's an action request. Is that from yourself to Mr. Gale?

20 A. Yes.

21 Q. You're probably better at your writing.

22 A. Well...

23 Q. What does that say?

24 A. I should be, but... Yes, I can read that particular memo.

25 Q. Okay, could you read it back to me?

1 A. Well, I'm asking Mr. Gale for comments to the question
2 "whether you think Donham is in contempt of court in his
3 comments on the court."

4 Q. And would that action request have been initiated as a result
5 of you seeing that particular article of Parker Donham's?

6 A. Me?

7 Q. Yes.

8 A. Initially? No.

9 Q. How was it initiated?

10 A. My recollection is that it was referred, referred to me for that
11 kind of advice and I don't recall..

12 Q. Do you recall by whom?

13 A. Who referred it to me but my recollection is that it was
14 referred to me.

15 Q. And then if you'll just flip over the page to 179. Mr. Gale is
16 getting back to yourself concerning the article, and again
17 down at the bottom of the page, you're saying, at 179...

18 A. Yes.

19 Q. "Check with our communications liaison to see if he can obtain
20 transcript." Et cetera, et cetera.

21 A. Yes.

22 Q. Was that sort of matter, that is, checking to see whether or
23 not a particular matter gave rise to contempt, the sort of thing
24 that would be done from time to time by the A. G.'s office? Or
25 would this be unusual?

1 A. Well, I don't recall a similar kind of request.

2 Q. sure.

3 A. but I don't know if it would be unusual or not. I mean it may
4 have been the first time this kind of article gave rise to the
5 concern. I don't know.

6 Q. Are you able to tell us whether or not there were any other
7 matters, and I'm not talking about administrative.

8 Nonadministrative, this is clearly nonadministrative matter
9 related to the court. Any other nonadministrative matters in
10 which the A.G.'s Department would respond to a request from
11 the court, for instance?

12 A. Not that I can think of. Not that I can think of.

13 Q. We'll get to this in a little while, but I note, for instance, that
14 in Volume 41, which is the volume which deals with the Court
15 Worker Program and various other things, that you undertook
16 to advise the judges, which is flipside, I guess, of that coin, of
17 the existence of the Court Worker Program.

18 A. Yes.

19 Q. Would there be other circumstances where you would advise
20 the judges of the existence of programs and services available
21 in the province?

22 A. Yes, we have, in recent years, been involved in trying to
23 automate some of the services in the court by using
24 computers and we have had, from time to time, consultants
25 involved in recommending appropriate hardware to respond

1 to some of these concerns. And in these cases, we would, and
2 I would write to the Chief Justice and make him aware that
3 these people are here and they would like to meet with him
4 and I would ask him to advise. That kind of thing would
5 happen from time to time. We were involved, I think it was
6 probably in the middle or late seventies in a communication
7 project and I think then we wanted and needed the input of
8 the members of the court and I recall corresponding with the
9 Chief Justice at the time and outlining the kind of study we
10 were doing and what our expectations were and solicit their
11 cooperation. I mean those kind of things from time to time,
12 yes.

13 Q. Sure. The last matter that I wanted to raise with you before
14 specifically getting to the Donald Marshall case has to do with
15 the Court Worker Program and native policing. Perhaps if
16 could, Volume 41, which I think is on the bottom of your
17 stack over there. Without going specifically to the documents
18 for the moment, Mr. Coles, can you give us an overview of
19 your involvement with the Court Worker Program and your
20 views as to, if you have them, as to what it was that caused
21 the demise of that program?

22 A. Well, the program was a joint federal/provincial program.
23 The initiatives, as I recall, were those of the federal
24 department. The Union of Nova Scotia Indians at the time
25 represented the, what we refer to as the "status Indians", by

1 reference to the classification under the Indian Act. It had a
2 proposal that would involve making available to the courts
3 people of Indian origin to assist native people coming before
4 the courts and the Minister of the day was supportive of the
5 program and we...

6 Q. Who would that have been at the time?

7 A. Well, I...

8 Q. '74 or '73.

9 A. I really don't know offhand. Well, that's a matter that could
10 be easily established.

11 Q. Sure.

12 A. And I personally was supportive of the program. I thought it
13 might be beneficial to, and...

14 Q. Did you have any sense at the time...

15 A. I'm sorry.

16 Q. Sorry, to interrupt you, but something occurred to me. Did
17 you have any sense at the time that the program was set up,
18 when you say that "it might be beneficial", did you have any
19 feeling at the time that natives were having any difficulty
20 with the court system in Nova Scotia?

21 A. I don't think I was aware of that as a situation, although, you
22 know, I expected that that might very well have been the
23 case and I saw this as a program that, you know, couldn't be
24 anything else but helpful. You know, I didn't see it, you
25 know, I didn't see it responding to an abstract hypothetical

1 situation.

2 Q. Why would you expect that there might have been problems?

3 A. Well, I had had considerable... No, I shouldn't exaggerate. I
4 don't mean considerable, but I had been involved in a
5 number of discussions involving the native people at the
6 federal/provincial level and I was sensitive to some of the
7 concerns that I would hear that people, unfortunately for a
8 range of reasons, mostly economic, as far as I can recall, found
9 themselves, or considered themselves at a disadvantage
10 because they didn't quite understand the process which they
11 were confronted with and, whether or not it was a part of
12 those involved from the justice point of view or whether it
13 was because of the anxiety of the accused person themselves,
14 they had the need for better communications and this was
15 basically, as I saw it, a communications counselling facility
16 and if it helped people to understand what was happening to
17 them and what was expected of them, so be it.

18 Q. Do you think, jumping ahead how to the present, based on
19 that view of why a program like that was, the Court Worker
20 Program was necessary, would it be your view that such a
21 program could still be of use in Nova Scotia?

22 A. Yes.

23 Q. If I could ask you turn...

24 A. I would go further. Not only in respect to native people.
25 There are a lot of non-native people who could benefit from a

1 better communication network in the justice system.

2 Q. And in what sense, when we're talking about non-native
3 people, in what sense would you say that there's a
4 communication problem in the justice system with non-native
5 people?

6 A. Well, you know, charges are laid. People are brought before
7 the courts. Then they're given information that when they
8 must appear and where they must appear. Some people have
9 transportation concerns. Some people have to make
10 arrangements for whether it be in respect to people
11 depending on them at home or in respect to their jobs. People
12 go to some of these places and there are a lot of rooms, a lot
13 of busy people, but nobody quite seems to know where they
14 ought to go or when they ought to be there or when they,
15 more importantly, when they can leave. Quite often, you
16 have a lot of people hanging around because nobody tells
17 them they can go home. And I identify this as a
18 communications problem. We just don't seem to be
19 responsive to the fact that, you know, people sometimes need
20 a little help and direction.

21 Q. If I could direct your attention to page 43 of Volume 41.

22 A. 43?

23 Q. Yes.

24 A. Yes.

25 Q. This is, I believe, a letter of yours to Mr. MacKinnon in

1 February of 1975 and I just want to draw your attention to
2 the third paragraph, perhaps more than anything, the
3 conference. I take it that's the National Conference on Native
4 People in the Criminal Justice System that you referred to in
5 the first paragraph.

6 The Conference did point out the need for
7 attitudinal changes on the part of those involved
8 in the criminal justice system and the need for
9 the system itself to be more sensitive to native
10 peoples who come in conflict with the law.

11 Can you expand on that for us and tell us what you meant by
12 that? What sorts of attitudinal changes are you adverting to?

13 A. Well, I think this is a conference that I believe was held in
14 Edmonton. I'm really responding to the kind of
15 representations that were made by numerous representatives
16 of native groups at that conference and I'm not in a position
17 to verify them, but certainly the representations were loud
18 and clear that native people, in particular, found that they
19 were not, in their judgement, at least, being treated when
20 they came in contact with the justice system as non-natives.
21 And that may have been a subjective assessment on their
22 part, I don't know. But it was certainly very evident by the
23 spokesmen at that conference that the native people, whether
24 justified or not, sensed that they were being treated
25 differently than the non-native people.