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- 7

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

Volume 79

Held: June 21, 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
The Honourable G. T. Evans, Q.C., Commissioners

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

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Mr. William L. Ryan, Q.C.: Counsel for Officers Evers, Green and
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Mr. Charles Broderick: Counsel for Sgt. J. Carroll

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

Messrs. Bruce H. Wildsmith and Graydon Nicholas: Counsel for
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Mr. E. Anthony Ross: Counsel for Oscar N. Seale

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

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13950

1 MR. GORDON COLES, previously sworn, testified as follows:

2 EXAMINATION BY MR. SPICER [Cont'd.]

3 Q. Mr. Coles, I hadn't quite finished dealing with the
4 compensation issue yesterday when we finished up. I just
5 had a couple of other questions I wanted to ask you about
6 that. Mr. Endres indicated that in negotiating he basically
7 took what was described as a hard line and understood that
8 to be the position that he was supposed to take. Would you
9 agree with that?

10 A. I don't recall our discussing how he was to do his
11 negotiations. The negotiations were left pretty well up to
12 himself.

13 Q. Let me just read you what he said in answer to some
14 questions from Miss Edwardh. The question was,

15 Q. Now, in terms of the hard line that you took,
16 would it be fair to say that from the very
17 beginning you took only the position and the
18 line that you understood Mr. Coles and the
Attorney General wished you to take?

19 A. It was an understanding I had. It was not a
20 clear expression of any kind of particular
21 fact or a principle.

22 Q. If you had been in any doubt about their
23 view of the matter, wouldn't it be obvious
24 for you to simply walk in and say, 'I'd like to
25 negotiate this on a totally different set of
principles.'

1 A. Sure, I had no doubt

2 Q. You had no doubt?

3 A. No.

4 So, certainly the impression that he had was that he was
5 supposed to be taking a hard line and you're saying that
6 that's not a view that was expressed directly to him?

7 A. Not, that I recall. But at the same time we expected him to
8 negotiate a settlement that would be acceptable and how
9 he...what negotiating posture he adopted, that was left very
10 much up to himself.

11 Q. Right. He wasn't provided with any specific instructions as
12 to how to handle it or in what manner he ought to approach
13 it.

14 A. No, no.

15 Q. Just one other general area that I wanted to ask you about,
16 and perhaps you could have a look at Volume 20, at page 4.
17 We looked at this briefly yesterday. Mr. Gale's letter to the
18 RCMP which was then responded to by the RCMP, if you
19 could turn to page 26 of that volume. A letter from Mr.
20 Christen to Mr. Gale with some reports from the RCMP
21 attached to it. Were you made aware of the RCMP response
22 to Mr. Gale's request?

23 A. Frankly, I don't recall.

24 Q. Mr. Gale indicated at page 13,453 that the RCMP response
25 was given to Coles.

1 A. Well, his recollection is probably correct. I just don't
2 specifically recall.

3 Q. Okay. Then later on in 1986 if you turn to page 72 of that
4 volume, there's a letter to Mr. Gale this time from Vaughan
5 and then at page 97, if you just want to keep your finger in
6 72 and then flip over to 97 you'll see a letter from yourself.

7 A. Yes.

8 Q. In which you indicate in referring to that letter "Your
9 review," that being Superintendent Vaughan, "...in this
10 matter concurs with my own understanding of the events
11 and I agree with your conclusions and advice in the matter."
12 Could you indicate to us what your understanding of the
13 events was and why it was that you agreed with the
14 conclusions of Superintendent Vaughan as set out in his
15 letter at page 72?

16 A. Well, I think I was referring to the advice that Mr.
17 Herschorn had earlier given following some correspondence
18 he had from Mr. Edwards in which he...Mr. Edwards spoke
19 about the...on the matter of perjury, or possible perjury
20 charges, and, ah, my recollection is that the...that this report
21 from Superintendent Vaughan paralleled the views that
22 were expressed to me by Mr. Herschorn, based on Mr.
23 Edwards' advice.

24 Q. Did you solicit Mr. Gale's view as to what the RCMP response
25 to his letter, that is, the material back at page 26, had

1 indicated at the time, whether or not in his view the
2 material provided to the Attorney General's office in 1983
3 would support the view that there ought to be a further
4 investigation?

5 A. Not that I recall. I should add that the second paragraph of
6 the letter makes reference to the...to an earlier letter that
7 Mr. Gale had sent in reference to investigating certain
8 members of the Sydney Police force and I thought that had
9 been misinterpreted by the RCM Police at the time from the
10 information that came to my attention, and I...my reference
11 that I...in my letter that I agreed with the conclusions also
12 included a reference to that particular paragraph.

13 Q. All right. Let's deal with that for a second. And you're
14 talking about the "hold in abeyance" comment, are you not?

15 A. Yes.

16 Q. Yes.

17 A. Yes.

18 Q. And in what sense do you...did you think that that was
19 misinterpreted by the RCMP?

20 A. Well, I'm not so sure it was misinterpreted so much by the
21 RCM Police, although it seemed to me that Mr. Edwards
22 thought that they were not to investigate or interrogate
23 members of the police in furtherance to their reinvestigation
24 of the Marshall incident.

25 Q. Right.

1 A. And that was...that was not our...was not my understanding
2 of Mr. Gale's letter.

3 Q. What was your understanding of Mr. Gale's letter?

4 A. That as far as an investigation into the police force, per se,
5 into matters related to the police force, it was a matter that
6 would be left in abeyance really in the context of an inquiry,
7 an inquiry into the police force. And, certainly in the course
8 of their reinvestigation of events surrounding Mr. Marshall's
9 conviction, the police, like any other witness, I would have
10 expected the police to interview in the normal course of
11 their investigation.

12 Q. So, you would have expected that when Mr. Gale indicated
13 that certain matters should be held in abeyance that that
14 wouldn't have included interviewing MacIntyre and
15 Urquhart.

16 A. Not in connection with the...with their reinvestigation of the
17 events surrounding Mr. Marshall's conviction, no.

18 Q. Did you talk to Mr. Gale about that at the time?

19 A. Not that I recall.

20 Q. So, this is just a view that you...

21 A. Well, I saw a copy of his letter and...

22 Q. Yes.

23 A. That's the way I understood it and...

24 Q. Did you realize at the time, that is in '83 or in '82 that the
25 RCMP, in fact, had not gone ahead and interviewed

1 MacIntyre and Urquhart?

2 A. No.

3 Q. You didn't know that?

4 A. No.

5 Q. When were you made aware that they hadn't?

6 A. I don't know if I...I don't know if I was ever made
7 specifically aware that they hadn't. I don't recall ever being
8 specifically told that they hadn't. The...I knew one thing and
9 that was one of the matters which we alluded to yesterday,
10 that the question of an inquiry into the Sydney Police was
11 held in abeyance, and that was one of the matters which
12 subsequent to the reference being disposed of was
13 addressed.

14 Q. But you didn't give any direction to Mr. Gale at any time to
15 say, "Now, look, it's the matter of the Sydney Police
16 Department in general, in terms of investigation, that's being
17 held in abeyance and why don't...why doesn't the RCMP get
18 on and interview MacIntyre and Urquhart?"

19 A. No.

20 Q. And why was that? Why didn't you do that?

21 A. Well, I didn't...I was not involved in the police
22 inves...reinvestigation. This is a matter for the police and if
23 they needed any directions, I would presume they would
24 contact Mr. Gale.

25 Q. And you weren't even aware of it at the time, I take it, were

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1 you that...

2 A. Initially.

3 Q. ...MacIntyre and Urquhart weren't being...

4 A. No.

5 Q. When you say in your letter in response to Vaughan that it
6 concur with your understanding of the events, I believe
7 you've indicated that in part that has to do with the hold in
8 abeyance reference in the second paragraph of Vaughan's
9 letter. But what else is there that concurs with your own
10 understanding of the events in Vaughan's correspondence?

11 A. Well, his comments about...about...I think he makes
12 comments about the matter of further prosecutions in this
13 matter, and if I recall his letter correctly, and I agreed, there
14 may have been a basis for laying charges of perjury, but
15 I...in my view, they were not the kind of ...there was not the
16 kind of evidence and the circumstances that would warrant
17 prosecuting any such charges.

18 Q. At the top of page 73, which is page 2 of Superintendent
19 Vaughan's letter when he says, "I do not support a further
20 investigation at this time for the following reasons." That
21 would be one of the conclusions, I take it, that you would
22 have agreed with.

23 A. Well, I'm not sure I specifically addressed myself to that.
24 Investigations are a matter within their prerogative. I don't
25 think it would matter whether I agreed with that or not,

1 That was advice that he was giving to me.

2 Q. And, on page 4 of his letter at 75, when he says, "For all
3 these reasons it is my view no useful purpose would be
4 served in initiating a further investigation into the
5 allegations of counselling perjury." Was that a conclusion
6 with which you agreed?

7 A. Yes.

8 Q. In the last sentence of that paragraph, "Should such public
9 inquiry identify any evidence of probative value warranting
10 further police investigation, the appropriate action would be
11 taken." Was that chronology acceptable to you? That is,
12 that there be a public inquiry, and then if that turned up
13 anything, then something further might be done?

14 A. Yes.

15 Q. You then indicated to Vaughan, I take it, on behalf of the
16 Attorney General's Department, that in agreeing with his
17 conclusions that there would be no need for the RCMP to
18 carry out any further investigation at that time.

19 A. Well, as I say, I'm not sure that he would need my
20 concurrence if he was talking about a criminal investigation.
21 I'm not sure that my...my concurrence there wouldn't be
22 superfluous in respect to that issue.

23 Q. You're certainly indicating to him though that you agree
24 with those. He's saying that I don't think there's any...

25 A. I generally...

1 Q. ...useful purpose and you're agreeing with it.

2 A. ...agree with the contents of his letter, yes, but I wouldn't
3 think it would be correct to interpret that agreement that I
4 would be directing or determining whether they would or
5 would not continue a police investigation. I don't think he
6 would have understood that.

7 Q. Mr. Gale was the person in your department who was the
8 most familiar with the police aspect of the matter, is that
9 correct?

10 A. That's correct.

11 Q. Right. Mr. Gale has indicated to us that he told you that he
12 thought there should be an inquiry. Do you remember him
13 telling you that?

14 A. Subsequent to this letter?

15 Q. In response to the RCMP material that we just referred to
16 in...around page 26, that he thought there ought to be an
17 inquiry. He understood the RCMP to be saying in their
18 response in '83 that this was "lousy police practise" to quote
19 him at 13,454, and "it shouldn't be allowed." And, at the
20 same page, having told you that he thought there should be
21 an inquiry, did he ever indicate that to you?

22 A. Well, he may have. The Minister did not rule out the
23 possibility of an inquiry. It was always a question of timing,
24 and the decision was taken to mandate this Commission as a
25 form of inquiry. I had my own views as to whether I...in my

1 view, whether an inquiry into the police, per se, would be a
2 useful inquiry, but the Minister had not ruled out the
3 possibility of an inquiry, whether it was an inquiry into the
4 police or a public inquiry of this form. So, Mr. Gale very
5 well may have mentioned that.

6 Q. What was your view as to whether or not there ought to
7 have been an inquiry into the police?

8 A. Well, I was of the view that there was not a basis for an
9 inquiry into the police.

10 Q. Notwithstanding Mr. Gale's advice to the contrary.

11 A. Well, as I say, he may have expressed those views. I'm not
12 sure. I don't recall it being a matter that he was...that he
13 was urging with any particular emphasis. He may have.

14 Q. Well.

15 A. I don't recall if he had.

16 Q. All right. If we assume that he was correct in the testimony
17 that he gave to us here, that he told you that he thought
18 there should be an inquiry.

19 A. I don't question the correctness of his testimony.

20 Q. Okay. Why, if he was the person who, as you say, was the
21 most knowledgeable person in the department concerning
22 the police, why would you not take that advice and
23 recommend an inquiry?

24 A. Because the information that had come to me through him
25 did not...did not convince me that there was any basis for an

1 inquiry. There were some allegations. I had hoped that
2 they would have been dealt with at the reference. They
3 were not. They were not dealt with at the reference. Mr.
4 Edwards himself seemed to have changed his position as to
5 what...as to the...as to the role of the police. The RCM Police,
6 in the reports that I had seen, apart from commenting on
7 the...on some aspects of the police interrogative methods,
8 they didn't indicate there was any, or at least I didn't read
9 into the reports any indication that there was any need for
10 an inquiry, and so, therefore, the matter really didn't grab
11 me in a sense that an inquiry into the police was necessarily
12 the kind of inquiry that was in the best of the public
13 interest. And the Minister, to my knowledge, deferred a
14 decision pending certain other events being completed and
15 decided on the form of inquiry that we are participating in
16 at the moment.

17 Q. You have told us that you didn't consider yourself to be an
18 expert in criminal law.

19 A. That's correct.

20 Q. You've told us that Gale and Herschorn had the expertise
21 and you went on to say at 13,661, "Unless it was a matter I
22 didn't see any need to, I always sought their advice. I think
23 I always took their advice, not necessarily took the action
24 that they recommended." You then said at 13,663, "The
25 formulation of my views would be based on the sources of

1 the information that I had available to me, including the
2 advice of people in the department." You've also told us that
3 you weren't very close to the police investigations and the
4 police reports. But you're telling us that notwithstanding
5 Mr. Gale's advice, being the person closest to the matter, that
6 you formulated your own conclusion and just decided that
7 you didn't want to recommend an inquiry. Is that fair to
8 say?

9 A. Well, I don't know whether I would agree with all your
10 premises.

11 Q. Well, most of them come out of your testimony, sir.

12 A. Well, I appreciate that. I was not involved in the police
13 investigations, that is correct. I was familiar generally with
14 some of the police reports. I had an understanding of what
15 the views were being expressed by the police.

16 Notwithstanding I may not have the expertise that Mr. Gale
17 has in police matters, I am the...I was in the position of the
18 Deputy, I had a...I had some responsibility and a judgement
19 to exercise and I exercised it on the basis of my
20 understanding of the police report.

21 Q. Can you explain to me why it is that in a particular case like
22 this, in the case of the police investigation, that you decide
23 to exercise your own judgement? But with respect to
24 certain other matters, for instance, the request to investigate
25 the performance of the Crown, the request to investigate,

1 well, take that one. Investigate the performance of the Crown.

2 That that's something that you choose to delegate. And to
3 check into compensation, which you were specifically asked
4 to do directly by the Minister, again that's something you
5 choose to delegate and then don't check the responses that
6 are given by the people that are working for you. Can you
7 give us some understanding of why you pick and choose the
8 instances when you choose to intervene?

9 A. No, I think that's just the manner in which I saw my role
10 and the position I took at the time, you know. I want to
11 come back that Mr. Gale may have mentioned that...and I
12 don't recall specifically that he did, but if he recalls doing so
13 I don't question his recollection. But Mr. Gale did not...did
14 not urge, it was not a matter of...that I understood to be of
15 compelling importance to him, and certainly if he had, and if
16 he felt strongly on the point, I would have thought that he
17 would have arranged a meeting with the Attorney General
18 to make the Attorney General fully aware of his views and
19 reasons for advocating that position. I'm not aware that he
20 did any such thing.

21 9:56 a.m.

22 Q. Well now, wait a minute though. Why should he do anything
23 other than make his views known to you. You're his superior
24 and why should you act on it?

25 A. Well, he knew my position that I did not see the need at that

1 time to advocate or recommend an inquiry into the police
2 force. Now if he had views to the contrary and felt strongly
3 on them this would be no different than any other situation in
4 the Department. As a director he would have the right to
5 have access to the Minister and say, or ask me to arrange a
6 meeting with the Minister and say, "I think this is a matter
7 that ought to be discussed with the Minister and I would
8 appreciate that opportunity." That would be the normal way
9 of resolving an issue, if it were that kind of an issue. And if it
10 was I was not aware of it.

11 Q. Having listened to you for the last couple of days is it fair to
12 say that in a lot of respects insofar as the Marshall case was
13 concerned, in some areas you certainly took a hands-off
14 attitude, in the sense that you delegated certain things to
15 certain people in your Department.

16 A. The norm, certainly, the normal progress of the case, I did not
17 involve myself in.

18 Q. Sure. And that's hands-off attitude evidenced itself by
19 relying on other people in your Department, certainly Messrs.
20 Herschorn and Gale.

21 A. Certainly.

22 Q. And I think it was clear from some of your testimony
23 yesterday that on occasion they weren't doing what you
24 thought they were doing.

25 A. Well then..

1 Q. Mr. Gale certainly wasn't with respect to Frank Edwards'
2 factum, for instance.

3 A. Well, in fairness, in hindsight that would appear to be so. But
4 hindsight, you know, can be...

5 Q. And at the time, but at the time...

6 A. At the time I simply assumed that they were doing what I
7 would have expected them to do.

8 Q. And another way in which you evidenced a bit of a hands-off
9 attitude to this case was by deciding, for whatever reason, not
10 to take hold of a particular issue yourself, again, perhaps by
11 delegating. You said I'm going to delegate this particular area
12 to somebody else.

13 A. Well I acted on issues that seemed to me to be important for
14 me to intervene on.

15 Q. Okay.

16 A. And I don't, and delegating the whole organization and
17 structure of the Department was such that that's why I
18 organized the Department into Sections with directors and
19 executive directors. They did have delegated authority and
20 they exercised it and I'm surprised in some instances it would
21 not appear that they may have seen fit to exercise it as I
22 presume they would have.

23 Q. And there were a number of situations where you either
24 acted or refused to act, or didn't act, and in some of those
25 cases you generally would have had a choice. If you'd done

1 one thing it would have assisted Mr. Marshall or his counsel
2 and if you'd taken another action it wouldn't. And I want to
3 suggest to you that with respect to a number of things that
4 you did that in all those cases you chose to do the thing that
5 would not have assisted Mr. Marshall or his counsel. For
6 instance, you chose not to release the RCMP report to Steve
7 Aronson or you chose not to want to do that. That was your
8 view and you indicated to me that that could have been done.
9 You indicated to us that it would have been possible to assist
10 Mr. Aronson by providing material to him in connection with
11 the reference, isn't that right? Prior to it being set up in
12 March or April. You indicated that you were not prepared to
13 recommend that Steve Aronson's account be paid voluntarily.
14 Again...

15 A. Before you move to the account may I address the first thing?

16 Q. Sure.

17 A. I'm not personally aware that Mr. Aronson made any request
18 for police reports to me. I heard several, a couple of years
19 later, after a police report was released that he had, that had
20 been released to him.

21 Q. It was your view, though, at that time that it's not something
22 that shouldn't have been released to him.

23 A. It was my view that the prosecuting officer had no authority
24 to release the police report per se, and my concern there was
25 with that action, and although I understand Mr. Gale has

1 given testimony that he authorized it, but that that
2 information was news to me.

3 Q. Mr. Aronson's account could have been paid, could have
4 recommended his account be paid, but chose not to.

5 A. Yes, because in my opinion it was a kind of proceeding that
6 was covered under a Canada and Nova Scotia agreement to
7 provide for the choice of counsel.

8 Q. You indicated to me that you had the discretion if you'd
9 wanted to exercise it to pay his account. You could have
10 advised Mr. How, recommended to How...

11 A. I could have recommended it, yes. I didn't see it as a kind of
12 account that I would recommend outside of the terms of that
13 agreement.

14 Q. I understand that. You could have supported Mr. Edwards'
15 views in connection with the way he was handling the
16 reference on the disposition issue but you chose not to.

17 A. As it turned out it I did. He did argue his position.

18 Q. That wasn't my question. You could have supported it
19 yourself and you didn't.

20 A. Well I could have except I thought, I had a difference of
21 opinion as to the proper role for...

22 Q. If you turn your mind to it you could have told Mr. Edwards
23 not to take the position that there was no fault in the criminal
24 justice system. You could have told him that.

25 A. I could have.

1 Q. You indicated to me yesterday that you could have told him
2 that.

3 A. Yes. That was not a part of his submission or advice that I
4 identified myself with and...

5 Q. No, you didn't...

6 A. Thought I should deal with.

7 Q. Didn't turn your mind to it but you indicated that if you had
8 you could have.

9 A. That's right.

10 Q. You could have provided the information to Cacchione when
11 he requested it and chose not to.

12 A. I was interpreting the Act and in my judgement he was
13 seeking information that, to which I was not in a position to
14 give him access.

15 Q. At the discretion to do so you told us you could have.

16 A. Well I could have.

17 Q. Yes.

18 A. I could have released it just as that information has been
19 released to this Commission. The Minister exercised his
20 discretion.

21 Q. You had that discretion and you could have exercised it and
22 you chose not to. You could also have told him you didn't
23 have that material if you thought to look at it to see whether
24 or not it was even there. You could have said to Mr.
25 Cacchione, "I'm sorry, we don't have this information why

1 don't you go seek it somewhere else," but you didn't do that.

2 A. I think I told you, Counsel, that in my opinion that kind of,
3 the information that he was seeking, if it were in our
4 possession it would have come to us from a source or from a
5 purpose to which public access was not...

6 Q. Yes. And my question wasn't that, my question was whether
7 or not you could have told, if you'd looked and found you
8 didn't have it you could have told him you didn't have it and
9 you didn't do that.

10 A. That would not have provided him with the information.

11 Q. It would have at least told him that you didn't have it. It
12 would have at least allowed him to go somewhere else and
13 look for it instead of saying to him, "We're not giving it to
14 you." You could have done that. Could you not have
15 instructed Mr. Endres not to take what he called a "hard line."
16 That's something you could have done if you'd chosen to.

17 A. I wasn't particularly aware that he was taking a hard line.

18 Q. Well you've heard what his testimony was.

19 A. He was...I beg your pardon?

20 Q. You've heard what his testimony was on that point that that
21 was his understanding. He got it from somewhere. It appears
22 that he says he got it from you.

23 A. Well, you know, I don't recall giving any instructions as to
24 how he would proceed with the negotiations.

25 Q. You could have instructed him positively to take an attitude if

1 you'd chosen to.

2 A. Well I...

3 Q. As you did with Mr. Edwards.

4 A. Well I wasn't, you know, I wasn't aware of what posture he
5 was taking in negotiations. I was hearing the results of, the
6 progress of the negotiations and I agreed with the results that
7 were being reported to me.

8 Q. You could have conceded that the Crown was partly to blame
9 on the reference if you'd turned your mind to it at the time.

10 A. Well if I had a basis for making that...

11 Q. Yes.

12 A. Sure, if I had a basis. I wasn't personally aware of a basis for
13 making that submission.

14 Q. But you hadn't turned your mind to it, isn't that correct?

15 A. I hadn't, no.

16 Q. Yes. And you could have if you'd wanted to, taken the
17 position that the civil suit that was initiated wasn't a factor
18 that should hold up the inquiry. That was something you
19 could have done.

20 A. It was a factor to be considered. I wouldn't agree that it held
21 up the inquiry.

22 Q. And in all those instances would you not agree with me that
23 the actions that you took in each of the instances that I've
24 referred to were instances that were cases that would not, in
25 fact, that would, decisions that would go, act to the detriment

1 of Mr. Marshall or his counsel.

2 A. No, I would not agree with that. They were taken on an
3 individual basis and in my opinion on what I understood and
4 thought at the time was a proper position for me to take. And
5 there was no intention to be cumulative in any way. I dealt
6 with them as they arose and as I felt was an appropriate
7 response on my part.

8 Q. Apart from the intent, sir, when you look at the cumulative
9 list of issues that I've just referred to you though, would you
10 not agree with me that the effect of those was, whether
11 intentionally or not, to act to the detriment of Mr. Marshall
12 and his counsel by, for instance, not agreeing to pay Aronson's
13 account or by not supporting Edwards' view on the reference
14 or by not conceding that the Crown was partly to blame in all
15 those cases.

16 A. Well I'm not in a position to comment on what effect these
17 decisions may have had. If I were to it would be probably
18 self-serving.

19 Q. I see. Thank you.

20 EXAMINATION BY MS. EDWARDH

21 Q. I'd like to ask you to turn your mind to some of the global
22 issues rather than some of the details, sir. You were
23 obviously the Deputy Attorney General in this province who
24 has the, I suppose, unfortunate fact of his career that Mr.
25 Marshall is one of the few innocent men who have been

1 convicted of a murder charge in Canada that we're aware of.

2 Correct?

3 A. One of the few that have been found not guilty of the crime of
4 which he was convicted.

5 Q. And, therefore, one of the few who as a matter of a law today
6 can be viewed as having been innocent of the crime for which
7 he was convicted.

8 A. I agree.

9 Q. And I take it that it has been of no small concern to you,
10 given the responsibilities that you discharged in the
11 government that the administration of justice has failed in
12 respect to Mr. Marshall.

13 A. Well, Counsel, I would not agree with that. I have difficulty
14 in seeing how the administration of justice has failed in the
15 situation. If I may, may I elaborate?

16 Q. Yes.

17 A. In a situation where a man is convicted by a jury, that
18 conviction is upheld on appeal. He, albeit after a period of
19 incarceration has access to a process that will review that and
20 have, with the results of acquitting him and finding him not
21 guilty of that offence then is the recipient of a process that
22 provides ex gratia compensation in respect to that period of
23 incarceration. I have difficulty in agreeing that this
24 represents some failure on the part of the administration of
25 justice. It seems to me it speaks well of the administration of

1 justice.

2 Q. Well let's leave off the last portion of the period that you've
3 described and let's deal with the first two aspects of that for a
4 moment, sir. You've said that here is a man who was
5 convicted by a jury, correct?

6 A. Yes.

7 Q. And I take it, sir, that you make that assertion being
8 confident also as well that there is a fact that he was
9 convicted on perjured evidence? You're aware of that?

10 A. Of course. That's what the reference, Court of Appeal found
11 on the reference.

12 Q. Yes. So I take it that it does not give one a great deal of
13 comfort to know that jury in the Province of Nova Scotia
14 convicted a man on perjured evidence.

15 A. But the jury, Counsel, did not know at the time, the jury
16 accepted the evidence, I presume, that it heard to be truthful.

17 Q. And one of the reasons, sir, that the jury did not know was
18 because Crown counsel, or the police, did not make statements
19 available to the defence so they could expose to the jury the
20 fact that there was a probability that the stories of these
21 young witnesses were concocted, do you agree?

22 A. No, I can't, I have no opinion whether that be so or not.

23 Q. Defence counsel didn't use those statements to show the jury
24 that there was a concoction, there was a piece of evidence
25 going forward that was perjured and false.

1 A. Well, I'm not...

2 Q. Correct?

3 A. I'm not aware that that has ever been established. I don't
4 know what evidence a jury would have believed in that
5 situation. I don't know whether the defence counsel asked
6 these witnesses whether they had given other statements.
7 You know, I can't answer that question.

8 Q. No, but let's look at your conclusions, sir. You say he was
9 convicted by a jury. We point out that there was perjured
10 evidence and you say, "Ah, but the jury didn't know the
11 evidence was perjured." Isn't it true, sir, that there is only
12 one way that that jury would have known that that evidence
13 was perjured and that was if disclosure had been made fully
14 of the different statements so those statements could have
15 been put to those witnesses.

16 A. The jury, if they had conflicting statements before it, the jury,
17 or with the assistance of the court, would have to determine
18 which of those statements it was going to accept.

19 Q. Absolutely.

20 A. And I don't know that it's been established that the
21 statements that you referred to as not having been disclosed
22 would have had more persuasiveness on the jury than the
23 ones that they, that were received by the jury.

24 Q. At least the jury would have had the opportunity of deciding
25 the issue, correct?

- 1 A. Well sure. No, sure, I agree with that.
- 2 Q. Okay. Now let's go the second level. We can agree that the
3 jury did not have the opportunity of deciding the issue. Let's
4 go then to the appellate process.
- 5 A. The issue being...
- 6 Q. The truth or falsity of the testimony.
- 7 A. Of conflicting statements.
- 8 Q. Yes. Let's go to the appellate level. Counsel for Mr. Marshall
9 files a notice of appeal on the most serious crime in the
10 Criminal Code, correct? Self-evident.
- 11 A. Sure.
- 12 Q. Crown counsel has in its, broadly speaking in terms of the
13 Attorney General's office, in its bailiwick possession and
14 knowledge information that indicates that Mr. Marshall did
15 not kill Mr. Seale, correct?
- 16 A. I don't know what they had in their possession.
- 17 Q. Well Mr. MacNeil certainly had that information. The
18 prosecuting attorney. There's no question of that. About...
- 19 A. The prosecuting attorney, to my information had knowledge
20 of the statement or the polygraph test of Messrs. Ebsary and
21 MacNeil.
- 22 Q. Let's just deal with the statement.
- 23 A. They had that. He had that.
- 24 Q. That's all I want to talk about.
- 25 A. That's all...

1 Q. Here is Mr. MacNeil who has come forward and said, "You've
2 got the wrong man."

3 A. Well...

4 Q. "The person who caused the death is Mr. Ebsary."

5 A. Just a moment, Counsel, why would he say that?

6 Q. Mr. MacNeil comes forward and he says...

7 A. Of, you mean Witness MacNeil...

8 Q. That's right.

9 A. I'm sorry. I apologize.

10 10:15 a.m.

11 Q. Witness MacNeil, comes forward and says, "You've got the
12 wrong man."

13 A. Uh-hum.

14 Q. Correct. Mr. Ebsary caused the death.

15 A. Yes. Yes.

16 Q. Of Sandy Seale. That information is not then given to
17 defence counsel.

18 A. That's my understanding.

19 Q. And defence counsel, of course, I'm going to suggest to you,
20 would not ask in the ordinary course. One would Crown
21 counsel to come forward with that evidence, given it's
22 nature. Would you agree with that?

23 A. You know, I...as I've said before, I don't know what the
24 instructions of the Crown were at that time.

25 Q. I'm not talking...

1 A. I don't know what you...

2 Q. ...about instructions.

3 A. I don't know what you would expect of them. I personally, I
4 would have a personal view, but I mean I don't know that
5 that's particularly relevant.

6 Q. We'll come back to that in a moment. But in the absence of
7 disclosure by Crown counsel, how could the Court of Appeal,
8 which you've just pointed to as giving you some sense of, I
9 suppose, confidence in the administration of justice, how
10 could the Court of Appeal adjudicate upon a perjured record
11 and, then further, deal with the nondisclosure of the Crown?
12 Why do you then point, sir, to the Court of Appeal as giving
13 you this sense of confidence in the administration of justice?

14 A. Well, I agree. The Court of Appeal has to deal with what's
15 before it. I didn't intend to imply it could do otherwise. But
16 it seems to me that...it seems to me that the defence, you
17 know, also has a responsibility, particularly on an appeal to
18 determine whether or not there is any new evidence that it
19 can bring forward to the Court. And I'm just, I'm simply
20 saying I have difficulty with laying it all on the Crown by a
21 suggestion of a duty for disclosure and it may be, but I'm
22 not aware of any such duty. And, I'm not, ah...

23 Q. Well, let me just, we'll come to the duty of the Crown in a
24 little bit. But I just want to then review with you this
25 conclusion. You said there is no failure in the administration

1 of justice because Mr. Marshall was duly convicted by a
2 properly constituted tribunal before a jury in the Province.
3 And then we learn it's on perjured evidence. Correct? So, in
4 fact, that aspect of the administration of justice shouldn't
5 give you any.

6 A. Except when that knowledge is learned, the system then
7 remedies, provides the remedies to...

8 Q. Ah. Does it?

9 A. Well.

10 Q. Mr. Coles, within twelve months the matter is before the
11 Nova Scotia Court of Appeal, and although the full scope of
12 the perjury is not known, what is known is that witness
13 MacNeil has said that Junior Marshall did not cause Sandy
14 Seale's death and that information is not handed forward
15 either to the Court or to the defence counsel. So the system
16 does not remedy itself.

17 A. No, I meant, I'm sorry, the Court at the time of the
18 reference, when this information became known, the Court
19 adjudicated on it. The Court directed a verdict.

20 Q. So, if I understand you then, what you're saying is the fact
21 that there was perjured evidence, there was a non-
22 disclosure to the Court and to the defence at the time of the
23 first appeal, does not cause you any concern in terms of the
24 due administration of justice because a decade later it was
25 remedied. Is that your evidence, sir?

1 A. No, of course it causes me concern. But I'm talking...I'm
2 talking about trying to point to fault, and the fault it seems
3 to me you have to...you have to identify, you have to
4 identify a duty. You can't, you know, hindsight can be very
5 useful in looking forward, but it's not much helpful, not very
6 helpful in looking backwards and...

7 Q. Okay. Well, let's start with duty then.

8 A. And I, you know, when you're attributing fault to a system,
9 I think you have to find somebody was in breach of a duty,
10 in breach of a responsibility, and I have difficulty in
11 identifying where that duty or responsibility, what the
12 source of it is.

13 Q. Well, let's then deal with the concept of duty and
14 responsibility for a moment. You are aware, sir, that there
15 were no directives promulgated by the Attorney General's
16 office with respect to Crown counsel's obligation to disclose
17 in the early seventies?

18 A. I have no knowledge that there were any.

19 Q. Certainly that's the state of the evidence at this time. You
20 are also aware, sir, that regardless of what directives may
21 be promulgated by any particular Attorney General, Crown
22 counsel is an officer of the Court and has certain duties
23 imposed by law, correct?

24 A. Yes.

25 Q. And that those duties imposed by law are at a minimum

1 that as...at a minimum, Crown counsel must not fail to
2 disclose evidence that is of assistance to the defence. It
3 must not suppress evidence, correct?

4 A. Well, you know, I'm not...I'm not in a position to say that the
5 Crown suppressed evidence

6 Q. No, I'm talking about duty.

7 A. The fact that evidence was not...

8 Q. I'm talking about duty here.

9 A. Well.

10 Q. We're just talking about, let's deal not with the facts of this
11 case, let's deal with your understanding.

12 A. Well.

13 Q. Of the law governing...

14 A. Well, I don't know...

15 Q. ...your office.

16 A. I'm sorry. I don't know what the law was in 1971. You
17 have an advantage on me if you...

18 Q. Well, I don't want to deal with, you know, new law that was
19 cropping up in 1971. Let's go back to the old standing law,
20 and let's deal with the period of time in the fifties. And
21 certainly when you took over your office as Deputy
22 Attorney General, you knew you would be advising the chief
23 law officer of the Crown.

24 A. Certainly.

25 Q. And in that regard his duties with respect to the

1 administration of criminal law are very important, correct?

2 A. Correct.

3 Q. And indeed, nothing can be more important than what the
4 legal duties are upon Crown counsel representing the
5 Attorney General, correct?

6 A. Correct.

7 Q. Now, in 1954 the Supreme Court of Canada in a case called
8 Boucher and The Queen talked about the role of the
9 prosecutor, and I would take it, although it may have
10 slipped your mind, that you are, indeed, well familiar with
11 these words, sir, and let me read them to you.

12
13 The role of prosecutor excludes any notion of
14 winning or losing. His function is a matter of
15 public duty than which in civil life there can be
16 none charged with greater personal responsi-
17 bility. It is to be efficiently performed with an
18 ingrained sense of the dignity, the seriousness
19 and the justness of judicial proceedings.

17 The Supreme Court of Canada, also in a case, the same time
18 period, LeMay and The Queen, Mr. Justice Kerwin speaking
19 for the Court says.

20 A. I'm sorry. That case was?

21 Q. LeMay, this one is Boucher, now this one is LeMay.

22 Q. Mr. Justice Kerwin stating,

23
24 Of course the Crown must not [let me underline
25 that] must not hold back evidence because it

MR. COLES, EXAM. BY MS. EDWARDH

would assist the accused.

1 And I'm going to suggest to you, sir, that it is and was and
2 has been not a question of policy or not a question of
3 direction, but of fundamental duty of Crown counsel, in all
4 courts in which they appear, that matters of evidence in
5 their position...in their possession, which would assist an
6 accused must be disclosed. Not equivocal, must be disclosed.
7 And that duty is far older and precedes your tenure as
8 Deputy Attorney General of this province. What is your
9 comment?

10 A. I have...I don't disagree with your statement of that, but
11 my...I come back to I don't know, I don't know whether the
12 Crown prosecutor at the time was aware of that position. I
13 don't know whether he was instructed in that position. I
14 don't know the circumstances that prevailed, whether he
15 thought this as a result of the polygraph test and the opinion
16 expressed of Mr. MacNeil whether this was useful, whether
17 he made an error judgement. I don't know. I don't feel that
18 I'm in a position to comment, vis-a-vis, Mr....prosecutor
19 MacNeil's role at that time.

20 Q. Well, let's just start with this though; we may come back to
21 it again. We do know, and we do agree then for the
22 purposes of these questions, that you appreciate that Crown
23 counsel has a legal duty to make disclosure of evidence that
24 would assist the defence?
25

1 A. I know that they have now. I know that they have been
2 instructed to exercise that...

3 Q. And they had it then.

4 A. ...responsibility.

5 Q. According to the law.

6 A. Well, maybe, maybe according to the law. I don't know. I
7 don't know to what extent Mr. MacNeil, prosecutor MacNeil
8 or others took...applied that principle.

9 Q. This is the Supreme Court of Canada. It is not a question of
10 whether he liked it, didn't like it. It may be a question of
11 whether he's in breach of it, sir, but it is a binding and
12 authoritative view of the law governing Crown counsel. Do
13 you agree with that?

14 A. I appreciate that.

15 Q. You agree.

16 A. Certainly.

17 Q. Now, whether Mr. MacNeil understood his obligation, let's
18 deal with that for a moment. I take it that throughout the
19 last fifteen years we can say this: One, prior to 1980 there
20 was nothing you did, sir, to ensure that your Crown counsel
21 out there in the field understood their obligations, correct?

22 A. That is correct.

23 Q. Do you consider that a failure on your part as Deputy
24 Attorney General of this province to have not promulgated,
25 articulated and got out there to make sure that Crown

1 counsel understood their obligations, in retrospect? We
2 have the advantage of hindsight and I fully appreciate that
3 that's...

4 A. Well, in retrospect the answer, of course, would be yes.
5 However, you must understand that it's, you know, there are
6 other people with responsibilities in the department.

7 Q. You can delegate.

8 A. And I expect that those who are superiors in authority to
9 prosecuting officers would make certain that the prosecuting
10 officers are appropriately instructed in matters like this.

11 Q. But as Deputy Attorney General, as the permanent head of
12 the department, you, sir, bear the ultimate responsibility,
13 correct?

14 A. No question about that.

15 Q. So.

16 A. I thought your question was directed why I didn't, why I
17 didn't do certain things.

18 Q. But you could have simply waved your finger and said, "This
19 is a matter of importance, of principle, and of concern, do
20 something." Correct?

21 A. Yes. I wasn't aware that there was any...any concern
22 that...in the area of disclosure.

23 Q. And in 1982, when the facts of this matter began to unfold
24 and the conduct of Crown counsel was a matter put to you as
25 potentially of concern, 1982, '83, '84.

1 A. Yes, yes.

2 Q. I take it you also then never made a decision to require an
3 investigation of Crown counsel's conduct in this matter.

4 A. That's correct.

5 Q. And, I don't mean just Mr. MacNeil. I mean his assistant,
6 the Crown who handled the first appeal, and any other
7 circumstances that could be gleaned from what happened,
8 correct?

9 A. Correct.

10 Q. Given the importance of Crown counsel's obligations to the
11 Court and to the accused and to the administration of justice,
12 can you offer, sir, any explanation, other than disregard of
13 your duty, that wouldn't have prompted you to say "Find
14 out," even if Mr. MacNeil is deceased, "Find out what
15 happened. What does Matheson say? What do other people
16 say?" What possible explanation, sir, is there?

17 A. Well, the situation was that the RCM Police were
18 reinvestigating the matter. Previously, you will recall, in
19 1971 there was an investigation by the RCM Police.
20 Their...that report did not indicate any wrongdoing in this
21 sense on the part of the prosecuting officer.

22 Q. But this is your staff.

23 A. Well, you know, let me answer you. You asked me why...

24 Q. Sure, sure.

25 A. Why.

1 Q. I'm sorry.

2 A. The reinvestigation by the RCM Police, I would have thought
3 would have, if there were the concerns that you are
4 identifying, they would have been the subject of
5 reinvestigation or if not by the RCM Police, they would have
6 said, "We have concerns in respect to the Crown prosecutor's
7 office and we would suggest that it be the subject of a
8 further or separate investigation." This was not the case to
9 my recollection. The decision was to have this whole matter
10 reviewed. I had anticipated that the whole matter would
11 have been reviewed by the Court, would have been before
12 the Court. As it turned out, the decision that was taken, as
13 to the section under which the reference was to be made,
14 limited the scope of that...that review. But to answer your
15 question, these were the events that were happening and I
16 did not...I did not see the need to initiate any kind of
17 investigation into the Crown Prosecutor's office.

18 Q. Now, I just want to examine what you have said.

19 A. Uh-hum.

20 Q. Because I'm going to suggest to you, Mr. Coles, that to have
21 seriously suggested that the Royal Canadian Mounted Police
22 were going to conduct an investigation into the disclosure
23 practises of the Attorney General's office and local Crown
24 counsel.

25 A. I didn't say...I didn't say they would. I said in the course of

1 an investigation they would...if they identified this concern,
2 they would have brought this to our attention and suggested
3 that this matter be investigated.

4 Q. But you were aware once the reports started to come in in
5 the eighties that there were potentially serious concerns
6 about the disclosure practise, correct?

7 A. Oh, I wasn't aware that...about the statements until quite
8 late in the...I think it was after that '82 investigation that I
9 was aware that...made aware that there had been...there had
10 been other statements taken from these accused. That
11 information I don't think I was aware of that prior to
12 reading that in the report.

13 Q. The point being you chose to do nothing.

14 A. Well, you have to have knowledge and a basis for action and
15 I...I just told you, I wasn't aware that those statements, and
16 I wasn't aware that disclosure, the non-disclosure of those
17 statements at that time was a breach of any duty on the
18 part of the prosecutor.

19 Q. But you became aware, sir.

20 A. Yes.

21 Q. And you became aware and you still did nothing.

22 A. Well, I became aware in the process of preparing the case
23 for the Appeal Court, the reference, and I expected that to
24 be subject to their investigations, and argument before the
25 Court as I expected the allegations that statements were not

1 voluntary that had been heard...or admitted to the Court.

2 Q. Now...

3 A. I wouldn't consider that doing nothing.

4 Q. Well, let me just put it this way. You didn't, I take it, have
5 any serious expectation that Crown counsel's conduct was
6 going to be explored by the Court of Appeal. They weren't
7 on the list of witnesses.

8 A. I would have thought that if the presence of those
9 statements were made known to the Court, as part of the
10 argument before the Court, I would have thought the Court
11 would have made enquiries as to what disclosure or non-
12 disclosure had been made and I would have expected the
13 Court to have commented on that. This was not...although it
14 was procedurally by way of an ordinary appeal, this was not
15 heard in the nature of an ordinary appeal.

16 Q. Well, let me then get it down to this. It's clear to me then,
17 sir, what you're saying is that you did not order an
18 investigation, but before we're critical of you, we have to
19 appreciate that the RCMP might have turned it up in their
20 investigation of the Attorney General's office, or the Court of
21 Appeal might have turned it up.

22 A. Or the RCM Police in their investigation would have
23 identified this as an area that ought to have been...ought to
24 be the subject of further investigation by the Attorney
25 General.

1 Q. And you'll agree with me that as a matter of policy, it would
2 have been much simpler for you, sir, to have made those
3 enquiries and conducted that investigation and ascertained
4 what the state of disclosure was out there in the field with
5 your Crown attorneys.

6 A. Well that...

7 Q. Rather than leaving it to the Court of Appeal and the police.

8 A. Well, at that time there is no doubt the policy of disclosure
9 was well known to our prosecuting officers at that time. At
10 the time I became knowledgeable about this situation in the
11 mid or late eighties, '82.

12 Q. And you could have conducted an investigation with respect
13 to Mr. Matheson and what happened when the matter first
14 went to the Court of Appeal except...

15 A. I could have if I had been aware of the need to do so.

16 Q. Yes. You were aware of the facts, but you weren't aware of
17 the need, is what your evidence is.

18 A. Well, I became aware of the facts too after the
19 reinvestigation in 1982 preliminary to the case being heard
20 by the Court of Appeal.

21 Q. And then after that, from the time that you became aware
22 of the facts, I just want to make it very clear, and after the
23 Court of Appeal failed to investigate it, and after the RCMP
24 were no longer investigating, you still didn't investigate.

25 A. No, but consideration was then being given to a possible

1 inquiry into this matter, which has resulted in the forum
2 before which we're now speaking.

3 Q And you don't think that's perhaps a little slow to respond
4 to a problem in the department.

5 A. Oh, I, well, I don't think there is a problem in the
6 department. We're talking about something of a possible
7 problem or a concern of a matter that happened in 1970-71.
8 I don't think the fact that it may have taken a matter of
9 months, the best part of a year, to mandate this inquiry,
10 some...what, some sixteen years later, you know, is
11 particular evidence of delay.

12 Q Well, we'll leave that for others to decide. Just so that we
13 understand in an overview sense your conclusion, do I take
14 it that from your perspective as Deputy Attorney General,
15 you do not point to any institutional failure in the province
16 as contributing to the wrongful conviction of Mr. Marshall, is
17 that your view, sir?

18 A. No, that's not a correct way. I say I don't think his
19 conviction resulted from a failure of the criminal justice
20 system.

21 Q. Yes. Since you are Deputy Attorney General and have, or
22 were for many years, it seems appropriate, sir, that we ask
23 you this question. Assuming it wasn't a complete failure,
24 well, I certainly agree with that, can you indicate for the
25 benefit of the Commissioners, because you are the most

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1 familiar with this system, I suppose, of anyone, or as
2 familiar as anyone, what your personal view is, having
3 examined the situation, as to what the institutional failures
4 were that led to Mr. Marshall's wrongful conviction?

5 A. Well, you see, I have difficulty, I have difficulty identifying
6 them. For instance, you have the situation, and...where the
7 police have statements from people who purport to be
8 eyewitnesses. You have subsequently those people giving
9 those statements, retracted those statements, some ten,
10 eleven years later. They...you have a situation where the
11 jury acted on the evidence that they had before them. Now,
12 one would say, yes, but that turned out to be perjured
13 evidence, but that was not known to the jury. So, this...the
14 trial, per se, part of the system which convicted Mr.
15 Marshall, as it turned out wrongfully, they convicted him
16 procedurally correctly. They convicted on the evidence that
17 was before them. So I have difficult...the fact that he was
18 wrongfully convicted was not the fault of the jury system, it
19 wasn't the fault of the trial.

20 10:37 a.m.

21 Q. Do you regard, if we can just stop there, do you regard the
22 conduct by police forces of criminal investigations as also part
23 of the administration of justice?

24 A. Certainly.

25 Q. And is there not a failing with respect to the procedures

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1 used?

2 A. Well..

3 Q. Leaving aside any question of fault, do you not identify any
4 failings in the interrogation techniques, the education or
5 anything else of the officers with respect to investigation for
6 Criminal Code offences?

7 A. Well I was relying and do rely on the reports of the RCM
8 Police. They had a difference of opinion as to the methods
9 that they understood were employed and, but they said apart
10 from, I think they used such words as overzealous which may
11 have led the witnesses to a misunderstanding or words to
12 that effect, they didn't go beyond that.

13 Q. Well let me just stop for a moment. The difference of opinion
14 is more than a difference of opinion that can be cast off in the
15 context of overzealous. Let me take you to Volume 20, sir,
16 and see whether or not I can get you to agree that although
17 there's a difference of opinion about whether a further
18 investigation in relation to criminal charges is warranted
19 there is no difference of opinion that there were, and let me
20 take you to, for example, page 73, "numerous flaws and
21 variances from standard police practices and procedures." Do
22 you see that at the top of 73?

23 A. Yes.

24 Q. So what, it seems though, although there's a difference of
25 opinion about whether it would be criminal conduct or would

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1 potentially be worth investigating as criminal conduct, there
2 isn't much difference of opinion that there were police
3 procedures and practices involved in the Marshall
4 investigation that ought not to be countenanced.

5 A. And this advice is August 1st, 1986. Just a couple of months
6 before the Court of Appeal heard the reference.

7 Q. But my question to you, Mr. Coles, was giving us the benefit of
8 your view as Deputy Attorney General, do you detect any
9 institutional failures, you then said the, you pointed to the
10 jury and the conviction and I'm asking you about police
11 practices.

12 A. Yeah, and they're talking about police practices that
13 transpired or which they are commenting upon that
14 happened some 15 years previously.

15 Q. So I take it your assumption is that's just in the past and it's
16 not a matter...

17 A. Well I had no information that would lead me to think that
18 this was a continuing practice by the officers of the Sydney
19 Police.

20 Q. And you had no...

21 A. They were commenting on events that transpired 15 years
22 previously.

23 Q. And you had no evidence to suggest it was...

MR. SAUNDERS

24
25 And My Lords, if I could just interject and I realize this is

MR. COLES, EXAM. BY MS. EDWARDH

1 cross-examination but I think in fairness my friend ought to put
2 the conclusions of Superintendent Vaughan...

3 MS. EDWARDH

4 Certainly.

5 MR. SAUNDERS

6 As set forth at page 74 and 75 of the report to the witness
7 he states in fact the commentary about it being overzealousness
8 and perhaps errors in judgement but not criminal or unlawful acts
9 on the part of the investigating police officers. I'm referring to
10 the paragraph on 74 that says, "I share the view..." and then the
11 paragraphs at the bottom of page 74 and 75, precisely what this
12 witness is saying.

13 MS. EDWARDH

14 Yes.

15 MR. SAUNDERS

16 I wouldn't want that forgotten.

17 MS. EDWARDH

18 No, I think that's quite fair and I apologize, sir.

19 Q. I also want to draw your attention to those portions that
20 indicate that the interrogation may have been irregular or
21 forceful but that there's no question that this person writing
22 the report doesn't suggest that it's, there was a criminal
23 element in it. Its poor judgement, its focusing, its
24 overzealousness and whatever.

25 A. Pardon me, Counsel, nowhere does he say they were irregular

MR. COLES, EXAM. BY MS. EDWARDH

1 or forceful. "The interrogation may have been..."

2 Q. Well you see, Mr. Coles...

3 A. That's a subjective judgement...

4 Q. You're quite right.

5 A. On assessment, but he's not, I don't read that as saying that
6 they were.

7 Q. You know, though, that there are other reports that say they
8 are. You know that this officer says they may be.

9 A. Well this is the report you referred me to.

10 Q. Well this is 86. This is Superintendent Vaughan's report.
11 You've seen Wheaton's report earlier.

12 A. I don't know that I've ever seen Mr. Wheaton's report. I saw
13 the report but I'm not sure I saw Wheaton's enclosed report.
14 I saw Scott's report.

15 Q. So are you saying that you, let's go back to my original
16 question. I don't want to get it lost.

17 I asked the question, speaking from today's perspective,
18 whether you identified any failings that were of an
19 institutional nature that led to the wrongful conviction, you're
20 the man who's been Deputy Attorney General.

21 A. I have difficulty in identifying those of an institutional
22 nature.

23 Q. So I take it then...

24 A. I think the failings were the fact that witnesses lied.

25 Q. And then if I, in the global sense or to assess your

MR. COLES, EXAM. BY MS. EDWARDH

1 understanding of what happened and your view of this
2 matter today, that there are no institutional failings, it's
3 peculiar or idiosyncratic to the Marshall case. That there was
4 perjured testimony and...

5 A. I don't want to sound argumentative, Counsel, I'm not saying
6 there are none. I'm saying I'm not aware of any.

7 Q. You can't identify...

8 A. You've asked me to identify them and I can't identify them.

9 Q. Okay. No, I'm trying to find out your view, sir.

10 A. Right.

11 Q. Now in terms of the other possible failures do you identify
12 and this may be of institutional kind, I think it's a little
13 different though, so if you don't have any institutional
14 failures you can identify do you identify, first of all given
15 your own personal role, any personal failings in the discharge
16 of your obligations and duties that gave rise to any failure of
17 the system, whether it be between 1972 right up to 1986, the
18 handling of the reference, the disclosure practices that
19 evolved or the treatment of Mr. Marshall just in terms of
20 elementary fairness. Do you have any concerns about that
21 process?

22 A. No, I don't have any concerns about the process. I think some
23 of my, I may have done things differently in hindsight. I may
24 have involved myself perhaps more than I did in certain
25 aspects, particularly in respect to the submissions by the

MR. COLES, EXAM. BY MS. EDWARDH

1 Crown before the Appeal Court. I think in hindsight I would
2 have tried to change the Section under which the reference
3 was had. I think...

4 Q Can you explain why?

5 A. Well it seems to me, you know, the Section that was decided
6 upon, subsection (b), caused the proceedings to be in the
7 nature of an appeal. And as I indicated to Mr. Spicer, my
8 own, on reflection it seems to me that not only limited the
9 scope of the court's inquiry on review but it also put the court
10 in a difficult position sitting on an appeal from itself. And it
11 seemed to me, and I don't know to what extent the court may
12 have felt uncomfortable in that position, but you know, I
13 personally have difficulty with that. I would have thought
14 subsection (c), on reflection, which is the position that Mr.
15 Edwards, as I understood, was suggesting, would have been a
16 better section for the court to hold this whole review process
17 and the kind of questions that you are concerning yourself
18 with seems to me could have been better argued before the
19 court under that subsection than under subsection (b)...

20 Q If you can...

21 A. And so I think if I had involved my, or had addressed that
22 more particularly it was left to senior member of our
23 Department, I think I would have perhaps argued a little
24 more for that choice, however, it was a federal minister's
25 decision and all we could have done would be make our

MR. COLES, EXAM. BY MS. EDWARDH

1 recommendations.

2 Q. So I take it that other than that one area, or those few areas
3 that you've just pointed to, is there anything else you'd like to
4 identify as any, in retrospect, a failing?

5 A. Well, you know, I have heard through the course of the
6 testimony given before this Commission that I relied on
7 certain people doing what I would have considered to be their
8 normal, discharge in their normal responsibility and here I'm
9 thinking in terms of the fact, of the argument in the factum
10 and the argument that was presented to the court. I did not
11 address that specifically. I was concerned with one aspect of
12 it. The role that the Crown was going to advocate and I didn't
13 concern myself with the other issues. Now having reflected
14 on them I think if I had I would have tried to be a little more
15 persuasive, maybe not any more successfully than I was with,
16 in respect to the role of the Crown but at least I would have
17 had my views on record as far as staff were concerned.

18 Q. So rather than just saying you might have been more hands-
19 on to give guidance to the individuals, is there any position of
20 the Crown that you think in retrospect was wrong?

21 A. No, I don't think so.

22 Q. Let me deal with some of the general questions about the, of
23 your office going back to its responsibilities for a moment and
24 the relationship between local Crown counsel. As Deputy
25 Attorney General it's your responsibility, or would you agree

MR. COLES, EXAM. BY MS. EDWARDH

1 with me, that it's your responsibility to dictate or to provide
2 some guidance with respect to the standards of criminal
3 prosecutions throughout the province.

4 A. Well certainly I would have the responsibility for doing it. I
5 wouldn't see that I would necessarily do it myself. I would
6 rely on my senior staff to...

7 Q. But you're responsible to ensure that it's done.

8 A. Yes.

9 Q. And that you are also responsible for ensuring that the
10 administration of justice is conducted efficiently and as
11 uniformly and as fairly as can be and you obviously delegate
12 some of that...

13 A. Yes.

14 Q. But you retain some significant personal responsibility to
15 ensure that what needs to be done is done. Correct?

16 A. Correct.

17 Q. Now the tension, if I can use that term, that I'd like to discuss
18 or ask some questions about is the historic responsibility of
19 local Crown attorneys. And would you agree, sir, that there is
20 and has been a tradition of local autonomy with respect to
21 Crown counsel who are out in the field prosecuting?

22 A. Yes. Subject to their superiors intervening as and when they
23 think it appropriate.

24 Q. Yes. But local Crown counsel are expected to know the local
25 conditions. Correct? They're, the local conditions in which

MR. COLES, EXAM. BY MS. EDWARDH

1 they're working, whether or not a crime is very prevalent in
2 his area. Whether he should be making submissions to the
3 court about the need for general deterrents, those kinds of
4 issues.

5 A. Oh sure. That's right.

6 Q. Local Crown counsel...

7 A. Again, subject to whatever advice and direction he or she
8 may get.

9 Q. Yes. Local Crown counsel takes the individual carriage of
10 trials.

11 A. Yes.

12 Q. Is responsible for the exercise of discretion in a fair and
13 equitable manner within the area that he works.

14 A. Within limits.

15 Q. Yes. And when the Attorney General's office has not
16 promulgated a policy in a specific area, I take it in the
17 ordinary course unless Crown counsel is doing something
18 quite outside the general ambit, you wouldn't interfere.

19 A. That's correct.

20 Q. Correct? In other words, you understand that both from the
21 perspective of maintaining the morale of your Crown counsel
22 and also insuring the integrity of their office, you don't
23 interfere unless they're doing something wrong.

24 A. Yes. Sure. But they are, you must remember, in this
25 province, the director or as he then was the assistant director,

MR. COLES, EXAM. BY MS. EDWARDH

1 has very close contact with our Crown Prosecutors. He knows
2 what's going on in their offices so it's not a case when you're
3 talking about autonomy as if they were, you know, separate
4 and apart and that there's no communications. I suggest to
5 you there's regular communications.

6 Q. But there is a recognized autonomy out there as part of their
7 job.

8 A. Certainly.

9 Q. Yes.

10 A. Sure.

11 Q. And that you don't expect Martin Herschorn to be running
12 around interfering in the decision making of his local Crowns
13 unless, in fact, they're doing something wrong or outside the
14 policy.

15 A. Well, yes. Except, you know, there is a lot of involvement by
16 Mr. Herschorn in the decision making of Crown Prosecutors.
17 There is constant contact and discussion and I presume...

18 Q. And consultation.

19 A. Consultation.

20 Q. And, indeed, though, that's different would you not agree, sir,
21 that the consultation that, in the ordinary course Crown
22 counsel might be seeking from the field by way of advice, is
23 different from just getting directions on a specific case.

24 A. Yeah, but the point I'm making, Counsel, is, you know,
25 autonomous has different meanings to different

MR. COLES, EXAM. BY MS. EDWARDH

1 circumstances and though they function autonomously they
2 are not autonomous.

3 Q. And they, when I, when you saw they are not autonomous
4 what I'm trying to understand is what the limits of their
5 autonomy are. In other words, they are autonomous as long
6 as they abide by the policy directives of the Attorney
7 General's office or they are not doing something that someone
8 views as incorrect.

9 A. Yeah.

10 Q. Correct?

11 A. That's a fair...

12 Q. And that's the way it should be.

13 A. That's a fair general statement.

14 Q. And that's the way it should be. Do you agree with that
15 proposition? Crown counsel needs some of that autonomy to
16 function in an area.

17 A. Oh certainly. If I thought otherwise that would not be the
18 case.

19 Q. Now when you said to Mr. Spicer with respect to the
20 withdrawing or ordering Gale, Mr. Gale, to phone Mr. Edwards
21 on the shop-lifting charge. When you said to Mr. Spicer that
22 it was not...

23 A. Counsel, the premise is not correct. It wasn't an order. I
24 asked him to call Edwards and tell him to withdraw or not
25 proceed with it. Now I don't...

MR. COLES, EXAM. BY MS. EDWARDH

- 1 Q. I call that an order. You tell him to do something, correct?
2 Let's call it that.
- 3 A. Well this is...
- 4 Q. Telling him to do something.
- 5 A. This is after we, after I discussed with him the
6 representations that were made to me and understood that he
7 agreed that the matter ought not to be proceeded and I said
8 call Edwards and tell him so.
- 9 Q. Well Edwards understood it to be an order but, so you make a
10 decision that something should be done, you tell Mr. Gale and
11 Mr. Gale tells Mr. Edwards what to do.
- 12 A. Yeah, the missing ingredients is that Mr. Gale knew the
13 representations and indicated concurrence with the decision.
- 14 Q. I'm not concerned about that. This is an ordinary everyday
15 prosecutorial decision. "I've got a shop-lift, am I going to
16 proceed?" Correct?
- 17 A. Yes.
- 18 Q. Crown counsels make it across this province every day,
19 correct?
- 20 A. Certainly.
- 21 Q. And I'm going to suggest to you that it could be viewed by
22 local Crown counsel as nothing but interference in the
23 ordinary day-to-day conduct of their caseload when they get
24 an order from above as to what to do after they've made a
25 decision which is within their discretion.

MR. COLES, EXAM. BY MS. EDWARDH

1 A. Yes. But they don't have the exclusive discretion of these
2 matters. In this particular case the decision came from me
3 and whatever position they had was over-ruled and they
4 understand the authority of my office and my right to take
5 that kind of a position.

6 Q. But surely, Mr. Coles, we've established that you don't
7 interfere unless they're wrong, unless something about the
8 exercise of their discretion is wrong.

9 A. I said generally that was so but you have to consider the
10 circumstances of a situation that I would involve myself in. I
11 wouldn't normally do it on a day-to-day basis but there is
12 representations that seem to me to justify the matter not
13 being proceeded with.

14 Q. If you respected the autonomy of your Crown counsel why
15 wouldn't you have Mr. Gale call Mr. Edwards and say, "We've
16 received these representations, we think they're meritorious.
17 Would you re-examine the issue?" Isn't that the way, if you
18 respected the autonomy of your local Crowns you would have
19 conducted yourself, sir?

20 A. Well I don't think it has to do, anything to do with respect.
21 Certainly that is a preferable way to deal with it and the
22 circumstances in this instance, as I recall, the representations
23 were made to me the morning of the trial and then I, and I
24 would have, if Mr. Gale had any, and after all he was the
25 person that had dealings with the prosecutors. I would have

MR. COLES, EXAM. BY MS. EDWARDH

1 thought that if he had any reservations about calling Mr.
2 Edwards he would have said so. Now in calling Mr. Edwards I
3 didn't foreclose that if Mr. Edwards had any difficulty with
4 the direction that I was giving, I would have expected him to
5 discuss it with Mr. Gale if, again, if there was time to do it.

6 Q. And if there wasn't time to do you would expect him to obey
7 your order?

8 A. Yes.

9 Q. And that's high-handed, isn't it, Mr Coles?

10 A. Oh, I don't think it's high-handed when I exercise the
11 authority of my office.

12 Q. When you interfere in an expressly given area of discretion of
13 Crown counsel without even consulting him?

14 A. I have difficulty with your use of the word "interfere". I was
15 exercising...

16 Q. You over-ruled him.

17 A. I was exercising my authority of my position and that I have
18 difficulty in equating to be, to interference.

19 Q. And we'll agree that it was in the area of the day-to-day
20 discharge of responsibilities by Crown counsel, that you
21 exercised your jurisdiction so to speak.

22 A. Well Crown Prosecutors are agents. They don't have exclusive
23 jurisdiction...

24 Q. I appreciate that.

25 A. In prosecutorial matters...

1 Q. But we've already identified the principal...

2 A. The practice, the practice was as we have identified it but
3 that is not an exclusive area of jurisdiction for a prosecuting
4 officer in this province or any other province of Canada.

5 Q. Would you agree that that gives to the public the sense that
6 there is political interference in the decision-making
7 processes of Crown counsel?

8 A. No. If it communicates anything to the province it indicates
9 that the Deputy Attorney General made a decision and that
10 the Deputy Attorney General for whatever reasons has
11 decided not to proceed in the matter.

12 Q. So you don't see in the conduct of that situation any problem
13 or concern arising from the appearance it creates to an
14 outside and reasonable observer. You see no problem.

15 A. Well, no, I don't see any. They expect the Attorney General or
16 his Deputy to exercise the responsibilities of his office and
17 when they do so I would not think they would be considered
18 to be political.

19 Q. And on the facts of this case you exercised your discretion
20 without checking on any of the facts, without consulting
21 Crown counsel.

22 A. That's correct.

23 Q. Did you know the lawyer who spoke to you?

24 10:59 a.m.

25 A. Yes.

- 1 Q. You knew him personally.
- 2 A. Yes.
- 3 Q. I take it then as a result of so knowing him you relied upon
4 the information that he gave you.
- 5 A. I relied on the representations he made. He was not...he did
6 not represent himself as a lawyer for the person involved.
7 He was a friend of the family and he made representations
8 to me and I...my knowledge of the gentleman would give me
9 no cause to question the representations he was making.
- 10 Q. So he wasn't even...
- 11 A. And I didn't...
- 12 Q. ...counsel on the case.
- 13 A. No, he was a friend of the family is my recollection.
- 14 Q. Was he a friend of your family as well and you?
- 15 A. No. No.
- 16 Q. Was he a friend of the Minister's family?
- 17 A. I have no knowledge. I don't think so.
- 18 Q. Was the person involved...was it your decision to withdraw
19 those charges connected to...in any way related to their
20 political affiliation?
- 21 A. No, of course not, of course not. The representations were
22 that this person and the family were scheduled to move out
23 of the province in a matter of days and that this woman was
24 suffering from...
- 25 Q. I've...you've asked, you've already identified, sir, and I just

MR. COLES, EXAM. BY MS. EDWARDH

1 wanted to clarify and ask you...

2 A. Well, I thought I...

3 Q. ...the question in point...in a point blank way whether there
4 was any political consideration involved in that.

5 A. I thought you may have missed the reasons and the
6 representations.

7 Q. No, sir.

8 A. As a basis and reason for your questions of that kind.

9 Q. No, sir, I did not. With respect to the education of Crown
10 counsel, and I'd like to go back generally for a moment, have
11 you...

12 MR. CHAIRMAN

13 Are you going to be awhile, Miss Edwardh?

14 MS. EDWARDH

15 I'm sorry.

16 MR. CHAIRMAN

17 You're going to be awhile.

18 MS. EDWARDH

19 Yes. I'm sorry.

20 MR. CHAIRMAN

21 We'll take a ten minute break.

22 MS. EDWARDH

23 Thank you, very much.

24 BREAK - 11:01 a.m. - 11:26 a.m.

25

1 MR. CHAIRMAN

2 Ms. Edwardh.

3 MS. EDWARDH

4 Thank you, My Lord.

5 Q. Mr. Coles, you described the importance, in terms of
6 acquiring your own experience in the field of criminal law,
7 of going to the Uniform Law Conference. I gather you
8 chaired one of the sections, is that correct?

9 A. I was...I attended a number of years. I, at one point ,was
10 the chairman of the criminal law section. I was the president
11 of the Uniform Law Conferences.

12 Q. And I take it from your earlier testimony, that in terms of
13 going to the job as Deputy Attorney General, although your
14 experience in criminal law, per se, was, I'm going to call
15 limited, that that kind of activity was of real assistance in
16 keeping you up with what was happening across the country
17 and what the important issues were in respect to the
18 administration of criminal law.

19 A. That was part of my opportunity to, sure.

20 Q. And it would assist you.

21 A. I beg your pardon.

22 Q. Going to those kinds of conferences would be of assistance to
23 you.

24 A. Oh, certainly.

25 Q. Now...

1 A. I like to think I also made a contribution to them.

2 Q. Yes, of course. And with respect to educating the
3 prosecutors who are out in the field, what steps, sir, did you
4 take to ensure that they had access, not only to an arena
5 within Nova Scotia where issues could be dealt with and
6 discussed at both an academic and practical level, as well as
7 them having an opportunity to share concerns with
8 colleagues across the country?

9 A. Well, we established a practise that we would send certain
10 prosecutors to various seminars and workshops, both within
11 the Maritimes and outside the Maritimes, and the material
12 that was available at those workshops would be reproduced
13 and made available to the other prosecuting officers. We
14 tried to...we tried to, within the limits of our resources, to
15 rotate so that most prosecutors had an opportunity to attend
16 a seminar or workshop outside of the province as well as
17 inside the province.

18 Q. Would that be on an annual basis or most...

19 A. On an annual basis. I would...

20 Q. How many, I'm sorry.

21 A. I would say this was probably more current from the
22 eighties on rather than the pre-eighties. We also established
23 annual...annual workshops internally, in-house, at which we
24 would bring people down from other jurisdictions to be
25 special workshop leaders or speakers on these occasions and

1 we do that on an annual basis.

2 Q So let me just fully understand this. So let's deal with the
3 annual workshops. I take it they are sponsored by the
4 Attorney General's office.

5 A. Yes.

6 Q And they would be...once a year there would be such a
7 workshop?

8 A. Yes.

9 Q And it would be academic in nature in terms of canvassing
10 important legal issues and positions Crown counsel were
11 taking.

12 A. Academic and administrative. We try to cover as much as
13 we could. These would normally be one-day workshops and
14 we would try to cover a wide range of areas, both academic,
15 as well as administrative matters.

16 Q So when you say...when you use the term "one-day
17 workshops" in the plural, would there be one one-day
18 workshop a year or...

19 A. Yeah.

20 Q ...are there many one-day workshops during the course of
21 the year?

22 A. The one that we're talking about now is an annual one.

23 Q So there is one meeting of all Crown counsel for one day.

24 A. Yes. Yes.

25 Q In which they would discuss, I suppose, all sorts of issues.

1 What other educational things have you...did you institute
2 in...within the Department?

3 A. Oh, I don't know that I can identify any. We developed
4 manuals, we made a point of circulating advice about
5 pending legislation and when new amendments to the Code
6 or other criminal law statutes were available we would
7 provide that material. I don't think we did anything in
8 any...

9 Q. One of the...I'm sorry, I don't want to cut you off.

10 A. Anything in any substantial way.

11 Q. One of the comments made by Mr. Edwards in a letter to
12 you, it's part of an exchange of correspondence, I think, in
13 relation to disclosing the police report, was the failure of
14 Crown counsel throughout Nova Scotia to press for the
15 formation or to form an association of prosecutors in Nova
16 Scotia. Do you recall that remark?

17 A. Yes. Yes.

18 Q. And would you agree with me, sir, that an association of
19 prosecutors in a province is a very important vehicle
20 whereby Crown counsel can identify issues of mutual
21 concern that ought to be addressed, whether by way of
22 approaching the courts or by going through the Attorney
23 General's office or areas of their own lacking, resources they
24 made need, things like that?

25 A. Well, it may be, and if I might elaborate on it. There was an

1 informal representation made to me by one and possibly
2 two prosecutors, I forget at the moment, I think there were
3 two, inquiring about becoming associated with an
4 organization of that kind of Crowns in the Province of
5 Ontario. And the information I had of that association was
6 such that I didn't think it would be particularly useful or
7 necessary in this province, and I...

8 Q. For them to join that association.

9 A. That's right. And, I at that time expressed those views, and
10 that's the last I had heard of it. There was never any formal
11 request or any repre...further representations made.

12 Q. So your...

13 A. My view...

14 Q. I'm sorry.

15 A. If I may, my view is that under our legislation prosecuting
16 officers are agents of the Attorney General. I thought our
17 Department was structured in a way that there was good
18 communications. They had an opportunity to express the
19 kind of or speak to the kind of issues that an association
20 collectively would have provided the opportunity and I
21 thought the communications within that section of that
22 Department were such that there was no need for them to,
23 as far as I was concerned, for the government to sponsor or
24 fund a separate association of Crown prosecutors.

25 Q. So I take it that what you are referring to then is a request

1 by these two individuals.

2 A. Any inquiry moreso than a request.

3 Q. Okay. And it relates to the Association of Crown
4 Prosecutors.

5 A. Well, you would be more familiar with the organization in
6 Ontario than I, but an Association of Crown Attorneys, I
7 think, perhaps it was called.

8 Q. And I take it that at the end of the day your position was
9 you opposed them.

10 A. I was not prepared to support such a representation.

11 Q. And I think you've given us your reasons, that they didn't
12 need it. But you obviously, sir, are not out in the field faced
13 with the problems and responsibilities of a local Crown
14 counsel. Why would you assume that their perceived need
15 ought not to be the guiding force in exercising any decision-
16 making powers you had?

17 A. Well, the two people, and I believe there were two who met
18 with Mr. Herschorn and myself. I wasn't...I didn't
19 understand that they were there in any representative
20 capacity. They were aware of the association. They
21 expressed an interest and made an inquiry. I expressed my
22 views on the matter and I don't recall any representations
23 being made beyond that to...on that subject.

24 Q. But I think, from what you've indicated, you said you
25 weren't...you made a decision at that time, as well.

- 1 A. No, I didn't make a decision.
- 2 Q. You were not prepared...
- 3 A. I responded to their inquiry based on the information I
4 knew of the association in Ontario and it was left there. And
5 there was no further follow-up or any representations made
6 on behalf of the Crown prosecutors.
- 7 Q. And I take it in the response that you've described already
8 in your testimony was that you were not prepared to
9 support it.
- 10 A. That is correct.
- 11 Q. I take it there is no other organization or association of
12 Crown counsel.
- 13 A. There may be, but I have no knowledge.
- 14 Q. You've not heard of it. I take it you would be aware of it,
15 as...
- 16 A. Oh, you mean in this province.
- 17 Q. In this province.
- 18 A. Oh, no, oh, of course, no, there isn't.
- 19 Q. Now with respect to the selection process of Crown counsel
20 that you described in answer to some questions by Mr.
21 Spicer, I'm going to suggest to you, sir, that your departure
22 from the Department has resulted in, for the first time in
23 this province, an advertising for the position of Crown
24 counsel and a proposed selection on the basis of some
25 competition, is that correct?

1 A. I don't know what the practise is today.

2 11:37 a.m.

3 Q. Well were you aware that an advertisement in the last couple
4 of months had been published in the ordinary press with
5 respect to a competition for the position?

6 A. I have not seen it. I was told there was an advertisement in
7 the paper. I've not seen it and I don't know what it's...

8 Q. Certainly under, when you were Deputy Attorney General no
9 such competitions took place.

10 A. Well advertisements of that kind were not inserted.

11 Q. In fact, advertisements calling for applications were not, as I
12 understood your evidence, ever put forward in any form.

13 A. Well we, no, we have made from time to time inquiries in
14 other jurisdictions and in some law offices to ascertain
15 whether there would be people interested and available. We
16 have, but in my experience in the Department we didn't have
17 the need. We always seemed to be receiving inquiries of
18 people who wanted to join the Department and we
19 maintained a file of such inquiries and whenever an
20 opportunity arose we would consult the file, contact people
21 and see if their interest was still current and interview those
22 applicants and go through the process of selection from
23 applications on file.

24 Q. I understand. So in summary, then, you either selected from
25 those who inquired or you went to, as you've just indicated,

1 some law firms asking if there was anyone interested.

2 A. Well, yes.

3 Q. You'll agree that there was no general competition as would
4 occur usually in the public service.

5 A. That's right.

6 Q. Now...

7 CHAIRMAN

8 Out of curiosity the applications or competition you referred
9 to now, is that to the Public Service Commission?

10 MS. EDWARDH

11 A very good question, My Lord.

12 Q. Do you know...

13 A. I'm sorry, I didn't hear the question...

14 Q. Let me...

15 CHAIRMAN

16 I realize, Mr Coles, you said you haven't seen the
17 advertisement...

18 A. Yes.

19 CHAIRMAN

20 But I'm curious as to whether or not the Public Service
21 Commission would be charged with the responsibility of hiring
22 professional people.

23 A. I can't answer.

24 CHAIRMAN

25 You don't know. They wouldn't have the ...

1 A. Certainly not when I was in the Department but I don't know.

2 CHAIRMAN

3 There is a Public Service Commission in Nova Scotia.

4 A. We refer to it, My Lord, as the Civil Service Commission, but
5 we're talking about the same kind of commission.

6 MS. EDWARDH

7 I'll try and get the ad but it's my recollection from the
8 information I received that it is to the Public Service Commission.

9 Q. So these individuals who are then, who have made their
10 inquiries or are sought out, I take it, as you've described are
11 appointed by Order-in-Council and they are appointed at
12 pleasure, correct?

13 A. Correct.

14 Q. And you'll agree with me then that from, as a matter of both
15 appearances and fact, they have virtually no security of
16 tenure.

17 A. Well technically that may be correct.

18 Q. Yes. As a matter of law they have no security.

19 A. We have others who are, other prosecutors who are civil
20 servants.

21 Q. If I understood you correctly though, sir, the vast majority of
22 them are appointed through this mechanism of Order-in-
23 Council.

24 A. Yes.

25 Q. And they have no security of tenure technically.

1 CHAIRMAN

2 What's meant by appointment at pleasure. It doesn't mean
3 you can terminate, or does it?

4 A. Sure it does.

5 MS. EDWARDH

6 Yes.

7 A. Technically the...

8 CHAIRMAN

9 There's some law that says differently. I'm sure I've read
10 decisions of people who were appointed by pleasure and then
11 thought they were...

12 MS. EDWARDH

13 If, as I understand the term, My Lord, as a matter to law
14 today there are, in the public service many appointments at
15 pleasure but they are now governed by over-riding contracts
16 because of unions and whatever. But if, without an underlying
17 contract at pleasure means at pleasure.

18 MR. COLES

19 On notice.

20 MS. EDWARDH

21 Upon notice.

22 MR. SAUNDERS

23 My Lords, I don't think that that is accurate. I can check a
24 specific date for clarification but it's my understanding that as of
25 April 1, 1988, all Order-in-Council appointments as Crowns

1 became Civil Service Commission's appointments. So that there is
2 that presently, that entire protection. But I can clarify the date
3 for the record.

4 CHAIRMAN

5 Okay, well let's not waste time on it. It's a very loose phrase
6 that I'm not sure it means what it says.

7 MS. EDWARDH

8 Q. Now my question to you in terms of the period of time when
9 time were you Deputy Attorney General is really whether or
10 not you would agree, Mr. Coles, that the Order-in-Council
11 device as being a vehicle for appointment makes the
12 appointment of prosecutors vulnerable to patronage
13 appointments.

14 A. Well I suspect the process does but I would like to say this
15 that although the appointment is by Order-in-Council the, and
16 it is one of pleasure I know of no instance where an appointee
17 has been dismissed on grounds, because of pleasure.

18 Q. No, well I appreciate that's what you've testified to with
19 respect to dismissal but my question, sir, related to the issue
20 of whether or not the selection of Crown Prosecutors was
21 vulnerable to political patronage and you would agree that in,
22 I take it, that because of the mechanism involved and the
23 absence of public competition and the absence of screening by
24 a public service commission of some kind, that there is an
25 appearance problem with the Order of Council.

1 A. Well, you know, I don't...

2 Q. You don't accept that?

3 A. I'm not, personally I don't think there's a problem but there
4 may be a perception in the minds of some but I, it's not my
5 experience that that's a problem.

6 Q. Were you not aware, sir, that certain appointments made
7 when you were Deputy Attorney General, indeed, provoked
8 some criticism because of people's connection to Cabinet
9 Ministers in the Province of Nova Scotia?

10 A. Yeah, I have heard some such comment but that isn't
11 necessarily true of the case.

12 Q. It doesn't mean that they're bad appointments, I'm not
13 suggesting that, sir. What I'm suggesting is that from the
14 perception...

15 A. And it doesn't mean that they're political...

16 Q. Of, from the perception of not, of having public prosecutors
17 who are not patronage appointments that such a vehicle as
18 was used in Nova Scotia, the Order-in-Council enhances the
19 likelihood that people will not have confidence that they are
20 meritorious appointments.

21 A. Well...

22 Q. Even if they may be.

23 A. Well, you know, I'm not a position to comment on that. That,
24 you know, because that may be the perception to some but I
25 can't speak to whether that is or is not. If it is, so it is but

1 that is not, you know, it's not a perception that I would
2 subscribe to.

3 Q. And you will agree, sir, though that the, I take it, that even if
4 you don't subscribe to that perception that the absence of
5 public competition for those positions undermines what
6 might realistically be assumed to be a sense in the community
7 that there is a real contest based on merit.

8 A. Well there may be but I should say, if I may, that the process
9 that we followed in the Department was that from the
10 applications that we had or were aware of the senior staff
11 would go through them and select probably five or six that
12 they thought would be appropriate for the position. These
13 people, then, would be interviewed by the our staff and if it
14 was a case that we're talking about a prosecutor, a senior
15 prosecutor would also interview them and we would have a
16 position that they were either acceptable or not acceptable,
17 qualified or not qualified. Some would have special
18 qualifications than others. And this report would go through
19 to the Minister and he would make his recommendation from
20 that list.

21 Q. And that's precisely the point.

22 A. And that's the procedure, well that's the procedure that was
23 followed. So that, and he would make his recommendation to
24 the Executive Council.

25 Q. So just in terms of your understanding of enhancing...

1 A. I just didn't want you to think that there wasn't evaluation or
2 assessment of the applicants.

3 Q. I appreciate you testified, sir, that there was a process of
4 interviewing after applications had been received or you had
5 gone out and solicited people to come forward. My question,
6 though, was in terms of the public confidence and the
7 administration of justice the matter I took it that you were
8 concerned with whether a competition for the position wasn't
9 far more, wasn't preferable.

10 A. It may be. Under the provisions of the Prosecutors Act
11 however, this is, the statutory provision provides for the, for
12 prosecuting officers and assistant prosecuting officers to be
13 appointed by the Attorney General. That's the existing
14 legislation in the province.

15 Q. And I take it..

16 A. Subject to what changes may have taken place to
17 accommodate what counsel has just notified...

18 Q. And I take it regardless of the terms of that Act you're
19 agreeing that it would be preferable if it were by public
20 competition.

21 A. Oh no, I don't know whether it would be anything preferable.
22 I don't know.

23 Q. You don't have any view of that.

24 A. Well I, you know, I think when you're selecting professional
25 people I have some difficulty with a non-professional group

1 to make a selection. So I don't know that their selection
2 would be preferable in terms of having the kind of person
3 occupy the position we're talking about.

4 Q. And if I were to suggest to you that that selection process
5 could take place with professionals, with the appropriate
6 arrangements made with the public service commission,
7 based upon an open competition on merit, would you agree
8 that would be preferable?

9 A. It would be preferable to one that had non-, that was
10 comprised of non-professional people.

11 Q. And it would be preferable to the system where the Attorney
12 General designates or picks...

13 A. I don't know if it would be preferable or not. It may be more
14 satisfactory to those people who you alluded to as having
15 perception that the other system is less acceptable.

16 Q. Isn't it fair to say that part of your concern as Deputy
17 Attorney General ought to be how to enhance the perceptions
18 about the administration of justice, its fairness, its neutrality.

19 A. Oh certainly, but I'm not aware of the kind of concerns that
20 you are suggesting. I have heard some comment but I don't
21 know to what extent those concerns are held or widespread
22 or...They certainly have not been raised to me with any kind
23 of significant concern.

24 Q. I take it that during your tenure in your office, sir, you were,
25 or your tenure as Deputy Attorney General you were not at

1 all concerned then about that process.

2 A. With the process of appointment?

3 Q. Yes.

4 A. No.

5 Q. Now I'd like to go back then just to some of the issues
6 specifically involving Mr. Marshall. I take it we have agreed,
7 correct me if I'm wrong, that the policy of disclosure that
8 exists today is one that evolved in terms of directives in the
9 80s.

10 A. That's my...

11 Q. I think you've said that a number of times.

12 A. That's my recollection, yes.

13 Q. And that the first written policy, and if you'd like to refresh
14 your memory, sir, you might take a look at Volume 28, the
15 first written policy in respect to disclosure was promulgated
16 in 1984, is that correct?

17 A. That is my recollection. However, there had been verbal
18 communications prior to that.

19 11:50 a.m.

20 Q. Yes, and I take it those were largely at the instigation of the
21 Attorney General, Mr. How.

22 A. That's my recollection.

23 Q. Now when... In terms of Volume 28, I don't recall you dealing
24 with this matter and please accept my apologies if you dealt
25

1 with it before. When this 1984 written discussion with
2 respect to disclosure was promulgated, do you recall whether
3 or not you did anything to insure that your field prosecutors,
4 if I can call them that, were aware of what the policy was? Or
5 was that totally within Mr. Herschorn's bailiwick?

6 A. No, I recall we, prior... My recollection is prior to that
7 communiqué, that directive going forward, there was a
8 meeting, one of these annual meetings that we spoke of
9 earlier, of the prosecutors at which time the question of
10 disclosure was raised and I had attempted to address that as
11 to what the then Attorney General, Mr. How, had said was to
12 be the practice and so that we had that discussion and I think
13 it was as a result of that discussion that the written directive
14 followed and that was sent out to all prosecuting officers and
15 the assistant prosecuting officers. So there's no doubt that
16 they knew what the, they knew at that time what the policy
17 was and I didn't have any doubt that they knew what the
18 expectation in the matter of disclosure was prior to that
19 directive.

20 Q. Now with respect to the differences between the 1984 and
21 1986 written disclosure directives.

22 A. What document should we be looking at?

23 Q. I'm sorry, let's take a look at pages 14 and you might choose
24 to compare that to page 16 in Volume 20. The 1984 policy
25 directive is set out at page 14 and the 1986 one is set out on

1 pages 16 and 17. Do those differ in any material respects that
2 I, in terms of what you were trying or what was sought to be
3 accomplished in these two directives? They don't seem to me
4 to be materially different.

5 A. Well, I think the thrust of them are the same. I think the
6 memorandum of September 15th is more specific.

7 Q. Yes.

8 A. It incorporates references to kinds of situations that where
9 disclosure may be limited in specific terms and I think it
10 concludes with a reference to police reports. I think, to that
11 extent, they differ in substance.

12 Q. They express reference to police reports.

13 A. Yes, I don't think the principle is different in either.

14 Q. Would it be fair to say that the reference to police reports as
15 set out at page 17 really is nothing more than what had been
16 evident to Crown counsel since the early eighties.

17 A. That would be my view.

18 Q. It just isn't...

19 A. Police reports, per se, were not intended to be part of the
20 disclosure policy of the Crown. That's not to say that parts of
21 the report ought not and should not be...

22 Q. Right.

23 A. Extracted and disclosed.

24 Q. So I take it it's fair to say that that view was a view as set out
25 in 1986 in this document but it is one that, it's your

1 understanding, would have been known to Crown counsel
2 since the early eighties. That's all I'm trying to establish.
3 There's nothing radical about this, nothing new.

4 A. No. No, except that my understanding was and I suppose a
5 reference having first been checked makes reference to
6 somebody... to somebody and that somebody, it was always
7 my understanding, was a superior person in the Department.
8 The prosecuting officer would consult with his superior in the
9 Department.

10 Q. I'm sorry, where does it say that?

11 A. Well, the top of page 17 in this thing.

12 Q. So on the 1986 disclosure, which says:

13
14 Prosecuting officers are reminded that in no case
15 should a file be turned over to the defence for
16 perusal without the file having been first
17 checked to insure...

18 And you're saying that you might interpret "check to insure"
19 be checked by a superior?

20 A. Well, I think that the advice that was given to the prosecuting
21 officers that police reports directed to the Crown, per se, were
22 not to be made, were not to be made public, unless they were
23 approved by a superior.

24 Q. Well, let's deal with your understanding and what this
25 document has just said.

A. That's not to say, to come back to my other statement, that's

1 not to say that parts of a police report that fell within the
2 ambit of information that was subject to our disclosure could
3 and should not be... could and should be released to the
4 defence.

5 Q. So let's break this down then. It's your understanding that
6 there was a notion, a view that police reports are confidential,
7 that they ought not to be disclosed in the ordinary course.

8 A. The report, per se.

9 Q. That's right.

10 A. Yes.

11 Q. But portions of the report may be disclosed.

12 A. Yes.

13 Q. Upon someone exercising their discretion that it was
14 important or useful or necessary to so disclose.

15 A. Yes.

16 Q. Surely you're not saying that that decision in each case had to
17 be taken by a superior.

18 A. Oh, no. No, no, the latter would be the decision of the
19 prosecuting officer.

20 Q. Sure. I mean he could be 300 miles away and he's not about
21 to phone you or Mr. Herschorn and say, "I've got this piece of
22 paper. Can I release it?"

23 A. No, I'm drawing a distinction between the release of
24 information contained in a police report as distinguished
25 from the police report, per se.

MR. COLES, EXAM. BY MS. EDWARDH

1 Q. Well, I take it if the police report contained a two-page
2 description of the scene of a homicide as well as a 14-page
3 analysis, that you would have no objection should the
4 prosecutor walk over, Xerox the two pages that are the
5 description of the physical facts, hand it to the defence
6 counsel and say, "Make use of this as you see fit, sir."

7 A. That's right.

8 Q. So we're not talking about any prohibition that involves
9 giving a duplicate copy of a couple of pages of the report if
10 the prosecutor exercises his discretion.

11 A. That's correct.

12 Q. And I take it, that's the rule as you understood it and that
13 rule hasn't changed over the eighties.

14 A. That's right.

15 Q. Okay, that's what I was trying to find out.

16 A. I'm sorry, I missed your point.

17 Q. Now that's what brings me then to a discussion of Mr.
18 Edwards. When Mr. Edwards chooses to release the police
19 report to Mr. Aronson, I'm going to suggest to you that there
20 was clearly, from his perspective and from the exercise of his
21 discretion as a Crown attorney, nothing improper, because he
22 knew what was in it. Correct? He was obviously very
23 familiar with what the police report said.

24 A. Well, I don't know because that's why I asked Mr. Gale to
25 write and find out. I didn't know what report he was talking

1 about. I did not have any advice as to what the contents of
2 the report was. The information I had was that he released a
3 police report per se.

4 Q. Right. So, presumptively, that's a matter of concern to you.

5 A. Yes.

6 Q. But we've already established clearly it was within his
7 discretion to do so, if, in fact, he had carefully reviewed it and
8 determined that it was essential to release.

9 A. Yes.

10 Q. Correct? Okay. So, and it's not improper under the 1986
11 guidelines and it wasn't improper when he did it.

12 A. Depending on what the substance of that report...

13 Q. Right.

14 A. Contained, or the contents of that report.

15 Q. And I take it that Mr. Edwards is an experienced prosecutor.

16 A. Yes.

17 Q. He may not be an experienced appellate lawyer, but he had
18 been out in the field for a long time.

19 A. Oh, sure.

20 Q. And so I take it you were also satisfied or must be satisfied
21 today that, indeed, he was familiar with that report. He knew
22 what he was releasing. He had been closely associated with
23 the reinvestigation.

24 A. Yes.

25 Q. Now what puzzles me then, and perhaps you can assist, is that

1 when Mr. Edwards writes to you to explain, or writes to Mr.
2 Gale to explain, I take it he simply indicates to you that he
3 felt, both as a matter of practical effect in the Marshall case
4 and otherwise, he was entitled to release the report. That's
5 the effect. Let me take you to Volume 28, page two and
6 three. I take it when Mr. Edwards responds to Mr. Gale, you
7 would have...

8 A. Just a moment now, Counsel.

9 Q. Volume 28. Do you not have Volume 28? The thin volume.

10 A. Hmmm?

11 Q. The same one you were using, sir.

12 A. Oh, I'm sorry.

13 Q. Page two. Mr. Gale first writes, that's page one.

14 A. Yes.

15 Q. And then Mr. Edwards responds. He offers some explanation
16 for why perhaps Mr. Aronson had passed on the report
17 without an understanding from somebody else. But then he
18 goes on to say that this is a case where, certainly because of
19 its nature, he saw fit to release a report.

20 A. Where is that?

21 Q. Take a look at page two.

22 A. Yes.

23 Q.

24 I believe that it was proper (and I'm looking at
25 the second and third line) I believe it was
proper, given the very unusual circumstances of

1 this case, to give Mr. Aronson a copy of the
2 report.

3 He had to carry the ball. He needed full disclosure. That's the
4 same as saying that and that the reference in the way it was
5 structured gave all the responsibility to Mr. Aronson and that
6 he should be privy to the new investigation. So he sets out
7 his reasons, correct?

8 A. Well, I don't see any reasons there. I mean he explains why
9 he did it. It doesn't answer my concern as to whether that
10 report was one that ought to have been disclosed, per se, or
11 whether it should have been or those parts that could have
12 been disclosed should have been extracted. He explains why
13 he did it. He doesn't answer the concern that I have. My
14 concern had nothing to do with the fact that it pertained to
15 the Marshall investigation. It had to do with the policy of
16 releasing a police report per se. Now if his explanation were,
17 as I would understand you're suggesting, that there was
18 nothing in that report that could not have been disclosed,
19 well, I would have expected him to say so. That's why I
20 asked Mr. Gale to write and find out the circumstances and
21 the reasons.

22 Q. Well, he does write back and say to you that there was an
23 onus, he felt, created by the reference which required that
24 Mr. Aronson be given full disclosure of the report. And he
25 says it right at the end of the paragraph on page two,

1 "including the details of the report." In other words, he
2 formed the view as a seasoned prosecutor that disclosure of
3 the report was essential for the defence to carry on its work
4 pursuant to the reference. Isn't that what that says?

5 A. Well...

6 Q. It's therefore likely...

7
8 It therefore likely seemed obvious to me that he
9 should be privy to every aspect of the new
10 investigation including the details of the report.

11 That's his view, correct?

12 A. Well, that's what he states there, yes.

13 Q. Yeah.

14 A. But I don't personally say that that answers the concerns I
15 had. I would have, I reacted to the fact that police reports
16 per se was a longstanding policy that they would not be made
17 public. And I expected to be advised as to what report was
18 made public. I don't even know what report he's referring to.
19 What report was made public and that he had satisfied
20 himself that there was nothing in that report that ought not to
21 have been disclosed. That was simply an inquiry that I asked
22 to be made and...

23 Q. Well, see...

24 A. And the answer that I interpret from this letter is that, as he
25 says here, he thought he should have the report and he gave
it to him.

1 Q. Which was entirely within the guidelines and quite proper, I
2 suggest.

3 A. Well, it may be. It may be.

4 Q. Well, if...

5 A. That was not the response I expected to justify the release of
6 the report per se.

7 Q. If, in fact, the guidelines are as you have testified to, sir, that
8 it was within his discretion to make an informed and
9 seasoned judgement as a prosecutor, why would you write
10 then, at page four, in what I would suggest to you is, indeed,
11 an authoritative manner:

12
13 I was surprised, to say the least, that you would
14 think (and I'm reading from the first line of the
15 third paragraph) that you would think that you
16 had either the authority or prerogative to
17 release a confidential report to Mr. Aronson.

18 Why would you say that when he had the right?

19 A. Well...

20 Q. He clearly had the right.

21 A. Well, he doesn't have the right to release the report. He has
22 the right to release material in the report that is relevant to
23 the matter under review or under investigation.

24 Q. And if he forms...

25 A. He does not the right to release a police report per se.

Q. And if he forms the conclusion that all of the report ought to

1 be disclosed, then indeed, under the guidelines, he has the
2 right to release the report, as they were in 1982 and '84 and
3 '86, does he not?

4 A. Well, I'm not... No, I disag... Well, I have difficulty. I don't
5 want to be argumentative, but what he says in his letter, he
6 says that reference to Mr. Aronson should be privy to every
7 aspect of a new investigation.

8 Q. Yes, he directed his mind to it.

9 A. Including the details of the report. Only if all the details in
10 the report or only, are not details in the report that may not
11 relate to the investigation in respect to Mr. Marshall. They
12 could have expressed concluded opinions and other matters
13 that were not germane to the investigation of Marshall.

14 Q. You didn't find that out, though, did you, Mr. Coles?

15 A. Well, no, because those questions were not answered.

16 Q. You didn't get a copy of the report through other channels,
17 read it and engage him in a discussion in any way, shape, or
18 form as to whether all portions or none ought to be released,
19 correct? You didn't do that.

20 A. Well, that is correct. He knew... I know but I was making, in
21 my letter of November 20th, I wanted to make it clear to him
22 what the policy and position of the Department was in respect
23 to police reports.

24 Q. Well, you don't make it clear, I suggest, sir, when you say that
25 he has neither authority or prerogative to release it when, in

MR. COLES, EXAM. BY MS. EDWARDH

1 fact, he does have authority and prerogative to release it if he
2 addresses his mind to certain matters...

MR. SAUNDERS

3
4 My Lords, I don't think it's fair for my friend to leave the
5 impression with the witness or the Commission that whatever Mr.
6 Edwards did with respect to the report was in accordance with the
7 policy of 1982, 1984, and 1986. I draw my friend's attention to
8 pages 14 and 16, which identify the 1984 and 1986 positions of
9 the Department and I say, with respect, it states quite clearly the
10 exceptions that come into play when opinions or inferences or
11 decisions taken by police officers are included in those police
12 reports. Now we've got the July 17, 1984 memorandum, which is
13 at page 14. At page 16, we've got the 1986 statement. At page
14 13, we've got the 1984 statement from Mr. Herschorn, where I
15 say that he makes it very clear in the second paragraph towards
16 the end where I'm quoting:

17
18 There will be the exceptional instance when a
19 Crown sheet (That's obviously what the author is
20 speaking of) includes personal views or opinions
21 of an investigator, or other matters of a
22 confidential nature...(et cetera). In such cases, it
23 may be necessary for you to summarize those
24 portions...

23 And the last paragraph dealing with the case, if there's any
24 uncertainty, you go to a senior officer. And I say, with respect,
25 that the same thing is said at page 14, the July 17, 1984

DISCUSSION

1 memorandum and continued in 1986. And it's unfair for my
2 friend to suggest to this witness that there wasn't that
3 requirement that when discretion was being exercised in those
4 circumstances, that you go to a superior officer.

MS. EDWARDH

5
6 Well, with the greatest of respect, my friend forgets the
7 testimony of Mr. Gale. It was his testimony before this
8 Commission, as I recall it, that there was no such policy until the
9 battle with Mr. Edwards started. And I'm putting to...

MR. CHAIRMAN

10
11 There was no such policy?

MS. EDWARDH

12
13 There was no such policy, a clear per se prohibition as what
14 appears later or even a qualified prohibition. And I'll find the
15 reference over lunch, but that's my expressed recollection of Mr.
16 Gale's testimony.

MR. CHAIRMAN

17
18 We have a memorandum of July 17th, 1984.

MS. EDWARDH

19
20 You'll note that all of this, of course, postdates the
21 correspondence with Mr. Edwards.

MR. CHAIRMAN

22
23 Oh, I appreciate that.

MS. EDWARDH

24
25 Okay.

[REPORTER'S NOTE - THERE IS NO PAGE 14038.]

DISCUSSIONMR. CHAIRMAN

1 As I understand Mr. Coles' evidence, is that he asked, having
2 learned that a police report was made public, became the public
3 domain, public in the hands of a solicitor is one thing; in the public
4 domain, is a matter of general debate, I gather. It may be
5 something else, but, in any event, this is what I've heard so far.
6 He having heard this requested the Director of Public
7 Prosecutions, or Criminal, to find out from Mr. Edwards as to what
8 transpired. And what he's telling us now that his interpretation of
9 Mr. Edwards' letter in response did not give the reasons other
10 than that he felt Mr. Aronson was entitled to have it. Now Mr.
11 Coles is saying I didn't regard that as being a satisfactory
12 explanation. Is that where we are now at this stage?

MS. EDWARDH

14 Yes, and I wanted to put to the witness that, in fact, he
15 didn't, in effect, consider the explanation in light of his letter and
16 reply, if I can just find it again here.

MR. CHAIRMAN

18 Yeah, I have it. The one of...

MS. EDWARDH

20 It's at page four.

MR. CHAIRMAN

22 Page four, yes.

23 12:12 p.m.
24
25

DISCUSSION

1 MS. EDWARDH

2 Where he doesn't deal with in any way with the
3 considerations of the merits of the decision made but rather with
4 authority and prerogative, which imply quite different
5 considerations.

6 MR. CHAIRMAN

7 What you're saying is that Mr. Coles should have gone back
8 and said, "Before I reach a firm decision, please give me details of
9 your grounds upon which you reached the conclusion..."

10 MS. EDWARDH

11 Absolutely.

12 MR. CHAIRMAN

13 "To release it, then I will decide whether you were right."

14 MS. EDWARDH

15 Well I mean I'm not even sure I would agree with that. It's
16 a two-step process. One, once one is satisfied that you've given
17 the discretion to someone and you've satisfied that they've
18 exercised it in accordance with considering certain...

19 MR. CHAIRMAN

20 The difficulty I'm having and I presume if a Crown
21 prosecutor anywhere in Nova Scotia releases a police report which
22 causes embarrassment to some person, that the person
23 answerable for that misconduct is either the Deputy Attorney
24 General or the Attorney General, even though they don't know
25 about it.

DISCUSSIONMS. EDWARDH

1 I would think that's true of all misconduct of Crown counsel.
2 At the end of the day the Deputy Attorney General and the
3 Attorney General are responsible.

MR. CHAIRMAN

4 That's right. So wouldn't the Deputy have the right to know
5 what he's being held responsible for?

MS. EDWARDH

6 I would think the needs of the administration of justice
7 preclude the Deputy from actually knowing. I mean...

MR. CHAIRMAN

8 Say that again?

MS. EDWARDH

9 There are so many cases that if one can't rely on Crown
10 counsel to, for example... Let me give a different kind of example.
11 There are certain circumstances where Crown counsel might make
12 a judgement call that, although there has been some behaviour
13 around a witness, they're not satisfied there's going to be any
14 tampering with this witness. So they give a statement that
15 identifies the location of the witness. Subsequently, there is
16 witness tampering and there might even be a big foofaraw. And
17 the Deputy Attorney General will undoubtedly have to respond,
18 and even the Attorney General, to explain why this material was
19 released. But that's just, in my respectful submission, My Lord,
20 the ordinary process. You know, you've got the guidelines. That's
21
22
23
24
25

DISCUSSION

1 the decision taken in a particular case.

2 MR. CHAIRMAN

3 So if an Attorney General calls in his Deputy and says, "Tell
4 me about this," and he said, "Oh, that was John Jones down in
5 some remote part of the province that did that," I suspect the
6 Attorney General would say, "That's not an answer."

7 MS. EDWARDH

8 I would think that it would be an answer, My Lord, to say
9 we've got guidelines. They are within the guidelines. A decision
10 was taken. The person adverted to the issues and he made
11 inquiries about the facts. These are the facts and that's the end of
12 the matter.

13 MR. CHAIRMAN

14 We're talking about that difficult area of Ministerial
15 responsibility, which I gather from recent decision of the Federal
16 Court of Canada, it's been extended beyond that contemplated...

17 MS. EDWARDH

18 All known bounds.

19 MR. CHAIRMAN

20 ...by anyone in public life.

21 MS. EDWARDH

22 I'm not responsible, My Lord.

23 MR. CHAIRMAN

24 Well, it's the law until changed.

25

DISCUSSION

1 MS. EDWARDH

2 But I would like, with your leave then, My Lord, to just
3 pursue this with him for a moment.

4 MR. CHAIRMAN

5 Well, I'm trying to find out where everybody is coming
6 from. You know, the letters speak for themselves.

7 MS. EDWARDH

8 Yes.

9 COMMISSIONER EVANS

10 Do you not agree that there is a prohibition, some right of
11 prohibition in the A.G. or the Deputy A.G. which prohibit?

12 MS. EDWARDH

13 Disclosure?

14 COMMISSIONER EVANS

15 Disclosure.

16 MS. EDWARDH

17 Yes, I think that it is incumbent upon the Attorney General
18 or his representative to notify the defence that there has been a
19 withholding of information.

20 COMMISSIONER EVANS

21 How would the Deputy A.G. know of that unless he knows
22 what's in the report that the local Crown has given out? If
23 everything is given out then the A.G. is... How would he know?

24 MS. EDWARDH

25 If there is a system of... I mean the two questions may be

DISCUSSION

1 quite different, My Lord. That if there is a refusal to give...

COMMISSIONER EVANS

2
3 I can see that.

MS. EDWARDH

4
5 Disclosure, then I think it is appropriate that someone
6 higher up make a decision about a refusal for disclosure.

COMMISSIONER EVANS

7
8 I don't have any trouble with that. It's for the opposite, the
9 other side of the coin. If you're saying that the local Crown
10 attorney can look at the report and if he decides that he should
11 give it out, then he can do it, even though there is confidential
12 material in there. If he guesses wrong, he makes a wrong
13 decision, he gives it out. And I think that's what the Deputy... or
14 the witness was trying to find out at that time. What did you give
15 him?

MS. EDWARDH

16
17 Well, the letter...

COMMISSIONER EVANS

18
19 And all he says back is "I gave him the report." And follows
20 the guidelines. Maybe I'm missing something in there, too. But he
21 had already given the report and you say that he exercised his
22 discretion.

MS. EDWARDH

23
24 Yes, the guidelines permit, as I read them, the discretion to
25 be exercised, and I'm also relying a little bit on what Mr. Gale said.

DISCUSSION

1 And it isn't that it precludes disclosure of confidential information
2 or information which expresses opinions, it says "which ought not
3 to be disclosed." So the mere fact of confidential information, the
4 mere fact of expressions of opinion is a matter that the Crown
5 counsel must direct their mind to and then say ought this to be
6 disclosed or is there something here that I really ought not to
7 disclose?

COMMISSIONER EVANS

8 Well, doesn't the Crown, the local Crown in this situation, Mr.
9 Edwards say, because of the peculiar circumstances of this
10 particular case...

MS. EDWARDH

11 Yes.

COMMISSIONER EVANS

12 And the position of Aronson, I gave him everything I had.

MS. EDWARDH

13 Yes, I think he...

COMMISSIONER EVANS

14 And I felt I was doing the right thing.

MS. EDWARDH

15 He also says that he felt, and I think it's a very important
16 point to note, that because of the reference which then casts the
17 responsibility on the defence, that they should be privy to all the
18 information available. And that's the substantive claim, as
19 opposed to the political or ethical issues. But the substantive one
20
21
22
23
24
25

DISCUSSION

1 is once they have the ballgame and once they have to carry the
2 ball, they ought to have the disclosure.

COMMISSIONER EVANS

3
4 But doesn't that indicate that he felt that, in other
5 circumstances, there would be a restriction on him, that he would
6 not have given this report out? I read that correspondence as
7 indicating that because of the peculiar circumstances and that Mr.
8 Aronson had to carry the appeal, the burden of carrying the
9 appeal, that Mr. Edwards felt he should give him everything there
10 was. I don't disagree with what he did. I just say I think that's
11 the position that he took. But if it had not been that situation, if
12 they had gone under the other section, probably the (c) section,
13 probably he would not have given that out. But he had already
14 done that. So the question of 617(b) or (c) made no, didn't come
15 into play because Aronson already had everything. Or did he give
16 him more after that? He gave him the report long before the
17 reference, did he not?

MS. EDWARDH

18
19 He gave him the report after the reference came down,
20 though, as I understand the facts. So after...

COMMISSIONER EVANS

21
22 After the reference.

MS. EDWARDH

23
24 Yeah, after it was formulated where the defence had the
25 onus...

DISCUSSIONCOMMISSIONER EVANS

Had the onus.

MS. EDWARDH

Yes, then he provided the factual material and the report.

MR. CHAIRMAN

Because he had the carriage of the case.

MR. COLES

Mr. Gale's letter refers to the date June 23rd, 1982.

MS. EDWARDH

And that would be after Ottawa had sent down the reference, which is June the 16th. I think that's what the records show.

MR. CHAIRMAN

The other, if you, you know, in defence of Mr. Edwards, in his letter to Mr. Gale of October 29th, he said that he can actually recall giving it to Mr. Aronson. But he did say that if I did give it to him, I believe that I told him that the reports were for his eyes only, which is a somewhat different practice than disclosure ordinarily, isn't it? You know, he seems to be troubled in his letter that Mr. Aronson having quit as counsel for Mr. Marshall may have handed the file over to someone else without making his aware, to Mr. Cacchione without making Mr. Cacchione aware of the restrictions that he, Mr. Edwards had imposed on the file.

MS. EDWARDH

In the ordinary course, I would have thought if Mr. Edwards

DISCUSSION

1 intended to impose such a restriction, it ought to be reduced in
2 writing and forwarded by letter to counsel.

3 MR. CHAIRMAN

4 Well, I suppose but, you know...

5 MS. EDWARDH

6 Well, it's an important restriction because clients do change
7 and lawyers come and go from cases and if...

8 COMMISSIONER POITRAS

9 Well, my understanding of the guidelines, Ms. Edwards, as
10 reflected on pages 11 and following of Volume 28, is that the local
11 Crown have the authority to release extracts of reports to the
12 defence. But when it came to the reports themselves, these could
13 not be released except with the express authorization of the
14 Director or Assistant Director of Criminal. And I think, and I may
15 be wrong, this is what Mr. Coles was attempting to say in his letter
16 of November 20th on page four.

17 MS. EDWARDH

18 I was trying to point out to Mr. Coles simply, My Lord, that
19 there are occasions when a portion of a report might be material
20 and then there are occasions where a report might, in its totality,
21 be material.

22 COMMISSIONER POITRAS

23 May be material or immaterial?

24 MS. EDWARDH

25 Material.

DISCUSSIONCOMMISSIONER POITRAS

Material.

MS. EDWARDH

To the defence.

COMMISSIONER POITRAS

But there appears to be a directive which obviously came about afterwards that if we are dealing with the reports at all, though they may be material, they may not be released except with the expressed authorization of the Director or Assistant Director. In other words, the local Crown has the authority to decide what extracts can be made available to the defence. When the time comes to reproduce or to hand over the entire reports, apparently this directive, if it was in effect at the time, would have prevented him from doing so except with the express authorization of the Director or Assistant Director of Criminal.

MS. EDWARDH

It is my understanding of what Mr. Gale testified to that that directive was not "operative" at the time of the release of the information. And I may be wrong.

COMMISSIONER POITRAS

Well, that's hard to say. I'm limiting my remarks to my understanding to Mr. Coles' testimony in light of this correspondence.

MR. CHAIRMAN

Are we getting confused between disclosure to counsel for

DISCUSSION

1 the accused and making a police report public?

2 MS. EDWARDH

3 Yes, could be.

4 MR. CHAIRMAN

5 Because Mr. Edwards says on page seven:

6
7 I am not saying that I have the right to make
8 this report public. I certainly did not then nor
9 do I now. I'm saying that in this particular
10 situation, I had a right and even a duty to
11 disclose this information to Mr. Aronson so that
12 he could properly prepare his case.

13 The exchange seems to have arisen out of the fact that
14 somehow or other, the document became public and what Mr.
15 Edwards is saying, I didn't intend it to be made public. I intended
16 it...

17 MS. EDWARDH

18 But it's important to note, My Lord, that what Mr. Gale is
19 inquiring about at page one isn't how they got to the public
20 domain.

21 MR. CHAIRMAN

22 No.

23 MS. EDWARDH

24 He wants to know how did Aronson get this report?

25 MR. CHAIRMAN

That's right.

DISCUSSIONMS. EDWARDH

1
2 And so I wanted to, in my initial questioning of the witness,
3 I said to him, if there was a description of the scene of a homicide
4 written on two pages of the report, there's no objection to
5 photostating it and handing it to defence counsel. So if Crown
6 counsel takes the view in reading a report that in its totality, it's
7 essential for someone, then I think, pursuant to these directives,
8 they would be entitled to exercise their discretion to release the
9 report. And that if that rule is in existence at the time, which the
10 witness has now testified was, that it never contemplated a
11 complete refusal to give any information, it depended on the
12 exercise of discretion, then his comment, and what I'm trying to
13 ask him about, is the comment he made about...

MR. CHAIRMAN

14
15 I appreciate that. I'm just... My recollection is that someone
16 testified that this all came to pass because during a political
17 campaign, this police report was quoted and made an issue by
18 some candidate or candidates, which certainly would be, would
19 cause concern to any responsible person.

MS. EDWARDH

20
21 Of course.

MR. CHAIRMAN

22
23 And I think Mr. Coles' testimony was he asked Gale to find
24 out from Edwards how this came to pass. And as I read Edwards'
25 evidence, he is saying I intended to help Mr. Aronson, which is

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1 commendable, prepare his case, because as a result of a last-
2 minute change in the approach before the Court of Appeal, he was
3 left with the responsibility of carriage of the case rather than the
4 Crown. But he reaffirms that he would have no right to make that
5 report public.

MS. EDWARDH

7 I see the witness's correspondence as being very critical of
8 the first of those, too. Maybe I am misconstruing it, My Lord, but
9 that's the purpose of this cross-examination. I am not concerned
10 with the questions around the propriety of releasing it to the
11 public in the true public domain, but I am very much concerned
12 about the Attorney General's position or his representative's
13 positions re disclosure of the report after Mr. Edwards decided it's
14 important to Mr. Aronson to prepare the case. That's where I was
15 going. Perhaps I could focus my questions a little more clearly.
16 It's 12:30.

MR. CHAIRMAN

18 Is there any chance of us finishing this area? We want to
19 get through with Mr. Coles today.

MS. EDWARDH

21 I'm not even sure I know where I'm going any more.

COMMISSIONER EVANS

23 And we haven't helped you in getting direction, I don't
24 imagine.

25

MR. COLES, EXAM. BY MS. EDWARDH

1 MS. EDWARDH

2 It would be helpful, perhaps, if we could break now.

3 MR. CHAIRMAN

4 All right, we'll rise until two.

5 12:25 p.m. - BREAK - INQUIRY RESUMES - 2:02 p.m.

6 Q. Mr. Coles, if I could just go back and try and conclude this
7 area with a number of brief questions. If I understood your
8 testimony, at the time Mr. Edwards released the police
9 reports there was a rule in the Attorney General's office
10 which precluded him from just handing them over, but that
11 if Crown counsel in the field had a police report that they
12 decided did not contain information that ought not to be
13 disclosed, they could disclose it, that's at the time Mr.
14 Edwards did disclose it. Is that or is that not the rule?

15 A. They could disclose information contained in the police
16 report that was relevant to the investigation and within the
17 understanding of our rules on disclosure, yes.

18 Q. And...

19 COMMISSIONER POITRAS

20 But could they disclose the full report?

21 MR. COLES

22 No.

23 MS. EDWARDH

24 Q. And then just to follow up if I could on His Lordship's
25 question to you. If Crown counsel took the view, and I

1 would assume that the full report isn't necessarily the same
2 thing in each case. Some reports may deal exhaustively
3 with an investigation, some reports may deal with part of an
4 investigation. Is that a fair statement?

5 A. Certainly.

6 Q. Yes. So, then with respect to a particular report, it would be
7 Crown counsel's obligation to read the report and to then
8 identify whether or not a portion of the report could be
9 disclosed, we agree on that.

10 A. Yes.

11 Q. And further, if all the report happened to deal, all of a
12 particular report happened to deal with matters that ought
13 to be disclosed, then they were entitled to disclose all of the
14 report, isn't that a fair statement?

15 A. Yes, I would say if the assessment that there was nothing
16 contained in the report that ought not to be disclosed, it
17 could be disclosed, sure.

18 Q. Yeah, it doesn't...okay. Your evidence then is clear in that
19 regard, sir. Now, what I would like then to ask you, if I
20 could, is in dealing with Mr. Edwards at page 9, no, I'm
21 sorry, that's your earlier letter, page 4 and 5 of Volume 28.
22 You state to him in very authoritative terms, if I might
23 suggest so, that he had no authority or prerogative to
24 release the report.

25 A. Yes.

1 Q. And is that then, in fact, not an accurate statement of the
2 policy? He did have it subject to him exercising his
3 discretion as to the propriety of a particular report.

4 A. Well, that's premised on the fact that he did exercise that.
5 The only advice I had was contained in his letter. And the
6 only reasons he advanced in that letter for releasing the
7 report is because he thought...he thought that Mr. Aronson
8 should be privy to every aspect of the new investigation.
9 Now, I suggest, and my understanding of that is that that is
10 not the answer to the inquiry I asked. If he had come back
11 and said that there was nothing in the report or reports that
12 I released that contained information that ought not and
13 should not have been made available, then there probably
14 had been no further concerns, but that...

15 Q. That...

16 A. ...is not the position he took. He took the position, as I
17 understood his advice, that he formed the opinion that Mr.
18 Aronson ought to be privy to everything, every aspect of the
19 new investigation, and that, I submit to you, is contrary to
20 the policy directive and the policy that he understood to be
21 in effect at the time.

22 Q. I...

23 A. That was not his decision to make.

24 Q. What I'm trying to identify is precisely what the issue was
25 between you and Mr. Edwards. So, I take it then that had he

1 responded by indicating as you've indicated, that would
2 have been well within the context of the policy.

3 A. If it...if he had been factually correct.

4 Q. Now, then let me draw...before we go on in that, let me draw
5 your attention to page 5. Then you say to him,

6 Less there be any doubt, you are to understand
7 that police reports prepared and delivered for
8 the use of the Attorney General, his Deputy and
9 agents, are not to be copied to other persons
10 without the expressed authorization of the
11 Attorney General or your superiors.

12 A. I wanted to make clear that...to him that less he be under
13 any misunderstanding as to what the policy was and had
14 been and at this point was... continued to be, I didn't want to
15 leave any doubt in his mind so that he would not be under
16 any misunderstanding as to what the policy was.

17 Q. Now, that changes the policy, does it not, sir? Because you
18 are telling him there that he requires, not the exercise of his
19 own discretion as to the propriety of release of the material,
20 but authority from either the Attorney General or one of his
21 other superiors.

22 A. To release a police report, per se, yes.

23 Q. And, is it your view that that was a clearly understood
24 policy prior to the time that Mr. Edwards released it?

25 A. Well, I don't know how well understood it was. It was the
 policy prior, and as a matter of fact, I think the letter from

1 Mr. Gillis, who...which is on page 12 of this same volume, he
2 asks for clarification and he makes reference for...in that
3 letter "For a number of years the department has instructed
4 the prosecutors that they are to provide all information to
5 defence counsel," which is an acknowledgement of the
6 disclosure policy that we had in effect, and he asked for
7 clarification in respect to the...the letter of Mr. Herschorn's.

8 Q. The Crown sheet.

9 A. Yes.

10 Q. He wanted to know whether...and the Crown sheet...

11 A. Where that...where the Crown sheet fitted into this matter.

12 Q. Now, then just as a final clarification, it's your evidence then,
13 I take it, that as best you understood the policy, although he
14 could have released some of the report.

15 A. Depending on the nature of the contents.

16 Q. Depending on, yes. He couldn't release all of the report
17 without approval?

18 A. He couldn't release a police report, per se, this is the
19 difficulty you and I are having.

20 Q. Well, what is...

21 A. And it's more than semantical. A police report contains a lot
22 of...a lot of things, as a rule, ongoing investigations, it has
23 opinions, it has...it may even disclose a wiretap or
24 information. A police report is simply that. It's a report.
25 It's not necessarily dealing with a particular aspect of the

1 investigation that may concern a particular charge. And so
2 police reports, per se, from a policy point of view, are not
3 releaseable. Now, that's not to say that some of its contents
4 are not releaseable. And, if a report has a one page and it
5 just deals with a statement of a person that's, well, it doesn't
6 make any difference to me whether or not that is
7 photostated or somebody cuts off the top. That doesn't
8 make much sense.

9 Q. That is releaseable.

10 A. Well, sure, if the contents of the report fits within the
11 guidelines of what can be released and those other caveats
12 are met, of course. But the attitude or the interpretation or
13 the understanding I got from Mr. Edwards' reply was that
14 he considered it was his prerogative to decide whether what
15 Mr. Aronson should have, not referable to the guidelines at
16 all. He thought that every aspect of the investigation ought
17 to be made available to Mr. Aronson. That, as a general
18 statement, does not comply with the by-law...with the
19 guidelines, in my opinion.

20 Q. So, it was the exercise of what you thought to be...an
21 exercise of discretion on Mr. Edwards' part that you thought
22 was in disregard, in effect, of the interpretation you put on.

23 A. The reasons he gave for advancing the report were not in
24 compliance with the guideline.

25 Q. And I take it, it's quite clear that you wrote Mr. Edwards in

1 the manner that you wrote him without ever scrutinizing
2 the report in question to see whether it was a one-pager, a
3 ten-pager or a fifty-pager.

4 A. Sure.

5 Q. Whether it had confidential information, expressions of
6 opinion or didn't have them. Is that a fair statement?

7 A. I was speaking to him in respect to the policy pertaining to
8 police reports and it was not specifically directed to the
9 investigation concerning Mr. Marshall. I wanted him to
10 clearly understand what the policy was in respect to
11 releasing of police reports, and that was the purpose and
12 intent of the letter.

13 Q. If one were to read this letter, sir, in relation to the, not only
14 general policy question, but the issue of a release in relation
15 to Marshall, to the Marshall case.

16 A. Uh-hum.

17 Q. You'll agree with me that it was written without you taking
18 specific note of the contents of the report in question.

19 A. Yes. I don't think I even knew what report he had released.

20 Q. And it precipitated, did it not, this whole incident with Mr.
21 Edwards, the directives issued by Mr. Herschorn that
22 is...start at page 11. That's what got this directive going out.
23 Is that a fair statement?

24 A. I suspect it was, I'm not certain what prompted Mr.
25 Herschorn to send that, but it would be consistent with that

1 correspondence for him to have sent that out. I can't speak
2 for him, I don't know.

3 Q. And do I take it that it's your evidence, sir, that your
4 criticism of Mr. Edwards had nothing to do then with his
5 decision to release that particular report in the Marshall
6 case? You might have been totally content with that if he
7 had answered the question differently.

8 A. Well, I may have, but I don't know. I was concerned with
9 his releasing a police report under the terms that he
10 indicated he had.

11 Q. But he might well have been quite within the realm of the
12 guideline if he had addressed himself specifically to that
13 report, what it said and the fact it had no confidential or
14 other types of information in it. That may have satisfied
15 you, is that your evidence?

16 A. Sure, it may have, sure.

17 Q. And then you, in addition to the Herschorn memo at page
18 11, there is another one that deals then with general
19 disclosure. No, it deals with, I'm sorry, at page 13, it deals
20 with police reports again. And, I take it it's at this point
21 where there is some suggestion that the Crown sheet also
22 should be the subject matter of scrutiny by Crown counsel to
23 ensure that it has nothing of a police report nature.

24 A. Yeah, that's what his...that's what his memo says.

25 Q. Now, if one were to take then from the letters or the