

**THE CORNWALL
PUBLIC INQUIRY**



**L'ENQUÊTE PUBLIQUE
SUR CORNWALL**

Public Hearing

Audience publique

Commissioner

**The Honourable Justice /
L'honorable juge
G. Normand Glaude**

Commissaire

VOLUME 43

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Hearings Room
709 Cotton Mill Street
Cornwall, Ontario
K6H 7K7

Tuesday, July 25, 2006

Tenue à:

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709, rue de la Fabrique
Cornwall, Ontario
K6H 7K7

Mardi, le 25 juillet 2006

Appearances/Comparutions

| | |
|---|---|
| Mr. Peter Engelmann | Lead Commission Counsel |
| Mr. Pierre R. Dumais | Commission Counsel |
| Ms. Louise Mongeon | Registrar |
| Mr. Peter Manderville Ms. Reena Lalji | Cornwall Police Service Board |
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| M ^e Claude Rouleau Mr. Mike Lawless | Ontario Ministry of Community and Correctional Services and Adult Community Corrections |
| Ms. Judie Im Ms. Leslie McIntosh Mr. Stephen Scharbach Ms. Lisa Jacek | Attorney General for Ontario |
| Mr. Peter Chisholm | The Children's Aid Society of the United Counties |
| Mr. Peter Wardle | Citizens for Community Renewal |
| Mr. Dallas Lee Ms. Lauren Schellenberger | Victims Group |
| Mr. David Bennett | The Men's Project |
| Mr. David Sherriff-Scott | Diocese of Alexandria-Cornwall and Bishop Eugene LaRocque |
| Mr. James Foord | The Estate of Ken Seguin and Scott Seguin and Father Charles MacDonald |

Appearances/Comparutions

Mr. Jose Hannah-Suarez

Mr. Jacques Leduc

Mr. Mark Wallace

Ontario Provincial Police
Association

Mr. Pierre R. Dumais

Ms. Mary Cameron Nethery

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(None Entered)

1 --- Upon commencing at 10:05 a.m./

2 L'audience débute à 10h05

3 **THE REGISTRAR:** This hearing of the Cornwall
4 Public Inquiry is now in session. The Honourable Mr.
5 Justice Normand Glaude presiding.

6 Please be seated. Veuillez vous asseoir.

7 **THE COMMISSIONER:** Good morning, Ms.
8 Nethery.

9 Me Dumais.

10 **MARY NETHERY, Resumed/Sous le même serment:**

11 --- **EXAMINATION IN-CHIEF BY/INTERROGATOIRE EN-CHEF PAR MR.**
12 **DUMAIS (Cont'd/Suite):**

13 **MR. DUMAIS:** Good morning, Ms. Nethery.

14 If I can just take you back. I believe we
15 were -- we had completed part of page 31 and we had
16 finished your evidence yesterday at Roman numeral "X",
17 bottom page 31, "Sentencing Considerations in Child Sexual
18 Abuse Cases".

19 **MS. NETHERY:** Yes. Well, as you can see we
20 have a number of policies and practice memos that relate to
21 sentencing generally and some of them relate specifically
22 to child abuse related cases. I think I'll perhaps speak
23 generally about it and then refer to at least a couple of
24 the policies and practice memos that are in the materials.

25 The original Crown Policy Manual that was

1 released in 1994 had a child abuse policy which is in your
2 materials. It's indicated as being C-3. It's at Tab 59.
3 Now, I don't plan to go through that in detail now because
4 we -- I think I have referred to it previously yesterday in
5 my evidence but we also have as of last week a new practice
6 memorandum that was issued to Crowns on July 20th and which
7 is now Exhibit 47 in the materials. And so in a few
8 moments I plan on going through that in some detail at
9 least.

10 However, certainly in the original child
11 abuse policy, Exhibit 59, there were sections relating to
12 relevant sentencing considerations for Crowns. And in
13 addition, after that, when we moved into -- or were
14 transitioning, rather, into our new Crown policy system of
15 having practice memos as well as policies, then we also
16 supplemented that with practice memos providing direction
17 for Crowns, outlining aggravating circumstances and so on,
18 and also the importance of using Victim Impact Statements
19 and other things such as firearms prohibitions in these
20 sorts of cases. And the Crown Policy Manual, when it was
21 released in 2006 and, as I say, is supplemented by the most
22 recent practice memo on child abuse, included a number of
23 updates.

24 So some of the transitional -- some of the
25 memos that came out after the original C-3 policy included

1 amendments to the *Ministry of Correctional Services Act*.
2 There was also a practice memo on our response to the
3 Robin's Report which highlighted section 161 of the
4 Criminal Code and reminded Crowns of that particular
5 provision which provided for protection orders as a matter
6 of sentencing in child abuse related cases and provided
7 that the accused, or at that point the offender, could be
8 ordered to stay away from public places such as parks and
9 swimming pools and not be engaged in employment that would
10 relate to children. So we published that or put it out for
11 Crowns.

12 The new DNA databank -- we'll call it the
13 new DNA databank -- but the DNA databank provisions which
14 came out in June of 2000 were the subject of three practice
15 memos for Crowns. Those are not technically sentencing
16 provisions but usually the DNA databank orders occur at
17 the time of sentence. So we did that and I think we can
18 probably expect -- I know there's new DNA legislation that
19 has come through parliament and part of it is still
20 proceeding through. So we can expect some updates when
21 that comes about.

22 Similarly, we had two practice memos
23 relating to the Provincial and National Sex Offender
24 Registry, and we talked about that yesterday as well. I
25 mean I know there's a good deal of overlap between the area

1 of sentencing in my evidence and some of the other parts of
2 the evidence but this is really a summary of some of the
3 sentencing aspects of our Crown policy and legal advice to
4 Crowns.

5 There was a separate practice memo dealing
6 with victim input which outlines the victim impact
7 statements and I would like to deal with that a little bit
8 because it does have three different types of victim impact
9 statement forms.

10 It's at Tab 68, Madam Clerk. And I wonder
11 if we could scroll down to the forms themselves which I
12 hope are attachments? It should be at the very end.

13 **THE COMMISSIONER:** Page -- yes, there you
14 go. Okay.

15 **MS. NETHERY:** Okay. So there are actually
16 three different victim impact statement forms and the first
17 one that you see on your screen right now is the one that's
18 used for adults, so it's the generic form. The other one,
19 if we can just -- the other two, if we can just scroll down
20 to the next two?

21 This is a -- the second one is one that's
22 for older children and youth to fill out. So it's more
23 shall we say youth-friendly and is something that, you
24 know, a child -- it's written more in a young person's
25 language and it asks them questions like, "Would you like

1 to read the statement if the accused is found guilty?", and
2 so on; tell the court how the offence has changed your
3 life; tell us if there are any conditions that might be
4 part of a probation order.

5 So it sets out, you know, "Please try not to
6 talk about the offence. The Judge already knows what
7 happened" because we're at the sentencing stage. So we've
8 tried to set out, you know in relatively plain child-
9 friendly language, what might be appropriate in a Victim
10 Impact Statement. And this is for the older -- you know,
11 the older kids and perhaps the teenagers, if I can put it
12 that way.

13 The next one, if we can just go into the
14 final one, this one is for younger children and it may be
15 filled out by a young child but it also may be filled out
16 by a parent or a caregiver. But the idea, you will see
17 from the instructions, if the parent is going to fill this
18 out they should read the form aloud to the child and allow
19 them to talk about their feelings. And it gives the
20 warning that, really, it's what the child feels and it's
21 the child's opportunity to express to the judge how he or
22 she feels about what happened.

23 There's also a space for a child to draw a
24 picture of how they feel and I think that's further down on
25 the form -- oh, yes -- about how they -- so there's a blank

1 page. You can draw your picture in this box and often
2 children are visual and will want to draw a picture for the
3 judge's consideration.

4 So on the victim impact statement front we -
5 - this is something that we put forward as a part of the
6 sentencing process and it's really an opportunity for the
7 victims to let the judge and let the court know how the
8 offence has affected them and we've tried to set up a
9 system so that even very young children can have their
10 voices heard in the courtroom through this victim impact
11 statement process.

12 And this is all pursuant to section 722 of
13 the *Criminal Code* which is the provision that relates to
14 the admissibility and the purposes of the victim impact
15 statements.

16 **THE COMMISSIONER:** Could we go over a bit
17 what the evolution has been of the relationship between the
18 Crown and victims in the sense of -- I was going through
19 some of your material in Tab 70 about communicating with
20 victims and that kind of thing. Has there been an evolution
21 in that regard?

22 **MS. NETHERY:** Yes, there has. Perhaps I can
23 just turn to Tab 70.

24 **THE COMMISSIONER:** Sorry, Mr. Dumais. It's
25 just I ---

1 **MR. DUMAIS:** That's fine.

2 **MS. NETHERY:** Well, I think when I --
3 perhaps the best way I can describe it is when I started as
4 a Crown attorney, which was in 1982, we didn't have Victim
5 Witness offices and there was probably not a lot of thought
6 even at that time given to our obligations to communicate
7 with victims.

8 And so I think gradually over time this
9 became much more apparent to us, partly as a result of, I
10 think -- there's been a victims' movement in the Unite
11 States and that evolved or migrated to Canada and coming
12 out of that and perhaps just a growing awareness not just
13 in the public but also in the criminal justice system and
14 among social scientists that perhaps there could be some
15 changes in the way that victims are treated in the justice
16 system because they weren't really -- they were considered
17 to be witnesses. I don't know that there were really
18 special considerations given to them certainly when I
19 started out, to be quite frank.

20 I think, as I say, there was a gradual
21 evolution as a result of victims' movements, as a result of
22 a growing understanding among social scientists, and
23 certainly within our ministry it was in the 1980s that we
24 started out some pilot projects relating to Victim Witness
25 Assistance Programs. And I know you'll hear from Sonia

1 Faryna perhaps later on today about that and how that
2 evolved but that started, in our Ministry at least, in the
3 1980s and it was just in very few jurisdictions that there
4 were these Victim Witness Assistance Programs.

5 But that -- although it was in a few
6 jurisdictions, the fact that we had that program set up --
7 and, as I say, I think it was around 1986 or '87 that that
8 started -- the fact that we had that program set up even as
9 pilot projects and the fact that we had somebody within our
10 Criminal Law Division who was in charge of it, really I
11 think, started to bring to the attention of Crown attorneys
12 particularly, you know, the importance of treating victims
13 with candour and respect, the importance of providing them
14 with information about the court process either through the
15 police or directly ourselves and making sure that we were
16 more accessible to victims when they had questions and
17 making sure that we went out of our way to interview them
18 and provide them with the -- some understanding of what
19 they were going to face when they went into the court
20 process.

21 And I think at that point in time, again
22 with our Victim Witness partners, we started to have
23 educational sessions with Crowns in, I think, the mid to
24 the late '80s and there were, I think, educational sessions
25 at our spring conference which is the conference which all

1 Crown attorneys attend, unless we have court commitments.

2 There were also some special educational
3 sessions set up, I think, two or three days in March and
4 that has carried on every year, again specifically relating
5 to child abuse, sex assault and domestic violence, and
6 specifically about the treatment of victims in those cases.
7 And those were sessions that were run jointly between the
8 Victim Witness staff and Crown attorneys but they were
9 focused, primarily at least, originally on Crowns.

10 So that was the -- that's the beginning of
11 the evolution.

12 **THE COMMISSIONER:** Okay. So in the 1980s,
13 presumably we have Crowns that are making decisions
14 affecting victims, and I call them victims because we're at
15 the sentencing part.

16 **MS. NETHERY:** Yes.

17 **THE COMMISSIONER:** And with no real policy
18 or procedure about calling them in and advising them that
19 the matter has been resolved and how it's been resolved.
20 Is that a fair comment?

21 **MS. NETHERY:** Yes, it is.

22 **THE COMMISSIONER:** All right. Okay.
23 So the next step?

24 **MS. NETHERY:** So I think, as I say, this is
25 sort of a gradual evolution over time. So that was, I

1 think, the way things were in the 1980s, and it didn't mean
2 that individual Crowns didn't call victims in, but it
3 wasn't a matter of policy and it wasn't something that was
4 really -- what would I say -- on our radar screen quite as
5 much as it certainly is today. So this started to
6 gradually evolve.

7 Then when we were drafting the Crown Policy
8 Manual on victim-related issues, this was something that I
9 was personally involved in and I brought in the victim
10 witness staff to assist in the drafting of our victim-
11 related policies which were issued in 1994. At that time
12 we issued policies related to -- general policy relating to
13 our treatment of victims, another policy which related to
14 special needs victims, a policy relating to child abuse
15 victims, which is the C-3 that we've spoken of, and a
16 further policy relating to sex offences and, finally, which
17 may be of less interest to this group but is a policy on
18 domestic violence specifically.

19 So those things came out in 1994 and that
20 was probably really the beginning of detailed advice to
21 Crowns about -- detailed policy advice to Crowns about
22 treatment of victims in the criminal justice system about
23 the importance of interviewing children, the importance of
24 interviewing other victims in a sensitive case such as the
25 domestic violence or sex assault.

1 And then after that, of course, we had the
2 victim impact legislation that came into effect, and so we
3 provided further -- I think it was more legal advice at
4 that point in time to Crowns about victim impact
5 statements.

6 And finally, in 2006, we rejuvenated our
7 Crown Policy Manual with the detailed advice to Crowns.

8 I don't know whether that answers your
9 question or ---

10 **THE COMMISSIONER:** It does.

11 Now, we've talked about sexual assaults.
12 Anything about -- any specific policy in there about
13 historical sexual abuse and how to deal with victims in
14 that regard?

15 **MS. NETHERY:** I think that it's really more
16 of a combination of our child abuse policy and our sexual
17 offences policy.

18 **THE COMMISSIONER:** M'hm.

19 **MS. NETHERY:** We don't have a separate
20 policy relating to historical sexual offences, and I think
21 the rationale for that may be that sometimes when we've got
22 an offender and it's alleged that he's committed multiple
23 offences, some of them are historical and some of them may
24 be present.

25 **THE COMMISSIONER:** M'hm.

1 **MS. NETHERY:** So it's really a combination
2 of the two policies that are appropriate because, of
3 course, some of your victims or alleged victims are adults.
4 Some of them may still be children, and that's not an
5 unusual circumstance.

6 **THE COMMISSIONER:** Thank you.
7 Maître Dumais.

8 **MR. DUMAIS:** Then we were just finishing
9 discussing your victim impact statement policy and the
10 responsibility for making sure that that statement is
11 filled out falls with the Victim Witness Awareness Program
12 or does it fall with the Crown ---

13 **MS. NETHERY:** I'm sorry, I just didn't hear
14 your question.

15 **MR. DUMAIS:** The responsibility for making
16 sure that the victim impact statement is prepared, does it
17 fall with the Victim Witness Awareness Program person or
18 the Crown or the police?

19 **MS. NETHERY:** I think what we suggest is
20 that this is -- I mean, ultimately it's the Crown who's
21 going to introduce this in court. So in an overall way,
22 the Crown has the responsibility in terms of making sure
23 it's in the file and available to be presented in court,
24 but frequently, you know, as I think I've pointed out
25 before, there are local protocols between the police, the

1 Crown and Victim Witness Assistance Program as to exactly
2 who is going to assist the victim and remind the victim of
3 the opportunity to fill this out. Usually the Victim
4 Witness Assistance staff are the ones who will carry that
5 responsibility, but there are some circumstances where we
6 suggest that the police may do that. It often depends on
7 who has the best rapport with the individual victim as to
8 who will have the primary contact with the victim.

9 **MR. DUMAIS:** Now, just finishing up with
10 this section, I'm looking at your second-last bullet which
11 is where we're at, the fact that the practice memorandum
12 also outlines the appropriate considerations for the
13 dangerous and long-term offenders.

14 **MS. NETHERY:** Yes. There's a separate
15 practice memorandum which is noted in your materials
16 relating to dangerous and long-term offenders. I think
17 it's at Tab 79. The flagging policy, which is at Tab 78, I
18 think we've already discussed that, that there is a
19 procedure for -- I'm sorry, there's also Tab 77 dealing
20 with dangerous and long-term offenders, but we've already
21 discussed, I think, the flagging system that we have in
22 place in Canada which allows high-risk offenders to be
23 flagged on CPIC, the police computer system, and in
24 addition, each provincial Crown system maintains files on
25 those high-risk offenders which are available to Crowns

1 across the country if they are prosecuting one of those
2 individuals who has been flagged.

3 **MR. DUMAIS:** And lastly, a new practice
4 memorandum was released regarding conditional sentences,
5 and that last version has been enclosed at Tab 75. And
6 that came out with the new Policy Manual 2006?

7 **MS. NETHERY:** Yes, it did, and it really is
8 -- as relates to the child abuse cases, it really suggests
9 that conditional sentences are inappropriate absent
10 exceptional circumstances in cases of child abuse.

11 Now, we will get into perhaps a little bit
12 about the minimum mandatory sentences for the child-
13 specific offences because the minimum mandatory sentences
14 preclude the operation of the conditional sentence regime.

15 However, as a technical matter, sometimes
16 offenders are convicted of other child abuse or child
17 sexual abuse-related offences that aren't included in the
18 minimum mandatory, and so the practice memo itself is
19 probably still useful for Crowns.

20 **MR. DUMAIS:** Was there anything else in that
21 section, Ms. Nethery?

22 **MS. NETHERY:** The only thing that I thought
23 might be helpful, because we haven't reviewed it, is to do
24 a review of the current child abuse practice memo which was
25 just issued last week.

1 **MR. DUMAIS:** That was filed as Exhibit 47,
2 dated July 20th, 2006?

3 **MS. NETHERY:** Yes, that's the document that
4 I'm referring to. This has been some time in the making.
5 The practice memo is entitled "Child Abuse and Offences
6 Involving Children" and it's dated July 20th, 2006. It has
7 been some time in the making and as we go through it, I see
8 that it really is, I guess, a summary or a compilation of
9 most, if not all, of the policy-related factors for Crowns
10 to consider in regard to child abuse-related cases and
11 there is an index which actually does have a search
12 capacity on it. But the practice memo itself applies not
13 just to cases of physical or sexual abuse.

14 If I can just move down to page 4, which is
15 the introduction, the practice memo applies to not just
16 cases of physical or sexual abuse, but also cases where
17 children have witnessed traumatic events, including
18 spouse/partner offences or other forms of domestic
19 violence. We've tried to be inclusive in it in terms of
20 setting out the various types of cases in which children
21 really may be involved and certainly would require special
22 attention by the Crown, because this may -- if they
23 witnessed domestic violence, they are frequently considered
24 to be victims of emotional abuse. So they are included in
25 the practice memo for Crowns to use, the various

1 considerations in the memo.

2 At page 8, we refer to, again, the
3 coordination of support and services for child victims and
4 the fact that government should provide leadership in the
5 community in response to child abuse and that it's very
6 important to have a coordinated response. This is at the
7 top of page 8, I think. I'm sorry, page 5. Excuse me. In
8 this particular section of the memo we note the importance
9 of the coordination of support and services for child
10 victims and that the government should provide leadership
11 to the community in response to child abuse cases and that
12 it's important to have a strong coordinated response by the
13 Crown's office, the police and Victim Witness, as well as
14 Child Welfare authorities and other government ministries.

15 We also recommend at this point in time that
16 Crown attorneys and police and Victim Witness should update
17 any local protocols that they have because, as you may
18 recall, in the original practice -- the original policy, C-
19 3, it was recommended that there be local and regional
20 protocols involving Victim Witness where they were
21 available and involving the police, and here we're just
22 telling Crowns it's time to take another look at them and
23 make sure that they're fresh and new.

24 We also remind Crowns about the fact that
25 there is a provincial child abuse coordinator who is the

1 counsel at the Victim Witness Assistance Program and we
2 provide them with phone contact for that individual. We
3 also remind Crowns that there is to be a local child abuse
4 coordinator who can facilitate the inter-agency
5 coordination, act as a resource person, make sure that the
6 cases of child abuse are being assigned and scheduled as
7 quickly and as appropriately as possible.

8 At page 6 we outline the importance of our
9 Victim Witness Assistance Program and the fact that they do
10 provide a lead role in providing support to child victims
11 and witnesses in ensuring that the community base supports
12 are there for children and that we should again make sure
13 that we have a complete, up-to-date list of programs and
14 community agencies that can provide support to child
15 victims and be familiar with those so that we have some
16 knowledge of those things and that we're not solely relying
17 on another program that is the Victim Witness Assistance
18 Program.

19 It's critical really that there is a good
20 relationship, I guess, amongst all the parties, the police,
21 the Victim Witness, the Crown, as well as the Child Welfare
22 authorities to make sure these cases are proceeding as
23 smoothly as possible and that's, I think, to the benefit of
24 everybody, the system, the public and the child.

25 That's again, I guess, emphasized in the

1 next section which has to do with communication with the
2 police, and we ask that the police contact the Crown
3 Attorney's Office at an early stage of a child abuse
4 investigation, especially where there are a large number of
5 victims or multiple accused and, particularly, these may be
6 cases of institutional or ritual or cult abuse and that we
7 provide a full-time Crown with experience to provide advice
8 to the police throughout their investigation.

9 So that's what we tell people about our
10 communication between the Crown and the police.

11 Then in terms of access to information about
12 the court process in specific cases we recommend that,
13 first of all, that there be a protocol or a process whereby
14 the Crown attorney's office can provide information either
15 directly or through the victim witness or the police about
16 the criminal justice system and case-specific information
17 as described below.

18 You know, in terms of any significant steps
19 in the proceeding unless they are exceptional circumstances
20 we should ensure that the victim is advised of significant
21 steps in the proceeding and they include things like the
22 status of judicial interim release which is bail, any
23 applications relating to psychiatric or third-party
24 records, dates for trial, plea or sentence. Significant
25 decisions may include any plea negotiations that are going

1 on, including a plea to a lesser charge. I think it's very
2 important that victims or often it's their families, are
3 aware that this process is going on so that they don't hear
4 about it for the first time in the media, for example, or
5 find out in some other way, and it gives them an
6 opportunity to ask questions. They may not agree with what
7 we are doing but at least give them some understanding of
8 how we are handling the case. And often if it's going to
9 be a guilty plea and there is going to be, for example, a
10 period of probation as a part of the sentence then, you
11 know, it's helpful to know about any terms that the victim
12 or the victim's family may find helpful to them.

13 Now, there are some cases where we may not
14 be able to do that, but that's what is recommended. As I
15 say, it may not always be direct contact with the Crown.
16 Sometimes, you'll find that -- we'll find that the police
17 have the best rapport with some of the victims or that the
18 Victim/Witness Assistance Program has the best rapport.
19 And so it may be a matter of asking the police officer to
20 make that initial contact. The Crown can be available for
21 any discussions but the point is to ensure that they, to
22 the greatest extent possible, know what's going on in the
23 case.

24 The other aspect of our discussions with
25 victims is to let them know, and sometimes they are

1 surprised to find out, that their statements, their written
2 statements for example, would be a part of our Crown
3 disclosure obligations. I'll talk a little bit about
4 disclosure of sensitive materials but it can come as a
5 surprise to them to realize that what they have said will
6 probably end up in the hands of the defence counsel and
7 will be shown to the accused. But it's important for them
8 to know that and understand that and that they may then
9 ultimately be cross-examined on the statement if it's a
10 matter of preliminary hearing or trial.

11 If there are security concerns about a child
12 witness or a victim then we inform them promptly and also
13 make sure that the police are well aware of any concerns
14 that perhaps had been brought to the attention of the Crown
15 and not initially to the police so that appropriate action
16 can be taken and we say that any action that we take in
17 this regard should be documented in the Crown brief.

18 We've already spoken about Victim Impact
19 Statements so I won't go over that portion of the memo in
20 detail.

21 The next area deals with page -- this one is
22 page 8. The next area that we deal with is assignment and
23 scheduling of cases and, of course, we're not -- you know,
24 in the Crown's office we're not in charge of the actual
25 scheduling of cases. That's a matter that's within the

1 purview of the court and often has to do with scheduling,
2 but we certainly indicate that we should make every effort
3 to expedite the trials and that's often a matter of
4 bringing it to the attention of the court clerk and the
5 judicial officer that this is a case involving child
6 witnesses. We all know that the passage of time may affect
7 a child's recall of details and increase anxiety and so on.
8 So we will bring that to the attention of the court to see
9 whether we can't have an expedited trial date for these
10 cases or expedited preliminary hearing date. Obviously, we
11 are not always successful given potentials for delays and
12 sometimes there are so many serious cases that are going
13 through the courts that it's hard to put an absolute
14 priority on one above another.

15 The other aspect has to do with the
16 assignment of cases and we indicate that we have to have a
17 system in place to identify the child abuse cases early and
18 assign a Crown to these cases at an early stage, if
19 possible prior to the bail hearing, but at least after the
20 bail hearing and before the preliminary hearing or trial so
21 that that Crown can meet with the child or if it's an adult
22 in an historical sexual assault case, can meet with the
23 alleged victim early in the process and there may have to
24 be a number of meetings in order to develop some rapport
25 between the Crown and the victim. I mean, they can't

1 always, you know, sit down and tell the Crown their story
2 on the first meeting. It's a pretty difficult thing at any
3 point in time.

4 So we also on page 9 where we're talking a
5 bit about bail, that the paramount consideration for the
6 Crown at any bail hearing is the safety of the child or the
7 victim and if there is a significant concern and that can't
8 be addressed by way of bail conditions then we should
9 consider seeking a detention order.

10 There is also a provision for in-custody
11 non-contact orders. And I think I mentioned that yesterday
12 about the fact that sometimes people are arrested and then
13 as soon as they get to the jail it used to be that there
14 might be a phone call back to the home of the victim. So
15 there is a provision in the Criminal Code now for an order
16 to be made that there be no contact from the jail.

17 Conditions of release; there are -- we set
18 out a non-exhaustive list of potential conditions to
19 consider.

20 Bail notification which, I guess, is at the
21 bottom of page 9 and, yes, on the top of page 10. We talk
22 about the importance of notifying the non-accused or non-
23 offending parent of the release of the accused and any
24 conditions. Again, it's something that we would rather
25 have them hear about understandably through either the

1 Crown's office or the police or the victim witness rather
2 than hearing about it, say, in the local newspaper or
3 otherwise and quite often that notification is done by the
4 police although it's not 100 per cent of the time. Again,
5 it's a matter of local protocol as to who might actually do
6 the notification.

7 Again, we make notes, if you look at the top
8 of page 10. We also, again, comment about the child's
9 safety being of paramount importance and making sure that
10 we do whatever we can through victim witness and police in
11 accordance with local protocols to ensure the safety and
12 security of the child.

13 We just note in the practice memo about
14 violent offences under the *Youth Criminal Justice Act* and I
15 won't go through that. As I've said, under part (f) on
16 page 10, you know the fact that a child may have witnessed
17 spousal abuse may be very damaging so these children who
18 are witnesses to this would be also treated as if they were
19 child abuse victims for the purpose of this practice memo.

20 Now, at part six -- we also talk about part
21 six which is at the bottom of page 10 and the top of page
22 11. We talk about the fact that the charge screening test
23 applies to all prosecutions of child abuse as they do to
24 any criminal offence. So although we have what some
25 describe as a vigorous prosecution policy involving child

1 abuse cases, we also always have to be mindful of our
2 Minister of Justice's role and the need to screen these
3 charges, particularly according to the reasonable prospect
4 of conviction test. But we also remind Crowns that, you
5 know, we shouldn't be applying stereotypical assessments of
6 witnesses. Some prosecutions are successful based on the
7 evidence of one fragile witness. In other cases it may not
8 be appropriate to go ahead because of inconsistencies and
9 deficiencies in the evidence. So if you look at the top of
10 page 11, we also -- yes, at the top of page 11. Where the
11 evidence of the child witness is reasonably capable of
12 belief and that there is a reasonable explanation for
13 difficulties in the evidence then the reasonable prospect
14 of conviction standard is met. And we go on and we talk
15 about other considerations set out in the charge screening
16 practice memo about the public interest factors.

17 Then, in terms of other charge screening
18 issues aside from the reasonable prospect of conviction and
19 public interest test, the Crown should look at -- find out
20 through the police whether the individual has been flagged
21 on CPIC as a high risk offender if he's got a previous
22 record and in that case we can contact our provincial
23 coordinator if it's an offence within Ontario or one of the
24 other provinces if it's from outside Ontario and the
25 materials can be sent to us. I think we've got a -- I

1 don't know if it's a 24-hour turnaround to obtain those
2 materials but the idea is it's set up so that we can obtain
3 those materials for the purpose of a bail hearing. So it's
4 a very quick turnaround to get those materials once we know
5 the individual has been flagged. We also refer Crowns to
6 the dangerous, long-term and high-risk offenders policy.

7 In terms of the assessment of post-
8 conviction sanctions, at the bottom of page 11 we remind
9 Crowns about DNA databank orders, sex offender registry
10 orders, the potential for dangerous and long term offender
11 declarations, firearms and weapons prohibitions, section
12 161 orders of the Criminal Code. At page 12 we remind
13 Crowns about elections in hybrid offences and a decision
14 there, of course, is important from the point of view of
15 sentencing, whether or not we are going to have a
16 preliminary hearing potentially or a trial, because
17 sometimes of course when we proceed by way of indictment,
18 that can result in hardship to the witnesses, and we refer
19 Crowns back to the elections in hybrid offences policy.

20 We also remind Crowns about the new
21 mandatory minimum sentence provisions and I think we went
22 through those yesterday, perhaps in another context. Yes,
23 I think in the context of Bill C-2.

24 **THE COMMISSIONER:** Yes, we did.

25 **MS. NETHERY:** Thank you. Okay. So I won't

1 belabour that point.

2 But again, it's there for Crowns. I think
3 the attempt in this practice memo is to put as many of the
4 relevant considerations for Crowns in child abuse cases as
5 possible in one place at least as an aide-mémoire or a memo
6 to them.

7 In terms of -- if we can turn to page 13.
8 On page 13 we deal with proper charges and wording and this
9 is a critical piece, particularly, if I might say, when we
10 are dealing with historical sexual offences because I think
11 most of us live in the present in terms of the present law,
12 and to go back to what was the law in 1982 or 1983, I think
13 especially for younger Crowns is quite difficult.

14 For me, at least I have some recollection of
15 what the law was 20 years ago. But we remind Crowns about
16 that and that's something that they need to look at, old
17 Criminal Codes and, as well, I think we've got a list of
18 charge wordings for Crowns on the old -- some of the old
19 sections that they can have access to.

20 And I think we've talked about Section E,
21 which is the child protection issues and we've already
22 reviewed the practice memo that relates to that, but this
23 is also a reminder if you suspect a child may be in need of
24 protection, have a reasonable suspicion or reasonable
25 grounds to suspect, then there's an obligation on the Crown

1 to report and we do have a reporting system which involves
2 a phone call and, as well, a form at the minimum and then
3 there may be other follow-up, and the form is faxed
4 directly to the Children's Aid or Child Welfare authority.

5 At the top of page 14 we talk about the
6 disclosure of sensitive material, and in this context
7 sensitive material includes videotapes, audiotapes,
8 photographs, computer-generated images or materials
9 depicting or recounting a sexual crime that applies
10 particularly in the Internet, crimes against children. And
11 in those cases we -- you know, I think there's a need to be
12 very cautious about the disclosure of those particular
13 materials and, in fact, we recommend that there be
14 undertakings by defence counsel about the limited use and
15 limited distribution of those things because there have
16 been -- and I think this is even noted in the Martin
17 Committee Report as early as 1993, but there have been
18 situations where images of children have been circulated
19 around, coming out of Crown briefs, and it's just such an
20 abuse of the child's privacy and dignity, and it's much
21 more so when it's an audiotape or a visual depiction of the
22 child perhaps giving their statement.

23 So we do have a specific -- in the
24 disclosure -- practice memo. We have a specific
25 undertaking that we ask defence counsel to fill out. In

1 some situations where the accused is unrepresented, then we
2 may ask them to come to the police station to view the
3 videotape or hear the audiotape rather than providing it to
4 them directly. But generally there is an undertaking for
5 defence counsel so that it isn't circulated broadly and, as
6 well, when it's an unrepresented accused there may be a
7 provision for them to come to the police station to view
8 the material.

9 In terms of resolution discussions, there
10 are certain guidelines that we have put out for Crowns and
11 it may be, for example, in the area dealing with the
12 withdrawal of charges and pleas to lesser offences. It may
13 be that -- well, first of all we say if there's a
14 reasonable prospect of conviction, the Crowns are not to
15 terminate the proceedings without the approval of the local
16 Crown attorney. So there may be some very good rationale
17 for terminating the proceedings. If, for example, the
18 accused is very elderly and infirm and perhaps has a fatal
19 illness, it may be felt that it's not appropriate to
20 proceed even though there is a reasonable prospect, but
21 that's something that has to be -- must be reviewed with
22 the local Crown attorney.

23 If there is to be a plea to a lesser
24 offence, then the Crown should look at what's the impact
25 going to be upon the child, the family, the community, and

1 also should consult with the local Crown attorney before
2 agreeing to a plea based on a reduced charge.

3 And in terms of mandatory minimum sentences,
4 they must not be reduced to avoid the mandatory minimum
5 sentence, and then if there is to be, for some reason, a
6 reduction of the charge, then again there has to be the
7 approval of the Crown attorney or it's the deputy director
8 -- one of the deputy directors in the Crown Law Office,
9 Criminal.

10 So the idea is that we've set up a system of
11 oversight in the area of charging and resolution
12 discussions. I think, as I said before, sometimes a
13 resolution, an early resolution based on a lesser offence
14 will be in the best interests of everybody, but it really
15 is something that requires careful consideration and
16 thought given the seriousness of these sorts of offences.
17 So we set up a system of review to ensure that things are
18 done in an appropriate way.

19 We've also noted that the resolution of
20 these offences should be premised on providing the greatest
21 possible protection to the public and particularly the
22 children.

23 So on page 15 we talk about the charges and
24 the underlying facts and sometimes there's an agreed
25 statement of facts between the defence and the Crown or

1 there's a review of the facts. The point is in this that
2 any of the, say, agreed statement of facts between the
3 defence and the Crown should really fully reflect the
4 gravity of the provable offence or offences.

5 So, you know, it may be that the accused
6 doesn't admit to certain facts but in an overall way the
7 facts as read into the record or as agreed to do reflect
8 the gravity of the provable offences, but it's important to
9 review that and make sure that that statement does indeed
10 fully reflect the gravity of the offences, the provable
11 offences.

12 Victim Impact, we've already talked about
13 that. The Crowns are to fully apprise themselves of the
14 impact of the offence, including any harm suffered by the
15 child before taking a firm position on sentence, and
16 sometimes that requires -- you know, if there's a pre-trial
17 conference with a judge and it looks as if there's going to
18 be the potential for a guilty plea, sometimes it means that
19 the Crown will have to make some phone calls at that point
20 in time or have the police or the victim witness make some
21 phone calls at that point in time to apprise themselves of
22 all the relevant factors and the information in order to
23 solidify the resolution. And it may be that when you make
24 the call you find out that there are many more, say,
25 physical injuries than you had first anticipated and that

1 can change the complexion of the resolution considerably,
2 as an example.

3 In terms of breach of court orders, if there
4 are breaches of court orders in child abuse-related cases,
5 then we indicate the Crown should pursue these matters.
6 We've referenced Section 161 that I've already talked
7 about, the protection orders, Section 810.1 and Section
8 810.2 which are actually what are sometimes called peace
9 bond-related sections that provide that an individual
10 should stay away from either certain other individuals or
11 locations, particularly in this context, locations where
12 children might be found, and if there are breaches of these
13 that are discovered or brought to the attention of the
14 Crown, then these should be prosecuted if they're provable.

15 Conditional sentences, well, we've already
16 said the Crowns are not to, absent exceptional
17 circumstances, advocate for a conditional sentence in cases
18 of serious violence or sexual offences against children.

19 Dangerous and long-term offenders, again,
20 this is an area that is -- obviously if it appears that
21 somebody is a dangerous offender and should be declared a
22 dangerous offender, which provides for an indeterminate or
23 indefinite sentence, then the Crown is not to, unless
24 they've consulted with the Crown attorney, negotiate a plea
25 in exchange for not having somebody declared a dangerous or

1 long-term offender. And any agreement as well on this area
2 is subject to the Attorney General's consent because under
3 the Criminal Code, if we are to bring a dangerous or a
4 long-term offender application, then we need to have the
5 Attorney General's consent. That consent is exercised
6 personally by the Attorney General and has not been
7 delegated except in unusual circumstances where he is not
8 available, and that's to the Deputy Attorney General.

9 So that's an area really where there is a
10 significant public safety concern and it isn't something
11 that we should negotiate away without all of the
12 appropriate consultations, and that will usually involve
13 some kind of determination that a dangerous offender
14 proceeding would not be successful.

15 The DNA databank orders, again, I think I've
16 mentioned this before, I think, about Crown not using the
17 DNA databank order as a bargaining chip, and the same, I
18 think, applies for the sex offender registry provisions as
19 well.

20 So those are, I think, the sentencing
21 provisions as we've considered them in relation to
22 children.

23 In terms of trial preparation, that's at
24 page 16. Here we talk about the importance of the
25 interview with the child and the use of some special

1 techniques when they ultimately testify. And certainly a
2 child who is well prepared, the research indicates, is
3 better able to cope with the trauma of testifying, and that
4 seems like a common-sense assessment.

5 So it's important for the Crown to meet with
6 the child early, and I know you'll hear from the Victim
7 Witness about their assistance in preparing the child in
8 terms of taking them into the courtroom and showing them
9 where they will be located and that sort of thing.

10 In terms of the age and level of development
11 -- at page 17 -- of the child, we should conduct the
12 interview in an appropriate manner. We want to use child-
13 friendly language. They may not understand many of the
14 adult words. You know, if you say to them, "Did something
15 happen prior to July 20th or after July 20th," they may not
16 understand the term "prior. So it's always important to
17 use child-appropriate language when we're talking to them
18 and we remind Crowns of that.

19 The timing and the frequency of these
20 interviews, Crown counsel must interview a child at least
21 once before a trial or preliminary hearing and as often as
22 necessary in order to establish the appropriate rapport,
23 and usually these interviews are to be done as early as
24 possible because so often when a Crown is interviewing a
25 child, additional facts come out and we of course make

1 disclosure of those. If that's happened late in the
2 process, like very close to the preliminary hearing or the
3 trial date, then we normally provide that disclosure to
4 defence. Then, understandably, defence may want an
5 adjournment of the preliminary hearing or trial in order to
6 review that late disclosure.

7 So we really suggest that when Crowns are
8 doing these interviews, that they do them early enough that
9 if that does happen, and it's a frequent occurrence, that
10 we're in a position to provide that disclosure at an early
11 time so that we don't have those adjournments. And then we
12 usually have a final meeting with the child close to the
13 date of the hearing just to lessen the anxiety of the child
14 and make sure that they remember who you are and that
15 they're still feeling comfortable in talking to you.

16 So in terms of the presence of third
17 parties, we like to have a police officer present or
18 another appropriate third person that the child feels
19 comfortable with and often even in some of the smaller
20 police services, the police officers assigned to these
21 sorts of cases are individuals who can establish that sort
22 of rapport with children. So it's good to have them
23 sitting in on the interviews because the children will feel
24 comfortable with them and it's good also in terms of the
25 disclosure obligations to have the police officer there in

1 order to take notes of any new disclosure so that, you
2 know, they can be provided readily to defence.

3 We also ask that Crowns assess any special
4 needs that children may have, including the child's ability
5 to respond to questions and communicate. There is a
6 further discussion of testimonial capacity and testimonial
7 aids, and I think we've talked about that a bit.

8 Now, in terms of -- at page 18, the top of
9 page 18 -- the review of the child's evidence, there is
10 sometimes a bit of a debate about how much the Crown should
11 review in terms of the factual underpinnings of what
12 happened because we want to avoid unnecessary retelling of
13 the victimization and, you know, avoid too much of a focus
14 on minor details and also ensure that our questioning
15 doesn't suggest a particular answer to the child, but it
16 usually quite frankly does require some review of the
17 evidence with the child with those sorts of concerns or
18 caveats taken into mind.

19 I've already, I think, spoken to you about
20 the conduct of witness interviews, practice memo, which is
21 a more generic memo that relates to ensuring that we're
22 not, you know, suggesting answers to witnesses and that's
23 particularly important with children.

24 The next area deals with familiarizing the
25 child with the courthouse. That's more of a victim witness

1 function; testimonial capacity of children. We refer to
2 the special needs victims practice memo for children, but
3 there is now a difference for children under 14 from the
4 old approach under section 16 as a result of Bill C-2, and
5 we've talked about that, so I won't belabour that point.

6 Protecting the privacy of child victims and
7 witnesses: At page 19 we talk about the
8 importance of ensuring that we do have certain
9 safeguards on the disclosure of sensitive
10 materials, which I've already mentioned, and so
11 we refer Crowns to the practice memo on
12 disclosure.

13 Publication bans: We also refer to the memo
14 on victims of crime and the privacy there.
15 Usually there will be a publication ban on the
16 identity of the victim and if it is a preliminary
17 hearing, there usually will be a publication ban
18 on the contents of their evidence at the request
19 of the Crown at least, if not the defence
20 actually.

21 Production of Private Records: I think
22 we've mentioned that there may be an application for
23 production of third party -- what are called third party
24 records or often psychiatric records, and so we remind
25 Crowns about the provisions of section 278. I think we

1 talked about the *O'Connor case* as well, and the *Mills case*
2 are both cited.

3 As well, although it's -- we also talk about
4 in part 4, the evidence of other sexual activity of the
5 victim and we have an attachment to the practice memo that
6 refers to that, and that may be of more importance or more
7 relevance in the area of historical sexual offences where
8 the individuals are adults or teenage complainants or
9 victims -- alleged victims.

10 Testimonial or other aids: We've talked ---

11 **MR. DUMAIS:** We talked about that yesterday.

12 **MS. NETHERY:** Thank you.

13 Cross-examination by an unrepresented
14 accused: I think we also spoke about that yesterday.

15 Hearsay evidence: We remind Crowns that
16 they may be able to use hearsay evidence where the child is
17 just not going to be able to testify or not available to
18 the court otherwise, and we cite the case of *Kahn and the*
19 *Supreme Court of Canada*.

20 In terms of expert evidence under h), we
21 cite certain areas where expert evidence may be
22 appropriate, and there are some areas where it may not be
23 necessary, so we simply ask that Crowns take care to ensure
24 that they read the recent and relevant case law so that
25 they can make a good determination of whether to call

1 expert evidence and, if so, making sure that it's tendered
2 for a permissible purpose.

3 Child witnesses in cases of spousal assault:
4 I think I've already referred to that.

5 Recanting witnesses: Again, we've dealt
6 with that, I think, under the "Recanting Witnesses"
7 practice memo, but this is again a reminder.

8 Evidence of child witnesses and assessment
9 of their testimony: Again, I think we've spoken about that
10 a little bit so I won't belabour that.

11 Sentencing and conviction issues: Again, I
12 think ---

13 **MR. DUMAIS:** We dealt with that mostly this
14 morning.

15 **MS. NETHERY:** I think we have already
16 reviewed that. Yes, it appears that we have, to me.

17 And as I say there are two attachments: one
18 has to do with the production of the third party records,
19 which is Attachment No. 1; and the other one is Attachment
20 No. 2, which relates to evidence of complainant's sexual
21 activity.

22 So that's -- and there's a third one
23 actually, which has to do -- is a summary of, I think it's
24 the Robin's report for Crowns, so that they have that
25 available to them.

1 So that's the child abuse policy which, as I
2 say, is a fairly detailed reminder to Crowns of the
3 different areas that they should consider. It is not
4 intended to be a replacement for legal research. It's more
5 of a -- it's almost like an aide-mémoire about the
6 different areas that they should be considering when
7 they're prosecuting child abuse-related cases.

8 So that, coupled with -- there's one that
9 relates specifically to sexual offences generally, which
10 was also issued, I think, on July 21st and which is
11 probably Exhibit 48, but those two practice memos, I think,
12 taken together provide a significant amount of policy
13 advice to Crowns about the prosecution of child abuse and
14 sexual assault cases.

15 **MR. DUMAIS:** Is it fair to say that sexual
16 assault practice memorandum, the general one, dated July
17 21st is substantially similar to the other one?

18 **MS. NETHERY:** Yes, it is. It deals ---

19 **MR. DUMAIS:** They look at some of the same
20 issues?

21 **MS. NETHERY:** Yes, it is on the same issues.
22 Yes, it's the more generic one. It would apply to cases
23 where we have adult witnesses, adult complainants but very
24 similar in terms of the considerations and the advice that
25 we give.

1 **MR. DUMAIS:** I think we are done with this
2 area, Commissioner, we have two other items to deal with:
3 One is training and educational programs and the other is
4 conflict of interest guidelines.

5 I am in the Court hands whether or not we
6 want to start.

7 **THE COMMISSIONER:** Well how long do you
8 think it would be to finish off?

9 **MR. DUMAIS:** I suspect between 20 and 30
10 minutes.

11 **THE COMMISSIONER:** So we'll take a break.
12 Have you canvassed the parties to see about cross-
13 examination and their times? Any idea about that yet?

14 **MR. DUMAIS:** I have had with some of the
15 parties, Commissioner. It appears anywhere between an hour
16 and a half and two hours.

17 **THE COMMISSIONER:** All right.
18 So we should hopefully finish today.

19 **MR. DUMAIS:** Yes, yes, we should be.

20 **THE COMMISSIONER:** All right.

21 Let's take a break.

22 **THE REGISTRAR:** Order. All rise. À
23 l'ordre; veuillez vous lever.

24 The hearing will reconvene at 11:30 a.m.

25 --- Upon recessing at 11:15 a.m./

1 L'audience est suspendue à 11h15

2 --- Upon resuming at 11:39 a.m./

3 L'audience est reprise à 11h39

4 **THE REGISTRAR:** This hearing of the Cornwall
5 Public Inquiry is now in session. Please be seated.

6 Veuillez vous asseoir.

7 **MR. DUMAIS:** Just one last question,
8 Commissioner, on the last item that we dealt with.

9 Ms. Nethery, you have been asked the
10 question earlier this morning on historical sexual abuse
11 and whether or not it had been mentioned anywhere, and I do
12 believe that you've reviewed the practice memorandum and
13 found some reference to it?

14 **MS. NETHERY:** Yes, that's correct. It's
15 specifically in Exhibit 48, which is the practice memo
16 issued on Friday.

17 **THE COMMISSIONER:** We will need a second
18 here.

19 **MS. NETHERY:** Exhibit 48.

20 **THE COMMISSIONER:** It's just that my screen
21 is dark. Is yours dark as well?

22 **MS. NETHERY:** Yes.

23 **THE COMMISSIONER:** Okay. We will have to
24 take a moment here.

25 **(SHORT PAUSE/COURTE PAUSE)**

1 **THE COMMISSIONER:** Any luck? All right,
2 well, let's see what you can -- we do have -- oh, here we
3 go.

4 Everybody has copies, so why don't we go
5 ahead with the copies?

6 **MS. NETHERY:** All right. Thank you.

7 So yes, in Exhibit No. 48, which is a
8 practice memo entitled "Sexual Assault and Other Offences",
9 this was issued on July 21st, so Friday, of 2006. It is
10 the companion practice memo to the child abuse related memo
11 -- Exhibit No. 47 -- that we had referred to before the
12 break, and it does have a specific reference to historical
13 allegations of sexual offences.

14 It's at page 5 of the practice memo and in
15 this particular area the memo provides advice on serious
16 sexual offences, and specifically serious sexual offences
17 include historical allegations of sexual offences,
18 including cases of institutional abuse or ritual, cultural
19 abuse, and that's on page 4 under the introductory portion
20 of the practice memo. So I thought I would simply bring
21 that to the Court's attention, as it had been mentioned or
22 questioned.

23 **THE COMMISSIONER:** Great, thank you.

24 **MR. DUMAIS:** If we can then have a look at
25 the bottom of page 33, "Crown Counsel Training and

1 Educational Program". Perhaps you could just go through
2 the different initiatives that the Ministry of the Attorney
3 General has undertaken to making sure that their Crowns are
4 trained.

5 **MS. NETHERY:** Yes. Well, the ongoing
6 training and education of Crowns is a key priority of the
7 Criminal Law Division and of the Ontario Crown Attorneys
8 Association, which is sometimes referred to as the OCAA.

9 The OCAA is the body that represents the
10 assistant Crown attorneys in Ontario, and there's a
11 collaboration between the management of the Criminal Law
12 Division and the OCAA to develop and produce educational
13 materials and educational sessions for Crowns, and we like
14 to think that we have the most comprehensive educational
15 program in Canada, if not North America. The example in
16 2005, there were over 27 different educational initiatives
17 courses and workshops offered to members of the Criminal
18 Law Division and, in fact, other provinces frequently
19 request to send their Crowns to our educational sessions
20 and if we have room available, we do allow them to come in,
21 space permitting, of course.

22 So the education includes summer school
23 programs, which would be going on -- I think there would be
24 some going on right now as we're here, and they cover areas
25 such as -- the summer school -- sexual offences. There's a

1 summer school on expert evidence. There's a summer school
2 on sentencing considerations. There's a summer school on
3 domestic violence, another one in impaired driving, trial
4 and appellate advocacy. There's one that's a bit of a
5 potpourri of current legal issues.

6 These training programs, certainly from my
7 experience, have been going on since I started in the Crown
8 attorney system. Some of them are mandatory for beginner
9 Crowns, and you have to go to them in sequence. There's
10 one for the first-year Crowns and then second year and so
11 on. I've been informed that the training programs have
12 been in existence since the 1960s, although I don't -- it's
13 one of the few times I can say I don't remember that ---

14 **THE COMMISSIONER:** Well ---

15 **MS. NETHERY:** --- because that was before my
16 time.

17 **THE COMMISSIONER:** Summer school had a bad
18 connotation for me.

19 **MS. NETHERY:** Okay. Well, it's often -- for
20 Crowns it's often an opportunity not just to learn in sort
21 of the formal session of the summer school but also to
22 develop a rapport with colleagues and exchange ideas about
23 prosecutions and so on.

24 So we also have semi-annual training
25 conferences for Crowns, and they include a spring

1 conference, which all prosecutors who are available go to,
2 and it's usually three days long and sometimes has a theme.
3 One year -- and I may have mentioned this previously --
4 that we had a theme of everything relating to bail. We've
5 also had themes relating to charged screening, resolution
6 discussions and disclosure, and then at other times they
7 can be more a matter of sort of more current legal issues,
8 just depending on what is happening in the world of
9 criminal justice.

10 In addition to the spring annual conference,
11 we have fall regional conferences. So they'll exist in, I
12 guess, the six regions. So there will be a localized
13 component to them as well as a more province-wide component
14 to what the educational sessions will cover, and they go
15 on, I think, from October to the beginning of November in
16 the different locations.

17 As I say, the sexual assault prosecution one
18 has been going on, I think, since 1994, and it includes
19 panels on historical sexual assault prosecutions, similar
20 fact evidence, prior sexual history, sentencing
21 considerations and dangerous offender proceedings, among
22 others, depending on current case law and current issues as
23 they are being raised in these cases. That particular
24 course has run consistently since 1994, and it's been
25 funded.

1 We also fund Crowns to go to external
2 educational events, which are things that are run by the
3 Canadian Bar Association, the Osgoode Hall Continuing Legal
4 Education Program. We'll sometimes go to Aylmer College,
5 which is the police college in Aylmer for training and
6 enjoy their facilities.

7 We have -- well, it says approximately over
8 20 external courses, which are available to Crowns.
9 There's so many courses that we get invited to that you
10 could be at a course every weekend. So you really have to
11 be careful in terms of focusing your energies, particularly
12 on some of these external courses. And in the summer, as I
13 say, usually a Crown goes to at least one week of summer
14 school every summer depending on what's happening.

15 We have an infrastructure -- an education
16 committee, which is responsible for the organization of the
17 initiative, and that's no small thing when you think that
18 we have, you know, 900 Crowns in the province and, as I
19 say, not all of them get to go to every course. I don't
20 know that they would have any time to go to court if they
21 went to every course that was offered, but certainly we
22 want them to go to every spring conference, every fall
23 conference, and at least one week of summer school as well
24 as a few external courses throughout the year. So these
25 are the types of things that we do.

1 The other area that we do as a partnership
2 with Victim Witness Assistance is a conference usually in
3 March of each year relating to victim-related issues. The
4 primary focus, I think, is usually domestic violence, but
5 it frequently also relates to child abuse and sexual
6 offences as well, and that's very helpful because it
7 focuses on those specific areas and it's a form of cross-
8 jurisdictional training, if you will.

9 So that's the training -- general training
10 program. We've also included for you a number of our
11 educational materials, I think, at Tab 88. We can turn to
12 -- good, we've got our video up again. What we've done, we
13 just took a selection of some of the -- this one is called
14 the 1975 Annual Meeting. In Tab 88 are a number of agendas
15 from Crown training, and we've just selected a few of them
16 to give the Court an idea of the type of training that
17 we've had over many, many years. And Crowns participate
18 both as attendants, as students and as presenters, and we
19 like to involve some of our younger Crowns in some of the
20 panels so that they can start early on in becoming involved
21 in these things.

22 So this is an agenda from 1975. I don't
23 know that there's anything specific -- well, there is
24 something specific to victims in it. You can see there's
25 something on restitution, compensation and aid to victims

1 and was chaired by Erik Silt, Q.C., the Chair of the
2 Criminal Injuries Compensation Board at that time and John
3 Sampson who was a Crown attorney in Kingston. So I guess
4 as early as 1975 there have been some educational events
5 relating to victims of crime.

6 Some of the others, although I don't know
7 that we need to look at them in detail, but some of the
8 others relate to in 1979 -- as early as '79, we had a panel
9 on practical problems in rape prosecutions; in 1980, a
10 panel on recent complaint; 1982, a specific panel on child
11 abuse and in 1987, a specific panel on sexual assault.

12 So those are some of the early agendas. In
13 addition -- and those are, as I say, ongoing right up to
14 2006. We had a spring conference, of course.

15 So virtually every session has a panel
16 dedicated to child or sexual abuse prosecutions because
17 it's a very large portion of our work. I mean, it's the
18 right thing to do to do what we can within our Ministry of
19 Justice role to support victims, but it's also, from a very
20 practical perspective, a very large portion of our workload
21 in terms of the cases that go to trial. So it's important
22 for us to make sure that we provide as much information as
23 possible to Crowns.

24 In addition, we have a monthly province-wide
25 publication, which was entitled the Crown's Newsletter, and

1 it started at least in the 1970s. A few selected Crown
2 Newsletters are found at Tab 89, if we could take a look at
3 that?

4 So this was one from -- I'm sorry, it's not
5 terribly legible, but this was one from 19 ---

6 **THE COMMISSIONER:** Seventy-four ('74).

7 **MS. NETHERY:** --- 74. Thank you.

8 So we had these come out on a monthly basis
9 to Crown attorneys and they were in written -- in a hard
10 copy format because, of course, we weren't in the
11 electronic world at that time.

12 So what you've got at Tab 89 are a selection
13 of Crown Newsletters and we've tried to select a few of
14 them that might be of some relevance to the proceedings
15 here. The 1974 -- well, let's move on. Yes. So September
16 of 1974 that's up on your screen right now -- and I'm not
17 sure why it was issued March 1975 -- but there was an
18 article on corroboration in sexual cases, evidence of
19 recent complaint, both of which would be relevant to sexual
20 offences. There are a number of other areas on disclosure,
21 sentencing and rape cases and right up to 1994 where there
22 was an article on the KGB decision, which was one of the
23 decisions on hearsay evidence.

24 So I won't go through all of those with you,
25 but that's a sample of Crown newsletters that were issued

1 in hardcopy to every Crown and every assistant Crown in the
2 province, and we had stacks of them sitting in our office,
3 as I recall. Once I had read them, I wasn't quite sure
4 what to do with all of them that we had. So that's at Tab
5 89.

6 Then I think what started to happen is we
7 moved into the electronic world, and that would be in 2000
8 and following, where updates of all Ontario Court of Appeal
9 and Supreme Court of Canada decisions in the area of
10 criminal law -- and I think we've got those noted at one of
11 the tabs as well, at Tab 91.

12 So this is an example of the kind of email
13 summaries of criminal cases that we received, and there's
14 one counsel in the Crown Law Office, Criminal, who is
15 tasked with doing these summaries. They are sent out
16 within a day or two of the decision coming down, and they
17 summarize the relevant case and, as well, these cases are
18 then posted on our CLD Net site with a search capacity.

19 I had someone do a search to determine how
20 many of these we received in 2005, and I think it was over
21 200 of these summaries that we received. So in terms of
22 the number of working days, you know, Monday to Friday
23 working days, I think that's actually over one a day that
24 we would receive, but sometimes we'll receive them in --
25 you know, they'll be a group of them that will be released

1 from the Court of Appeal or the Supreme Court of Canada.

2 But that's an example of one of the
3 summaries and, as I say, the summary and the full case are
4 posted on the CLD Net for all Crowns.

5 So that's another example of the educational
6 process that we have to ensure that we remain current on
7 the law. I think now it's a daunting task to be able to
8 read all of the material that we receive, and I think we've
9 talked now about how we distribute the Crown Policy Manual.

10 So these two practice memos that were just
11 handed out to you, Exhibits 47 and 48, would have been --
12 there would have been an email or there was an email that
13 was sent out to all Crowns and all assistant Crowns last
14 week providing the link to our CLD Net site with these two
15 new practice memos on it. So everyone would have been --
16 was alerted on the day that they were released, and the
17 documents themselves were posted and available to all
18 Crowns.

19 The other thing that I think I've mentioned
20 before is that in the electronic database we have papers
21 and packages and sentencing charts that are routinely
22 updated for Crowns. So, for example, there's a DNA
23 package. There is a sentencing chart on homicides and
24 child abuse-related cases that are there for Crowns to
25 assist them in their -- you know, in their legal research.

1 Of course, we'd like to think that, although
2 other provinces have Crown policy manuals, none of them are
3 as comprehensive as Ontario and few are as publicly
4 accessible as ours.

5 That I had to put in.

6 **THE COMMISSIONER:** There's that plug.

7 **MS. NETHERY:** The other thing that -- and I
8 think we've talked about this before as well, the fact that
9 there have been memos sent out to Crowns as early as the
10 1960's, and we were able to locate some of those old memos.
11 So those are located at Tab 90, oh yes, Tab 90 where we --
12 and I think we've actually already looked at this, but it
13 does deal with, you know, things like the minimum
14 requirement for all libraries. One in September of 1981
15 dealt with the Disclosure Guidelines to Crowns that we've
16 already spoken of.

17 So those are the old paper memos, and I
18 think we talked about the fact that there were some very
19 minimal memos relating to child and sexual abuse cases. So
20 for example in 1985, there was a memo dealing with the
21 assignment of child and sexual abuse cases, and in 1983, a
22 memo dealing with victim witness preparation.

23 So I think that's it for Tab 90.

24 I think we've already dealt with the annual
25 conferences at Tab 88.

1 **THE COMMISSIONER:** M'hm.

2 **MS. NETHERY:** So that is really a sample of
3 what we like to think of as a very comprehensive
4 educational system for Crowns in the province of Ontario.
5 So in terms of looking at the policies and the practice
6 memos, I think it's one thing to get the e-mails, it's
7 another thing to go to an educational session where you're
8 hearing speakers, you're perhaps having the opportunity in
9 small groups to discuss and debate some of the issues and
10 problem-solve about individual cases. That's really very
11 helpful.

12 **MR. DUMAIS:** Just to take you back to your
13 summer school program and semi-annual training conferences,
14 just a general question, is there a seat allotment? So is
15 there a certain number of seats reserved for different
16 Crown offices or can everyone that wants to attend attend?

17 **MS. NETHERY:** Well, I'm under the impression
18 -- well, first of all, usually not everybody can attend, so
19 I'm not sure of the exact number of seats set aside, but it
20 might be say, 600 out of 900. But usually, because of the
21 fact that people do have court commitments in some years,
22 we don't -- I've never heard of us turning anybody away. I
23 guess that's the way I'll put it.

24 **MR. DUMAIS:** All right.

25 And for example, if I look at the sexual

1 assault prosecutions course, which you been offering in
2 1994, is there any process to determine whether or not
3 there's a properly trained Crown in every Crown office? Do
4 you know if that exists?

5 **MS. NETHERY:** I think that's a management
6 responsibility to ensure that that happens. And you'll
7 notice in the current child abuse practice memo the
8 previous child abuse policy there was a requirement that
9 every office have somebody with that expertise and that
10 ability to coordinate those cases. And it's a manager's
11 responsibility to make sure that that person has the time
12 freed up to be able to go to appropriate courses, whether
13 they be summer school, whether they be some of the external
14 courses.

15 **MR. DUMAIS:** And when you say management
16 decision, you mean local management?

17 **MR. NETHERY:** Yes, I mean the Crown attorney
18 for the jurisdiction.

19 **MR. DUMAIS:** All right.

20 So then the Education Committee is not
21 responsible for any tracking of training? They are in
22 charge of organizing the conferences? Is that a fair
23 statement?

24 **MS. NETHERY:** Well, I think that's right. I
25 think there is some informal tracking that's done, but

1 really it's the responsibility of the local manager to make
2 sure that he or she -- the local Crown attorney -- that he
3 or she has provided the education for those individuals, if
4 I can put it that way.

5 **MR. DUMAIS:** You've indicated earlier that
6 we make sure that the new Crowns go to their first course.
7 Do you know if that's mandatory for the first year?

8 **MS. NETHERY:** Well, I think it depends on
9 how many Crowns we have hired in an individual year. So
10 for example, I think -- just my own personal example was I
11 didn't go the first year because there hadn't been that
12 many Crowns hired. I went in the second year. But it is
13 mandatory that I think within the first couple of years
14 that you go to that course, and it's a week long. It may
15 not -- you know, most recently, I think, some of them have
16 been held in the spring rather than in the summer because
17 there have been some fairly large hirings. You may recall
18 we talked about the JDRI or Justice Delay Reduction
19 Initiative hirings. My recollection is that a special
20 course was set up in the spring in order to deal with that
21 initial influx of people, and then I think there was a
22 further one in the summer as well to deal with it.

23 So it may not be -- you know, if you've only
24 got two or three new Crowns -- although that hasn't been
25 the case in recent years -- in any given year then you may

1 not actually hold the course that year, it may be the
2 following year. But given the fact that we've been hiring
3 so many Crowns over the past few years, it's generally been
4 on an annual basis.

5 **MR. DUMAIS:** All right. Thank you.

6 I think that brings us to the Crown Counsel
7 Conflict of Interest Guidelines, which is the last item
8 that you'll be dealing with in your evidence. I think
9 you've dealt with some of the historical guidelines or
10 historical memorandums. There was one that had been issued
11 in May of 1971 by the Director of Public Prosecutions that
12 we find at Tab 28. That was the memorandum dealing with
13 prosecution of police officers.

14 **MS. NETHERY:** Yes. I think we've already --
15 -

16 **MR. DUMAIS:** Yes.

17 **MS. NETHERY:** --- spoken about that, but
18 that's to avoid any appearance of a conflict of interest to
19 ensure that not only is justice done but seen to be done
20 that we bring in somebody from outside the specific
21 jurisdiction in order to prosecute the case.

22 **MR. DUMAIS:** And the current guideline has
23 been enclosed at Tab 95 of your materials, and that is the
24 Conflict of Interest Guidelines.

25 **MS. NETHERY:** Yes. That is a guideline

1 the appearance of fairness and justice in my view.

2 **MR. DUMAIS:** And I think that both the Crown
3 Policy Manual of 1994 and 2006 addresses the issue of
4 conflict as well in a more general manner, in that Crowns
5 are asked to independently exercise their discretion and
6 always be fair and judicious.

7 **MS. NETHERY:** Yes. I mean, it's a
8 fundamental part of our job, in my view, to act as Minister
9 of Justice and that has to do with fairness and not showing
10 favour to any individual or organization or business
11 entity.

12 **MR. DUMAIS:** And you have enclosed as well
13 the relevant sections dealing with that in the Crown Policy
14 Manual 2006 at Tab 17.

15 **MR. NETHERY:** Yes, and I think that we have
16 already ---

17 **MR. DUMAIS:** Yes.

18 **MS. NETHERY:** --- reviewed that unless you
19 want to refer me to something specific about it.

20 **MR. DUMAIS:** I do not.

21 **MS. NETHERY:** Okay.

22 **MR. DUMAIS:** And on that I believe these are
23 all my questions for Ms. Nethery.

24 **THE COMMISSIONER:** Thank you.

25 **MR. DUMAIS:** Thank you.

1 MS. NETHERY: Thank you.

2 THE COMMISSIONER: All right.

3 Mr. Wardle.

4 --- CROSS EXAMINATION BY/CONTRE-INTERROGATOIRE PAR MR.
5 WARDLE:

6 MR. WARDLE: Good morning, Ms. Nethery.

7 MS. NETHERY: Good morning.

8 MR. WARDLE: I'm Peter Wardle. I'm here for
9 Citizens for Community Renewal.

10 I want to start, if I can, by just taking
11 you back, way back to yesterday morning, to Tab 5 again.
12 You should have that up on the screen now.

13 MS. NETHERY: Right. I do.

14 MR. WARDLE: First of all, is this the --
15 does this give us the organization of the Crown Law Office,
16 Criminal, currently or historically?

17 MS. NETHERY: I'm sorry; this actually --
18 this is the Criminal Law Division. Is that what you were
19 referring to, as opposed to the -- the Crown Office,
20 Criminal, just in case I didn't make myself clear, I know
21 it was a long day yesterday, but the Crown Law Office,
22 Criminal, is the appellate branch of the Criminal Law
23 Division.

24 MR. WARDLE: Sorry. I'm using the wrong
25 terminology.

1 **MS. NETHERY:** Okay. No, I just ---

2 **MR. WARDLE:** It was a long day yesterday.
3 At least for me.

4 **MS. NETHERY:** Well, for me as well.

5 **MR. WARDLE:** So let me start again. Is this
6 the current organization of the Criminal Law Division?

7 **MS. NETHERY:** Yes. Yes, it is.

8 **MR. WARDLE:** And has that organization been
9 sort of similar to what we've seen for the past 10 or 15
10 years or have there been significant changes over that
11 time?

12 **MS. NETHERY:** Let me see. I think there was
13 a change, and I'm sorry I don't know what year it was, but
14 there was a slight difference in the organization of the
15 regions, and there were actually more regions and I think
16 it was in the early -- mid 1990's or early 1990's, I'm not
17 sure which, that we reduced the number of regions to the
18 six. I think there had been perhaps eight regions as ---

19 **MR. WARDLE:** Yes.

20 **MS. NETHERY:** --- opposed to six.

21 So for example, when you see the North
22 Region, which is on the extreme right-hand side, it had
23 been divided into two regions Northwest and Northeast, as
24 an example.

25 **MR. WARDLE:** All right.

1 Well, I'm primarily interested obviously in
2 the East Region.

3 MS. NETHERY: M'hm.

4 MR. WARDLE: And do you know whether the
5 chart that we see here is accurate going back to that time
6 period?

7 MS. NETHERY: Yes, as far as I'm aware, it
8 is.

9 MR. WARDLE: All right.

10 So do I have it -- just so that I understand
11 the structure in terms of prosecutions, and going from the
12 top, which is obviously the Attorney General down to the
13 Crowns who are handling day-to-day prosecutions, we've got
14 a number of layers but we've got the Attorney General,
15 Deputy Attorney General and Assistant Deputy Attorney
16 General; correct?

17 MS. NETHERY: Yes, that's right.

18 MR. WARDLE: And we have -- and then as I
19 understand it, we have six directors of Crown operations
20 for the six regions?

21 MS. NETHERY: Yes, that's right.

22 MR. WARDLE: All right.

23 So for the East Region, for the period
24 between, let's say, 1990 and today, there has always been a
25 Director of Crown Operations for the East Region?

1 **MS. NETHERY:** Yes. As I say, there was a
2 reorganization in the 1990s, and they may have been called
3 directors of Crown attorneys as opposed to director of
4 Crown operations, but it's a very similar function. So
5 you're right; there's always been a -- the structure has
6 always been Attorney General, Deputy, Assistant Director,
7 Crowns and then assistants, if that's what you're getting
8 at.

9 **MR. WARDLE:** That's really what I'm getting
10 at.

11 And then have I got this right that for the
12 United Counties, there would be one Crown Attorney?

13 **MS. NETHERY:** As I understand it, yes.

14 **MR. WARDLE:** And then there would be a
15 number of assistant Crown attorneys who report through that
16 Crown attorney; is that correct?

17 **MS. NETHERY:** Yes, that's correct.

18 **MR. WARDLE:** And do you know how many Crown
19 attorneys there were in the United Counties in the 1990s.

20 **MS. NETHERY:** I made some inquiries about
21 that. If I can just have a moment?

22 **(SHORT PAUSE/COURTE PAUSE)**

23 **MR. WARDLE:** It's raining on my parade, Mr.
24 Commissioner.

25 **THE COMMISSIONER:** I thought you were going

1 to steal someone's thunder. As long as the power stays on.

2 **MS. NETHERY:** This is the information that
3 I'd received, and I'm sorry it's not -- it's information
4 received. It's not really that I've had made any personal
5 study of the Cornwall Crown's Office, but as I understand
6 it, from the 1970s to 1992, there was one individual Crown
7 named Donald Johnson. He had two assistant Crowns for most
8 of that time. There were some brief gaps when people left.
9 The longest serving assistant Crown started in 1987 and is
10 still there. The current Crown Attorney became the Crown
11 in 1992, and at that time the office was still one Crown
12 and two assistants.

13 **THE COMMISSIONER:** M'hm.

14 **MS. NETHERY:** Now I'm advised there are
15 seven full-time assistant Crown attorneys and, in addition,
16 one Crown attorney on contract.

17 As well as these Crowns and assistants,
18 there were what we call per diem Crowns used over the
19 years, and those are people usually who are members of the
20 Bar in the local community who are brought in because we
21 just don't have enough Crowns to staff the courts. So
22 that's the information that I have about the Cornwall
23 Office.

24 **MR. WARDLE:** All right.

25 So you wouldn't be able to tell us, for

1 example, how many per diem Crowns were being used at
2 various points in time?

3 **MS. NETHERY:** I don't know the answer to
4 that, no.

5 **MR. WARDLE:** Okay.

6 **MS. NETHERY:** I think if the current Crown
7 Attorney is going to testify, he might be in a better place
8 to answer that.

9 **MR. WARDLE:** All right.

10 And the current Crown Attorney, again, his
11 name is?

12 **MS. NETHERY:** Murray MacDonald.

13 **MR. WARDLE:** And so what you're indicating
14 is that in terms of full-time staff, there's been a fairly
15 significant increase in resources from 1992 to the present?

16 **MS. NETHERY:** That's correct.

17 **MR. WARDLE:** Okay. Now, let me ask you
18 this. For a major case, and let's say a case that involves
19 multiple victims and involves sexual offences, would that
20 kind of case be handled always out of the local Crown's
21 office or would people get involved at a more senior level
22 within the region or in Toronto?

23 **MS. NETHERY:** I think it depends on the
24 exact circumstances of the case, but as you've heard, if
25 it's considered to be complex, perhaps is going to be

1 lengthy, it will be a matter where, say, the local Crown
2 will speak to his or her director and bring in, at this
3 time, the Major Case Management Advisory Group to provide
4 advice on do you need more resources; what kind of
5 structure should be set up in order to prosecute; do you
6 need more Crowns; do you need more Victim Witness
7 Assistance support staff, for example, to help out; are
8 there some special legal issues that you'll need advice on?
9 For example, if there's some consideration of a wiretap
10 being applied for, certainly we have people in the Crown
11 Law Office, Criminal, the Appellate Branch ---

12 **MR. WARDLE:** Right.

13 **MS. NETHERY:** --- who can provide advice and
14 assistance and guidance on that. If there's going to be,
15 say, some sort of a complex search warrant-related issue,
16 similarly, there are people in the Crown Law Office,
17 Criminal, who can assist with that and may actually come to
18 court and do some of the arguments and the applications.

19 So if it's a major case, then usually there
20 will be -- currently, there will be a process whereby the
21 Crown Attorney will notify the director and then the Major
22 Case Advisory Group will be brought in, and that's chaired,
23 just by the way, by James Stewart, Q.C., who is the
24 Director of Crown Operations for the East Region.

25 **MR. WARDLE:** Now, the Major Case Advisory

1 Group, that process came in in what year?

2 MS. NETHERY: In 2001.

3 MR. WARDLE: Right.

4 So prior to that time, how was the process
5 handled for major cases? Was that handled by the Director
6 of Crown Operations for a particular region? Was that that
7 person's call?

8 MS. NETHERY: Well, I think it was a
9 discretionary issue for sure.

10 However, you may recall that I testified
11 about the different processes for handling major cases
12 before the major case management process came in in 2001.
13 So the Crown Law Office, Criminal, in addition to
14 performing -- looking after the appellate prosecutions as
15 well, has always had a trial -- I think they call
16 themselves a Trial Practice Group. And those are
17 individuals who will come in to other jurisdictions and do
18 this routinely upon request of the Director of Crown
19 Operations or the local Crown attorney to assist. For
20 example, if they have expertise in a particular area, if
21 it's an organized crime case, if it's, as you say, a major
22 case involving multi victims in a historical sexual assault
23 case and that the local Crown does not have the expertise
24 or doesn't feel that he has the expertise, then there will
25 be that sort of discussion going on between the Crown, the

1 Director and often the Crown Law Office, Criminal.

2 They have their own Deputy Director in the
3 Crown Law Office, Criminal who looks after those trials.

4 The other thing that has existed since -- I
5 have to go back to my notes, but certainly since the mid-
6 nineties is something called the Director of Public
7 Prosecutions -- Director of Criminal Prosecutions, and that
8 was the function -- that particular group looked after
9 prosecutions relating to police officers or other justice
10 officials. So if, for example, the prosecution involved
11 somebody who was a local police officer in a particular
12 jurisdiction or a judge or a Crown, then that group would
13 be called in.

14 **MR. WARDLE:** But as I understand it, if
15 we're dealing with a case that involves sexual offences or
16 child abuse, for example, with multi victims, there
17 wouldn't be any specific expertise in the Crown Law Office
18 to deal with that. That's something that would be
19 available throughout the province as needed. Have I got
20 that right?

21 **MS. NETHERY:** Well, I think the answer is
22 both.

23 **MR. WARDLE:** Okay.

24 **MS. NETHERY:** Because there certainly are
25 some trial counsel in the Crown Law Office, Criminal, who

1 do have that sort of expertise, but in addition, you know,
2 for example, if you've got a -- we'll say a case in
3 Kapuskasing and the Crown up there doesn't feel comfortable
4 with that, then the Director will see whether or not it's
5 appropriate to bring in somebody from the Trial Division of
6 the Crown Law Office, Criminal, or it may be a Crown from
7 another jurisdiction who has significant experience in the
8 prosecution of child sexual abuse cases.

9 **MR. WARDLE:** Now ---

10 **MS. NETHERY:** I don't know whether that
11 really answers your question.

12 **MR. WARDLE:** No, I think that helps.

13 Just dealing with -- we've lost the chart.
14 I was using the chart as a bit of an aid. You are, I'm
15 sure, pretty familiar with the chart.

16 How do people at the more senior levels of
17 the Attorney General's Office become involved in a specific
18 investigation? For example, if we're talking about a major
19 case, is the Attorney General briefed on major cases on a
20 regular basis? Is that something that's dealt with by the
21 Deputy or at the ADM level?

22 **MS. NETHERY:** I think that it's variable.
23 Certainly if it's a major case we have various -- we have
24 different processes for what we call issues management.
25 And so there may -- I don't know whether you can hear me or

1 not.

2 **THE COMMISSIONER:** Can you hear?

3 **MR. WARDLE:** I can hear Ms. Nethery, but I'm
4 not sure about the rest of them.

5 **THE COMMISSIONER:** We're wired.

6 **MS. NETHERY:** I'll keep on.

7 **THE COMMISSIONER:** Sure.

8 **MS. NETHERY:** Okay. We have an issues
9 management process, so if there are major cases, there are
10 often either oral briefings of the Director, the Assistant
11 Deputy, the Deputy and the Attorney General. There may be
12 some written materials done up for briefings for the
13 Attorney General. It just depends on your definition of a
14 major case.

15 **MR. WARDLE:** I understand that.

16 **MS. NETHERY:** But there certainly is a
17 mechanism to make sure that the Assistant Deputy, the
18 Deputy and the Attorney General are briefed on any
19 significant issues, which would include major cases.

20 **MR. WARDLE:** Now, one of the things you said
21 in your outline was that although -- and I'm paraphrasing -
22 - although in theory the Attorney General can become
23 involved in a specific case, that that's rarely exercised
24 in practice.

25 Can you give us an example of when the

1 Attorney General would become personally involved in an
2 individual prosecution -- not a specific example, but an
3 example of a type of case where that might happen?

4 **MS. NETHERY:** Well, I think there's one
5 that's actually outlined in the Martin Committee Report
6 where there was a federal politician who was facing
7 criminal charges. The criminal charges, I believe, were
8 withdrawn because the individual was a federal politician
9 and it was a very high-profile case. The Attorney General,
10 who at that time was the Honourable R. Roy McMurtry stood
11 up in the House and explained the rationale for withdrawing
12 that charge.

13 So it's an example of the accountability, I
14 guess, in progress.

15 **MR. WARDLE:** Now, I'm going to come to this
16 -- I may come to this if it stops raining. You've dealt
17 with this yesterday and I'm going to ask you some questions
18 about it. You made it very clear in your evidence
19 yesterday that the police have the responsibility of making
20 the decision to lay a charge; correct?

21 **MS. NETHERY:** Yes.

22 **MR. WARDLE:** But, however, there may be
23 circumstances, a number of circumstances where the police
24 ask the Crown for advice of one kind or another before that
25 decision is made; correct?

1 **MS. NETHERY:** Yes, that's correct. In fact,
2 we encourage it on major cases.

3 **MR. WARDLE:** Right.

4 And is that advice -- the giving of that
5 advice by a Crown attorney, is that something that's done
6 at a local level or is that something that's supervised by
7 people further up the management chain?

8 **MS. NETHERY:** Well, I'm sorry to give what
9 may sound like a lawyer's answer, but I think it depends on
10 the circumstances. I think routinely in many, if not all,
11 jurisdictions the police will make appointments to come in
12 and see the local Crown attorney or the assistant Crown
13 attorney, and it may involve advice on, for example, an
14 impaired driving case or it may involve advice on a multi-
15 victim sex offence. So there's a broad range of the types
16 of cases that may come in and there may be advice given by
17 the local Crown attorney or a local assistant Crown
18 attorney to the police.

19 On the other hand, you know, sometimes we'll
20 say -- the local Crown or local assistant will say, "Well,
21 I really think that we should take this up to the Director
22 of Crown Operations or even potentially to the Assistant
23 Deputy Attorney General." So in those sorts of cases, we
24 will move this up the management line, as it were, in order
25 to get some other advice.

1 I mean, the example of, you know, what we
2 just spoke about, about if there's going to be potentially
3 a wiretap application, some Crowns in smaller offices don't
4 have access to the expertise to deal with those.

5 **MR. WARDLE:** Right.

6 **MS. NETHERY:** Just as an example.

7 **MR. WARDLE:** Right.

8 **THE COMMISSIONER:** Okay. Why don't we break
9 for lunch and we'll come back ---

10 **MR. WARDLE:** Thank you, sir.

11 **THE COMMISSIONER:** We'll come back to your
12 cross-examination at 2:00.

13 **THE REGISTRAR:** Order; all rise. À l'ordre;
14 veuillez vous lever.

15 The hearing will reconvene at 2:00 p.m.

16 --- Upon recessing at 12:30 p.m./

17 L'audience est suspendue à 12h30

18 --- Upon resuming at 2:08 p.m./

19 L'audience est reprise à 14h08

20 **THE REGISTRAR:** This hearing of the Cornwall
21 Public Inquiry is now in session.

22 Please be seated. Veuillez vous asseoir.

23 **MARY NETHERY, Resumed/Sous le même serment:**

24 **THE COMMISSIONER:** Ah, the fresh smell of
25 pizza. Were some of you able to get out or did you all

1 order in?

2 (LAUGHTER/RIRES)

3 MR. WARDLE: Most of us were locked in here.

4 THE COMMISSIONER: That's great.

5 MR. WARDLE: But that's what it feels like
6 every day here, sir.

7 THE COMMISSIONER: Oh, come ---

8 (LAUGHTER/RIRES)

9 THE COMMISSIONER: And I thought it was the
10 feeling of being all together. Mr. Wardle, I'm
11 disappointed.

12 Any pizza left?

13 MR. WARDLE: You can take that gold star
14 away.

15 THE COMMISSIONER: No, but any pizza left?

16 (LAUGHTER/RIRES)

17 THE COMMISSIONER: All right.

18 You were saying before the thunder took us
19 away?

20 --- CROSS-EXAMINATION BY/CONTRE-INTERROGATOIRE PAR MR.

21 WARDLE (CONT'D/SUITE):

22 MR. WARDLE: Ms. Nethery, I was asking you,
23 I think before lunch, some questions -- we were shouting at
24 each other -- but about the role of the ---

25 MS. NETHERY: But only in a friendly way,

1 though.

2 **MR. WARDLE:** Yes. Of the role of the Crown
3 in giving advice to the police at the pre-charge stage and
4 I think we had established that there are occasions when
5 that advice is not only given at the local level but
6 involves people up the management chain.

7 **MS. NETHERY:** Yes, that's correct.

8 **MR. WARDLE:** I think that's where we
9 stopped. And one question I had for you was does the
10 advice given by the Crown with respect to the laying of a
11 charge; that is, the advice given to the police, does that
12 ever go up to the political level to the Attorney General's
13 Office?

14 **MS. NETHERY:** I'm not aware of that
15 happening, no.

16 **MR. WARDLE:** And I take it, if it did
17 happen, that would be a real exceptional situation?

18 **MS. NETHERY:** A very exceptional situation,
19 yes.

20 **MR. WARDLE:** And I assume that the reason
21 that the Attorney General wouldn't be involved in that kind
22 of decision would be because of the potential for conflict
23 given his responsibilities, his political responsibilities,
24 if I can put it that way?

25 **MS. NETHERY:** Well, I mean, the Attorney

1 General does perform a dual role, of course, but I think
2 the idea, as we've discussed before, is that we want to
3 ensure that there's no appearance of political influence or
4 interference in, I suppose, on the one hand, the charging
5 decision by the police and, on the other hand, the
6 prosecutorial decision.

7 So recognizing, of course, the Attorney
8 General is essentially the chief prosecutor for the
9 province but he does grant broad areas of discretion to
10 Crowns in order to alleviate any concerns about that,
11 potential appearance, and as well it's just impractical to
12 assume that the Attorney General would in this day and age
13 be able to direct every prosecution in the province when we
14 have about 500,000 criminal charges going through the
15 system every year.

16 And partly, I mean, partly the reason that
17 we have policy guidelines and the reason that we have so
18 much education for Crowns is to make sure that they are in
19 a position to be able to exercise their discretion in an
20 appropriate way and are knowledgeable about the law and the
21 right policy considerations. And that is the direction of
22 the Attorney General; for us to do that.

23 So generally I -- there may be cases where
24 that has happened, but I'm not aware of it and it would be
25 an unusual circumstance.

1 **MR. WARDLE:** Thank you.

2 Can I ask you a few questions about charge
3 screening, and perhaps we could turn up Tab 32 in the
4 document brief?

5 First of all, do I understand that the
6 document at Tab 32 -- if we could just find the front page
7 of that -- is the original policy that came in with the
8 Crown Policy Manual in 1994 and it has since been amended?

9 **MS. NETHERY:** Yes, that's correct. It's
10 essentially been replaced by a new policy which is very
11 brief and a practice memo which I think you also have in
12 the materials at some ---

13 **MR. WARDLE:** Right.

14 **MS. NETHERY:** --- point.

15 **MR. WARDLE:** And the policy, just so that
16 we've got the right reference, the policy is at Tab 36. Do
17 I have that right?

18 **MS. NETHERY:** No.

19 **MR. WARDLE:** Can you give me the correct
20 reference for it, if you don't mind?

21 **MS. NETHERY:** I don't know whether I can or
22 not.

23 **MR. WARDLE:** You might also try Tab 38.

24 **MS. NETHERY:** Okay. Well, Tab ---

25 **MR. WARDLE:** No, that's recanting witnesses.

1 That's a little more specific.

2 MS. NETHERY: Okay. All right. Let's just
3 go back a little bit.

4 The new charge screening policy which was
5 issued as a part of the new 2006 Crown Policy Manual is
6 found at Tab 40 ---

7 MR. WARDLE: Thank you.

8 MS. NETHERY: --- in my materials.

9 MR. WARDLE: All right.

10 MS. NETHERY: And then the companion to it,
11 the companion piece to it is the charge screening practice
12 memo which is located at Tab 37. So those ---

13 MR. WARDLE: I have it half right. And the
14 previous document was a single document which is the
15 document at Tab 32?

16 MS. NETHERY: Yes, that's right.

17 MR. WARDLE: All right.

18 So ---

19 MS. NETHERY: Can I just put in a couple of
20 caveats? I mean the caveats ---

21 MR. WARDLE: Sure.

22 MS. NETHERY: --- are that the original
23 document at Tab 32, the charge screening policy, did have
24 the commentaries that were issued as well. There was one
25 in 1995 which was a general charge screening commentary on

1 how to apply the reasonable prospect of conviction test
2 specifically and relating to the single fragile witness and
3 a discussion of that. It was issued, I think, under the
4 name of Michael Code who was the ADAG at that time, and
5 then the second commentary is one relating to recanting
6 witnesses and how to apply charge screening to those. So
7 that's the -- just to be complete in my answer, those are
8 the original documents relating to charge screening.

9 **MR. WARDLE:** And those are in the materials,
10 I believe?

11 **MS. NETHERY:** Yes, they are.

12 **MR. WARDLE:** All right.

13 Well, let's just look, if we can, for a
14 moment at Tab 32.

15 **MS. NETHERY:** Okay.

16 **MR. WARDLE:** So this would have been in
17 effect between January of 1994 until it was replaced in
18 2002. Do I have that right?

19 **MS. NETHERY:** Yes, that's correct.

20 **MR. WARDLE:** And if we turn to page 3, these
21 aren't numbered pages unfortunately, at least in my version
22 they're not numbered, but there's a discussion of the
23 "Threshold Test - Reasonable Prospect of Conviction" and
24 then, as you indicated, there's a companion memo from Mr.
25 Code that goes into more detail. Have I got that right?

1 **MS. NETHERY:** Yes, that's correct.

2 **MR. WARDLE:** Can I just ask you briefly
3 about the public interest? And do I understand, first,
4 that in charge screening you don't get the public interest
5 unless there is a reasonable prospect of conviction? In
6 other words, if the Crown concludes that there is not a
7 reasonable prospect of conviction, you don't get the second
8 issue. Correct?

9 **MS. NETHERY:** That's correct.

10 **MR. WARDLE:** And then I see here there's a
11 list of factors that must be excluded from consideration in
12 determining the public interest. So, for example, some of
13 this is obvious: the accused' race, religion, sex,
14 national origin, political associations or status in life
15 is one of the factors. And then I see in item (iii):

16 "...any partisan political advantage or
17 disadvantage which might flow from the
18 decision to undertake or stop a
19 prosecution;"

20 I think that's obvious as well.

21 One of the questions I had for you is
22 whether in considering the public interest test the Crown
23 has any obligation to look at the position of the potential
24 offender within the community; i.e. whether it's a person
25 of some influence or notoriety in the local community?

1 **MS. NETHERY:** I think that that is
2 specifically excluded from our consideration by virtue of
3 section 3(b)(iv) which is:

4 "...the possible effect on the personal
5 or professional circumstances of anyone
6 connected to the prosecution
7 decision..."

8 So in other words, if somebody is a person
9 of high standing in the community and there's an allegation
10 of a sexual abuse, that is not something that we would take
11 into account. That person should be treated as somebody
12 who is perhaps in a different socioeconomic status.

13 **MR. WARDLE:** Now, in terms of the list of
14 public interest factors that the Crown should take into
15 account, and I see that they're not -- that the Crown may
16 take into account I think is the better way of putting it
17 and it's a ---

18 **MS. NETHERY:** Yes.

19 **MR. WARDLE:** It's not an exhaustive list.
20 But perhaps you could just give us some examples of this
21 because we really didn't deal with this yesterday, and let
22 me just pick a couple of them for you, if you don't mind.

23 Can you give us an example of the
24 circumstances and views of the victim, for example?

25 **MS. NETHERY:** Well, here's a -- yes. Here's

1 an example. Let's assume that we barely have a reasonable
2 prospect of conviction. It's not -- we passed the test but
3 it's not what we might call a very strong case. We've had
4 some contact with the victim. The victim would like us to
5 resolve it on a guilty plea if possible. The victim isn't,
6 say, concerned about the sentence but they want to have
7 that acknowledgment of guilt. So armed with that -- those
8 -- and this is a simplistic way of looking at it, but I
9 assume you don't want the two-hour explanation; you'd
10 rather have the short, brief explanation. So armed with
11 that information, one might approach the defence counsel to
12 canvass whether or not there is a possibility of resolving
13 the case based on, say, a guilty plea to -- if there are
14 five charges, maybe to one charge, maybe to a lesser
15 charge, knowing that -- you know, understanding as well
16 that that may be in the broader public interest in terms of
17 protecting the public. But that's an example of the kind
18 of situation that we sometimes face.

19 It may be, however, that the victim would
20 come to us in those circumstances and say, you know, "I'd
21 really like you to resolve it and I don't care whether the
22 individual goes to jail." It may be a case where we've
23 looked at the broader public interest and the case law and
24 as a Crown we feel that we should be proceeding and that
25 there should be a period of incarceration, and that's

1 something we would have to explain to the victim.

2 But that's the sort of thing that comes into
3 play for us.

4 **MR. WARDLE:** M'hm.

5 **MS. NETHERY:** So we certainly want to hear
6 from them, but it's not necessarily going to be
7 determinative understandably because we've got some broader
8 concerns.

9 **MR. WARDLE:** What if the victim says to you,
10 "I'm no longer interested in this process. I just no
11 longer want to participate in it", is that a factor that
12 you take into account in considering the public interest?

13 **MS. NETHERY:** That would be one factor to
14 consider among others, yes.

15 **MR. WARDLE:** And are there any special
16 considerations that go into play in considering that factor
17 in a child abuse case?

18 **MS. NETHERY:** Well, the obvious concern is
19 to ensure that the public are protected from that alleged
20 abuser. I mean, that's one, clearly, a very important
21 concern that we have. So that's one example.

22 **MR. WARDLE:** Let me just go down, and I'm
23 not going to go through the whole list, but one of the
24 other factors is (iv):

25 "the need to maintain public confidence in

1 the administration of justice;"

2 Can you give me an example of where that
3 might be a factor that a Crown would consider?

4 **MS. NETHERY:** Well, I think, as we all know,
5 child abuse -- are we still dealing with the child abuse
6 example? Is that the idea?

7 **MR. WARDLE:** We don't have to. I just
8 wanted you to give me an example of when that factor might
9 come into play.

10 **MS. NETHERY:** Okay. Well, you know, I think
11 it's -- one example would be where we have a reasonable
12 prospect of conviction and I think the example that we
13 talked about, about the victim perhaps coming forward and
14 saying, "Well, I don't want to go ahead", the Crown maybe
15 knows that the individual has a previous record and has
16 some information about the psychiatric status of the
17 individual, which suggests that he or she is a continuing
18 danger to the public. So there's the issue about
19 protection of the public but also an issue about
20 maintaining public confidence in the administration of
21 justice that we, as Crowns, are as we say not there as
22 lawyers for the victims, not there seeking to obtain a
23 conviction at all cost but want to make sure that the
24 public feel that they're well represented in terms of us
25 proceeding in a case of that nature.

1 So quite often that may -- well, not
2 necessarily, but it may intersect with protection of the
3 public.

4 So those are examples. They're not
5 exhaustive. You can add in, I suppose, as we do in law
6 school, any number of factors or situations, and the
7 decision could change.

8 **MR. WARDLE:** Right.

9 **MS. NETHERY:** And I think the other thing
10 that we say when we are talking about making a charge
11 screening decision is that because there are a number of
12 factors that we're looking at, because it is discretionary,
13 that sometimes reasonable, intelligent people can disagree
14 on the final decision.

15 **MR. WARDLE:** Now, am I right that when a
16 charge is terminated -- and forgive me if I don't use the
17 right terminology, but that's the phrase that is used here.
18 If you look at the first page of the tab we are looking at,
19 it says:

20 "The decision to continue or terminate
21 a prosecution..."

22 So when I think of terminating a
23 prosecution, I think of the charges being withdrawn. Would
24 that be correct?

25 **MS. NETHERY:** No, it's not necessarily

1 correct. It could be withdrawn, it could be a consent to
2 an acquittal or it could be a stay.

3 **MR. WARDLE:** All right. And if ---

4 **MS. NETHERY:** Because it's a continuing
5 obligation and so the issue about the lack of a reasonable
6 prospect or public interest can arise at any stage of the
7 prosecution.

8 **MR. WARDLE:** And if a decision is made to
9 terminate a prosecution in one of those three ways, are the
10 reasons for that decision always public?

11 **MS. NETHERY:** We recommend that the Crown
12 provide some reasons on the record for the decision to
13 terminate the prosecution. There are some circumstances,
14 however, where that may not be appropriate and, you know,
15 if there are other sort of issues relating to interference
16 with another -- potential interference with another
17 criminal investigation, if it relates -- if the reason
18 relates to a confidential informer, then the reasons may
19 not be fully put on the record. But we do recommend as a
20 matter of public accountability that the Crown put as many
21 reasons on as they can that would be in the best interest
22 of justice.

23 So I don't know, for example, if there were
24 a very significant concern that the complainant or the
25 alleged victim was simply totally incredible and there was

1 incontrovertible evidence that he or she was lying, it may
2 not be appropriate to put very full reasons on the record
3 about that sort of thing because we're not here to
4 embarrass specific individuals in terms of our decisions.

5 So I hope that answers your question.

6 **MR. WARDLE:** Now, am I right that if a
7 decision is made by the police not to lay a charge based on
8 advice received from the Crown, that ordinarily that would
9 not be public?

10 **MS. NETHERY:** I think that's correct.

11 **MR. WARDLE:** In fact, it would be unusual
12 for the police to announce publicly that they were not
13 laying a charge or the reason for not laying a charge. Is
14 that fair?

15 **MS. NETHERY:** I think that's right.

16 **MR. WARDLE:** Okay. Now, can I ask you
17 briefly about Tab 30.1 and again, this is a Crown policy
18 which has been updated. So let me make sure we have got
19 the ---

20 **(SHORT PAUSE/COURTE PAUSE)**

21 **MR. WARDLE:** I have at Tab 30.1 what I
22 understand to be the original policy dated August of 1997.
23 And then I understand that there is now a practice
24 memorandum dated March of 2006, and that's at Tab 31.

25 **MS. NETHERY:** That's right.

1 **MR. WARDLE:** And so I understand that this
2 policy deals with a number of matters, but the one I'm most
3 interested in is the charging decision, which really starts
4 under the heading "Pre-Charge" on the second page. And
5 you've already spoken about this, I think, at some length
6 yesterday; the fact that the police may seek advice from
7 the Crown on a number of matters before charges are laid,
8 including things such as statements, use of undercover
9 agents, charter issues, I assume, search and seizure
10 issues, those kinds of things. Correct?

11 **MS. NETHERY:** Yes, that's right.

12 **MR. WARDLE:** And then it indicates on the
13 third page of this memorandum that the police will from
14 time to time seek advice from the Crown on whether to lay
15 an information. And there are a number of steps which are
16 outlined here. This is at the very bottom of the third
17 page.

18 First of all, from what I see, I understand
19 that the Crown is really being advised to make sure that
20 they get the facts from the police by way of a written
21 investigative brief. Correct?

22 **MS. NETHERY:** Yes, our advice can only be as
23 good as the facts that we're given and then everybody is
24 clear on exactly what the understanding was by receiving a
25 written brief.

1 **MR. WARDLE:** And then I take it that the
2 next part really indicates that, if at all possible, the
3 advice given should be in writing for obvious reasons, so
4 there's a written record.

5 **MS. NETHERY:** Yes. "Where feasible", I
6 think, is the terminology.

7 **MR. WARDLE:** And then over on the next page,
8 I take it that there are occasions where because the tests
9 are different, the test for the police, if I can put it
10 that way, is different from the test for the Crown.
11 Correct?

12 **MS. NETHERY:** Yes.

13 **MR. WARDLE:** There will be occasions where
14 reasonable grounds exist to lay an information, but the
15 Crown is already of the view at that early stage that there
16 is not a reasonable prospective conviction. Correct?

17 **MS. NETHERY:** Yes, that's right.

18 **MR. WARDLE:** And in those cases, the policy
19 provides that it's appropriate to tell the police that
20 although reasonable grounds exist and that while that
21 decision rests with the police, any charge laid will be
22 withdrawn by the Crown and the reasons for the withdrawal
23 put on the record.

24 **MS. NETHERY:** Yes, that's right.

25 **MR. WARDLE:** Okay. Now, is it fair to say

1 that in those circumstances, it would be very unusual for
2 the police to go ahead and lay the information, having been
3 told by the Crown that if they do so the charge will be
4 withdrawn?

5 **MS. NETHERY:** It is unusual. I guess what I
6 would say, though, is that every case turns on its
7 individual circumstances. There are some cases where given
8 the seriousness of the matter that the police are concerned
9 with, the police may say and they may be dealing with a
10 relatively junior or inexperienced Crown, they may say I
11 think quite properly, "Well, we would like to have another
12 opinion about this". Or the Crown himself or herself may
13 decide to have another opinion. You know how we just --
14 you were asking me questions about do some things sometimes
15 go to directors? Do some things go to the Assistant Deputy
16 Attorney General? And the answer is, "Yes, they do". And
17 sometimes we will bring in other Crowns to do a review.

18 So if it is a serious case and the police
19 are concerned about the advice that they're getting,
20 there's nothing wrong, and in fact it's entirely proper,
21 for them to say, "Can we move this up to" -- if it's an
22 Assistant Crown Attorney, "Can we move it up to the Crown
23 Attorney for the jurisdiction? Can we take it from there
24 to the director? Can we bring in a group of Crowns?"

25 Because I don't know that any of us as

1 individuals pretend to have all of the answers all of the
2 time.

3 **MR. WARDLE:** M'hm.

4 **MS. NETHERY:** So if I can put it in that
5 sort of a context that yes, once the matter has been fully
6 reviewed by senior counsel and that the -- I guess it's not
7 a formal appeal route, as it were, but once there has been
8 that review sort of by the Crown, by the director and
9 perhaps other people who have been brought in, at that
10 point in time, if the Crown provides the advice that we do
11 not believe there is a reasonable prospect of conviction
12 and so we would withdraw the charge, then I think at that
13 point it would be unusual for the police to lay it, but
14 they still are in a position to do so. It's a part of the
15 system of checks and balances in our system.

16 **THE COMMISSIONER:** Well, that having been
17 said, have you ever heard of anyone following that route
18 and then the police force saying, "I'm going to go ahead
19 and lay the charge"?

20 **MS. NETHERY:** When there's been a full
21 review by different levels of Crowns?

22 **THE COMMISSIONER:** M'hm.

23 **MS. NETHERY:** I am not personally aware of
24 that.

25 **THE COMMISSIONER:** Okay. Thank you.

1 **MR. WARDLE:** Now, I want to ask you just a
2 few questions, if I may, about the parts of the Crown
3 Policy Manual that deal with child abuse and sexual
4 offences.

5 First of all, we might just turn up Tab 59.
6 Now, Tab 59, as I understand it, is the original policy, C-
7 3, that was made part of the original Crown Policy Manual
8 in 1994. Correct?

9 **MS. NETHERY:** That's right.

10 **MR. WARDLE:** And that policy was recently
11 superseded by the document that we looked at a little
12 earlier, Exhibit 47?

13 **MS. NETHERY:** Yes, that's correct.

14 **MR. WARDLE:** And I am not going to take you
15 to these now, but there's also a companion policy on sexual
16 assault, and the original policy was at Tab 60. Maybe we
17 could just turn that up for one minute.

18 **(SHORT PAUSE/COURTE PAUSE)**

19 **MR. WARDLE:** I'm going to get you flipping
20 between too many tabs, Ms. Nethery.

21 **MS. NETHERY:** It's okay.

22 **MR. WARDLE:** If you just look at the screen.

23 **MS. NETHERY:** I'll look at the screen but
24 sometimes I -- I still sometimes have one foot in the paper
25 world, if you'll excuse me.

1 **MR. WARDLE:** No, you don't need to apologize
2 to this room.

3 So in 1994 there was a policy on sexual
4 offences that was part of the Crown Policy Manual. That's
5 at Tab 60 that's presently on the screen. And then that
6 was also replaced very recently and that's Exhibit 48.
7 Have I got that right?

8 **MS. NETHERY:** Yes, that's right.

9 **MR. WARDLE:** Now, do I have it right that
10 charges involving historic sexual abuse of adults when they
11 were children would involve both policies?

12 **MS. NETHERY:** Yes, that's right.

13 **MR. WARDLE:** And the reason for that, I
14 think, is obvious; that we have adults who are making
15 allegations regarding sexual offences, but they also
16 involve child abuse. So a Crown would want to look at both
17 policies together?

18 **MS. NETHERY:** Yes, that's correct.

19 **MR. WARDLE:** Okay. Now, I wasn't sure I
20 caught this this morning. Was there any policy on either
21 of these areas in place prior to the Crown Policy Manual
22 coming in force in 1994?

23 **MS. NETHERY:** There were the 1988 Directives
24 and Guidelines, and there was either one or two directives
25 or guidelines relating to interviewing child victims and, I

1 think, early assignment of the cases and I believe that
2 those are in the materials, but those were very brief, one
3 or two paragraph statements. So in terms of actual policy
4 advice, there was not, but if you recall some of the
5 educational materials ---

6 **MR. WARDLE:** Yes.

7 **MS. NETHERY:** --- we did a significant
8 amount of education with Crowns before the policies came
9 out in 1994. And that was quite frankly -- I guess, as
10 lawyers, as Crowns, we are more in the oral tradition and
11 so I think that was where our focus was originally in terms
12 of ensuring our Crowns were able to practise well in the
13 courts.

14 **MR. WARDLE:** Well, if I can look briefly at
15 Tab 59, which is Policy C-3, I take it by -- if you look at
16 the second page at the very top, clearly this is a message
17 to Crowns handling day-to-day prosecutions that these kinds
18 of prosecutions are to be treated in a special fashion.
19 Would you agree with that?

20 **MS. NETHERY:** Yes, that's right.

21 **MR. WARDLE:** They're being given some
22 priority?

23 **MS. NETHERY:** Yes, they are.

24 **MR. WARDLE:** And that's been the case since
25 1994 right through to today; correct?

1 **MS. NETHERY:** That's correct.

2 **MR. WARDLE:** And it's also the case with
3 sexual offences?

4 **MS. NETHERY:** Yes, and it's the case with
5 impaired driving and domestic violence and currently gun
6 violence. So there are certain things that are indicated
7 as being high-priority items, and this is one of them.

8 **MR. WARDLE:** And you'll see, if you look
9 again on the second page, there is a heading "Local Child
10 Abuse Coordinator". It says:

11 "The Attorney General has implemented a
12 program of training resulting in one or
13 more Crown counsel in the local Crown
14 Attorney's Office being designated as
15 child abuse coordinators."

16 I wasn't quite sure what that meant, whether
17 that meant this is in process or we've completed it.

18 Do you know if by 1994 every Crown's office
19 across the province had someone designated as the local
20 child abuse coordinator?

21 **MS. NETHERY:** You know, I'm not sure whether
22 we actually had them designated by 1994 or whether it was
23 pursuant to this policy that there was a more formal
24 designation.

25 I do know that there was training to ensure

1 that somebody was designated in each Crown's office before
2 the release of this manual. I also know that the training
3 continued on after that on an annual basis so that
4 sometimes there would be a shift or a change. You know,
5 one person would leave that Crown's office. Another person
6 would be designated as the coordinator.

7 **MR. WARDLE:** Yes.

8 And do you know at all whether someone in
9 the Cornwall Crown's Office had that training?

10 **MS. NETHERY:** I would only assume yes, but I
11 can't say from any personal knowledge.

12 **MR. WARDLE:** And then over the next page
13 there's a section headed "Vertical Prosecution and
14 Designated as Staff". I take it what this is indicating is
15 that the Crown should attempt, wherever possible, to have
16 these prosecutions handled by the same Crown right through
17 the process, one person, if possible?

18 **MS. NETHERY:** Yes, that's right.

19 **MR. WARDLE:** And then over towards the end
20 of this, I think on the very last page, there's a heading
21 "Multiple Victims and Multiple Offenders".

22 **MS. NETHERY:** Oh, yes, m'hm.

23 **MR. WARDLE:** Now, I don't know if you had a
24 hand in drafting this particular policy, Ms. Nethery? Did
25 you?

1 **MS. NETHERY:** Yes, I did.

2 **MR. WARDLE:** All right.

3 Was this particular section -- did this
4 arise out of any particular set of advance or prosecutions?

5 **MS. NETHERY:** I can't say that it
6 specifically did, no. This was something that was drafted
7 by the counsel and the Victim Witness Office together with
8 myself. Now, perhaps she had something in mind. I can't
9 say that I did. I think there was just a growing
10 recognition that we had an increasing number of cases with
11 multiple victims and multiple offenders. It was for us a
12 relatively new thing. And so I think we felt that we
13 should at least provide some advice to Crowns about how to
14 handle it, and it's perhaps not as much advice as we might
15 like or provide in today's milieu, which I think we've done
16 in part by the major case management process, but ---

17 **MR. WARDLE:** Right.

18 **MS. NETHERY:** --- it was an attempt or an
19 effort to let people know that these cases were coming
20 along and that they needed some special attention because
21 of the complexity and the potential seriousness.

22 **MR. WARDLE:** Now, what I don't see in this
23 policy or in the sexual offence policy, Tab 60, is anything
24 dealing with historical allegations. You certainly pointed
25 out this morning that there's something in the new policy.

1 **MS. NETHERY:** I think that's correct, that
2 there wasn't anything in 1994 that specifically referred to
3 historical sexual abuse cases, and again, to be fair and to
4 be frank, that was a very new phenomena, if I can -- it
5 isn't a phenomena now, but it seemed like one at the time,
6 and so it probably wasn't something that we specifically
7 put policy advice in regard to, but by the same token, I
8 think common sense would indicate that both of these
9 policies would apply to historical sexual abuse cases.

10 **MR. WARDLE:** Right.

11 Although, just to sort of -- I mean, by that
12 time, by the time you were writing the original Crown
13 Policy Manual, we had had the events of Mount Cashel and
14 we'd also had some events here in Ontario, had we not, that
15 had led to prosecutions relating to historic allegations of
16 abuse in institutions?

17 **MS. NETHERY:** I remember there was
18 Grandview, St. Joseph's and a third one, but I ---

19 **MR. WARDLE:** Alfred.

20 **MS. NETHERY:** I'm sorry -- yes. And I just
21 don't recall the exact timing of those, whether those were
22 before the Crown Policy Manual was issued or after, but
23 certainly I think it was known that there were -- we were
24 starting to have allegations of historical sexual abuse,
25 yes.

1 **MR. WARDLE:** Okay. And then looking very
2 quickly at the new policy for sexual offences, sexual
3 assault and other sexual offences, Exhibit 48, you pointed
4 out this morning, I think, that it does have -- and this
5 was in response to a question the Commissioner asked
6 yesterday -- I think you pointed out that there is a
7 reference to historic allegations of sexual offences on
8 page 4 of that policy.

9 **MS. NETHERY:** Yes, that's right.

10 **MR. WARDLE:** I wanted to just direct you
11 quickly to page 5 which, if you look at Item "C", it has a
12 somewhat more extensive discussion of allegations of a
13 historical nature. Do you see that?

14 **MS. NETHERY:** I'm sorry; you're looking at
15 page?

16 **MR. WARDLE:** I'm looking at page 5 under the
17 heading, "C) Communication Between Crown Attorneys Offices
18 and Police Regarding Sexual Offences Cases".

19 **MS. NETHERY:** Okay.

20 **MR. WARDLE:** And you'll see it suggests
21 that:

22 "The Crown Attorney in each
23 jurisdiction, together with the local
24 sexual offences coordinators should
25 liaise with local police services to

1 address the inherent challenges of
2 cases involving a large number of
3 victims and/or multiple offenders,
4 particularly where the allegations are
5 of a historical nature."

6 **MS. NETHERY:** Yes, thank you. That's right.

7 **MR. WARDLE:** And first of all -- pardon me
8 if I'm asking you to repeat something that is obvious --
9 but what are the challenges of these cases from a
10 prosecutor's perspective, allegations of a historical
11 nature where there are a large number of victims and/or
12 multiple offenders?

13 **MS. NETHERY:** Well, I can give you some of
14 the challenges. I don't know that I can outline every
15 single one, but one of the things is, of course, with the
16 passage of time, other supporting evidence is not
17 necessarily available. So the people who might have been
18 neighbours or witnesses may not be there. If the
19 allegations involve institutions or children who have been
20 in institutions, the records may not be available anymore.

21 I think we talked a little bit about the
22 fact that there may be different charges. In other words,
23 it may be a case where it's pre-1983 when the charges may
24 have been, say, rape or indecent assault as opposed to the
25 current sections of sexual assault or some of the offences

1 involving sexual interference.

2 Those are a few. I don't know how much you
3 would like to go into.

4 **MR. WARDLE:** And has the Crown's Office, the
5 Crown Law Division ---

6 **MS. NETHERY:** The Criminal Law Division.

7 **MR. WARDLE:** --- the Criminal Law Division,
8 over time, built up some expertise in dealing with these
9 cases?

10 **MS. NETHERY:** Well, I would say that the
11 answer is yes because so many of the sexual offence cases
12 do involve historic -- allegations of historical sexual
13 abuse or historical allegations of sexual abuse, but
14 usually we don't see one Crown who would specialize, for
15 example, in historical sexual abuse of children, as opposed
16 to sexual abuse of children, because sometimes there is a
17 significant amount of overlap between the two areas. So
18 yes, there is expertise in that area.

19 **MR. WARDLE:** I guess one of the things I'm
20 wondering, and this takes me back to some questions I asked
21 before lunch, when a major case comes in, and it has this
22 kind of mix, multiple victims, historical allegations of
23 child abuse, you don't have a specific group within the
24 Ministry that these cases get assigned to, but you're
25 telling me, I take it, that there is expertise that would

1 be brought to bear on it?

2 **MS. NETHERY:** Well, yes, and I think what
3 I've explained is unfortunately, these sorts of cases are
4 very prevalent and yet often, as Rix Rogers says, often
5 hidden. So virtually every jurisdiction in the province
6 now, I think, has to prosecute child abuse and sexual
7 assault cases.

8 So in terms of the expertise, it is indeed
9 spread throughout the province, but it's also because of
10 the fact that we do have some individuals in the Crown Law
11 Office, Criminal, which is a member of the Appellate Branch
12 but has a small trial group. Some of those individuals do
13 have specific expertise in the area of child abuse and
14 sexual offences.

15 And I think I've mentioned to you as well
16 that when it is one of these cases, these major and more
17 complex cases, then the case is to be referred to the Major
18 Case Management Advisory Group, and that group can provide
19 advice as to whether or not an outside Crown should be
20 brought in, how many Crowns they need on the case, because
21 there may be, say, disclosure issues that come up. You may
22 need to have one Crown who's really designated as the
23 disclosure Crown if there are thousands of pages of
24 disclosure. It may be a case where there really should be
25 a specialized police team, and we may have to contact the

1 local police service or the OPP. Quite often the police
2 recognize that and do that in any event, but there has to
3 be sort of a good division of responsibilities between the
4 police and the Crown, and that has to be looked at.

5 So right now what we do, as I say, is we
6 bring in this Major Case Advisory Group if it is a major --
7 considered to be a major prosecution, and these multiple
8 offender/multiple victim cases generally fall into that
9 category, according to our rules.

10 If we take the Grandview case, for example,
11 I wasn't personally involved in it, but I do know that
12 there were outside Crowns who were brought in to assist,
13 and there were Victim Witness staff assigned directly to
14 that prosecution and investigation. It was a case,
15 allegations of abuse by officials in a training school
16 setting, and that was certainly before the major case
17 management process came in.

18 So there have been more informal processes
19 around the province to deal with these sorts of things, and
20 it's not always -- what shall I say -- it's not always a
21 matter of expertise. There can be some other issues that
22 come into play. I can just take an example where I was
23 asked to prosecute in another jurisdiction, and the reason
24 was the victims were boys, and they had been allegedly
25 abused by males and were not -- they couldn't relate to the

1 male prosecutors no matter how good they were in terms of
2 their courtroom expertise. So I was asked to go in and do
3 it, I guess, because it was an easier rapport.

4 So there are a number of factors that will
5 go into the decision about who should be prosecuting a
6 case. We can't kind of pigeonhole them and say, "Well,
7 this is absolutely the way to do it." But the major case
8 process, I think, has enough flexibility in it to allow for
9 those sorts of decisions.

10 **MR. WARDLE:** All right.

11 Let me switch topics. I wanted to ask you a
12 little bit about delay and Askov, and I know this is a
13 problem that your Ministry has grappled with for a long
14 time.

15 Does the Ministry keep statistics on how
16 many charges are dismissed as a result of delay around the
17 province?

18 **MS. NETHERY:** Yes, we do.

19 **MR. WARDLE:** Do you have those statistics or
20 can you make them available to us for the east region going
21 back to the early 1990s?

22 **MS. NETHERY:** I will have to take that under
23 advisement. I know that we do keep statistics. It's just
24 not something that I informed myself about before I came
25 here, in terms of the exact numbers.

1 **MR. WARDLE:** Well ---

2 **MS. NETHERY:** We certainly do know the
3 number post Askov. It was 50,000 at least.

4 **MR. WARDLE:** Yes.

5 When you were considering allocation of
6 resources to a particular region or to a particular Crown's
7 office, is statistical material something that, you know,
8 the Ministry looks at?

9 **MR. NETHERY:** Yes, absolutely. It's not one
10 of my areas of expertise, but we do have a divisional
11 planning area. We've also actually, just in the last two
12 months, created a new position. It's called the Director
13 of Legal Resources. That individual is tasked directly
14 with grappling with how we assign our resources because it
15 is just a very -- it's a vexing problem.

16 **MR. WARDLE:** No, and I understand it's a
17 very complex problem, but one of the issues we may be
18 interested in here is whether delay has been a factor in
19 contributing to some of the -- to the termination of some
20 of the charges in the Project Truth cases. So I'm just
21 wondering if those statistics are available.

22 I guess what I'll do is just leave my
23 request on the record, Mr. Commissioner. I'm not sure it's
24 really for this witness to answer, but perhaps Commission
25 counsel can take it up at the appropriate time.

1 **THE COMMISSIONER:** Exactly. That's fine.

2 Thank you.

3 **MR. WARDLE:** And a related question, a
4 little bit related, but when you have a major prosecution
5 that is unsuccessful, is there a post-mortem process that
6 takes place within your Ministry?

7 **MS. NETHERLY:** Yes, the Major Case Advisory
8 Group will take a look at it in terms of lessons learned;
9 what should we be doing differently in the future; are
10 there implications in terms of general changes in process
11 and procedure?

12 **THE COMMISSIONER:** I'm sorry; when was that
13 instituted?

14 **MS. NETHERY:** In 2001 it started.

15 **MR. WARDLE:** Did you have any process in
16 place prior to 2001 or was it a more informal process?

17 **MS. NETHERY:** It was an informal process.
18 No, we didn't have a formalized process in place.

19 **MR. WARDLE:** And I'm assuming, Ms. Nethery,
20 that you've been involved in prosecutions where there's
21 both the prosecution in a parallel civil proceeding?

22 **MS. NETHERY:** Yes.

23 **MR. WARDLE:** And have you been involved or
24 can you tell us about what the Crown's policy is in
25 situations where, for example, there's been a civil

1 settlement and the complainant no longer wants to proceed
2 with the criminal prosecution?

3 **MS. NETHERY:** Well, I don't think ---

4 **MS. McINTOSH:** Is there a question about
5 whether there's a Crown policy that ---

6 **MR. WARDLE:** Yes.

7 **MS. McINTOSH:** Okay.

8 **MS. NETHERY:** No, there isn't.

9 **MR. WARDLE:** Okay.

10 And I take it you're not the person to ask
11 about any policy on the civil side of the Ministry dealing
12 with confidentiality agreements in the context of
13 settlements? It's not your area of expertise?

14 **MS. NETHERY:** No, that would not --
15 definitely not be my area of expertise.

16 Now, I'm sorry; I just want to go back to
17 your previous question, if I might, when you say is there
18 any police about that. No, there isn't, but I think it's
19 something that would fall within the charge screening
20 policy.

21 **MR. WARDLE:** So it would be one of the
22 public interest factors that would be considered?

23 **MS. NETHERY:** Yes, remembering that the
24 public interest factors can either dictate in favour of or
25 against a prosecution.

1 MR. WARDLE: Thank you.

2 MS. NETHERY: Or may be neutral for that
3 matter.

4 MR. WARDLE: Thank you very much.

5 MS. NETHERY: You're welcome.

6 MR. WARDLE: Those are all my questions.

7 THE COMMISSIONER: Thank you.

8 Mr. Lee.

9 MR. LEE: Good afternoon, Mr. Commissioner.

10 THE COMMISSIONER: Good afternoon.

11 --- CROSS-EXAMINATION BY/CONTRE INTERROGATOIRE PAR

12 MR. LEE:

13 MR. LEE: Good afternoon, Ms. Nethery. My
14 name is Dallas Lee. I'm counsel for the Victims Group.

15 I'd like to take you to page 7 of your
16 outline, please. Specifically, I'm looking at the fourth
17 bullet on that page under the heading "Crown Policies -
18 Crown Policy Manual". It reads that:

19 "Policies provide the overall
20 philosophy, direction and priorities of
21 the Ministry and do not usually purport
22 to provide specific or absolute
23 direction in all cases."

24 I'm wondering if you can give us an example
25 of when a policy would purport to provide specific or

1 absolute direction.

2 **MS. NETHERY:** Well, I think that if you look
3 at the policy -- or not the policy but the practice
4 memorandum relating to child abuse, and we reviewed that
5 this morning, and it says that if there's a reasonable
6 prospect of conviction on a child abuse-related case, that
7 the Crown must not withdraw the case, absent exceptional
8 circumstances, and only then with the consent of the Crown
9 attorney. So that's a much more directive sort of a
10 policy.

11 The other areas, again, in the child abuse-
12 related practice memo, the Crown must not bargain away or
13 use as a bargaining chip things like the minimum mandatory
14 sentences, the DNA orders and the sex offender registry
15 orders.

16 So those are examples.

17 **MR. LEE:** And as far as you understand it,
18 the sex abuse policy that you just mentioned, would that
19 deal ---

20 **MS. NETHERY:** That's the child abuse policy
21 that ---

22 **MR. LEE:** Child abuse policy.

23 **MS. NETHERY:** --- I was referring to.

24 **MR. LEE:** Would that deal with historic
25 cases of child abuse as well, as far as you understand it?

1 **MS. NETHERY:** Yes, they would.

2 **MR. LEE:** So if it was an adult who was
3 complaining about abuse while a child, that would still
4 apply?

5 **MS. NETHERY:** Yes, it would.

6 **MR. LEE:** I'd like to change topics and move
7 to the charge screening policy that was issued in 1994. I
8 think your discussion of that in your materials begins at
9 page 18.

10 You mention in your outline that -- at the
11 third bullet under heading 12 that:

12 "It should be recognized that charge
13 screening, as it is practiced today by
14 Crown counsel, is a relatively new
15 process that arose out of the
16 recommendations from the Martin
17 Report."

18 I'm not exactly clear on what the test was
19 before 1994.

20 **MS. NETHERY:** There was not a formalized
21 test. There was no policy. It was -- as I understand it,
22 the test was whether there was a) a triable case, and b)
23 whether it was in the public interest to proceed, and I
24 think I would refer you to the chapter in the Martin
25 Committee Report dealing with charge screening. There's a

1 fairly good discussion of that issue there. But there was
2 always a question what is a triable case. It was not
3 defined and, likewise, the public interest factors were not
4 well defined.

5 **MR. LEE:** So there wouldn't have been a
6 single document that you could have looked to in 1992 to
7 tell you exactly what a triable case is?

8 **MS. NETHERY:** No, it would not. Absolutely
9 not.

10 **MR. LEE:** You spoke a little while ago with
11 Mr. Wardle about exercise of Crown discretion and, in
12 particular, I suppose I'll call it challenging an exercise
13 of Crown discretion. Once an individual Crown has
14 exercised his or her discretion to not proceed with the
15 prosecution, you discussed with Mr. Wardle that a police
16 officer, for example, may be able to go up the ladder, so
17 to speak, in the Crown's Office.

18 Have you -- in your experience, have you
19 ever had a member of the community or perhaps the victim go
20 above the Crown's head, so to speak, to when a decision has
21 been made not to proceed with a prosecution?

22 **MS. NETHERY:** Oh, yes, absolutely. I mean,
23 I think complainants, victims, members of the public are
24 free to, and do, write and communicate with the Attorney
25 General, the Deputy Attorney General and the assistant

1 Deputy Attorney General on a -- I wouldn't say a regular
2 basis, but certainly absolutely that happens and it's the
3 right of every citizen to do that, and I think we have to
4 be respectful of that process. Not everybody -- you know,
5 people may respect what we do, but they don't necessarily
6 like what we do, and I think as public servants we have to
7 be ready to meet those potential challenges.

8 **MR. LEE:** Is there a formal process in place
9 for that to happen?

10 **MS. NETHERY:** We actually -- yes, we do have
11 a policy memorandum which is available for the public
12 relating to what to do if you're not happy with a decision
13 by a Crown attorney. So people who come into the Crown's
14 office, and it's not unusual, may not be happy with what
15 we've done in terms of either charges or they may not have
16 been cancelled as witnesses early enough and they may have
17 ended up losing a day's work. That's not an uncommon one.

18 So, you know, they'll come in. They may not
19 want to speak to the assistant Crown who's been handling
20 the case. They may want to speak to the Crown Attorney, or
21 they may want to know, you know, how they can write the
22 Attorney General and we provide them with a copy of the
23 practice memo and they're quite free to do that.

24 **MR. LEE:** Do you know whether that practice
25 memo has been provided in our material -- in your

1 materials?

2 **MS. NETHERY:** I know that it's been provided
3 as part of our general disclosure to the Commission, but I
4 don't think that it's in any of my reference materials
5 here.

6 **MR. LEE:** I didn't see it.

7 **MS. NETHERY:** No.

8 **MR. LEE:** I just want to make sure I hadn't
9 missed it.

10 **MS. NETHERY:** But that's something that I
11 know we can obtain pretty readily for you.

12 **MR. LEE:** Okay. Thank you.

13 Are there certain offences that trigger an
14 automatic review where a decision is made not to prosecute?
15 So, for example, if the police lay a charge of murder,
16 let's say, and the decision is made by a Crown not to
17 proceed, would it automatically be reviewed by a superior?
18 Does it require two Crowns to sign off on the decision or
19 anything like that?

20 **MS. NETHERY:** There's nothing specific about
21 it, but it's kind of a common sense sort of thing. If
22 you're going to withdraw a homicide case as an assistant
23 Crown Attorney, it's the sort of thing that would go to
24 your Crown Attorney, probably the director, and maybe
25 higher as well because it's obviously a matter of great

1 public interest. But there's nothing in writing and I
2 don't -- but I don't know that it's ever been -- I
3 shouldn't say. I think it's very seldom that it's a
4 concern that it hasn't been sort of pushed up the line of
5 command, if I can put it that way.

6 **MR. LEE:** So it's a matter of practice but
7 not one of policy?

8 **MS. NETHERY:** That's right.

9 **MR. LEE:** Changing focus a bit, yesterday
10 you spoke of certain child sexual abuse resources. You
11 spoke of the "J" Court in Toronto. You spoke of the Family
12 Court Clinic about specially trained Crowns with expertise
13 in, for example, dealing with children specifically.

14 Is there anything similar, be it in terms of
15 resources, training, expertise -- sorry; not expertise,
16 something formal, training, resources, facilities for
17 dealing with historic cases of childhood sexual abuse?

18 **MS. NETHERY:** No. No, because, as I say, so
19 many of the issues overlap that the training, for example,
20 relating to child abuse or to sexual offences frequently
21 contains a component of what do we do when there's an
22 historical -- an allegation of a historical offence.

23 **MR. LEE:** So typically there would not be an
24 assistant Crown in every office who is the Crown that deals
25 with historical sexual abuse?

1 **MS. NETHERY:** No, and I would not support
2 that either because of the fact that there is that sort of
3 overlap and we want to make sure -- and quite often there's
4 an overlap within the prosecutions themselves whereby we
5 will have current victims and victims who are historically
6 assaulted, and that happens unfortunately not infrequently
7 in, for example, school teacher cases. Somebody will read
8 in the paper about an allegation relating to a child by a
9 current teacher and sometimes the older students or the
10 people who were students will come forward at a later date
11 because they can't -- you know, sometimes I've had them say
12 "Well, I just can't believe he's still out there doing
13 that."

14 So we can have these cases that cover
15 literally decades from sort of somebody who's an eight-year
16 old today to somebody who's, you know, 30 years old. So in
17 that sort of case would we want to have, you know, a Crown
18 who really only had the expertise in the historical sexual
19 assault or do we want somebody who has the general
20 expertise in those cases? And my view is that we should
21 have that more general expertise to cover both issues.

22 **MR. LEE:** As a matter of policy then, to the
23 best of your knowledge, are there any provisions in place
24 that deal specifically with historical sexual abuse?

25 **MS. NETHERY:** Any policy provisions apart

1 from those that we've already discussed today?

2 MR. LEE: Right.

3 MR. NETHERY: No.

4 MR. LEE: Okay.

5 If I can turn you to page 34 of your outline
6 of evidence, you speak there about Crown summer school, and
7 in the sixth bullet down it reads:

8 "The summer school program first
9 developed a course dealing exclusively
10 with sexual assault prosecutions in
11 1994 and include the panels on
12 historical sexual assault
13 prosecutions."

14 I notice that through most of the outline
15 the term used is child abuse or sexual abuse where here
16 it's sexual assault.

17 Is there a distinction? Am I reading too
18 much into this? Does this deal with sexual abuse --
19 historical child sexual abuse at all or is this strictly
20 sexual assault?

21 MS. NETHERY: This is a general course on
22 sexual assault and they do at times include child abuse and
23 historical sexual abuse of children, but it's more of a
24 general course that covers sexual assault, and it may
25 -- I mean, it's sort of similar to does our sexual assault

1 policy apply to child abuse? Yes, it does, as well as the
2 child abuse policy.

3 **MR. LEE:** Do you know whether or not course
4 materials exist for the summer schools going back to 1994?

5 **MS. NETHERY:** Yes, we do have some. They
6 are primarily legal articles, but we do have some of the
7 old materials.

8 **MR. LEE:** Do you know whether those have
9 been produced as part of the Attorney General's disclosure?

10 **THE COMMISSIONER:** Can anybody help?

11 **MR. LEE:** I'll do what Mr. Wardle did and I
12 can leave it to Commission counsel to see whether or not
13 those are available.

14 **MS. McINTOSH:** I think we produced the
15 agendas for the summer schools that we could find. I don't
16 know that we actually produced the course material. I
17 think it's quite voluminous. I think we were awaiting some
18 direction about what actual course material you wanted
19 produced.

20 **MR. LEE:** I'm sure once we get into the
21 disclosure we'll know whether or not that's something that
22 we're looking at.

23 **THE COMMISSIONER:** Sure.

24 **MR. LEE:** If now we can bring up Tab 35,
25 please? This is a memorandum issued on January 31st of 1995

1 by Michael Code, who was the Assistant Deputy Attorney
2 General, and I would like to take you -- and it's about
3 charge screening, as you can see. I would like to take you
4 to the last page of that.

5 **MS. NETHERY:** I just would like to find that
6 in the hardcopy.

7 **MR. LEE:** Sure.

8 **MS. NETHERY:** It's 35, did you say?

9 **MR. LEE:** Yes, Tab 35.

10 **(SHORT PAUSE/COURTE PAUSE)**

11 **MS. NETHERY:** Okay. I have it. Thank you.

12 **MR. LEE:** So the last page, as you can see,
13 has one paragraph on it, and I would just like to read you
14 the first couple of sentences from that. It reads:

15 "In conclusion, we should be clear that
16 all cases we prosecute, including
17 sexual assaults and spousal assaults,
18 must be screened in accordance with a
19 reasonable prospect of convictions
20 standard. The personal, professional
21 or political consequences of a
22 conscientious screening decision should
23 never affect a prosecutor's judgment."

24 Do you agree with that statement?

25 **MS. NETHERY:** I absolutely agree with it.

1 **MR. LEE:** And that goes to what you were
2 speaking with Mr. Wardle about earlier, that the political
3 consequences of a screening decision have no place; is that
4 correct?

5 **MS. NETHERY:** That's absolutely correct.

6 **MR. LEE:** And that would have been true in
7 1995 as it is today?

8 **MS. NETHERY:** Yes.

9 **MR. LEE:** Now, earlier -- I believe it was
10 in May -- Detective Staff Sergeant Paul Yelle was here from
11 the Ontario Provincial Police, and he testified about the
12 OPP use of what he called issue notes and he described
13 these as being a brief synopsis of an incident that is
14 created to notify supervisory personnel of certain issues.

15 Specifically, he explained that an issue
16 note would be created if political figures or institutional
17 figureheads are involved in situations because it might
18 attract media attention and the supervisors may be called
19 upon to ask questions, may be consulted, and they should
20 essentially be given a heads-up, if I can use that phrase.

21 Does the Attorney General have anything
22 similar to an issue note that it creates?

23 **MS. NETHERY:** We have a -- I think we
24 mentioned this about the issues management process. We
25 have a process whereby we provide information to the

1 Attorney General in case he is asked questions in the
2 House, and that process is called "House Book Notes". So
3 it's confidential advice that is provided by our division,
4 signed off by our Assistant Deputy Attorney General, and
5 that goes to the Attorney General for his use.

6 **MR. LEE:** Are there anything -- obviously
7 House Book Notes wouldn't be appropriate at the lower
8 offices, but is there anything, for example, going from
9 assistant Crown attorneys to the Crown attorney in a
10 region? Essentially I'm thinking of a situation where the
11 mayor of a town, for example, is charged with a crime,
12 where the Attorney General would say, "Everybody, take note
13 of this one. We're going to need to ---

14 **MS. NETHERY:** I don't know that there's
15 anything formal in place whereby an assistant Crown would
16 notify the Crown and then the Crown would notify the
17 Director of Crown Operations, if that's what you're asking
18 me about.

19 **MR. LEE:** I'm asking specifically if there's
20 -- I'm sure that it must happen that a phone call or an
21 email passes or a conversation in the hallway. Is there
22 anything formal?

23 **MS. NETHERY:** There's not a formalized
24 process that covers it, no. You're right; it's done on an
25 informal basis, levels that are not the political level.

1 **MR. LEE:** Finally, it may well be my version
2 of the materials, but if I can have you turn to page 35 of
3 your outline, at the bottom of the page, just before where
4 it says, "Tab 90", the bullet above that says:

5 "Even prior to the comprehensive Crown
6 Policy Manual the directives and
7 guidelines addressed issues dealing
8 with child and sexual abuse; for
9 example..."

10 And there's a list comprising Tab 90. The last bullet in
11 that list is an April 1985 memo outlining assignment of
12 child and sexual abuse cases. My Tab 90 doesn't contain
13 that memorandum. I don't know if that's been raised or if
14 it's not been raised, but I don't have that and I was
15 wondering ---

16 **MS. McINTOSH:** Yes, we identified it at
17 lunchtime, Mr. Commissioner. There were a couple of memos
18 missing. I thought they might be in fact hot off the
19 press. We identified at lunch that there was some
20 documents missing at that tab and we're tracking them down.

21 **THE COMMISSIONER:** All right.

22 **MR. LEE:** I foolishly braved the rains at
23 lunch, so I wasn't around for that discussion.

24 **THE COMMISSIONER:** You should have stayed
25 for pizza.

1 **MR. LEE:** Had I known there was pizza,
2 believe me, I would have stayed.

3 Thank you very much. Those are my
4 questions.

5 **THE COMMISSIONER:** Thank you.

6 Why don't we take the afternoon break?
7 We'll come back at 3:30. How much more -- you said a
8 couple of hours, Maître Dumais?

9 **MR. DUMAIS:** Yes.

10 **THE COMMISSIONER:** Were you looking to have
11 this witness completed by the end of the day?

12 **MR. DUMAIS:** Just five or ten minutes,
13 Commissioner. A total of 30 minutes.

14 **THE COMMISSIONER:** Okay. Well, let's take
15 the afternoon break and then we'll come back and see where
16 we're going.

17 **THE REGISTRAR:** Order; all rise. À l'ordre;
18 veuillez vous lever.

19 The hearing will reconvene at 3:30.

20 --- Upon recessing at 3:14 p.m./

21 L'audience est suspendue à 15h14

22 --- Upon resuming at 3:41 p.m./

23 L'audience est reprise à 15h41

24 **THE REGISTRAR:** This hearing of the Cornwall
25 Public Inquiry is now in session. Please be seated.

1 Veillez vous asseoir.

2 **MARY NETHERY, Resumed/Sous le même serment:**

3 **THE COMMISSIONER:** Mr. Foord.

4 **MR. FOORD:** Yes, good afternoon, Mr.
5 Commissioner. I have a few questions ---

6 **THE COMMISSIONER:** Yes.

7 **MR. FOORD:** --- for the first hour anyway.

8 **THE COMMISSIONER:** I'm sorry?

9 **MR. FOORD:** Miss ---

10 **THE COMMISSIONER:** For the first hour?

11 **MR. FOORD:** It was a joke.

12 **THE COMMISSIONER:** Oh, okay. Good.

13 **(LAUGHTER/RIRE)**

14 **MR. FOORD:** It wasn't as good ---

15 **THE COMMISSIONER:** That was good.

16 **MR. FOORD:** It wasn't thundering.

17 **THE COMMISSIONER:** Good, good.

18 **--- CROSS-EXAMINATION BY/CONTRE-INTERROGATOIRE PAR MR.**
19 **FOORD:**

20 **MR. FOORD:** Ms. Nethery, I just have a
21 couple of questions regarding disclosure and the reasonable
22 prospect conviction test.

23 I think you've set out for us over the last
24 couple of days that that test, among other things, protects
25 citizens from unnecessary prosecutions and the possibility

1 of wrongful convictions among other things; right?

2 **MS. NETHERY:** Yes, that's correct.

3 **MR. FOORD:** And so the decision whether to
4 proceed or discontinue obviously is very important in that
5 regard and that's what you -- that's what the reasonable
6 prospect conviction test is about, right?

7 **MS. NETHERY:** Yes. We want to make sure
8 that provable charges are proceeded with when they're in
9 the public interest and that we do discontinue those where
10 there isn't a reasonable prospect, and certainly the *Donald*
11 *Marshall Jr.* Inquiry made it clear that the lack of
12 disclosure or lack of proper screening could, indeed,
13 contribute to a wrongful conviction.

14 **MR. FOORD:** Thank you.

15 You've described the test as one that's both
16 objective and impartial, right?

17 **MS. NETHERY:** Yes.

18 **MR. FOORD:** Yes. And certainly with respect
19 to the facts, whether there's available evidence to prove
20 the elements of an offence, that makes a lot of sense that
21 it would be objective, but when it comes to the assessment
22 of credibility, which you've described as playing a smaller
23 role in the test, there has to be some subjective elements
24 to that discretion, right?

25 **MS. NETHERY:** Well, sorry, I just want to

1 turn up my notes here for a moment.

2 MR. FOORD: Sure.

3 MS. NETHERY: Okay. I think that if you
4 look at the most recent practice memo and, as well, also
5 look at the Martin Committee Report on how that aspect of
6 the test should be applied, it is really -- we really have
7 to look at objective indicators of credibility in terms of
8 -- and I think I said this yesterday -- is there a history
9 of dishonesty; is there a motive to lie; what is the
10 individual's ability to observe. And in that regard, I
11 mean we all know about the frailties of eye-witness
12 identification and the part that that can play in wrongful
13 convictions, which you've raised. Is there irrefutable
14 evidence that the witness is lying or mistaken? So those
15 are things that are relatively objective evidence that the
16 individual has lied under oath.

17 So the idea here is that we should not usurp
18 the function of the judge and jury or the trier of fact,
19 but that there should be some assessment of credibility
20 based on those objective indicators.

21 MR. FOORD: All right. I think you've
22 explained that. So at the end, you look to these objective
23 indicators to come to a decision that a Crown may not agree
24 with other Crowns about. Is that fair enough? And in that
25 sense there's a subjective element to the discretion at

1 that level.

2 **MS. NETHERY:** Well, there's -- discretion
3 assumes that there's going to be a subjective element. So
4 whether it's a subjective element about the reasonable
5 prospect or the public interest test, yes, I mean that's
6 fair. But what we've tried to do in this test is to remove
7 as many of the subject developments from the determination
8 of the reasonable prospect of conviction. I would prefer
9 to say that the reasonable prospect of conviction test is a
10 term of art rather than trying to say that it's subjective.

11 **MR. FOORD:** All right.

12 **MS. NETHERY:** It's not a scientific
13 mathematical formula. If we had a scientific mathematical
14 formula, I suppose we wouldn't need to have Crowns or
15 lawyers at all. We could just put it all into a computer
16 and get the answer there.

17 **MR. FOORD:** Right. Absent of that computer,
18 what I would like to try to do is on the continuum, and I
19 think we could describe that there is a continuum upon
20 which the reasonable prospect of conviction test sits or
21 it's a place on the continuum from where there is no
22 evidence at one end to where you might have proof beyond a
23 reasonable doubt at the other end. Would you agree with
24 that?

25 **MS. NETHERY:** Yes.

1 **MR. FOORD:** And you've indicated earlier
2 that -- and it's in the materials -- that the test is
3 something more than the no-evidence test, and it's
4 something less than a probability of conviction. It's
5 somewhere between those two points on that continuum.

6 **MS. NETHERY:** It's higher than the standard
7 for a committal on a preliminary hearing. So it's higher
8 than the test that requires that evidence whereby a
9 reasonable jury properly instructed could convict, but on
10 the other hand, it doesn't require a 51 per cent
11 probability of conviction. So it doesn't require that
12 probability.

13 **MR. FOORD:** And would you agree with me that
14 for there to be a reasonable prospect or a reasonable
15 expectation of a conviction, it can't fall on the continuum
16 where -- at the point at which you would say that a
17 conviction is improbable?

18 **MS. NETHERY:** I'm sorry, what's that again?

19 **MR. FOORD:** Okay. For there to be a
20 reasonable prospect or expectation of conviction, that
21 point on the continuum can't be the same point where you
22 would say that a conviction is improbable in these
23 circumstances.

24 **MS. NETHERY:** It doesn't have to be a
25 probability of conviction but, on the other hand, we're not

1 going to -- I don't know that we talk about improbable
2 convictions.

3 MR. FOORD: Right, and I'm asking you about
4 that to try to place this more clearly on the continuum, so
5 we have a better understanding of when that threshold will
6 be or won't be met. And I'm suggesting to you that it
7 cannot be the case that a reasonable prospect of conviction
8 is one where a conviction is improbable.

9 MS. NETHERY: Well, improbable according to
10 what, sir?

11 MR. FOORD: According to the same criteria
12 that you consider in coming to the conclusion that there is
13 or is not a reasonable prospect of conviction.

14 MS. NETHERY: So you're saying if a
15 conviction is unlikely?

16 MR. FOORD: Yes.

17 MS. NETHERY: I don't know that we express
18 it in those terms, but I suppose you can say if it's a
19 reasonable prospect of conviction, then it's a conviction
20 that's not improbable.

21 MR. FOORD: All right. And so if we were to
22 look at where we could place that starting point on the
23 continuum, would we be placing it where there may or may
24 not be a conviction, and one can't tell whether it's
25 probable or improbable? Is that the space we're sort of at

1 as to where it starts? Somewhere after the improbability
2 of conviction, we can lay it down?

3 **MS. NETHERY:** Yes, because it doesn't have
4 to be a 51 per cent likelihood.

5 **MR. FOORD:** Right.

6 In 2002, if I could refer you to Tab 38,
7 page 4, this was the -- with respect to recantation.

8 **MS. NETHERY:** Yes.

9 **MR. FOORD:** At page 4, there's a number
10 9(b), and 9(a) and (b) and (c) are discussing the issue of
11 when it would be appropriate to continue with the
12 prosecution when there has been a recantation.

13 **MS. NETHERY:** M'hm.

14 **MR. FOORD:** And the (a) reference is where
15 there's independent evidence of the recantation, well then
16 you should proceed; (b) talks about where the prosecutor
17 has the belief that the witness may return to their
18 original statement and that original statement may be true,
19 that the prosecution can continue. That's what that says,
20 right?

21 **MS. NETHERY:** Well, I think you have to read
22 the whole paragraph.

23 **MR. FOORD:** Right, right.

24 **MS. NETHERY:** I'm not going to paraphrase
25 it.

1 **MR. FOORD:** Right. And it does say at the
2 end that that must be read -- in bold letters, it says it
3 must be read in the context of the "reasonable prospect of
4 conviction" test.

5 **MS. NETHERY:** And the "'public interest'
6 tests as set out in the Charge Screening Policy." That's
7 right.

8 **MR. FOORD:** Right. And correct me if I'm
9 wrong but using the language and directing a prosecutor to
10 consider whether they may or may not be telling the truth
11 does not comport with the test of reasonable prospect of
12 conviction. And I'm suggesting to you that it's
13 inconsistent and therefore, if not diluting the test, it's
14 confusing.

15 **MS. NETHERY:** Well, I don't agree with that
16 assessment.

17 **MR. FOORD:** And I think you've already told
18 us that -- I think you've answered this, but the public
19 interest component, which comes into bear only after the
20 reasonable prospect of conviction test has been met, could
21 never, in any way, influence the reasonable prospect of
22 conviction test, right?

23 **MS. NETHERY:** I don't put it in the way that
24 you have just described it.

25 **MR. FOORD:** Okay.

1 **MS. NETHERY:** In fact, I really don't
2 describe the reasonable prospect of conviction test or the
3 public interest test in the way that you've described it at
4 all, sir. So the public -- no public interest can be the
5 foundation of a prosecution, no matter how compelling, if
6 there is no reasonable prospect of conviction. That's how
7 I put it.

8 **MR. FOORD:** Right and that's how ---

9 **MS. NETHERY:** --- And that's how it's put in
10 the practice memo.

11 **MR. FOORD:** All right.

12 Moving then to the issue of disclosure. The
13 materials make plain as a view that all information that is
14 reasonably possible in assisting the defence must be
15 disclosed. That's the *Stinchcombe* test. And they also
16 make plain that that disclosure must be ongoing and timely.
17 That's right?

18 **MS. NETHERY:** Yes.

19 **MR. FOORD:** And the underlying reason for
20 that is to provide the accused individual with the
21 opportunity for full answer in defence and to avoid delay
22 if disclosure materials are not made in a timely fashion.

23 **MS. NETHERY:** Yes, that's right.

24 **MR. FOORD:** And my question to you is this.
25 It's with respect to police and the Crown. You described

1 that in principle and maybe by statute, they have separate
2 duties and responsibilities in the administration of
3 justice. The police charge, you described, and the Crown
4 either adopt to prosecute or they do not adopt to
5 prosecute. Is that fair?

6 MS. NETHERY: Yes.

7 MR. FOORD: Okay. Post-Charge, however, and
8 especially in the era of the big case -- and at Tab 48, if
9 I just refer everyone to the place I'm at -- Tab 48, 2001,
10 talking about the big case management.

11 MS. NETHERY: Okay. Let me just ---

12 MR. FOORD: Sure.

13 MS. NETHERY: --- bring that up.

14 (SHORT PAUSE/COURTE PAUSE)

15 MR. FOORD: Okay. In reference to those
16 materials, you described for us that it is recognized now
17 at least or as of 2001 that police and the Crowns must work
18 together in preparing these bigger cases for trial. Right?

19 MS. NETHERY: Yes.

20 MR. FOORD: Right. That in fact in that
21 section at Tab 48 it's talked about the importance of
22 planning and the importance of considering a disclosure
23 officer to work with the Crown to keep the Crown apprised
24 of disclosure as it develops. Is that right?

25 MS. NETHERY: Yes, that's right.

1 **MR. FOORD:** Right. I would suggest that
2 with respect to the big case, whether it be a historical
3 sexual assault or a homicide case, any other approach would
4 be dysfunctional; not working together, keeping each other
5 apprised of what's going on would be dysfunctional.

6 **MS. NETHERY:** I think it's absolutely
7 critical that the police and the Crown work together on
8 these major cases, that they have an organized way of
9 dividing up the responsibilities; for example, that the
10 police make sure that they, pursuant to their Major Case
11 Management Manual, prepare the materials in an organized
12 way, so that you can tell in -- with tabs, with indexes,
13 with the proper lettering and so on, and likewise, that the
14 Crown and the police liaise together as to who is going to
15 perform which responsibility, particularly relating to the
16 important obligation of disclosure.

17 **MR. FOORD:** If that communication is not
18 effected in that way, you're going to have a process that
19 is not functionally optimal; right?

20 **MS. NETHERY:** That's right. No, it's almost
21 really the only way to ensure, for example, that disclosure
22 is properly made. I mean, if the police, for example,
23 provide hundreds and hundreds of pages of documents to a
24 Crown that aren't properly tabbed or aren't properly
25 indexed, then it's really working at cross-purposes.

1 You're not going to be able to provide effective disclosure
2 to the defence and so then there are going to be delays.
3 So we can keep going around in circle about it, really. So
4 it absolutely has to be -- there has to be an organized way
5 of proceeding with these major cases that involves both the
6 police and the Crown cooperating together.

7 **MR. FOORD:** Thank you.

8 And that's why earlier this morning you
9 described as there being two obligations, I would describe
10 it as reciprocal: the obligation of the police to inform
11 the Crown of new information and, further, the obligation
12 of the Crown to follow up and inquire about the status of
13 disclosure.

14 **MS. NETHERY:** Yes. I mean, those are basic
15 obligations, and if you have the organizational structure
16 that's set out in our Major Case Management Resource
17 Document, then those things will be done.

18 **MR. FOORD:** And that avoids a situation
19 where someone shows up at trial or counsel show up at trial
20 and there's more disclosure and the case has to be
21 adjourned, and the delay and the problems that that causes.

22 **MS. NETHERY:** Well, in an optimal situation,
23 it will. I mean, sometimes we do have cases where there is
24 last-minute disclosure and that isn't something that either
25 the police or the Crown can control. If a witness comes

1 forward on the eve of trial, we may have further disclosure
2 to make, but optimally, assuming that we've had all the
3 materials for some period of time, if it's all been
4 properly organized and disclosed in advance, then it's one
5 less thing to delay the process.

6 **MR. FOORD:** All right.

7 **MS. NETHERY:** And it's easier obviously for
8 defence counsel to review and consider what their position
9 should be vis-à-vis plea or trial procedure.

10 **MR. FOORD:** And that's what the Tab 48, 2001
11 Big Case Management, that's one of the things it's aimed
12 at; right, more efficient and delay reduction?

13 **MS. NETHERY:** Yes, I think it's a more
14 efficient but also an effective way of practising in the
15 criminal courts today.

16 **MR. FOORD:** I think that this may be
17 obvious, but when there is recent evidence, for example,
18 when there is a recantation situation, like we were talking
19 about before, when there's new evidence that comes up,
20 given the importance of timely disclosure and the ongoing
21 obligation, you would agree that that disclosure that comes
22 up later should be disclosed immediately, or unless there's
23 some exceptional circumstance, it should be disclosed
24 forthwith to defence counsel?

25 **MS. NETHERY:** Yes, the idea is we disclose

1 as soon as possible, unless we have a valid reason to delay
2 or unless there is a privacy concern or a privilege that
3 would prevent that.

4 **MR. FOORD:** And the last issue is that with
5 respect to these two issues and perhaps first, the issue of
6 the big case management and the working and communicating
7 together effectively with police, as stated in the 2001
8 memo, is that something that was going on 10 years ago?
9 Was there any clear policy directive that that's what
10 should be going on 10 years ago or is it really something
11 that's new as of 2001?

12 **MS. NETHERY:** Well, we didn't have
13 documentation to Crowns relating to how to handle the major
14 case management, and we didn't have a Major Case Management
15 Advisory Committee. We didn't have the Employee Assistance
16 Program. So all of that documentation and that process
17 wasn't in place. However, I think on a more informal
18 basis, the police and the Crown generally cooperated very
19 well on the major cases. My last homicide case before I
20 entered into the policy world, really the brief was
21 incredibly well organized by the police. There was
22 excellent cooperation. They did have a disclosure officer
23 available. Everything was also available on discs, so that
24 we had both the hardcopy, very organized files and, as
25 well, the electronic files available for the courtroom with

1 the search engine.

2 So although there may not have been policy
3 advice and documentation for Crowns, that process was going
4 on. This really -- I think the Major Case Management
5 Resource Document documents the best practices that we had
6 already started with good police cooperation and puts this
7 into a template for all Crowns to be able to see and
8 potentially follow.

9 **MR. FOORD:** So 10 years ago, for example, to
10 the extent that a similar methodology was not adopted and
11 being carried out and communication was lacking, that would
12 be a real failure in the system that was adopted at that
13 time?

14 **MS. NETHERY:** Well, I'm sorry, I'm not in a
15 position to be able to make broad sweeping statements of
16 the nature that you're asking me to.

17 **MR. FOORD:** All right. Okay.

18 **MS. NETHERY:** And I'm sorry, I also did not
19 review the regulations to the *Police Services Act*, which I
20 know provide certain obligations on the police to manage
21 their major cases as to when that came into effect. So
22 that would have to be reviewed.

23 **MR. FOORD:** All right. Thank you. Those
24 are my only questions.

25 **THE COMMISSIONER:** Thank you.

1 Mr. Chisholm.

2 **MR. CHISHOLM:** No questions, Mr.

3 Commissioner.

4 **THE COMMISSIONER:** Thank you.

5 Mr. Lawless or Rouleau?

6 **MR. ROULEAU:** I have no questions, Mr.

7 Commissioner.

8 **THE COMMISSIONER:** Thank you.

9 Anyone from -- I'm sorry. Mr. Hannah-

10 Suarez.

11 **MR. HANNAH-SUAREZ:** Yes, just a few brief
12 questions.

13 --- CROSS-EXAMINATION BY/CONTRE-INTERROGATOIRE PAR MR.

14 HANNAH-SUAREZ:

15 **MR. HANNAH-SUAREZ:** If I could turn you to
16 Tab 52, and that's the Crown Policy on Disclosure dated
17 1995, I believe.

18 **MS. NETHERY:** I have it, thanks.

19 **MR. HANNAH-SUAREZ:** And if we could go to
20 paragraph number please, and that's, I think, at page 4.

21 Now, just looking at the first sentence, it
22 indicates that where an accused is represented by counsel,
23 the disclosure -- the right to disclosure is triggered by a
24 request for disclosure made by counsel.

25 I was just wondering if you could explain

1 that same -- I mean, does it apply, for instance, to
2 initial disclosure?

3 **MS. NETHERY:** Well, this was the 1994 --
4 yes, 1994, and it's updated in 1995 -- policy. I think
5 that followed some of the dicta in *Stinchcombe*. Since that
6 time, the Criminal Case Management Review recommended
7 first-appearance disclosure. Our Case Management Protocol
8 provides for first-appearance disclosure, and I think our
9 current Crown policy and practice memo, although
10 technically the right may be triggered by a request that we
11 recommend first appearance disclosure.

12 **MR. HANNAH-SUAREZ:** Are you in a position to
13 indicate how long, I guess more accurately when the initial
14 disclosure on the first-appearance policy came into effect?

15 **MS. NETHERY:** Well, this is something that
16 has been, I think, gradually happening in various
17 jurisdictions from the time that this initial policy came
18 into effect up until about 2005, and so when the new
19 practice memo came out, it was I think this first
20 appearance disclosure was generally the standard across the
21 province. There are some exceptions, of course, to first
22 appearance disclosure. For example, if it's a very complex
23 case, there may be some waiting period, or there may be an
24 initial disclosure, which is a smaller brief that at least
25 gives defence counsel some idea about the case, and then it

1 may take some time to reproduce the full brief if it's
2 several volumes long. But the standard is first-appearance
3 disclosure for as many of the cases as we possibly can and
4 that's to everyone's benefit.

5 **MR. HANNAH-SUAREZ:** Okay. So just to make
6 sure that I have that clear, so the policy now is to
7 disclose as much as possible on the first appearance, and
8 if it's a large case, obviously, as the materials become
9 available?

10 **MS. NETHERY:** That's correct.

11 **MR. HANNAH-SUAREZ:** Now prior then, I guess,
12 to these new policies coming into effect, I was wondering
13 if you could provide some indication of how full disclosure
14 came to come out. So let's say around the 1994 timeframe.
15 For instance, would it be at all -- what would somebody
16 receive, for instance, on the first appearance?

17 **MS. NETHERY:** I don't think in 1994-95, when
18 this policy came out, that we had first-appearance
19 disclosure. Usually, defence counsel or if the accused was
20 unrepresented, would come to the Crown's office, fill out a
21 request for disclosure -- there were usually forms -- leave
22 it with the Crown's office and, you know, I'm not sure how
23 much time it would take to provide the disclosure, but it
24 would usually be within a short period of time that that
25 would be provided and then the matter would proceed.

1 **MR. HANNAH-SUAREZ:** Now, if something came
2 to the attention of the Crown subsequent to this first
3 request and subsequent to receiving the first initial
4 disclosure package, how would defence counsel be made aware
5 that there was additional disclosure available or would
6 they be made aware?

7 **MS. NETHERY:** Well, there are a couple of --
8 I mean, it really depends on the local practice. I think
9 initially before we were quite as aware of issues of maybe,
10 you know, pieces of paper floating around as disclosure,
11 that sometimes the Crown would simply phone defence counsel
12 and say that there are some more statements that have come
13 in or some of the staff would. I think it's more likely
14 now that there's some sort of a written note -- or later
15 on, some sort of a written note saying, "There is more
16 disclosure; Please come and pick it up."

17 **MR. HANNAH-SUAREZ:** Again, let's start with
18 1994 or around that time. Was there any sort of formal
19 policy indicating that this should take place or was it
20 just kind of the general practice?

21 **MS. NETHERY:** I may have to, I mean, I --
22 well, if you look at paragraph 6, I think it really
23 explains in part the Crown's obligation to "specifically
24 advise the defence before trial of any information in his
25 or her possession".

1 **MR. HANNAH-SUAREZ:** So just before trial?
2 At some point before trial but not specifically when it's
3 received?

4 **MS. NETHERY:** Well, I'd have to look at the
5 old policy again, I'm sorry.

6 **(SHORT PAUSE/COURTE PAUSE)**

7 **MS. NETHERY:** I'm sorry, I'm having trouble
8 finding the exact paragraph, but I do know that there is a
9 provision in this policy providing that the disclosure
10 should be provided before a date for preliminary hearing or
11 election or trial is set because, of course, the disclosure
12 can affect those decisions. I apologize, but I know it's
13 in here and I'd have to just take a couple of minutes to
14 find it.

15 **MR. HANNAH-SUAREZ:** Sure, and just if --
16 just at a later date if counsel become aware of the policy
17 or where it's located, just if it's ---

18 **MS. NETHERY:** No, it's in this ---

19 **MR. HANNAH-SUAREZ:** It's in here somewhere?

20 **MS. NETHERY:** --- specific policy. It's
21 just I'm ---

22 **MR. HANNAH-SUAREZ:** Okay. No, that's fine.
23 We'll move on to ---

24 **MS. NETHERY:** I'm not seeing it as I'm
25 looking at it.

1 **MR. HANNAH-SUAREZ:** Sure enough.

2 Now, I just had a question now about current
3 policies with respect to defence counsel request for
4 further disclosure. Are you aware of any policies that
5 would indicate that Crown counsel are obligated to respond
6 to the request within a given timeframe?

7 **MS. NETHERY:** Respond to a request?

8 **MR. HANNAH-SUAREZ:** For further disclosure
9 that is made by the defence?

10 **MS. NETHERY:** Not specifically, except
11 obviously it should -- I mean, as a matter of common sense,
12 it should be done as soon as possible.

13 **MR. HANNAH-SUAREZ:** Now, in terms of other
14 Crown policies for general contact between defence counsel
15 and the Crown, are there any specific policies indicating
16 that phone calls have to be returned within a certain
17 timeframe or correspondence has to be replied to within a
18 certain timeframe?

19 **MS. NETHERY:** We don't have it specifically
20 relating to defence counsel. We do have a Ministry-wide
21 policy about returning phone calls, I think it's within one
22 business day, and I think there's also a Ministry policy
23 relating to responding to letters within -- I can't
24 remember whether it's a week or whether three or four days,
25 but that's Ministry-wide. It's not just Crowns.

1 **MR. HANNAH-SUAREZ:** And this applies to
2 defence counsel obviously making the phone calls as well;
3 right?

4 **MS. NETHERY:** Yes, it would.

5 **MR. HANNAH-SUAREZ:** And has this policy been
6 disclosed or is it publicly available?

7 **MS. NETHERY:** I think it should be publicly
8 available, yes. It's a standard of our Ministry.

9 **MR. HANNAH-SUAREZ:** Now, I'm just going to
10 ask you some questions about the interaction between Crown
11 Attorney offices and police services when disclosure
12 requests are made.

13 Now, are there any policies or command
14 structures that you can point to, to ensure policies
15 between the Crown Attorney's office or command structures
16 between the Crown Attorney's office and the police services
17 to ensure that requests for further disclosure are
18 addressed quickly?

19 **MS. NETHERY:** Yes. What we set out, I
20 think, in our current disclosure practice memo, and perhaps
21 -- is that Crown Attorney's offices should have protocols
22 with the local police services about how that's to be
23 handled.

24 So in some jurisdictions there are memos
25 sent out by the case management coordinators -- remember,

1 we talked about those yesterday -- to the police. In other
2 jurisdictions I think they're moving toward a more
3 electronic process whereby the police service themselves
4 take responsibility for ensuring that the Crowns' requests
5 are met.

6 So there are different protocols on a local
7 basis, and so what we do in terms of in the practice memo
8 is to say that each Crowns office should have a protocol
9 with the local police service relating to that.

10 **MR. HANNAH-SUAREZ:** And that's mandatory?

11 **MS. NETHERY:** Yes.

12 **MR. HANNAH-SUAREZ:** Now, I'm just going to
13 suppose a hypothetical situation to you. Now, let's -- and
14 it is going to relate back to policy. Now, let's suppose
15 that there's an individual police investigator who is
16 retaining his or her notes or some sort of evidence and has
17 refused to disclose it, it's by explicit request. Do you
18 know if there's any policies -- or there are any policies
19 in place to deal with such situations?

20 **MS. NETHERY:** Where the police are
21 purposefully withholding ---

22 **MR. HANNAH-SUAREZ:** Or just unresponsive.

23 **MS. NETHERY:** --- their disclosure?

24 Well, I think the police services -- the
25 regulations to the *Police Services Act* put an obligation on

1 all police officers to make full disclosure to the Crown of
2 any information that they have.

3 **MR. HANNAH-SUAREZ:** But from the Crown's end
4 to ensure that those policies are adhered to, are there any
5 policies dictating a particular course of action in such
6 circumstances?

7 **MS. NETHERY:** Well, I think that's -- to me
8 it's such a breach of the police officer's obligation that
9 it's not a matter of policy. It would be a matter of
10 common sense that the Crown attorney would be on the phone
11 to, you know, the police chief or whoever up the chain of
12 command to ensure that we got that information.

13 **MR. HANNAH-SUAREZ:** So it would be dealt
14 with essentially on an ad hoc basis, is that ---

15 **MS. NETHERY:** It would be dealt with as a
16 management matter. I think it's just such a basic thing.
17 I don't think we have to say to people, you know, if the
18 police aren't doing their basic duty under the *Police*
19 *Services Act*, you know, here are some steps for you to
20 take. In my experience that's an unusual circumstance and
21 it's something that any assistant Crown attorney, as a
22 matter of common sense, would bring it to the attention of
23 their Crown and it would be dealt with through the
24 management chain.

25 **MR. HANNAH-SUAREZ:** Now, just as a second

1 brief hypothetical, let's say during the course of an
2 active prosecution there's an individual police
3 investigator who is in some way obstructing justice or
4 interfering with the process, are there any specific
5 policies in place from the Ministry's side to deal with
6 such situations?

7 **MS. NETHERY:** Well, as you're describing it,
8 if the person is obstructing justice then it sounds to me
9 as if it would be something that the Crown's office might
10 want to refer to another police service for investigation.

11 **MR. HANNAH-SUAREZ:** Are there any police --
12 sorry; specific policies dictating that that's the course
13 of action to be taken or is it just a matter of ad hoc
14 common sense?

15 **MS. NETHERY:** It's not an ad hoc thing. If
16 you think that somebody's committing a criminal offence
17 it's sort of like saying to Crowns, you know, "If you find
18 out that one of your Crowns is committing child abuse you
19 should report that to the police. If you find out a police
20 officer is obstructing justice that should be reported to a
21 police service who can then investigate the charge."

22 **MR. HANNAH-SUAREZ:** That's fair enough.

23 **MS. NETHERY:** That's the way I would
24 describe it.

25 **MR. HANNAH-SUAREZ:** I just have a few more

1 questions.

2 Now, just relating back to charge screening,
3 there had been some questions before -- this should be
4 fairly straightforward -- that one of the issues to
5 consider is a very limited assessment of the credibility of
6 the witnesses or the complainants; is that correct?

7 **MS. NETHERY:** That's right.

8 **MR. HANNAH-SUAREZ:** Now, during the course
9 of this assessment are there any policies in place
10 dictating that the Crown attorney has to ever meet with the
11 complainant or is it done mostly on paper?

12 **MS. NETHERY:** I know you said that was a
13 straightforward question, but in terms of this, as you
14 know, the screening process is a continuing process. So
15 usually on the initial screening which happens often right
16 after a matter, right after a charge has been laid and the
17 bail issues have been dealt with, often at that point we
18 would not be meeting with the victim in order to make that
19 initial assessment of whether or not we have a reasonable
20 prospect of conviction.

21 There are, of course as we go along with the
22 case and assuming we've moved on to a situation where
23 there's a preliminary hearing date set and so on, then, as
24 I mentioned before, the Crowns usually do a pre-trial or
25 pre-preliminary hearing interview. After that the Crown

1 may make an assessment at that point that there's no
2 reasonable prospect of conviction. So it's not -- you
3 know, the interview, I guess, can be a dual purpose
4 interview at that point.

5 The other thing that -- it can happen,
6 however, as a matter of our decision about reasonable
7 prospect that we do meet with the victim earlier on if
8 there may be some reasons for it, and that's something
9 that's done very rarely in Ontario and we've made a note of
10 the fact that that is a very rare process in our practice
11 memo relating to witness interviews, which is a part of the
12 materials, and I think we did speak to that. It's based on
13 the Supreme Court of Canada case *Regina and Reagan*.

14 **MR. HANNAH-SUAREZ:** Thanks.

15 And then ---

16 **MS. NETHERY:** I'm sorry; that was kind of a
17 lengthy answer.

18 **MR. HANNAH-SUAREZ:** Now, still on this issue
19 of the reasonable prospect of conviction, is it relevant to
20 consider the strong likelihood of a stay of proceedings, be
21 it for delay or abuse of process? Is that one of the
22 considerations that is taken into account?

23 **MS. NETHERY:** A strong -- sorry; a strong?

24 **MR. HANNAH-SUAREZ:** Likelihood of a stay of
25 proceedings.

1 **MS. NETHERY:** I think that the way we put it
2 is that if there's a clear Charter violation that's one of
3 the things that we would take into account. But the way
4 that you've put it, a strong likelihood or probability,
5 that is -- that may be something that wouldn't come into
6 the reasonable prospect test specifically but it may be
7 considered more under the public interest test.

8 So it may pass the first stage, the
9 reasonable prospect, and then at the second stage we'd take
10 into account the public interest but it would not be an
11 automatic bar. But if it's a clear Charter violation,
12 that's something that -- where we know that the matter is
13 going to be, you know, stayed, well, that's a different
14 story obviously.

15 **MR. HANNAH-SUAREZ:** Now, in terms of this
16 standard, the reasonable prospect of conviction standard,
17 just from my understanding of it -- you've discussed it
18 quite a bit so far -- in essence as long as a conviction
19 would not be unreasonable based on the evidence and it's
20 obviously higher than the threshold for committal the
21 charge should not be withdrawn. Is that accurate?

22 **MS. NETHERY:** Yes, that's right. Not on the
23 basis of a reasonable prospect of conviction.

24 **MR. HANNAH-SUAREZ:** Now, I just -- now, this
25 is the last question. In light of the recent Sophonow and

1 Morin inquiries on wrongful convictions, are you aware of
2 any reconsideration of this threshold by the Ministry of
3 the Attorney General?

4 **MS. NETHERY:** No. We have put out a number
5 of policies relating to the Morin Report, the Coffman
6 Report. We have actually participated in a
7 federal/provincial report, and in fact with our colleagues
8 across the country there's never been any recommendation by
9 any group that I'm aware of that we should change that
10 reasonable prospect of conviction test.

11 **MR. HANNAH-SUAREZ:** Okay. Thank you.
12 Those are my questions.

13 **THE COMMISSIONER:** Thank you.

14 **MR. HANNAH-SUAREZ:** Thank you.

15 **THE COMMISSIONER:** Mr. Bennett, I'm sorry,
16 we missed you this morning. Would you have any questions
17 this afternoon?

18 **MR. BENNETT:** No, I haven't.

19 **THE COMMISSIONER:** Thank you.

20 Mr. Sherriff-Scott.

21 **MR. SHERRIFF-SCOTT:** Thank you,
22 Commissioner. Good afternoon.

23 --- CROSS-EXAMINATION BY/CONTRE-INTERROGATOIRE PAR

24 **MR. SHERRIFF-SCOTT:**

25 **MR. SHERRIFF-SCOTT:** A couple of self

1 evident propositions. The Crown screening practice, while
2 historical in nature was -- thank you. I'm reminded I
3 should identify myself, that I act for the Diocese of
4 Alexandria-Cornwall and my name is David Sherriff-Scott. I
5 promise I'll wear a badge next time.

6 **MS. NETHERY:** It's fine. It's just there's
7 a lot of people asking me questions.

8 **MR. SHERRIFF-SCOTT:** That's okay. My
9 apologies.

10 Now, the practice of Crown screening, we
11 know that it was historical prior to your setting down the
12 practice in policy in the '94 manual. In other words, it's
13 something that predated in practice the actual codification
14 in your '94 manual.

15 **MS. NETHERY:** Yes, on a very ad hoc basis.

16 **MR. SHERRIFF-SCOTT:** Yes.

17 And part of the imperative, as I understand
18 it, to get it down on paper would have been, at least in
19 part, the significant backlog in the early '90's?

20 **MS. NETHERY:** Well, that would be one
21 impetus, yes.

22 **MR. SHERRIFF-SCOTT:** That's why I said in
23 part. So it would be, at least in part, based on the
24 Crown's view that there were many charges being laid which
25 wouldn't have met your considerations on a policy basis;

1 that is, reasonable prospects and public policy
2 considerations?

3 **MS. NETHERY:** I don't know that I'd agree
4 that there were many charges that wouldn't meet that test
5 but clearly there are some.

6 **MR. SHERRIFF-SCOTT:** There are some. Okay.
7 So at least, in part, the screening is
8 necessary because charges are laid that don't meet your
9 threshold, and that would imply, I take it, that the police
10 may more readily charge than the Crown may more readily
11 proceed. Is that fair?

12 **MS. NETHERY:** Well, I think it's -- how
13 shall I say? In a way that's really not fair to the
14 police, in the sense that I think they're putting forward
15 their cases on the basis that they think it's an
16 appropriate case.

17 **MR. SHERRIFF-SCOTT:** Really what I'm driving
18 at is, is there a difference -- differences in the
19 standards that's applied by the Crown as opposed to the
20 police?

21 **MS. NETHERY:** Yes, there is.

22 **MR. SHERRIFF-SCOTT:** Okay. So when I say
23 more readily I mean essentially the police may operate on a
24 lower threshold than the reasonable prospect of conviction
25 and/or public policy considerations?

1 **MS. NETHERY:** Yes, I think that's a fair way
2 of putting it.

3 **MR. SHERRIFF-SCOTT:** All right.

4 Now, by 1994, in terms of your policy,
5 Crowns were specifically enjoined from considering what I
6 would call a social or community status of a person in
7 deciding whether to continue with a charge. Is that fair?

8 **MS. NETHERY:** Yes, I think that's right.

9 **MR. SHERRIFF-SCOTT:** And would that too have
10 reflected a prior practice? In other words, the Crown --
11 the fact that it was written down in 1994 would have
12 reflected some considerations that would have operated in
13 the Crown's mind?

14 **MS. NETHERY:** I'm sorry; are you saying
15 before did we think -- how did we think about it before?

16 **MR. SHERRIFF-SCOTT:** I assume that in 1994
17 the Crown didn't learn how to practise, that these are a
18 reflection in part of the existence of the status quo?

19 **MS. NETHERY:** Yes. Thank you. Yes, that's
20 right. I didn't quite understand your question.

21 **MR. SHERRIFF-SCOTT:** No, no, and I don't
22 mean to be facetious. What I am driving at is that these
23 things in part, and in particular this one I just alluded
24 to, would have been a reflection of prior practice, at
25 least in part?

1 **MS. NETHERY:** Yes. Yes, of course. I mean,
2 that's part of the appropriate role of the Crown.

3 **MR. SHERRIFF-SCOTT:** Now, just talking for a
4 few seconds about the concept of police consultation at the
5 pre-charge stage or what I would call the decision to
6 charge stage. That would be, I take it, the Crown's
7 involvement more common in larger and complex cases as
8 we've talked about?

9 **MS. NETHERY:** Yes, that's right.

10 **MR. SHERRIFF-SCOTT:** And included in those
11 there would be taskforce type cases, major taskforce type
12 cases?

13 **MS. NETHERY:** Yes, it would.

14 **MR. SHERRIFF-SCOTT:** And that would be so
15 because those types of cases are a public initiative to
16 attempt to respond to some already identified concern?

17 **MS. NETHERY:** Not necessarily a public
18 initiative to respond to a concern, but it may simply be
19 the complexity of the case, the number of potential
20 accused, the number of potential victims.

21 **MR. SHERRIFF-SCOTT:** I accept that, but a
22 taskforce case or a taskforce type case would typically
23 attract a significant amount of -- more public attention
24 than a more routine prosecution?

25 **MS. NETHERY:** Well, I mean, some taskforces

1 are not conducted in a public way at all until charges are
2 laid, and so they may not have attracted any public
3 attention until the actual charges have been laid.

4 MR. SHERRIFF-SCOTT: All right.

5 MS. NETHERY: That's not an unusual
6 situation, because the police, they don't always sort of
7 publicize their ---

8 MR. SHERRIFF-SCOTT: Activities.

9 MS. NETHERY: --- investigations.

10 MR. SHERRIFF-SCOTT: But in some cases they
11 do; correct?

12 MS. NETHERY: Yes, they do.

13 MR. SHERRIFF-SCOTT: For example, we've
14 heard a lot about the London case where there was discovery
15 of pornography and there was a major taskforce and there
16 was a great deal of publicity.

17 MS. NETHERY: Okay.

18 MR. SHERRIFF-SCOTT: Correct?

19 MS. NETHERY: Yes.

20 MR. SHERRIFF-SCOTT: Okay. So there are
21 some cases that are taskforce in nature that would be
22 highly sensitive and public, and in that environment, that
23 may be one consideration leading to a pre-charge
24 consideration or consultation with the Crown.

25 MS. NETHERY: Yes, the police may determine

1 to do that.

2 **MR. SHERRIFF-SCOTT:** Okay. And if we can
3 just turn up Tab 30.1 of your documents, just several pages
4 down under the heading "Charging Stage". This is
5 essentially when you are consulted. "Post-Charge" and then
6 there's "The Charging Decision". Could we just scroll down
7 a bit? A little further. I'm looking for "whether there
8 are reasonable grounds to support specific charges".
9 Sorry. So if we could just scroll up a bit.

10 **MS. NETHERY:** So this is the 1997 document,
11 not the current practice memo.

12 **MR. SHERRIFF-SCOTT:** Yes, I understand that.

13 **MS. NETHERY:** Okay.

14 **MR. SHERRIFF-SCOTT:** Okay. I'm looking at
15 the second indented paragraph:

16 "Where feasible, your reply should be
17 in writing."

18 **MS. NETHERY:** Yes, that's right.

19 **MR. SHERRIFF-SCOTT:** And again this is where
20 the Crown is consulted for the purpose of the police
21 raising either legal issues or being concerned about
22 whether they ought to charge. Correct?

23 **MS. NETHERY:** Yes, legal issues relating to
24 whether they should charge; that's right.

25 **MR. SHERRIFF-SCOTT:** Okay. And the response

1 of your -- the Attorney General here is advising the Crown
2 that where feasible you should be responding in writing, in
3 the second indent, and:

4 "The issue should be addressing whether
5 there are reasonable grounds to support
6 specific criminal charges based on the
7 evidence contained in the...brief."

8 Correct?

9 **MS. NETHERY:** Yes, that's right.

10 **MR. SHERRIFF-SCOTT:** So in practical terms
11 the advice here, although the decision in the final
12 analysis is that of the police, is to charge or not to
13 charge.

14 **MS. NETHERY:** Yes, setting out the legal
15 test about charging.

16 **MR. SHERRIFF-SCOTT:** All right. So now, in
17 the type of environment of a larger or more complex or
18 taskforce cases, would those typically, when there is
19 consultation at the pre-charge or investigative stage --
20 and I saw from the Tab 48 that that does happen -- would
21 that typically attract the higher levels of the Crown
22 involvement where there is more focused expertise, beyond,
23 say, a city Crown?

24 **MS. NETHERY:** Well, I guess as a city Crown
25 I ---

1 **MR. SHERRIFF-SCOTT:** No, what I mean is you
2 described earlier today that when you go up the chain and
3 there is advice given there is sort of epicentres of
4 expertise, in particular in connection with larger or more
5 complex cases.

6 **MS. NETHERY:** Yes. I mean, it isn't unusual
7 to see a triage situation where the Crown in a particular
8 jurisdiction may be -- you know, an extremely competent
9 trial Crown may want to go the Crown Law Office, Criminal
10 to get advice about wiretaps or search warrants. Those are
11 the examples I think I used previously. And then they may
12 bring in, for example, another Crown who is well known for,
13 you know, trial strategy, so that it's not always just
14 "Should we go to one Crown or another Crown". It's quite
15 often a group of Crowns that will bring in as a triage or
16 an advisory group and that's partly what this major case
17 advisory group is about. It's making sure that we get the
18 advice in the different areas of expertise.

19 **MR. SHERRIFF-SCOTT:** Okay. So the focus is
20 on bringing to bear the best expertise, and in the more
21 complex cases would it be more likely that that would
22 involve going beyond city resources?

23 **MS. NETHERY:** You mean local resources?

24 **MR. SHERRIFF-SCOTT:** Yes.

25 **MS. NETHERY:** Yes.

1 **MR. SHERRIFF-SCOTT:** Yes, local resources.

2 Thank you.

3 Now, Tab 30.1 and we don't need to turn it
4 up unless you need to see it and I'll just put the
5 questions and you can refer to it if need be. This again
6 was historical advice given to the Crowns about how to
7 respond to the pre-charge requests and there was "a
8 response should be in writing" based on essentially all of
9 the evidence collected in the brief by the police.

10 **MS. NETHERY:** Yes.

11 **MR. SHERRIFF-SCOTT:** That's a practice in
12 terms of giving advice at the pre-charging stage where
13 that's happening?

14 **MS. NETHERY:** Yes, in the major
15 prosecutions; that's correct.

16 **MR. SHERRIFF-SCOTT:** And the Crown would do
17 that in order to bring the sort of fullest expertise to
18 bear on a particular issue obviously?

19 **MS. NETHERY:** Yes, and to make sure that
20 there's a full understanding of what the facts are because,
21 you know, you can be sitting in an office talking to a
22 police officer, the phone rings, something else happens,
23 you forget to write something down and then you're
24 providing advice to the police on perhaps a different set
25 of facts or a set of facts where something has been left

1 out. And likewise, the police may -- they may be busy.
2 They may have to go off to a robbery call or something like
3 that. They may not have given you the full briefing.

4 So in order to avoid any misunderstandings
5 or miscommunications the best practice is to have the brief
6 in writing. And we know that's not always a feasible
7 option for the police, we know it's not always feasible for
8 Crowns, but certainly in these major cases that's the best
9 practice and that's what we recommend.

10 **MR. SHERRIFF-SCOTT:** Okay. Thank you.

11 Now, one little last subject that I want to
12 talk about is Tab 32, if we can turn that up, under the
13 heading of -- this is the second branch of the test, the
14 public interest considerations on screening. So if you can
15 just scroll down you'll see the factors that can be
16 considered versus those that ought not to be considered.
17 Keep going down.

18 **MS. NETHERY:** You're there, I think.

19 **MR. SHERRIFF-SCOTT:** I'm sort of hazing over
20 it at this point. We will want to consider the following
21 factors.

22 **MS. NETHERY:** You are?

23 **MR. SHERRIFF-SCOTT:** I'm not -- I'm trying
24 to get onto the public interest test.

25 **MS. NETHERY:** There we go.

1 **MR. SHERRIFF-SCOTT:** That's it. There we
2 go. So the must be excluded. If we can scroll past this
3 and just up a little bit further to the preamble to this
4 paragraph which says the factors they can take into account
5 -- may be taken into account.

6 There's a list here of factors and just as
7 with my previous question, I take it that this would have
8 been predated by actual practice; in other words, setting
9 down factors on the public interest that would've been
10 screening -- even ad hoc screening would've been previous
11 considerations as well?

12 **MS. NETHERY:** Well, I can't say that I've
13 ever seen anything in writing about these specific factors
14 for Crowns in Ontario. Some of these -- so no, I mean we
15 didn't have it in a document but as a matter of, you know,
16 common sense or good practice these would be
17 considerations.

18 **MR. SHERRIFF-SCOTT:** All right.

19 And ---

20 **MS. NETHERY:** I should -- can I just ---

21 **MR. SHERRIFF-SCOTT:** Yes.

22 **MS. NETHERY:** --- add one thing? I mean the
23 one -- I think when these policies were drafted and when
24 Mr. Justice Martin was drafting his report one of the
25 things that was done was to take a look at other

1 jurisdictions where they had charge screening and look at
2 some of their factors. So some of these would be mirrors
3 of other jurisdictions' factors and some of them would be
4 in addition to ---

5 **MR. SHERRIFF-SCOTT:** Really what I want to
6 focus on is the question of the lack of cooperation of an
7 alleged victim. Even before 1994, the fact of the alleged
8 victim's lack of cooperation, I assume that a Crown would
9 in the normal course in that environment consider more than
10 that in deciding whether to press on with the prosecution
11 or not.

12 **MS. NETHERY:** Yes. I mean I think the -- if
13 you look at the current practice memo on recanting
14 witnesses which is at Tab 38, I think that really sets out
15 the way -- the general approach that we would take.

16 **MR. SHERRIFF-SCOTT:** Well, I'm thinking back
17 to sort of early 1990s, say, a year or two, maybe three
18 before 1994. The fact that a witness may not want to
19 cooperate, that exclusively on its own would not be the
20 governing determination. There would be other factors the
21 Crown would normally consider.

22 **MS. NETHERY:** Yes, that's right. Certainly
23 the fact that the witness is not cooperative is not a bar
24 to the prosecution.

25 **MR. SHERRIFF-SCOTT:** Thank you. Those are

1 my questions.

2 Thank you, Commissioner.

3 **THE COMMISSIONER:** Thank you.

4 Mr. Manderville.

5 **MR. MANDERVILLE:** Mr. Commissioner, I have
6 no questions.

7 **THE COMMISSIONER:** Thank you.

8 Ms. Brannan.

9 **MS. SACCOCHIO BRANNAN:** Mr. Commissioner,
10 the Ontario Provincial Police have no questions.

11 **THE COMMISSIONER:** Thank you.

12 And is it Mr. Wallace today? Yes.

13 **MR. WALLACE:** I'm in the same position, Mr.
14 Commissioner. I have no questions.

15 **THE COMMISSIONER:** There you go.

16 And now we have the Ministry.

17 **MS. McINTOSH:** Ms. Nethery knows who ---

18 **THE COMMISSIONER:** I think that you two know
19 each other?

20 **MS. McINTOSH:** Yes, I don't know if the
21 world at large needs to know that I'm Leslie McIntosh from
22 the Ministry of the Attorney General.

23 --- CROSS-EXAMINATION BY/CONTRE-INTERROGATOIRE PAR MS.

24 **McINTOSH:**

25 **MS. McINTOSH:** I had a few questions, Ms.

1 Nethery, about -- just to finish out the record about
2 historical child abuse. In -- I'm at Tab 59 and in Tab 59
3 I wanted to draw your attention to a number of other
4 references and see whether you thought these had to do with
5 historical child abuse.

6 Actually while I'm in page 59, let me -- Tab
7 59, let me deal with page 2 of Tab 59 under "Inter-Agency
8 Coordination" and just ask you to talk about this in terms
9 of the questions from Mr. Foord about whether there was
10 anything before the major case protocol that described how
11 the police and Crowns are supposed to be working together.

12 **MS. NETHERY:** All right.

13 Well, yes, under the heading of "Inter-
14 Agency Cooperation" and this is the policy that was -- came
15 out in 1994 and it's been called C-3. It really talks
16 about the government providing leadership in response to
17 child abuse and the importance of a strong coordinated
18 approach to these cases and the coordination being between
19 the Crown, the police, the child welfare authorities and
20 the community in general. And I don't think that that can
21 be, as we say in the policy, it can't be overestimated.

22 So we encourage the Crown to continue to
23 participate in the development of local protocols, to
24 develop and implement inter-agency procedures for
25 responding to child abuse cases. And you may recall that

1 in the update to that, the practice memo that I think is
2 Exhibit 47, we ask that Crowns then take those protocols
3 and update them in light of current issues. Yes, so that's
4 what that is about and that applies to all types of child
5 abuse, whether historical or otherwise.

6 **MS. McINTOSH:** Okay.

7 And then dealing with historical abuse,
8 could I direct your attention to page 6 of Tab 59, under
9 "Expert Evidence"? I take it I'm looking at delayed
10 reporting gradual disclosure and so on. Is that a
11 reference to historical abuse there or does that have any
12 application to historical abuse?

13 **MS. NETHERY:** Well, it applies to child
14 abuse generally and it can apply to historical abuse as
15 well.

16 **MS. McINTOSH:** And further down the page
17 under "Publicity", in the second paragraph beginning "In
18 the case of adults testifying as to events which occurred
19 when they were children", I take it that's a policy with
20 respect to allegations of historical abuse. Would I be
21 correct about that?

22 **MS. NETHERY:** Yes, that's right.

23 **MS. McINTOSH:** And then on the last page of
24 that tab, the reference at the very last paragraph about
25 multiple victims and multiple offenders, again is that

1 something that would have application to cases of
2 historical abuse?

3 **MS. NETHERY:** Yes, it does.

4 **MS. McINTOSH:** And just on that point, for a
5 moment, am I reading that paragraph correctly that the
6 normal process is that the police would approach the
7 Crown's office and identify a case as a multiple victim/
8 multiple offender case?

9 **MS. NETHERY:** Yes. I mean, that's the only
10 way that we would be aware of it, really. They would
11 either approach us on a pre-charge or post-charge basis.
12 It may be a case where they've only laid, say, one charge
13 involving one victim and one offender but may feel that
14 there are further allegations and the only way that we
15 would know that something else might be coming to us would
16 be through discussions with the police obviously. So they
17 are the ones who initiate the charges and, you know, I
18 think they usually bring that to our attention.

19 **MS. McINTOSH:** And a couple of other
20 references to historical abuse. At Tab 48, the major case
21 resource document, at page 7, my understanding is that
22 listed here are the cases which fall within this protocol,
23 including historical or current sexual abuse, physical
24 abuse cases with multiple victims. Is that your
25 understanding; that this protocol applies to those sorts of

1 cases?

2 **MS. NETHERY:** Yes, and it indicated
3 specifically historical or current sexual abuse, physical
4 abuse cases with multiple victims are included in the
5 definition of a major case.

6 **MS. McINTOSH:** And your attention was drawn
7 to some references to historical abuse in Exhibit 48, which
8 is the brand new policy from last Friday. The reference is
9 at pages 4 and 5 in the introduction to the definition of
10 serious sexual offences, including historical allegations.

11 **MS. NETHERY:** Yes, that's right.

12 **MS. McINTOSH:** Yes. And at page 4, under
13 the heading "Communication Between Crown Attorney's Office
14 and Police Regarding Sexual Offences Cases", again, abusive
15 and historical nature is referred to.

16 I wonder if you would turn to page 17 and
17 just -- if we could just note for the record that at page
18 17 under "expert evidence" there is what I understand to be
19 a reference to issues of expert evidence in relation to
20 historical sexual offences. Is that the way you read that?

21 **MS. NETHERY:** I'm sorry; I just have to find
22 the exact reference. The expert evidence area?

23 **MS. McINTOSH:** Yes.

24 **MS. NETHERY:** And under paragraph E, it
25 talks about expert evidence with issues relating to memory,

1 particularly in cases of historical sexual offences.

2 **MS. McINTOSH:** And I think you were asked
3 whether the sexual assault summer school courses dealt
4 expressly with historical abuse. And at Tab 88 in August
5 of 1985, I think I found a reference. Regrettably there
6 are no page numbers at Tab 88, but it's about a third of
7 the way in and the heading is August 1995, which I think
8 would be a summer school.

9 **THE COMMISSIONER:** This?

10 **MS. McINTOSH:** Yes.

11 **THE COMMISSIONER:** That's '94, so ---

12 **MS. McINTOSH:** It looks like this and then
13 the actual second page looks like that.

14 **THE COMMISSIONER:** Here we go.

15 **MS. McINTOSH:** Yes, that's it.

16 **MS. NETHERY:** Yes, I think I have that
17 before me.

18 **MS. McINTOSH:** Yes.

19 **MS. NETHERY:** Does it start "Monday, August
20 14th of 1995"?

21 **THE COMMISSIONER:** That's right.

22 **MS. McINTOSH:** Yes. So is this a sexual
23 assault summer school program?

24 **MS. NETHERY:** Yes, this is the agenda for
25 the 1995 course. As you can see, it deals with section

1 276, various issues relating to sexual assault, but as
2 well, if you take a look at the second page, if you can
3 scroll down to that, there is -- well, there's obviously
4 the section dealing with memory and false memory, but as
5 well, there was a brief section on historical sexual
6 offences, dangerous offenders, similar act evidence, all of
7 which were issues that related not just to adult sexual
8 abuse but as well to child sexual abuse.

9 And if you also turn the page further to the
10 next section, you can see that there was a section on
11 testimonial aids for child witnesses in that course. There
12 was also, if we look at the Thursday section, which is
13 further down, I think, on that page, Madam Clerk,
14 interviewing techniques for witnesses, whether they're a
15 recanting witness; the prior consistent statements and con,
16 section 16, and preparing the witness, which relates
17 directly to child witnesses.

18 The sex assault courses dealt in part with
19 sexual offences relating to adults but also with sexual
20 offences relating to children and historical sexual
21 offences. There's a considerable amount of overlap both in
22 terms of the law and policy considerations relating to
23 those three areas really.

24 **MS. McINTOSH:** Thank you.

25 Now, a number of times -- turning to a

1 different topic -- a number of times in your testimony
2 you've talked about the independent role of the police in
3 laying charges, and you've referred us to not only the
4 policy manuals but the Martin Report and cases in support
5 of that principle.

6 Can you tell us whether Crown attorneys are
7 trained in the respective roles of the police and the
8 Crowns in laying charges and proceeding with prosecutions?

9 **MS. NETHERY:** Yes, they are. We talked
10 about the fact that there is a week-long training course
11 for new Crowns, and that's one of the roles of the Crown.
12 Our relationship to the police is a significant portion of
13 that training course. It's also something though that we
14 deal with as well at our spring conferences and other
15 training sessions as well because it's such an important
16 aspect of our job. How do we relate to the police? What's
17 our proper role and how can we, while working together,
18 maintain the independence of each party in a respectful
19 way?

20 So that's dealt with at various points in
21 Crown training and is something that is emphasized as well
22 in terms of mentoring processes. Senior Crowns will speak
23 to junior Crowns about it because we don't want them to be
24 put into a difficult position when perhaps a young,
25 inexperienced police officer comes in and speaks to a

1 young, inexperienced Crown. So it's a critical part of our
2 training, both in a hands-on, practical way, but also in
3 terms of our training courses for Crowns and our policy.

4 **MS. McINTOSH:** And have you been involved in
5 training of police?

6 **MS. NETHERY:** Yes, I have.

7 **MS. McINTOSH:** And do you have any knowledge
8 or awareness of whether the police are trained in the
9 concept of their independence in laying charges?

10 **MS. NETHERY:** Yes. I can't say that I've
11 lectured to the police on that particular point, but it's
12 always apparent to me that at least the senior experienced
13 officers are very well aware of their role and their
14 independence and are also respectful of the Crown and our
15 role and our independence in terms of prosecution.

16 **MS. McINTOSH:** And in the example that you
17 gave about the federal politician where the then Attorney
18 General rose in the legislature and explained the
19 withdrawal of charges, do you know whether the Crown had
20 advised the police in that case about whether to lay
21 charges or not?

22 **MS. NETHERY:** I think the answer is yes, but
23 I can't say for absolutely certain.

24 **MS. McINTOSH:** Now, Mr. Lee, I think it was,
25 asked you about Tab 38 -- page 4 of Tab 38. I'd like to

1 turn there now. And the question was about number 9(b). I
2 don't know if it was Mr. Lee. I may be misattributing this
3 question.

4 You were asked whether the assessment of
5 credibility deluded or was inconsistent with the reasonable
6 prospect of conviction test, and it was suggested to you
7 that it was, and you disagreed. And I wanted to ask you
8 why you disagreed with that suggestion?

9 **MS. NETHERY:** Well, I mean, it's certainly a
10 difficult area, but it's not outside of the realm of
11 experience that witnesses do return to their original
12 statement and are truthful about -- pardon me -- return to
13 their original statement, which may ultimately be truthful.
14 And it's often extremely difficult for us to predict what a
15 witness may say on the witness stand.

16 I mean, I suppose if we decided at that
17 point in time that the advice to Crowns would be, "Well,
18 you have to withdraw," then we're making the same sort of
19 assessment of credibility. This is the situation where
20 we're saying really the assessment of credibility should or
21 could be made by the trier of fact as opposed to the Crown.
22 So it really is consistent with our position that we're not
23 making or taking over the role of the trier of fact, but
24 we're giving the Crown permission to go ahead if they feel
25 that the original statement may be truthful and that the

1 individual may return to that statement.

2 And we also say to the Crown that, "No
3 matter what, you still are required to apply the reasonable
4 prospect of conviction and public interest test when you're
5 making that screening."

6 So we're not saying either you must go ahead
7 or you must not go ahead. We're providing that discretion,
8 and by doing that, we're really saying, "It's not your
9 assessment of credibility. It may be that you want to
10 leave that issue up to the trier of fact."

11 **MS. McINTOSH:** Okay. And just a couple of
12 questions about Tabs 30.1 and Tab 31. And I don't know
13 that I need to direct your attention to an actual
14 reference, but you were asked about the notion of advice to
15 police being based on a full -- on the full brief and,
16 where feasible, in writing. And I just wanted to ask you
17 whether that applied to every sort of advice that Crowns
18 were giving police in every case or whether it was limited
19 to -- I think you called it major cases on a couple of
20 occasions?

21 **MS. NETHERY:** Yes, and I think -- yes, I
22 think it does apply to major cases, and if you note at Tab
23 30.1 under the portion, "The Charging Decision", it
24 describes that in difficult cases the police may come to
25 the Crown for legal advice.

1 So the process that's recommended in
2 "difficult cases when the police seek
3 charging advice (this practice will not
4 be required in every case - only in the
5 most difficult): [then] Require that
6 the police provide a full *written*
7 investigative brief that will form the
8 basis of your advice." [and then]
9 "Where feasible, your reply should be
10 in writing."

11 So whether we describe it as a difficult
12 case or a major case, that's the preferred way of
13 proceeding.

14 **MS. McINTOSH:** All right.

15 And lastly, just to touch on the two new
16 documents we got at Tab 90, the first, the memo of July the
17 13th, 1983 to all Crown attorneys from Richard F. Challenor,
18 Q.C., Director of Crown Attorneys at the time.

19 **MS. NETHERY:** Yes.

20 **MS. McINTOSH:** This memo talks about a
21 booklet designed to familiarize witnesses with the court
22 system. I take it we weren't able to actually find the
23 booklet itself, just the memo describing the fact that
24 there was a booklet. Is that correct?

25 **MS. NETHERY:** That's correct. Again, it was

1 the paper world. We made a search. We found the memo. We
2 didn't find the booklet.

3 **MS. McINTOSH:** But would it be fair to say
4 that this booklet is part of the, if I can use the
5 Commissioner's word, evolution of the relationship between
6 the Crown and witness in 1983?

7 **MS. NETHERY:** Yes, I think that's a fair way
8 of characterizing it because in 1983, we didn't have Victim
9 Witness offices at all. And so really the -- if I can call
10 it the victim/witness preparation was done by a combination
11 of the Crown and the police.

12 **MS. McINTOSH:** And the other memo is dated
13 April 11th, 1985, also part of Tab 90, again from Mr.
14 Challenor to all Crown attorneys, and it talks about the
15 assignment of full-time Crown attorneys to victims of child
16 abuse and child victims of sexual assault, and it says:

17 "Please ensure that a full-time
18 assistant Crown attorney is assigned to
19 any of the above types of prosecutions
20 for purposes of preliminary hearing and
21 trial. Part-time assistant Crown
22 attorneys should not be conducting
23 these prosecutions."

24 What I wondered was are part-time assistant
25 Crown attorneys, are they per diem Crowns? Is that an

1 interchangeably ---

2 **MS. NETHERY:** Yes, that's correct.

3 **MS. McINTOSH:** Those are my questions.

4 Thanks.

5 **MS. NETHERY:** Thank you.

6 **THE COMMISSIONER:** Thank you.

7 Maître Dumais, do you have any questions?

8 **MR. DUMAIS:** No re-examination,

9 Commissioner.

10 **THE COMMISSIONER:** Thank you.

11 We'll call it a day and we'll come back

12 tomorrow morning at 10:00.

13 Thank you very much for your assistance.

14 **MS. NETHERY:** Thank you very much, sir.

15 **THE REGISTRAR:** Order; all rise. À l'ordre;

16 veuillez vous lever.

17 The hearing is now adjourned. L'audience

18 est ajournée.

19 --- Upon adjourning at 4:55 p.m./

20 L'audience est ajournée à 16h55

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C E R T I F I C A T I O N

I, Marc Demers a certified court reporter in the Province of Ontario, hereby certify the foregoing pages to be an accurate transcription of my notes/records to the best of my skill and ability, and I so swear.

Je, Marc Demers, un sténographe officiel dans la province de l'Ontario, certifie que les pages ci-hautes sont une transcription conforme de mes notes/enregistrements au meilleur de mes capacités, et je le jure.



Marc Demers, CVR-CM