

PRESS

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

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**Volume 85**

- Held: September 14, 1988, at the St. Thomas Aquinas Church Hall,  
Halifax, Nova Scotia
- Before: Chief Justice T.A. Hickman, Chairman  
Assoc. Chief Justice L.A. Poitras and  
The Honourable G. T. Evans, Q.C., Commissioners
- Counsel: Messrs. George MacDonald, Q.C., Wylie Spicer, and David  
Orsborn: Commission counsel
- Mr. Clayton Ruby, Ms. Marlys Edwardh, and Ms. A. Derrick:  
Counsel for Donald Marshall, Jr.
- Mr. Ronald N. Pugsley, Q.C.: Counsel for Mr. John F. MacIntyre
- Mr. Donald C. Murray: Counsel for Mr. William Urquhart
- Messrs. Frank L. Elman, Q.C., and David G. Barrett: Counsel for  
Donald MacNeil estate
- Messrs. Jamie W.S. Saunders and Darrel I. Pink: Counsel for the  
Attorney General of Nova Scotia
- Mr. James D. Bissell & Mr. A. Pringle: Counsel for the R.C.M.P.  
and Counsel for the Correctional Services of Canada
- Mr. William L. Ryan, Q.C.: Counsel for Officers Evers, Green and  
MacAlpine
- Mr. Charles Broderick: Counsel for Sgt. J. Carroll
- Messrs. S. Bruce Outhouse, Q.C. and Thomas M. Macdonald: Counsel  
for Staff Sgt. Wheaton and Insp. Scott
- Messrs. Bruce H. Wildsmith and Graydon Nicholas: Counsel for  
the Union of Nova Scotia Indians
- Mr. E. Anthony Ross: Counsel for Oscar N. Seale
- Mr. E. Anthony Ross and Jeremy Gay: Counsel for the Black  
United Front
- Court Reporting: Margaret E. Graham, OCR, RPR

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WEDNESDAY, SEPTEMBER 14, 1988 - 9:42 A.M.

MR. CHAIRMAN

1           Good Morning. Mr. Orsborn?  
2

MR. ORSBORN

3           Thank you, My Lord. There is one matter before we  
4 proceed. You will notice that there is no counsel this morning for  
5 Mr. Marshall. Mr. Ruby is in the Appeal Court on the Cabinet  
6 matter and we were advised by Ms. Derrick today that she is ill.  
7 She has requested that if at all possible the Commission agree to  
8 recalling witnesses that will be heard today, Mr. Herschorn and  
9 Mr. Coles, so that the counsel for Mr. Marshall may cross-examine.  
10 Both these witnesses will be recalled next week to deal with the  
11 MacLean matter and have asked if their cross-examination could  
12 be put off until that time. They ask that that's something that  
13 Your Lordships could consider. I don't know if any other counsel  
14 wished to make any comment on that.

MR. MERRICK

15           My Lords, I think I would. It's a matter that involves us.  
16 That would mean that we would want to be present during that  
17 cross-examination. That's going to be somewhat inconvenient  
18 because we are resting on Your Lordship's assurance that this  
19 aspect of the matter would be completed this week. I would hate  
20 to see the matter have to be dragged over to next week or the tail  
21 end of next week for some other point.  
22

MR. CHAIRMAN

23           There's no one more anxious to get these hearings over with  
24  
25

1 than we are so we can get on with all the other things that have to  
2 be done. But we have no control over the genuine illness of  
3 counsel and I understand that our counsellors are quite satisfied  
4 that it's absolutely impossible for Ms. Derrick to be here this  
5 morning, and clearly Mr. Ruby can't be here if he's in the Court of  
6 Appeal. Well, when the time comes for cross-examination, we will  
7 take it under advisement. But as of now, I would find it very  
8 difficult to refuse the request that has been made by Ms. Derrick  
9 through our counsel. I don't know if there's any possibility that  
10 tomorrow Mr. Coles and Mr. Herschorn could be made available  
11 early in the morning for cross-examination.

11 MR. MERRICK

12 That will be convenient, any day this week.

13 MR. CHAIRMAN

14 I suppose there's always the remote possibility that the  
15 hearing in the Court of Appeal won't take all day. Again, I guess  
16 Mr. Ruby would want to see the transcript before he cross-  
17 examines. That may not be practical. Anyway, we will... Well,  
18 any other counsel have any observations? Mr. Pink?

19 MR. PINK

20 We will do whatever we can to oblige.

21 MR. CHAIRMAN

22 Thank you. Okay.

23 MR. ORSBORN

24 Thank you, My Lord. The next witness to be called is Martin  
25 Herschorn.

MARTIN HERSCHORN, recalled and previously sworn, testified

as follows:

EXAMINATION BY MR. ORSBORN

Q. Mr. Herschorn, you've previously testified before this Inquiry.

A. That's correct.

Q. And you're still testifying as a barrister of the court?

A. Yes.

Q. I'll just briefly recap your history. I understand that you're presently employed with the Department of the Attorney General as the Director of Prosecutions?

A. Yes.

Q. And you were with the Department since January of 1972.

A. Yes.

Q. And occupied the position of senior solicitor for some six years... You were made a senior solicitor some six years after that?

A. I believe that's correct, yes.

Q. And you became Assistant Director of Criminal in September, 1980?

A. Yes.

Q. When were you appointed as Director of Prosecutions?

A. I can't be specific on the month. The year was 1986. I believe it was March.

Q. I also understand that you had criminal appeal work largely

1 for about 13 years before that?

2 A. That's correct.

3 Q. And not a great deal of trial work.

4 A. That's correct.

5 Q. So if we turn now to 1980, am I correct that prior to  
6 September, 1980, you were a senior solicitor and subsequent  
7 to September, 1980, you were Assistant Director of Criminal.

8 A. Correct.

9 Q. Was there a distinct change in your functions from one  
10 position to another?

11 A. The most specific change, if I recall correctly, was a specific  
12 responsibility assigned, although I'm not sure of the precise  
13 point in time in which the assignment was made, to deal with  
14 prosecutors and prosecution matters... prosecuting officers  
15 and prosecution matters. I'm a little un... My recollection is  
16 not very clear because it may have been subsequent to my  
17 appointment as Assistant Director of Criminal that that  
18 specific responsibility was assigned. I'm not sure if they were  
19 simultaneous.

20 Q. So, in any event, prior to September, 1980, do I understand  
21 that you had no direct responsibility then for the assignment  
22 of prosecutor for matters involving Crown prosecutors?

23 A. That's correct.

24 Q. Now in April, 1980 following a meeting with Mr. Gale of your  
25 Department with the R.C.M.P. commenced a full investigation

1 into matters involving Mr. Thornhill. Were you aware that  
2 that investigation was being carried out?

3 A. I can't recall whether I was aware at the time or not. I was  
4 not involved, directly involved at that stage of the  
5 proceedings.

6 Q. Were you sufficiently aware of it to be able to describe it as a  
7 commercial crime matter or not?

8 A. No, I had no real understanding of the investigation at that  
9 point.

10 Q. At that time, in the summer of 1980, were you aware of any  
11 standard policy or practice within the Department regarding  
12 the reporting of investigations into commercial crime, vis-a-  
13 vis the reporting by the police to the Department of Attorney  
14 General?

15 A. It would be routine for commercial crime matters to be  
16 reported to the Department. It would be a standard  
17 procedure of filing reports with the Department.

18 Q. And would that involve a circumvention of the local Crown's  
19 office?

20 A. No.

21 Q. Were you aware of any standard policy or practice that  
22 precluded at least having access to local Crowns during their  
23 investigation?

24 A. No.

25 Q. Were you aware of any offences or types of offences, the

1 investigation or reports of which would be forwarded directly  
2 to the Department as a matter of policy?

3 A. Only in cases where the Department had so requested. If that  
4 was the situation, then...

5 Q. On a case-by-case basis.

6 A. Yes.

7 Q. Were you aware of any categories of investigations to which  
8 that would apply?

9 A. No specific category, no.

10 Q. We've had evidence from Thomas and some documentation in  
11 respect of it that in July of 1980, the R.C.M.P. investigating the  
12 matter contacted Mr. Thomas who assigned Mr. Burke, told  
13 Mr. Burke to go to the investigator. Were you aware that that  
14 had taken place?

15 A. Not at the time. No, I learned of the matter of which you  
16 speak subsequent, but I had no involvement at the time.

17 Q. Yes. Even though you had made, did not have any  
18 involvement, would you regard that a direction between the  
19 Crown and the police as unusual?

20 A. No, I wouldn't. The Department has that prerogative, if it  
21 decides to follow that course.

22 Q. But it would not be unusual for Mr. Thomas to assign a  
23 prosecutor to go talk to an investigator on a commercial crime  
24 case.

25 A. As I understand the scenario from the outset, and I must

1 stress I was not involved at that time. I'm going, this is really  
2 hearsay more than anything. But my understanding is that  
3 the Department at the outset, at the request of the Deputy  
4 Attorney General, had issued instructions to the R.C.M.P. to  
5 have the matter, any reports concerning the matter returned  
6 to the Department. I believe to the specific attention of either  
7 the Deputy or Mr. Gale.

8 Q. When did you acquire that understanding?

9 A. I can't recall specifically when...

10 Q. During the Thornhill case?

11 A. Just through...

12 Q. Or preparing for the Inquiry?

13 A. No, I think during the course of the case I learned that.

14 Q. Were you given any understanding as to why that approach  
15 was taken?

16 A. No, as I say, I had no direct involvement with that decision  
17 being taken.

18 Q. Did you ask why it was taken?

19 A. No, I did not. The Deputy Attorney General being the second  
20 most senior law officer of the Crown has that prerogative and  
21 he chose to exercise it in this case.

22 Q. In September then when you became Assistant Director of  
23 Criminal, you then entered the chain of command with  
24 respect to serious criminal matters or criminal justice within  
25 the province. You entered that chain of command?

1 A. It wouldn't be my characterization. I suppose that's a fair  
2 characterization.

3 Q. That matters involving prosecutions before they got to the  
4 level of the Deputy or the Director would normally flow up  
5 through?

6 A. After my appointment as Assistant Director?

7 Q. Yes.

8 A. Yes, that's correct.

9 Q. Is it fair to characterize this investigation as a commercial  
10 crime investigation?

11 A. Yes, I understand the matter was carried out by investigators  
12 within the commercial crime section of the R.C.M.P.. So, hence,  
13 it would be a fair characterization.

14 Q. In an investigation of that nature in Halifax County, where  
15 would you expect the decision to lay a charge would be  
16 made?

17 A. As I indicated earlier, the decision was, as I understand it,  
18 was made by the Deputy Attorney General at the outset of the  
19 investigation. The decisions with respect to this investigation  
20 would be made initially by the head office of the Department.

21 Q. Leaving aside that specific direction, in the absence of that  
22 specific direction, where would you anticipate or where would  
23 you expect in the normal course of events that a decision to  
24 charge would be made, by whom?

25 A. The usual procedure is for the police, either during the course



1 of their investigation or at the conclusion of their  
2 investigation to consult with the county prosecutor,  
3 prosecuting officer or assistant prosecuting officer to have an  
4 assessment made by the Crown as to the sufficiency of the  
5 evidence. Or if it's during the course of the investigation, to  
6 provide the investigators with legal advice concerning any  
7 points they may have questions about.

8 Q. And is it fair to say that the decision to lay the charge would  
9 then be made by the police following consultation with the  
10 local Crown?

11 A. That's correct.

12 Q. And insofar as there is any decision to be made to proceed  
13 with a prosecution, where would you expect that decision to  
14 be made?

15 A. To proceed with the laying of a charge or with the  
16 prosecution?

17 Q. To proceed with the prosecution?

18 A. That decision is made by the Attorney General or his agents.

19 Q. So if there were any questions by the local Crown as to  
20 whether a prosecution should proceed, that would be passed  
21 up the line.

22 A. Yes.

23 Q. Would you expect to be involved in that?

24 A. At the present point in time? Yes. I'm the initial point of  
25 contact, liaison person, in the first instance between

1 prosecuting officers and the head office of the Department.

2 Q. In a high profile case, would you as, I realize that "high  
3 profile" is subject to some subjectivity, in a high profile case,  
4 would you as Assistant Director of Criminal expect to be  
5 involved in the decision to lay a charge?

6 A. It can happen from time to time. I don't know whether I  
7 would use the word "expect." It depends, again, on the facts  
8 of the particular case. If there is a request by a prosecuting  
9 officer for assistance, for guidance from the head office of the  
10 Department, then I might become involved. Or I might  
11 interject myself into a situation that I was aware of and felt  
12 required some guidance to a local prosecuting officer.

13 Q. Mr. Thomas told us yesterday that as a, I don't know if it was  
14 a matter of practice, that if he were to get a high profile case,  
15 he would pass it on up the line with respect to a decision  
16 regarding charges. Does that reflect on the instruction that  
17 you've given...

18 A. No, I think that's the approach of the individual incumbent  
19 prosecuting officer for each county. Again, as you rightly  
20 indicate, high profile can be subjective. What's high profile to  
21 one person may not be to another.

22 Q. Sure. The final R.C.M.P. report was forwarded to your  
23 Department on September 11th and I believe received on the  
24 same day. Did you receive a copy of that report?

25 A. To the best of my recollection, not at the date that it was, on

1 the date that it was received initially. At some subsequent  
2 point in time, I did.

3 Q. Were you aware in September that the matter was being  
4 handled by the Department, senior people in the Department?

5 A. Yes, I think I would have been aware of it at that point.

6 Q. Whose file was it in your Department?

7 A. Deputy Attorney General's.

8 Q. It was his file.

9 A. Yes.

10 Q. Did you eventually receive any instructions with respect to  
11 the R.C.M.P. report?

12 A. Yes, I was asked to peruse the document with a view to  
13 preparing a memorandum, which I believe is in the materials  
14 at page 25, the Commission materials concerning #165.

15 Q. Who asked you to peruse the report?

16 A. I am not entirely certain whether it was the Deputy Attorney  
17 General or Mr. Gale, perhaps on his behalf.

18 Q. What were you asked to do?

19 A. As the memorandum indicates in its opening paragraph, I was  
20 asked first to review the R.C.M.P. investigation report.

21 Q. You're reading from page 25?

22 A. Page 25, Paragraphs 1 and 2, numbered paragraphs 1 and 2.

23  
24 To provide a chronology of the negotiations  
25 which took place between Mr. Thornhill and the  
chartered banks culminating in the settlement of

Mr. Thornhill's obligations in November of 1979.

1 And, secondly, as it indicates:  
2

3 The indications contained in the police  
4 investigation report of the position of the  
5 chartered banks had the settlement of Mr.  
6 Thornhill's obligations not been negotiated.

7 Q. They appear to be two fairly specific objectives.

8 A. Yes.

9 Q. Do they reflect the instructions that were given to you?

10 A. I believe they do, yes.

11 Q. Were your instructions given to you in writing or verbally?

12 A. To the best of my recollection, they would have been verbal.

13 Q. Do you recall what documentation you were given to assist  
14 you in your task?

15 A. Again, to the best of my recollection, it would have been the  
16 R.C.M.P. investigation report, I believe the chief investigator  
17 being Corporal House.

18 Q. And that had a number of attachments...

19 A. A number of appen...

20 Q. To go along with it?

21 A. That's correct.

22 Q. Bank documentation, letters, what have you?

23 A. That's correct.

24 Q. Did you have any assistance in preparing your...

25 A. No.

Q. From the date that the R.C.M.P. report was received by the

1 Department and the date of submission of your memo, which  
2 I think was October 23rd, it was around five weeks, was there  
3 any urgency suggested to you in the preparation of your  
4 memo?

5 A. None that I recall. I believe that the memo is dated October  
6 17th, on page 30.

7 Q. Yes, I'm sorry. Before you submitted your memo, did anyone  
8 in the Department express to you their view on whether or  
9 not charges should or should not be laid?

10 A. Not that I recall. That decision had yet to, was yet to be  
11 taken.

12 Q. Mr. Gale's personal views.

13 A. Not that I recall on that specific point.

14 Q. Mr. Coles'?

15 A. Not that I recall.

16 Q. Mr. How?

17 A. No.

18 Q. Did you ever discuss the matter with Mr. How?

19 A. Not that I recall.

20 Q. I would ask you to refer...

21 A. I should clar... Not that I recall prior to the decision being  
22 taken. There may have been informal discussions within the,  
23 between myself and Mr. How after the fact. I'm sure we  
24 either discussed directly, indirectly, or alluded to the  
25 Thornhill file in some manner.

1 MR. ORSBORN

2 My Lord, I have distributed the files as an exhibit a press  
3 clipping. I understand the next number would be **EXHIBIT 169**.  
4 The clipping is dated "R.C.M.P. seeking documentation." There is a  
5 stamp date on the right-hand side dated April 18th, 1980. I am  
6 not able to indicate what paper this is taken from. I can indicate,  
7 however, that looking at the text of the clipping and comparing it  
8 with *Hansard* that the date of April 18th, 1980 would appear to  
9 be accurate. I don't have any difficulty with the date.

10 **EXHIBIT 169 - DOCUMENT ENTITLED 'R.C.M.P. SEEKING**  
11 **DOCUMENTATION', DATED APRIL 18, 1980.**

12 Q. And, Mr. Herschorn, I just draw your attention to the third  
13 column in the first full paragraph. And this is reporting  
14 apparently on a conversation that the Attorney General had  
15 with reporters on April 17th, 1980, which is shortly after the  
16 investigation commenced. And he is reported, and one can  
17 assume that it's accurate, he is reported as saying:

18 He is convinced Mr. Thornhill did nothing  
19 improper in settling with the bank and he hopes  
20 the Minister will stay in his job for a long time to  
21 come.

22 Were you aware at the time of preparation of your memo that  
23 Mr. House... I'm sorry, Mr. How had expressed those views  
24 publicly?

25 A. i may have been, if this was published in the local newspaper,

1 the *Chronicle-Herald*, I may have been aware of it. I have no  
2 specific recollection of being aware of it at the time.

3 Q. What did you understand your memorandum was to be used  
4 for?

5 A. My understanding was that it was to assist the Deputy  
6 Attorney General in the preparation of his opinion as to  
7 whether there was sufficient evidence to warrant the laying  
8 of a charge or charges against Mr. Thornhill.

9 Q. Just Mr. Thornhill?

10 A. That was my understanding.

11 Q. You were given no instructions to consider facts that may  
12 relate to laying a charge against one or more of the banks?

13 A. Not to my recollection, no.

14 Q. And at the time you prepared your memo, I presume you  
15 were aware of the recommendations made by the R.C.M.P. in  
16 the report.

17 A. I had a copy of their report, so the answer to that would be  
18 yes.

19 Q. Turning to your memo, you go through on the first two or  
20 three pages of your memo, pages 26 and 27, 28, a chronology  
21 of the banks. There are some lines through some of the dates  
22 which appear at page 27 and 28. Are you able to explain  
23 those lines?

24 A. I'm not the author of the lines or the annotations to this copy.  
25 I have, I can't say who put them on. I think I understand

MR. HERSCHORN, EXAM. BY MR. ORSBORN

1 why the lines are there but I don't know who originated those  
2 lines.

3 Q. I see.

4 A. Perhaps I can clarify. There were some mistakes made in  
5 the original draft of this memorandum in terms of the dates.  
6 In particular, and in terms of the sequence in which the  
7 items appear. In particular, I think the errors commenced  
8 at mid- page on page 27 where the reference September 17,  
9 1978 appears. "Letters go forward from Mr. Rice." That  
10 should be a reference to 1979. The next reference,  
11 September 19th, 1978 would be correct. The provincial  
12 recollection, to my recollection, was held in '78. But the  
13 following reference, the following three dates on the  
14 remainder of page 27 would be 1979 references as opposed  
15 to 1978. And those and, again, on page 28, there are some  
16 errors carried forward. 1978, October 5th, 1978, the first  
17 reference would undoubtedly be correct. The remaining  
18 three references would more accurately 1979. These  
19 mistakes were noted at the time and clarified before the  
20 Deputy, for the Deputy Attorney General for the purposes of  
21 his review.

22 10:05

23 Q. So in summary what you have, you have the election and  
24 the appointment as a Minister throughout the year before  
25 the letters go off to Mr. Rice.



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1 A. That was my...that's my recollection, that's what reflected  
2 here.

3 Q. And the other things you were asked to do was to give an  
4 indication of the position of the banks if a settlement were  
5 not negotiated and do I understand that you were  
6 specifically asked to do this, you were asked to addressed  
7 that particular point?

8 A. That's what the memorandum indicates and I have no other  
9 recollection.

10 Q. And you understood that you were doing that with a view to  
11 assisting the Deputy in reaching a conclusion on whether  
12 charges should proceed against Mr. Thornhill.

13 A. That's correct.

14 Q. When were you compiling your summary, were you doing it  
15 with consideration of any particular offence?

16 A. The context of the RCMP report was section 100(1)(c) in  
17 Mr.Thornhill's situation and that would have been the  
18 context I would have been reviewing it.

19 Q. Uh-hum. You include in your memorandum some bank  
20 extracts of each dated primarily in 1978 which speak of  
21 recommending write-offs of Mr. Thornhill's account. When  
22 you wrote that, what was your understanding of the phrase  
23 "write-off" as used by the bank?

24 A. My understanding would, I suppose, be written off as an  
25 uncollectable bad debt.

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1 Q. Was it your view that...

2 A. In other words, the banks would cease any attempt to  
3 collect that debt.

4 Q. Would they then no longer consider it owing?

5 A. I suppose the debt is always owing once created, but in  
6 terms of the bank's approach to that debt, whether it  
7 viewed it as a collectable or uncollectable item, they would  
8 use the terminology write-off if it was uncollectable.

9 Q. Did you intend to leave the impression from your memo that  
10 the banks, all the banks, had eliminated Mr. Thornhill's  
11 liability with them?

12 A. I don't believe the references, I would have to double check,  
13 but I don't believe the references contained in the second  
14 part of the memorandum are references from each of the  
15 four banks involved.

16 Q. That's...

17 A. I believe it was two in particular is my best recollection.

18 Q. Well, with respect then to the debt as a whole, what  
19 impression did you wish to leave with the reader as to the  
20 position of the banks?

21 A. I didn't intend to leave any impression with the reader.  
22 These were...I was asked to comment on aspects, this was in  
23 a sense a fact...a memorandum of fact rather than law  
24 designed to assist the Deputy Attorney General, hopefully  
25 accurately pointing to and with the acknowledged errors

MR. HERSCHORN, EXAM. BY MR. ORSBORN

1 I've made reference to in reference to the dates, to specific  
2 matters of fact referred to in the RCMP report.

3 Q. When you...

4 A. It was not my intention to colour or flavour it one way or  
5 the other.

6 Q. When you received your instructions, was there any  
7 discussion of whether or not Mr.Thornhill had or had not  
8 received a benefit from the settlement?

9 A. None that I recall.

10 Q. When you were writing your memorandum, did you wish to  
11 leave any impression with the reader that Mr. Thornhill did  
12 or did not receive a benefit from such?

13 A. No, I did not.

14 Q. Now were you asked to set out the position of the banks in  
15 the absence of a settlement, is that fair to say?

16 A. Yes.

17 Q. On page 40 to 42 there are a number of extracts from the  
18 forty... there are a number of extracts from the bank  
19 documentation. My understanding is that these extracts are  
20 included in documents which were available to yourself  
21 when compiling your memorandum. Are you able to tell us  
22 whether or not you are...if you read one or more of these  
23 extracts when you were preparing your memorandum?

24 A. I would...if they are contained, as I have no reason to doubt  
25 that the items contained at pages 40 through 42 here are

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1 accurate, if they were contained in Corporal House's  
2 summary report, I suspect I would have read them.

3 Q. Yes. And did you consider such extracts in any way  
4 relevant to the position of the banks in the absence of a  
5 settlement?

6 A. I believe some of them were because I think there is some  
7 correlation between some of the references in the document  
8 at page 40 through 42 in this booklet with matters referred  
9 to in the second part of my memorandum.

10 Q. Yes, certainly number 3(a) and (b) would be included in  
11 your memorandum.

12 A. I believe so.

13 Q. And form part of it.

14 A. Yes.

15 Q. And the dates there are marked 1978.

16 A. Yes.

17 Q. There are other extracts dated late in September, later in '78  
18 and some in '79. Do I conclude that you considered the  
19 other extracts not relevant to the position of the banks?

20 A. Having read within the last week or two pages 40 through  
21 42, I would characterize these references as references to  
22 the political connotations which is not the aspect of the  
23 matter that I was pursuing in my memorandum. I was  
24 pursuing the question of the position of the banks, if a  
25 settlement had not been arrived at, in the context of writing

MR. HERSCHORN, EXAM. BY MR. ORSBORN

- 1 off debt.
- 2 Q. Were you specifically asked to address your memo in the  
3 context of writing off the debt?
- 4 A. Yes.
- 5 Q. So your...
- 6 A. As it would appear.
- 7 Q. So I understand then that your instructions were "Give me a  
8 memo setting out the position of the banks about writing off  
9 the debt if the settlement had not been reached."
- 10 A. That's correct.
- 11 Q. Can you give us any assistance as to why your instructions  
12 might have been confined so narrowly?
- 13 A. No, I can't.
- 14 Q. If your instructions had not been confined to references to  
15 writing off the debt, would you have considered that  
16 extracts such as these would have been relevant to the  
17 position of the banks in the absence of a settlement?
- 18 A. I think you're asking me to speculate. I can't...I think the  
19 answer is yes, I think they would be relevant.
- 20 Q. Did you give any consideration to the RCMP's  
21 recommendation about 'let's look at the banks a little more'  
22 when you were reviewing this file?
- 23 A. No, as I indicated earlier, I was asked to address two areas  
24 of facts and the memos, I believe, responsive to those two  
25 requests made of me and that was the extent of my...of the

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1 request made of me.

2 Q. Did you give any consideration to the comments of the RCMP  
3 about the conduct of the banks?

4 A. No, I wasn't add...I wasn't asked to nor was I addressing that  
5 aspect of the matter.

6 Q. Can I ask why you would not do that? You're a senior man  
7 in the department looking at a report of the RCMP that  
8 canvasses a number of possible charges. You indicate that  
9 you would have looked at the whole report. Why would you  
10 not in the exercise of your own judgement and  
11 responsibility bring your own mind to bear on an issue such  
12 as that?

13 A. Well, in terms of reviewing the whole report, it was  
14 essential that I review the whole report in order to respond  
15 to the request made of me as reflected in the memorandum  
16 that I alluded at page 25. In reference to your broader  
17 aspect of your question, this file was a file of the Deputy  
18 Attorney General and he was the law officer of the Crown  
19 who was looking in to the question of whether charges  
20 or...he was the individual who was making the ultimate  
21 determination, not I.

22 Q. So even if there had been something in the report that had  
23 given you cause for concern about something other than Mr.  
24 Thornhill under 110(c), you would have not done anything  
25 about it?

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1 A. It's difficult to answer that question, Mr. Orsborn, in a  
2 general fashion. I'd have to have a specific case in point. If  
3 something came to my attention which revealed the  
4 commission of some other criminal offence, I suspect I  
5 would bring it to the attention of someone.

6 Q. Do I take it from what you're saying that the...

7 A. I think I have to add that it was...it's not...wasn't my...I  
8 didn't perceive my function to provide a critique of the  
9 Deputy Attorney General's work in this area. He was...he, as  
10 I indicated earlier, is the second most senior law officer of  
11 the Crown and fully capable of reaching his decision on his  
12 own.

13 Q. You've indicated that your instructions were narrowly  
14 defined to the matter of write-off. Is it then fair to say that  
15 your memo was really directed to assisting the Deputy  
16 Attorney General in reaching a conclusion as to whether or  
17 not there had been a benefit?

18 A. I really can't answer that question, because I think the  
19 question would have to be better directed to the person who  
20 originated the request for it as to what...

21 Q. You would know as an experienced criminal lawyer that the  
22 position of the banks, vis-a-vis writing off would really only  
23 be referable to the question of a benefit.

24 A. It was relevant to the question of a benefit, yes.

25 Q. Did you review the file with a view to determining in your

MR. HERSCHORN, EXAM. BY MR. ORSBORN

1 own mind whether or not a charge should be laid?

2 A. I don't believe I did that in any...as a positive step in terms  
3 of being requested to do so or that I was mandated to do so.  
4 But in terms of the...I can state that in terms of the ultimate  
5 decision taken not to lay a charge against Mr. Thornhill that  
6 I concurred in the result.

7 Q. But you were not mandated to review the file with that in  
8 mind.

9 A. No.

10 Q. And your memo itself expressed no conclusions.

11 A. I don't...I don't read it as doing so.

12 Q. And no opinions.

13 A. No.

14 Q. And you were simply asked for a factual review.

15 A. That's my recollection.

16 Q. In the course of your review, did you review or research  
17 any law?

18 A. Not that I recall, no.

19 Q. Were you at all formally asked for your view on whether or  
20 not charges should proceed?

21 A. I wouldn't use the term "formally." I can recall a meeting in  
22 the Deputy Attorney General's office, my best recollection  
23 would be prior to the release of his opinion, where  
24 the...where the matter was discussed. I wouldn't...it's for. I  
25 guess. others to characterize whether that's a formal or



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1 informal setting.

2 Q. Uh-hum.

3 A. I would characterize it as more informal than formal.

4 Q. Who was present at that meeting?

5 A. My best recollection is Mr. Gordon Gale and the Deputy  
6 Attorney General, Gordon Coles, and myself.

7 Q. Uh-hum. And did you express your view on whether or not  
8 charges should be laid against Mr. Thornhill?

9 A. I believe I did. It's extremely difficult with the number of  
10 years that have passed to recall accurately.

11 Q. Uh-hum. Do I understand that your decision, your view  
12 about whether or not charges should be laid, and I say...I  
13 gather you concurred in the decision, was something that  
14 you sort of absorbed in your review of the file rather than  
15 specifically focusing on the elements of the offence?

16 A. Yes.

17 Q. Is that correct?

18 A. That's correct. Well, not the exclusion of it, I think the  
19 review would have to take into consideration the elements  
20 of the offence. But I would share your characterization it  
21 was more an absorption having gone through the exercise  
22 that I did for the purposes of preparing the memorandum. I  
23 would have absorbed the full flavour, hopefully, of the...

24 Q. Was it more of gut reaction than a researched opinion?

25 A. Yes. I think that's a fair characterization.

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- 1 Q. And based on the review that you had done, would you  
2 have signed your name as a lawyer to an opinion stating  
3 that no charges should be laid?
- 4 A. Only if I agreed with the full contents of the opinion.
- 5 Q. Could you expand on that?
- 6 A. Well, I've indicated I concurred with the final result. An  
7 opinion may contain conclusions as to law or as to fact and  
8 before I would sign my name to it I would want to be  
9 satisfied and adopt those conclusions, make my own  
10 independent assessment of the law and reach those  
11 conclusions on my own.
- 12 Q. Okay. So you did not do a full assessment of the law or the  
13 facts to enable you to reach your own considered opinion, is  
14 that correct?
- 15 A. I think that's an accurate statement.
- 16 Q. Was the fact that Mr. How had made these public comments  
17 back in April that we referred to ever discussed as a matter  
18 of concern prior to the release of Mr. Coles' opinion?
- 19 A. Not to my recollection.
- 20 Q. Did you have occasion to provide either Mr. Gale or Mr. Coles  
21 with your opinion as to the intent that was required under  
22 110(1)(c)?
- 23 A. No, I did not.
- 24 Q. Did you have occasion to, during the currency of this matter,  
25 to research any law concerning that issue?

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1 A. Could I ask you to clarify what time frame, during the  
2 currency of which matter? The matter here or back then?

3 Q. Back then, I'm sorry.

4 A. No.

5 Q. If I could ask you to turn to page 31.

6 A. Yes.

7 Q. This is a memo from Mr. Coles to Mr. How in which he sets  
8 out his conclusion, and Page 32, paragraph 2, I'm  
9 paraphrasing to an extent but he said, "The foregoing report  
10 and attachment have been fully considered by you to  
11 determine whether or not the settlement constituted an  
12 offence."

13 A. Yes.

14 Q. Do I understand your evidence as saying that you did not  
15 fully consider the report and the attachments with a view to  
16 determining whether or not offences had been committed?

17 A. I think that's correct. I don't...I wouldn't characterize my  
18 involvement as a full assessment of the evidence with a  
19 view to determining whether an offence had been  
20 committed.

21 Q. So to the extent that this paragraph refers to your  
22 involvement, is it fair to say it's inaccurate?

23 A. I think it's an overstatement of my role.

24 Q. Were you...did you get a copy of Mr. Coles' memorandum,  
25 did you see a copy of it?

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- 1 A. I was just looking, I don't...I believe I would have after its  
2 release. I have no specific recollection. But I suspect I  
3 would have.
- 4 Q. Prior to its release, were you aware that the issue of intent  
5 on the 110(c) was in Mr. Coles' words, the crux of the  
6 matter?
- 7 A. I can't recall whether I was or wasn't prior to its release, no.
- 8 Q. Uh-hum. Were you involved in any discussions concerning  
9 the necessary intent under that section?
- 10 A. At the meeting to which I alluded to earlier involving  
11 myself and Mr. Gale and the Deputy Attorney General, there  
12 may have been reference to that issue.
- 13 Q. Were you aware of Mr. Coles' view as expressed in this  
14 memorandum that the intent required under that section  
15 was a criminal intent or a guilty mind as he uses the  
16 phrase?
- 17 A. I think that's an accurate statement.
- 18 Q. It's a what?
- 19 A. That's an accurate statement in terms of criminal intent with  
20 respect to the commission of any criminal offence.
- 21 Q. Were you aware of Mr. Coles' view of the degree of intent  
22 required to sustain a conviction under that section?
- 23 A. Not prior to having looked at his ultimate opinion on the  
24 matter, no.
- 25 Q. Did you ever express to Mr. Gale or Mr. Coles your opinion,

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1           either agreeing or disagreeing with Mr. Coles' view on the  
2           intent required?

3           A.    Not to my recollection.

4           Q.    Did you hold an opinion at the time on the intent that was  
5           required?

6           A.    No, I don't think I addressed my mind specifically to that  
7           issue.

8           Q.    Is it fair to say then that on the issue that Mr. Coles himself  
9           characterized as the crux of the matter, this issue of intent,  
10          you didn't provide any assistance or input or opinions?

11          A.    Not that I can recall.  There may have been...there may have  
12          been questions posed to me at this meeting or another  
13          informal discussion on the issue but I have no specific  
14          recollection of that.

15          Q.    Okay.  I'd ask you to turn 103, Mr. Herschorn, page 103.  
16          This is a letter again from Mr. Coles to Chief Superintendent  
17          Feagan in January of '81 and in the middle paragraph he's  
18          referring to this issue of intent which was one of the  
19          discussion between the Deputy and the RCMP.  He refers to a  
20          couple of cases and he said basically you can be assured  
21          that we are familiar with these cases, we addressed our  
22          minds to it, they were carefully considered in assessing any  
23          value in the police reports and other relevant authoritative  
24          cases were also considered by senior staff members as well.  
25          Insofar as the thrust of that paragraph relates to you and

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1 your involvement, is it accurate?

2 A. Perhaps you'll allow me to read it first. [Witness reads  
3 document]

4 Where the paragraph refers to "since both of these case  
5 originated in this jurisdiction and staff of this department  
6 were involved in both the prosecutions and representing the  
7 Crown on the respective appeals," yes, I would have, prior to  
8 September of 1980, had specific responsibility for the  
9 administration of appeals and I personally would  
10 undoubtedly have had some involvement with respect to  
11 the two cases referred to in the letter.

12 Q. Uh-hum.

13 A. Where the letter goes on, "You can assume that we," I  
14 can't...I don't know to whom the "we" refers.

15 Q. Uh-hum. So far as it may refer to you.

16 A. Well, as it goes on "we are," if it refers to me "We are very  
17 familiar with the evidence involved in the decisions of our  
18 courts were carefully..." down to "decisions of our court," yes,  
19 I think that's a fair statement, "Were carefully considered in  
20 assessing and evaluating the police reports and enclosures in  
21 the above-captioned matter in reaching our decision."  
22 Insofar as myself is concerned, I don't believe that's a  
23 reference to myself.

24 Q. Okay.

25 A. And as it concludes, "Other relevant authoritative cases were

1 also considered by senior staff members as well as the  
2 undersigned," I don't believe that that would refer to me.

3 Q. Did you read any cases at all in helping the Deputy reach his  
4 decision?

5 A. Not that I recall.

6 Q. The senior staff members that are referred to, it says, "Senior  
7 staff members as well as the undersigned," who would be the  
8 senior staff members in the department?

9 A. I can't answer that, it would have to...you'd have to direct that  
10 question to Mr. Coles. In terms of my knowledge of who that  
11 phrase is most commonly used in reference to would be Mr.  
12 Gale's position, director of criminal, and my own position,  
13 director of...currently director of prosecutions and assistant  
14 director of criminal.

15 10:30 a.m.

16 Q. So the only one that could be included here in senior staff  
17 members other than yourself would be Mr. Gale, in common  
18 partners.

19 A. To my understanding. But since these are Mr. Coles' words, I  
20 think the question would be better directed to him.

21 Q. So insofar as that paragraph relates to your involvement in  
22 assessing and evaluation or using the decisions of [Ruddick?]  
23 and Williams in assessing and evaluating police reports and  
24 considering other relevant reported cases, insofar as it may  
25 relate to you, it is inaccurate?

- 1 A. I wouldn't characterize it as inaccurate. I don't think the  
2 references are to me.
- 3 Q. If you are included in the rubric there as senior members.
- 4 A. If by definition I am one of the so-called "senior staff  
5 members", then it would be inaccurate, yes.
- 6 Q. It would be?
- 7 A. It would be inaccurate.
- 8 Q. Inaccurate.
- 9 A. Yes.
- 10 Q. You've indicated to us it was your understanding that the  
11 decision as to whether or not charges would be laid rested  
12 with the Deputy in this case?
- 13 A. That's correct.
- 14 Q. Can you give any reason as to why that was the case?
- 15 A. No, I don't think I ever recall asking specifically. I just  
16 understood it and accepted it that that was a decision of the  
17 Deputy Attorney General.
- 18 Q. Did you consider it appropriate?
- 19 A. Yes, I think I would.
- 20 Q. Why?
- 21 A. I think that because I feel the Deputy Attorney General has  
22 the prerogative in any case to decide that he will be the agent  
23 of the Attorney General, the representative of the Crown who  
24 will make the final determination.
- 25 Q. Speaking of the determination now...



- 1 A. Particularly in a high profile case, and I have no trouble  
2 characterizing this as a high profile case.
- 3 Q. I'm thinking now about the determination to lay charges, not  
4 the determination to proceed with the prosecution. Just so  
5 that we're clear. And your evidence is that you believe...
- 6 A. The decision to lay charges is a decision for the police.
- 7 Q. Okay, then I've misunderstood your earlier evidence. I had  
8 understood you to say that you believed in this case that the  
9 decision about the laying of charges was going to rest with the  
10 Deputy. Did I misunderstand it?
- 11 A. Perhaps I should clarify. I think the distinction is often  
12 muddled in terms of the phrase that's commonly used "laying  
13 of charges." But, in my view, there's two components to that.  
14 The police, their investigation, their assessment of the  
15 evidence and, secondly, the Crown prosecutor, the agent of  
16 the Attorney General, and his input into that decision. But  
17 pure, in my view, technical legal terminology, the decision as  
18 to the laying of a charge is one for the police.
- 19 Q. And that's reflected in your earlier evidence before this  
20 Inquiry.
- 21 A. Yes.
- 22 Q. And I believe you've used the word "unequivocally."
- 23 A. Yes.
- 24 Q. It's the responsibility of the police.
- 25 A. Yes. And reflected in Chief Commissioner Simmonds'

1 subsequent letter to the Attorney General, I believe.

2 Q. I'll go back to your earlier testimony here this morning, so  
3 that we are clear. In this case, at what level and by whom  
4 was the decision to lay charges to be taken, to your  
5 understanding?

6 A. In my understanding, the decision in any case as to the laying  
7 of the charge where there has been a police investigation is  
8 one ultimately for the police.

9 Q. And was it your understanding that that pertained in this  
10 case?

11 A. I can only, since I wasn't involved in that aspect of the case, I  
12 can't comment. I think I know what you're alluding to from  
13 review of some of the file material.

14 Q. But you've told us earlier this morning...

15 A. But I can't comment on it, because I wasn't involved.

16 Q. You've told us earlier this morning that you were preparing  
17 your opinion with a view to assisting the Deputy in reaching a  
18 conclusion as to whether or not charges should be laid.

19 A. Right.

20 Q. Is that not inconsistent with...

21 A. Well, I think you're using the term "charges should be laid"  
22 too narrowly. The role of the law officer of the Crown is to  
23 assess the evidence and determine whether there is sufficient  
24 evidence to warrant a prosecution. And in the vast majority  
25 of cases, there is concurrence in view between the police

1 investigators and the law officer of the Crown as to the  
2 sufficiency of the case. In this case, it would appear there  
3 was a dispute at certain levels within the R.C.M.P. as to the  
4 sufficiency of the evidence. But at the highest level, there  
5 was concurrence with the view of the Deputy Attorney  
6 General. I don't characterize the position taken by the  
7 Department in this matter as a stopping the police, had they  
8 so desired, from laying a charge. That is, that's always the  
9 position, in my view.

10 Q. So I take it that it was your view that the Department at the  
11 highest level was providing advice to the police on whether or  
12 not charges should proceed?

13 A. Yes, and as to whether, as to whether there was a case that  
14 could be successfully prosecuted.

15 Q. Is it your understanding that following the Deputy's  
16 determination that the police would be so advised?

17 A. I would have anticipated that, yes.

18 Q. Prior to the decision being announced that no charges were to  
19 be laid, did you have any knowledge that consideration was  
20 being given to briefing the premier?

21 A. None whatsoever.

22 Q. When Mr. Coles formulated his opinion, was his opinion  
23 communicated to you before it was released?

24 A. Not to my recollection.

25 Q. How did you find out that charges were not going to be laid?

1 A. I can only assume that I would have received a copy of Mr.  
2 Coles' decision upon its release.

3 Q. And you were aware then that once that decision was  
4 reached, that it was going against the recommendation of the  
5 R.C.M.P.?

6 A. Against the recommendation of certain members of the  
7 R.C.M.P., yes. At some point. Whether I knew precisely at  
8 that point, because I wasn't involved in those discussions with  
9 the R.C.M.P.

10 Q. Were you aware that there was a press release going to be  
11 issued by the Deputy?

12 A. No.

13 Q. I take it you found out about it when it was released?

14 A. I would assume so, yes.

15 Q. Would that strike you as an unusual step?

16 A. Not given the profile that this case had achieved publicly.

17 Q. Did you have any discussion about the effect of that press  
18 release on the position of the R.C.M.P.?

19 A. No.

20 Q. You've indicated to us that it was your view that despite the  
21 advice given by the Deputy that the police were not estopped  
22 from laying a charge. Surely once a press release of this  
23 nature is made, for practical purposes, surely the police are  
24 estopped from proceeding.

25 A. No, I don't accept that. The police are not estopped from

1 proceeding. The police have the right to, as any citizen in our  
2 society has, to lay a criminal charge.

3 Q. Would you agree that for practical purposes it would make  
4 proceedings infinitely more difficult?

5 A. Yes, I would. Because the police are forearmed with the  
6 knowledge of what position the prosecutor will take in the  
7 event of a charge being laid.

8 Q. Was there any discussion within the Department to your  
9 knowledge about obtaining an opinion of outside counsel?

10 A. With reference to what?

11 Q. Whether or not a charge should be laid?

12 A. I have no knowledge of that.

13 Q. Was there any discussion, to your knowledge, about the  
14 Department being concerned that a perception of absolute  
15 impartiality be maintained on the issue?

16 A. Well, I see references in this press release that you've  
17 entered this morning to the Attorney General of the day, Mr.  
18 How, indicating "we are not going to be seen as exercising any  
19 political interference with what they do." Similarly, I know of  
20 no political interference in the judgement exercised on this  
21 matter within the Department.

22 Q. No, I wasn't asking that. I was asking whether or not in the  
23 process adopted by the Department in considering this case,  
24 whether or not there was a concern that an appearance of  
25 impartiality be particularly maintained?

1 A. I wasn't mandated to deal with that type of issue; hence, I  
2 can't answer your question, I'm afraid.

3 Q. The release that was eventually issued is on page 44, Mr.  
4 Herschorn. The second paragraph reads:

5 I'm advised (this is Mr. How speaking) that the  
6 report and attachments have been fully  
7 considered by Mr. Coles and other senior law  
8 officers of the Crown and it is their considered  
9 opinion that the nature of the settlement  
10 reached...

11 Et cetera. Et cetera. Do I understand your previous evidence  
12 was that the opinion, as you expressed, was more in the  
13 nature of a gut reaction than a full considered opinion?

14 A. Yes, I think that's correct.

15 Q. And would it be fair then to say that if, in fact, you are  
16 included in the reference to "senior law officers of the Crown,"  
17 that insofar as this release may relate to you, it is at least, or  
18 at best, an overstatement?

19 A. Yes, I think that's accurate. However, I want to add that I  
20 have no difficulty associating myself with the final decision  
21 reached in this matter.

22 Q. Based on your gut reaction.

23 A. Yes, and my knowledge of the file and the evidence that's  
24 contained therein.

25 Q. On the matter of the assignment of the prosecutor, there was  
a later flurry of press releases and discussions, I believe, with

1 Mr. Thomas about the assignment of Mr. Burke.

2 A. Uh-huh.

3 Q. Mr. Thomas testified yesterday and the press release, first  
4 press release relating to that issue is found on page 58. I  
5 believe we have touched on this before. There is reference in  
6 the second paragraph of that press release to a clearly  
7 understood policy and practice in cases of commercial crime  
8 and fraud about referring the matter to the Deputy and senior  
9 staff. Do I understand your evidence to be that while this  
10 may be done on a case-by-case basis, there was no commonly  
11 accepted policy or practice?

12 A. Yes, I think that's an accurate assessment.

13 Q. Were you aware of this press release when it came out?

14 A. No, I was not.

15 Q. After it came out?

16 A. I suspect I would have been aware of it afterwards, yes. This  
17 was in the summer, I believe, of..

18 Q. November, I believe, 1980. Mr. Coles was in Victoria.

19 A. Oh, yes. Yes, I would have been aware of it afterwards, no  
20 doubt.

21 Q. Did the reference to "a clearly understood policy and practice"  
22 give you any cause for concern?

23 A. No, this is Mr. Coles' statement. He released it. I can't  
24 comment on the contents of it one way or the other.

25 Q. Did you have any concern about its accuracy?

1 A. Well, I've alluded, I've just indicated that I don't feel that's a,  
2 I think that's perhaps an overstatement of the situation in  
3 terms of there being accepted practice or policy with  
4 reference to these matters being referred to the Department.  
5 I'm not familiar with such a policy or practice.

6 Q. But if you see a press release which affects your Department,  
7 and a part of which contains an overstatement, do you do  
8 anything about it to try and fix it?

9 A. Again, it depends on the particular facts of the matter.

10 Q. Were you contacted by Mr. Thomas in respect of this press  
11 release?

12 A. I may have been. I have no specific recollection of that, but  
13 it's possible.

14 Q. Mr. Thomas, in fact, testified yesterday that he contacted you  
15 and asked you to contact Mr. Coles to tell him to fix it. Does  
16 that in any way refresh your memory?

17 A. It doesn't really. I was aware of that, Mr. Thomas'  
18 understanding of the situation before. I have no specific  
19 recollection of it. I have no reason to doubt his testimony or  
20 his...

21 Q. Do you have any recollection of speaking to Mr. Coles about  
22 it?

23 A. I really don't, no.

24 Q. On page 108, Mr. Herschorn, is a letter from Mr. Coles to  
25 Superintendent Feagan in January of '81 commenting



1 generally on the role of the Attorney General and the  
2 relationship between police and Crown counsel. I just direct  
3 your attention to the last paragraph on page 108. He speaks  
4 of the role of the police in investigating and the authority of  
5 the Attorney General to take over prosecution and to stay it.  
6 The last couple of sentences read:

7  
8 It would appear implicit, therefore, that the  
9 person who has the prosecutorial responsibility  
10 would decide any difference of opinion which  
11 might arise between an investigating officer and  
12 the Attorney General or his agent. I've always  
13 understood this to be the policy in this province.

14 Now my reading of that in context is that Mr. Coles is saying  
15 that if there is a difference of opinion as to whether a charge  
16 should be laid, that difference of opinion will be decided by  
17 the prosecuting party. Is that...

18 A. If that's what the letter says, then I would disassociate myself  
19 with the viewpoint. As my testimony has been earlier, the  
20 ultimate decision as to the laying of a charge rests with the  
21 police, rests with the potential informant.

22 Q. In November...

23 A. However, I think I have to add, because of what I've also  
24 alluded to earlier, the blurring of my view of the phrase  
25 "laying of charges" that, and what you also alluded to in your  
questioning, that if the police are forearmed with the  
knowledge that the Crown will not prosecute a matter, then in

1 layman's terminology, the handwriting is on the wall, in a  
2 sense.

3 Q. Yes, although what is written here appears to be a little more  
4 definite than that and speaks about the deciding a difference  
5 of opinion. Is it your evidence that, at least in legal theory,  
6 proper theory, that decision rests with the police?

7 A. Well, he's talking here, I think we have to be perhaps, again  
8 better directed to Mr. Coles, the author of the letter, but the  
9 letter speaks as if it would appear implicit, therefore the  
10 person who is the prosecutorial responsibility would decide  
11 any difference of opinion which might arise between the  
12 investigating officer and the Attorney General or his agent  
13 and the question is what is he referring to. Any difference of  
14 opinion vis-a-vis what? And if that, if you read in there the  
15 laying of a charge, then, again, I disassociate myself with it  
16 because of my earlier stated views.

17 Q. Were you aware that the R.C.M.P. made some attempts in  
18 November of 1980 to get the Deputy to change his mind?

19 A. No, I was not.

20 Q. Not aware?

21 A. No.

22 COMMISSIONER POITRAS

23 Mr. Orsborn, did you cover page 59 of that press release, the  
24 second paragraph of it?  
25

MR. HERSCHORN, EXAM. BY MR. ORSBORNMR. ORSBORN

1  
2 Yes, thank you, My Lord.

3 Q. On page 59, Mr. Herschorn, again the release by Mr. Coles  
4 from Victoria. And this is, I think, in line with the press  
5 release in October. It speaks of the reports being thoroughly  
6 assessed and in this one he mentions you specifically, the  
7 Assistant Director of Criminal. "And in their considered  
8 opinion, the facts did not evidence the commission of any  
9 offence." Do I take your earlier evidence to be that insofar as  
10 this relates to you and to your considered opinion, it is not  
11 accurate?

12 10:45 a.m.

13 A. I would say it is an overstatement, but subject to...hence  
14 perhaps question the word "considered" that appears on the  
15 fourth line of that final paragraph, but again I stress I would  
16 have no cause or feel any reason to query the Deputy  
17 Attorney General in his including me specifically in that  
18 because of my overall viewpoint, to use your terminology  
19 "gut reaction" to the...

20 Q. In the same vein, could I ask you to turn to page 64 and  
21 these are notes by Chief Superintendent Feagan arising out  
22 of a meeting with Mr. Coles and Mr. How in November, and  
23 Superintendent Feagan has testified that these notes are an  
24 accurate reflection, I believe, of what was said and about  
25 probably ten or fifteen lines from the bottom he is relating

MR. HERSCHORN, EXAM. BY MR. ORSBORN

1 that what Mr. Coles said, Mr. Coles is reported to have said,  
2 "He had given a decision after two other senior lawyers of  
3 his department, Mr. Gale and Mr. Herschorn and himself had  
4 carefully researched the law." Now insofar as that  
5 statement refers to you, carefully researching the law, I take  
6 it to be inaccurate.

7 A. Yes.

8 Q. Now there are various facets of this case that we've talked  
9 about, the process by which it was treated. One is that there  
10 was a prohibition by the department to the RCMP directing  
11 them not to have contact with the prosecutors, to cease  
12 contact and to talk to the senior people. There was a  
13 request or an order that the report goes directly to the  
14 Deputy. There was, in fact, a decision by Mr. Coles that no  
15 charges be laid. And we have a decision which was contrary  
16 to the recommendation by the RCMP being announced to the  
17 press without further dialogue with the force. We have  
18 yourself, as assistant director, not being formally requested  
19 for a full considered legal opinion on the totality of the  
20 offence. Is that, in your view, an acceptable way to handle a  
21 commercial fraud case?

22 A. I have no problem with most of the points that you include  
23 in your enumeration with the possible exception of if, and  
24 again I wasn't personally involved in this, but if there was  
25 an estopping of the police from entering into a dialogue with

MR. HERSCHORN, EXAM. BY MR. ORSBORN

1 the department, in this case the Deputy Attorney General, as  
2 to his ultimate decision, and if the manner in which that  
3 decision was publicly disseminated forestalled any further  
4 dialogue, then I would have difficulty with that aspect of it.

5 Q. Do I take it then that you would have had no difficulty with  
6 the manner in which this case proceeded, in effect, of any  
7 criminal investigation apart from the public announcement  
8 of the decision of the deputy?

9 A. No, because as my earlier evidence indicated, if in the view  
10 of the second most senior law officer of the Crown,  
11 investigation reports should be dealt with by him as  
12 opposed to a local county prosecuting officer, I have no  
13 difficulty with that. He's the one that exercises  
14 responsibility. He is responsible for the decisions of the  
15 prosecuting officers and if he chooses ...under the terms of  
16 the Prosecuting Officers Act, and if he chooses to personally  
17 involve himself in a decision of this type or any type  
18 involving an assessment of a police investigation reports, I  
19 have no difficulty whatsoever with that.

20 Q. Simply because he has the authority to do that.

21 A. Correct.

22 Q. Do you have any knowledge or understanding of the factors  
23 which might be brought into play in determining whether or  
24 not the Deputy take over carriage of a case as apparently  
25 happened here?

MR. HERSCHORN, EXAM. BY MR. ORSBORN

- 1 A. Do I have any specific knowledge in the context of this case?  
2 The answer to that would be no.
- 3 Q. Okay. Do you have any general knowledge of the factors  
4 that might be at work in...
- 5 A. Generally, I suppose the profile that a particular case has  
6 gathered may warrant the personal involvement of the  
7 Deputy Attorney General in an assessment of the matter.
- 8 Q. Let's just stop with that. Why would the profile warrant the  
9 individual attention of the deputy to the exclusion of local  
10 Crowns?
- 11 A. Because if a case is of a particular magnitude and if the  
12 decision, as in the particular facts of this case, could involve  
13 the future career of a politician, I have no difficulty with the  
14 personal involvement of the Deputy Attorney General in  
15 assessing that situation.
- 16 Q. But surely any criminal investigation involves the future  
17 career of the person they investigate.
- 18 A. Yes, and often the Deputy Attorney General or myself in my  
19 position or the director of criminal may become involved in  
20 assessments of cases that are...would otherwise perhaps be  
21 dealt with by a county prosecutor.
- 22 Q. Because of the concern about the career of the person being  
23 investigated.
- 24 A. That may be one factor. Each case, I would stress, has to be  
25 considered on its own merits.

MR. HERSCHORN, EXAM. BY MR. ORSBORN

1 Q If the effect on the person being investigated, the effect on  
2 their career is to be considered, do I understand that that is  
3 then more of a policy or discretionary consideration rather  
4 than anything to do with the facts or the law?

5 A. Yes, I think that falls within the...what the academic  
6 community would characterize as prosecutorial discretion.

7 Q And is it your evidence then that you do not think it  
8 inappropriate that where there is a politician being  
9 investigated that the Deputy should involve himself  
10 personally?

11 A. I don't, I don't characterize that as inappropriate, no.

12 Q Not inappropriate?

13 A. No.

14 Q Why? What are the interests that the deputy is trying to  
15 protect?

16 A. I reject the implication in your question that he's trying to  
17 protect anything. He is the...he is the...in practical terms,  
18 because the Attorney General is not involved in day-to-day  
19 administration matters, he is the most senior available, for  
20 want of a better term, Crown attorney, and if he chooses to  
21 inject himself into a situation, I have no difficulty with that.  
22 He's responsible, to use common parlance, the buck stops on  
23 his desk, and if he chooses to involve himself, that's entirely  
24 appropriate.

25 Q But what is it about the career of a politician that makes it

MR. HERSCHORN, EXAM. BY MR. ORSBORN

1 appropriate for the deputy to involve...

2 A. I can't comment on the specifics of this. You'll have to direct  
3 Mr...that type of question to Mr. Coles.

4 Q. No, I wasn't asking about specifics, but you had indicated  
5 that if it involved the career of a politician, it would not be  
6 inappropriate for...

7 A. That could be one factor, yes.

8 Q. All I'm asking is what is so...

9 A. Or the career of any individual.

10 Q. Well surely, any accused has a career or at least a potential  
11 career...

12 A. That's...I acknowledge...

13 Q. You're not telling me...you're not telling me that the deputy  
14 is going to involve himself in every case.

15 A. No, I'm not, nor do I.

16 Q. What's so different about the career of a politician?

17 A. The matter has an obvious high profile.

18 Q. Yes.

19 A. And I think given that profile, it is not inappropriate, should  
20 he so desire, for a Deputy Attorney General to himself in  
21 such a situation.

22 Q. To involve himself to the exclusion of normal processes, the  
23 review by local crowns or further dialogue...

24 A. If that's his determination, he has the responsibility and the  
25 accountability for such decisions.



MR. HERSCHORN, EXAM. BY MR. ORSBORN

1 Q. Are you able to suggest any other factors in this case other  
2 than the fact that Mr. Thornhill was a politician that might  
3 have contributed to the manner in which it was treated?

4 A. This perhaps doesn't directly meet your question, but  
5 because, because the person under investigation was a  
6 Cabinet, a member of the Cabinet in which the Attorney  
7 General sat himself, it would preclude the Attorney General,  
8 and as Mr...in practical terms from involving himself in the  
9 decision and hence the Deputy Attorney General felt it  
10 would be appropriate, as I understand it, for he to become  
11 involved and for him to make the ultimate decision.

12 Q. Okay, that's an issue that we'll canvass with Mr. How.

13 A. But beyond that, I can't really respond any further.

14 Q. Again, more a matter of our discussion with Mr. How than  
15 yourself, Mr. Herschorn, but...

16 A. I would say more so with Mr. Coles, he was the one...

17 Q. Yeah, but I'm thinking about the involvement of Mr. How,  
18 it's perhaps more a matter for him.

19 A. I should also indicate because I don't think you've perhaps  
20 asked me this, but I think it bears in response to your last  
21 question, I had no involvement in the structuring of how  
22 this particular file was to be handled.

23 Q. I appreciate that. I appreciate that. But it is your  
24 understanding that the Attorney General isolated himself  
25 because he was a member of Cabinet.

MR. HERSCHORN, EXAM. BY MR. ORSBORN

1 A. That's the...I understand from press statements and as well  
2 within the department, that's the position he took, yes.

3 Q. Yes. It may be a luxury a person in that position can't  
4 afford, but nonetheless that's the way it happened.

5 A. Oh, there is some dispute about this...

6 Q. Sure.

7 A. Discussion within the academic community, I think.

8 Q. Uh-hum.

9 A. As to the role of the Attorney General and hopefully this  
10 Commission will assist in clarifying that.

11 Q. Thank you. Just one final question, Mr. Herschorn, then I'll  
12 finish. On page 78 in the booklet there is a November, 1980,  
13 memo, a RCMP memo, from Doug Christen, Superintendent  
14 Christen, to Superintendent Feagan and I'd just like to draw  
15 your attention on page 78 to the second full paragraph and  
16 in the last sentence and I appreciate that this is second or  
17 third hand in the memo, but Superintendent Christen  
18 concludes, "It would appear in future any major  
19 investigations involving politically prominent persons, the  
20 decision as to whether there is evidence to support charges  
21 will be made at the Deputy Attorney General's level." Do I  
22 understand from the...your evidence, the discussion we've  
23 just had that you would share his view that that certainly in  
24 1980-81 was, in fact, the case?

25 A. No, I don't share that based upon my knowledge of

MR. HERSCHORN, EXAM. BY MR. ORSBORN

1 subsequent cases involving politically prominent persons.

2 Q. I see. So in subsequent cases involving politically  
3 prominent persons, your evidence is that charges, a decision  
4 about charges were made at a level other than the deputy.

5 A. That's correct.

6 Q. Do you have any views that could assist this Commission on  
7 how, given your experience and position, cases involving  
8 politically prominent persons should be handled?

9 A. I haven't really applied my mind to that. I think as an  
10 overview what is fundamental is the integrity of the  
11 individual. I think, to my regret, there's been little focus on  
12 the question of integrity of the individual, incumbents in  
13 positions, That's fundamental to the whole role of the  
14 prosecutor.

15 Q. Integrity of...

16 A. Of the individual person making the determination. It's  
17 important that persons of high integrity be placed in  
18 positions as prosecuting officers and as Deputy Attorney  
19 Generals and directors of prosecution and director of  
20 criminal, whatever... These are very important positions.  
21 They effect of the decisions made by such individuals  
22 impact profoundly upon the lives of citizens and it's  
23 important that those people have integrity, and I have no...I  
24 have no reason to question the integrity of any of the  
25 individuals that have been under discussion this morning.

11:00 a.m

1 Q Uh-hum. Any other suggestions that you can make that  
2 would be of assistance?

3 A. Not really off the top of my head. I...there is a large, a  
4 large...it's an on-going issue and the...it's a focus, I  
5 understand, of researches within the Commission and I look  
6 with interest the results of their work.

7 MR. ORSBORN

8 Thank you.

9 EXAMINATION BY MR. BISSELL

10 Q Mr. Herschorn, I just have a couple of questions for you on  
11 behalf of the RCMP. You mentioned at the beginning of your  
12 evidence to my learned friend that as specific cases arose  
13 there might be a direction or a request that the investigation  
14 reports be given by the senior officers in the RCMP in "H"  
15 division to someone in headquarters, be it Mr. Coles or  
16 yourself and Mr. Gale. Would that instruction, in your mind,  
17 also imply that the investigator or the...in the lower ranks of  
18 the police not have access to Crown counsel in the various  
19 Crown offices around the province?

20 A. Only if that was the specific instruction at the time of the  
21 Deputy Attorney General or whatever, quote unquote,  
22 "senior official" was making the determination.

23 Q Thank you. To go for just a moment to your...to the memo  
24 that you wrote that appears in the exhibit book, one point I  
25

1 am not clear on, who was it that gave you the instructions to  
2 write that memo?

3 A. You're referring to the memorandum at page 25.

4 Q. Yeah.

5 A. The memorandum as you'll see is addressed to Mr. Gale, the  
6 director of criminal, but I cannot specifically recall whether  
7 it was Mr. Gale who made the request to me or whether it  
8 was Mr. Coles. It was one of those two gentlemen. I may, as  
9 a matter of protocol, if it was the latter, Mr. Coles, I may  
10 have, as a matter of protocol, as I was assistant director at  
11 that point in time, routed my response to Mr. Gale.

12 Q. So you don't recall which of those two gentlemen it was that  
13 asked you to address the question of the position in  
14 advance?

15 A. If I was put on the spot I would think it would be Mr. Coles  
16 moreso than Mr. Gale.

17 Q. And to your knowledge, did Mr. Gale prepare a written legal  
18 opinion on the question of intent or any of the other  
19 questions in this particular matter?

20 A. Not to my knowledge.

21 Q. You haven't seen any.

22 A. No.

23 Q. Did you attend any oral briefings in which Mr. Gale gave to  
24 Mr. Coles a legal opinion as opposed to your gut reaction that  
25 you gave to Mr. Coles?

1 A. No, I did not.

2 Q. And just one final area, sir, you said that you didn't think  
3 that the press release that appears at forty, I think it's 44,  
4 was an unusual step in this case given the amount of  
5 publicity to the case, is that correct?

6 A. I think that was my response and I think there was a  
7 subsequent question wherein I indicated that if the effect of  
8 a press release estopped the investigators from continuing  
9 their dialogue with respect to a file with the department,  
10 then I had some concerns about that.

11 Q. Let me put it you, sir, that it would probably be more  
12 appropriate to convey the decision or the opinion of the  
13 officials of the Department of the Attorney General to the  
14 investigating officers prior to making such a decision public,  
15 would you agree with that?

16 A. Yes, I would.

17 Q. I also put to you that part of the practical problems that  
18 arise to the police in a situation such as this is not so much  
19 that they're forearmed with the decision, but that they're  
20 forearmed in a public fashion, is that correct? Would you  
21 agree with that?

22 A. Well, I'm not sure what you're reading into the public  
23 fashion aspect of it. What the concern is, if you could  
24 elaborate on that aspect, perhaps I could answer your  
25 question.

1 Q. Well, by taking a public position is it not more difficult for  
2 the Attorney General and his officials to then change their  
3 mind?

4 A. Yes, I would agree.

5 Q. It would be more normal for the Attorney General to simply  
6 file a stay in a situation such as this rather than issue a  
7 press release, would it not?

8 A. If the police investigators had reached the determination  
9 that they were prepared to lay a charge and did, in fact, do  
10 so.

11 Q. And finally, sir, to your knowledge, sorry.

12 COMMISSIONER EVANS

13 Could you elaborate?

14 MR HERSCHORN

15 Well, the question from Mr. Bissell, as I understood it,  
16 related to the entering of a stay, and as a practical, as a  
17 prerequisite to the entering of a stay is the laying of a charge  
18 so...which didn't occur in this particular fact situation, so I was  
19 having some difficulty in responding to Mr. Bissell's point.

20 COMMISSIONER EVANS

21 Is that a response to your question?

22 MR. BISSELL

23 Probably not, sir.

24 A. Have another go at me, I'll be happy to...

25 Q. I'm sorry, sir.

1 A. Have...ask it again. I'd be happy to try to respond better.

2 Q. Is it not, in situations such as this, is it not the normal  
3 routine that a charge is laid and a stay is entered rather  
4 than a press release before a charge is laid or before a  
5 decision can be made by the police whether a charge ought  
6 to be laid?

7 A. There is not much wealth of experience in my personal  
8 opinion to call upon in terms of gauging what's normal  
9 or...this is a rare type of situation. I can...I am aware of a  
10 situation in the Province of Ontario where, I believe it was  
11 in context to one of the cases involving Dr. Henry  
12 Morgentaler, where the police laid a charge in the morning  
13 and in the afternoon it was stayed by the Attorney General.  
14 That's the only experience I can draw upon and...

15 Q. Are you aware from experience in this province of Crown  
16 entering stays?

17 A. Yes, I am.

18 Q. Where they don't feel that the evidence warrants a  
19 prosecution?

20 A. I have no experience with the entering of a stay against the  
21 wishes of the police investigators in a particular matter. The  
22 stay is entered for other purposes because a key witness is  
23 unavailable and without the evidence of that key witness,  
24 the case will fall, that would be one situation. But I have...I  
25 cannot recall of a situation where a stay has been employed



MR. HERSCHORN, EXAM. BY MR. BISSELL

1 to bring to an end a prosecution which the police wish to  
2 have prosecuted.

MR. CHAIRMAN

3  
4 What would you do, Mr. Herschorn, in the event that the  
5 police laid a charge and you, as a trained prosecutor, legally  
6 trained prosecutor, then being given the carriage of the case  
7 reviewed the facts and concluded that the charge should not have  
8 been laid, that it was not sustainable, and if the police said, "Well,  
9 we still want to proceed"?

MR. HERSCHORN

10  
11 My Lord, I would think the approach would be for that  
12 prosecutor to relate through to, I guess, my position his concern  
13 about that and the matter would be assessed and if the opinion of  
14 the prosecutor was shared, then an authorization would be given  
15 to that prosecutor to enter the stay.

MR. CHAIRMAN

16  
17 Regardless of the wishes of the police.

MR. HERSCHORN

18  
19 Yes, because it's...because the police role doesn't cease, well,  
20 in terms of prosecutorial responsibility bringing the matter  
21 forward through court it ceases. That's the role of the Crown  
22 prosecutor and if he determines in his professional opinion that  
23 there is insufficient evidence to sustain a charge...

MR. CHAIRMAN

24  
25 Then you have a duty to stay, don't you, I would suggest?

1 MR. HERSCHORN

2 Yes, I think it can be characterized that way.

3 MR. BISSELL

4 Q. One final question, sir, at this time, to your knowledge,  
5 within the department in the 1980's, was there any  
6 expertise either within the headquarters or among the  
7 prosecuting officers in the field, so to speak, in the area of  
8 frauds, commercial crime?

9 A. We have within the department, I believe, for  
10 approximately fifteen, fourteen to fifteen years have  
11 identified a requirement for a specialized prosecutions unit  
12 to deal with commercial crime matters. At this particular  
13 juncture it was sort a on-again/off-again situation  
14 depending upon available resources. Mr. Kevin Burke, who  
15 had some involvement in this matter, had at that time, if I  
16 recall correctly, been designated as so-called commercial  
17 crime prosecutor and cases of this nature...commercial crime  
18 cases would in the first instance, if he was available, and  
19 that was often the problem because he wasn't available,  
20 would be channelled in his direction. Now we're moving to a  
21 situation of a full-time unit which will deal with this type of  
22 prosecution.

23 Q. So I take it you're saying that Mr. Burke possessed some  
24 expertise at this time.

25 A. He would have possessed some acquired expertise through

1 previous cases and it rotated. At times Mr. Burke would  
2 become involved in other matters and another prosecutor  
3 would be the sort of designated commercial crime  
4 prosecutor.

5 Q. Thank you, sir, those are all my questions.

6 MR. CHAIRMAN

7 Mr. Ross.

8 MR. ROSS

9 My Lord, I've got one question and perhaps I should direct  
10 the area to you to see whether or not I'll be permitted. The  
11 purpose is to round out the testimony of this witness recognizing  
12 that the interests of the Black United Front will be to do a  
13 comparative analysis between matters which have been public as  
14 they specifically relate to black people and the general  
15 administration of justice. And I want to refer this witness back to  
16 the time of this investigation, the Thornhill investigation, to  
17 whether or not there was another investigation going on of other  
18 prominent people of a different political stripe which resulted in  
19 prosecution to find out whether there were different  
20 considerations taken at that time by the Attorney General's  
21 Department.

22 MR. CHAIRMAN

23 I'm certainly having difficulty with that one, Mr. Ross. Last  
24 evening we made it very clear that we would not permit  
25 questioning that would involve other persons who are not before

DISCUSSION

1 us, persons prosecuted, convicted, persons not prosecuted, it  
2 would be grossly unfair and this Commission must not and will  
3 not get involved in anything that casts reflection upon people who  
4 are not directly before us.

MR. ROSS

5  
6 Very much so, and I don't propose to get in that area. I was  
7 going to just ask this witness directly whether or not he was  
8 aware of other investigations going on at that time involving other  
9 prominent people in which this thrust towards non-prosecution  
10 was invoked. It might lead to other questions after, but that will  
11 be the extent of...

MR. CHAIRMAN

12  
13 Well, that's my concern. Supposing the answer is "Yes".

MR. ROSS

14  
15 Well, then I take it that Mr. Orsborn would have questions  
16 in rebuttal or redirect, sorry.

MR. CHAIRMAN

17  
18 No, I would suggest then that you would have to in  
19 fairness...then you would...the questions would lead to the  
20 identification of innocent people and we will not permit that  
21 under any circumstances. This is a very narrow line of  
22 examination by this Commission designed to help the Commission  
23 formulate recommendations. It is not designed to elicit evidence  
24 leading to the guilt or innocence of any person or to even suggest  
25 that any person is guilty of an offence and that's why we've been

DISCUSSION

1 very restrictive. To answer your question, to answer your  
2 proposal, I don't think your question is appropriate.

MR. ROSS

4 Thank you very kindly, My Lord.

EXAMINATION BY MR. MERRICK

6 Q. Mr. Herschorn, I want to deal first with just one point  
7 relating to the suggestion of a false pretences charge. Now I  
8 appreciate you weren't asked to prepare a memorandum  
9 specifically on that, but as the Commissioners very pointedly  
10 stated last evening, they don't want this inquiry to become a  
11 slander session. Mr. Quintal told us yesterday that on his  
12 review of the police file he saw no evidence that would  
13 constitute a reasonable and probable basis for a false  
14 pretences charge. And my question to you, sir, is in your  
15 review of the file, I take it you would agree with that, that  
16 there was no evidence in that file that would constitute  
17 reasonable and probable grounds for false pretences.

18 A. Mr. Merrick, I unfortunately cannot answer your question as  
19 you've framed it. I didn't direct my mind to that issue at  
20 the time and nor have I done so to date, and hence I cannot  
21 answer your question.

22 Q. Well, let me salvage it by putting it this way. I take it then  
23 that there was nothing that came to your attention that, in  
24 fact, told you that there was reasonable and probable  
25 grounds for such a charge?

1 A. Again I have to hedge in my answer, I regret doing so, but I  
2 did not apply my mind...I wasn't mandated to nor was I  
3 applying my mind to that issue.

4 Q. All right. I won't press you further on that. The one thing  
5 that you were requested to do in your duties was to review  
6 the file and in particular the bank documentation was to  
7 attempt to pull out the facts relating to the position that the  
8 banks would have been in had the proposal not been made  
9 if I understand your evidence.

10 A. That's correct.

11 Q. And you did review, I take it, all the bank documentation  
12 that was available to you.

13 A. I believe I did.

14 Q. And I take it that in addition to pulling out the excerpts that  
15 you did, you were able to gather some general impression  
16 that you were able to form in your own mind as to what the  
17 banks might have done had Mr. Thornhill not made his  
18 proposal.

19 A. There was evidence which indicated what certain of the  
20 banks might have done had they ...had there not been a  
21 settlement.

22 11:15 a.m.

23 Q. And am I correct that the impression that you gathered was  
24 that if nobody had come forward voluntarily to make any  
25 proposal to him, that one or more, perhaps, of the banks may

1 well have written off those debts and walked away.

2 A. Yes.

3 Q. And, indeed, from the evidence that you had the proposal  
4 then that Mr. Thornhill made to them came in completely  
5 voluntarily with no pressure on him from the banks.

6 A. I understand the proposal to be one initiated by Mr. Rice on  
7 Mr. Thornhill's behalf, yes.

8 Q. And circumstances were perhaps, otherwise the banks would  
9 have walked away from those debts.

10 A. There was evidence to that effect, yes.

11 Q. Thank you. Now in dealing, you were asked a few questions  
12 on direct as to the, your assessment of the intent element in  
13 these Criminal Code sections and I'm not going to dwell in any  
14 detail on it, but you did state that normally, and I think you  
15 were referring to Section 110(1)(b), that there was a mental  
16 element, or an element of the offence required of a guilty  
17 mind. And I wrote down those words that you used, "a guilty  
18 mind." You would agree with me that on the basis of the file  
19 that you saw there was nothing about the September proposal  
20 made that indicated a guilty mind on the part of either the  
21 banks or Mr. Thornhill.

22 A. I would agree with that.

23 Q. Thank you. Indeed, Mr. Quintal told me yesterday that  
24 knowing what he knew of the business proposal he  
25 characterized it as a "normal business proposition." And I put

1 it to you Mr. Herschorn, that on the basis of your file review  
2 you saw nothing that would cause you to challenge that  
3 description of the proposal.

4 A. No, I would not.

5 Q. Thank you. You've told us that you concurred in the decision  
6 that was ultimately made by the Deputy Attorney General  
7 and the Attorney General's Department. That no charges  
8 were to be laid or were warranted to be laid. Is that right?

9 A. That's correct.

10 Q. I take it that in making that assessment you would have also  
11 had in your mind the awareness that any charge against Mr.  
12 Thornhill under Section 110(1)(c), that section specifically  
13 provides that if a written consent has been obtained from the  
14 head of government then no offence has been committed,  
15 you were aware of that.

16 A. Yes, I was.

17 Q. You were also aware that the Premier has already indicated  
18 that he was aware of Mr. Thornhill's settlement with the  
19 banks.

20 A. I believe there's reference to that back in the police  
21 investigation report.

22 Q. Yes, so he stated it quite publicly. So that the only thing that  
23 had been omitted to be obtained by Mr. Thornhill to have  
24 avoided all this was a written piece of paper from the  
25 Premier. You were aware of that.



1 A. It can be characterized that way, yes.

2 Q. And, in fact, was that a consideration that was in the back of  
3 your mind when you concurred with the decision? That this  
4 was a missing piece of paper solely by Mr. Thornhill that  
5 generated all of this?

6 A. That was, I think that was in the back of my, I don't think  
7 that was the predominant factor that influenced my so-called  
8 gut reaction but that was a factor, yes.

9 Q. Yes. And in any event, you concurred in the decision. Now  
10 let me ask you the key question here. In arriving at your  
11 concurrence in the decision, at least, did anybody put any  
12 political pressure on you?

13 A. None whatsoever.

14 Q. And certainly Mr. Thornhill was not involved in any of this,  
15 was he.

16 A. No, he was not. To my knowledge

17 Q. Mr. Quintal told me yesterday that based on his 32 years' of  
18 experience as a police officer that he made his decision  
19 notwithstanding the Attorney General's position because he "  
20 didn't think there was a strong enough case to lead to a  
21 conviction." And I take it that that's what you're also saying  
22 as to why you concurred in the decision.

23 A. That is the, my bottom line.

24 Q. There wasn't a strong enough case to lead to a conviction.

25 A. I would characterize it, perhaps, in the more usual

MR. HERSCHORN, EXAM. BY MR. MERRICK

1 prosecutorial parlance, there was no substantial likelihood of  
2 a conviction, in my opinion, in this set of facts.

MR. MERRICK

3  
4 Thank you very much, Mr. Herschorn, that's all I have.

CHAIRMAN

5  
6 I guess, Mr. Pink, as Mr. Herschorn is your witness you have  
7 the right to go after counsel for Donald Marshall, Jr., if either...

MR. PINK

8  
9 At this point, My Lord, I have no questions but I would like  
10 to reserve the opportunity subsequent to that cross-examination  
11 and should there be none, I won't have any questions.

MR. ORSBORN

12  
13 I just have one question on re-direct, My Lord.

CHAIRMAN

14  
15 Pardon?

MR. ORSBORN

16  
17 I just have one question on re-direct.

CHAIRMAN

18  
19 Go ahead.

RE-EXAMINATION BY MR. ORSBORN

20  
21 Q. My friend, Mr. Merrick, asked you some questions about the  
22 evidence in the file about the position of the banks and did I  
23 understand your earlier evidence to be that by and large your  
24 conclusion, that no charges should follow, was based on your  
25 assessment that Mr. Thornhill had not received a benefit or

1 did I misunderstand you?

2 A. I don't know whether I testified to that effect earlier this  
3 morning. I think I share that viewpoint to some degree that I  
4 have difficulty I think by referring to my earlier answer, no  
5 substantial likelihood of a conviction, I think is premised in  
6 my view upon difficulty that I feel a trier would have in  
7 characterizing this scenario as a benefit to Mr. Thornhill.

8 Q. And your view on whether or not Mr. Thornhill received a  
9 benefit, do I take it that that was based on, I think I've got  
10 your words here correctly, "evidence that of what's certain  
11 how the banks might have done it."

12 A. Yes.

13 MR. ORSBORN

14 Thank you.

15 EXAMINATION BY COMMISSIONER EVANS

16 Q. I have a couple of points that were bothering me a bit. Did  
17 anyone in your Department, to your knowledge, prepare a  
18 legal brief in support of the position adopted by the  
19 Department not to proceed?

20 A. My Lord, I believe Mr. Coles framed and prepared an  
21 opinion...

22 Q. Other than Mr. Coles.

23 A. Other than that?

24 Q. Yes.

25 A. Not to my knowledge.

1 Q. And you were familiar with the brief, of course, prepared by  
2 Mr. Coles.

3 A. Not prior to its preparation.

4 Q. Not prior to?

5 A. Not prior to its completion.

6 Q. But after its completion you say that you concurred in it.

7 A. I concurred in the eventual, in the ultimate decision...

8 Q. Not to proceed.

9 A. Not to proceed with prosecution.

10 Q. And I understood you to say that you were, had a gut  
11 reaction to this.

12 A. [Witness nods "yes".]

13 Q. In view of the fact that this was such a high-profile case that  
14 called for the intervention of the Deputy Attorney General,  
15 why would you concur in a decision in the absence of a  
16 thoroughly prepared legal opinion as opposed to a gut  
17 reaction?

18 A. I had reviewed the RCMP report in its entirety in the process  
19 of preparing the limited memorandum which is included in  
20 these papers and I felt that that armed me with sufficient  
21 information to reach the so-called gut reaction concerning the  
22 matter.

23 Q. So it really wasn't a gut reaction, then, it was a carefully  
24 considered opinion.

25 A. I have difficulty in using the phraseology "carefully

1 considered"...

2 Q. Well, I take any opinion's carefully considered...

3 A. Hopefully they are. I...

4 Q. When it's a high-profile case of this kind.

5 A. I felt comfortable with the eventual decision reached by the  
6 Deputy Attorney General. I, obviously, as my earlier evidence  
7 indicates, have some difficulty with the characterizations of  
8 my involvement in the decision-making process. But I didn't  
9 take issue with those at the time because I felt the end result  
10 was the appropriate one and...

11 Q. And the other question I wanted to ask you, during the  
12 period of time that you have been there, do you know of any  
13 other cases in which the Attorney General, or Deputy  
14 Attorney General intervened prior to the laying of a charge?

15 A. I'm having difficulty with your question, My Lord, with  
16 respect, intervened or designated...

17 Q. Gave some direction or something.

18 A. There are many cases where the Deputy Attorney General  
19 may give direction through me to a prosecutor. I'm not sure  
20 I'm responding specifically to your question.

21 Q. Well that's when it comes up through the prosecutor to you...

22 A. Yes. Um-hmm.

23 Q. That wasn't this situation.

24 A. This, I can't, from my own personal experience, recall of a  
25 similar situation where the Deputy Attorney General directed

1 at the outset that the reports were to come here. Perhaps the  
2 closest analogous situation might be the re-investigation  
3 phase of the Donald Marshall matter where there was a  
4 direction to the RCMP to liaise with Mr. Gale, in particular, I  
5 think.

6 Q. And did I understand you to say that the press release issued  
7 would not handicap the RCMP if they wished to proceed with  
8 the laying of a charge?

9 A. Not legally.

10 Q. No, no...

11 A. In practical terms it would be a great, a large impediment to  
12 them so I know what you're saying.

13 Q. And the fact that the release was issued would make it a little  
14 difficult for the Attorney General to back off from that  
15 position, would it not?

16 A. It would.

17 COMMISSIONER EVANS

18 Thank you.

19 CHAIRMAN

20 Now we have the request that counsel for the, for Donald  
21 Marshall, Jr. who are unavoidably absent today be given the  
22 opportunity to cross-examine Mr. Herschorn on his evidence-in-  
23 chief today if they so desire. It's a request that would be very  
24 difficult to refuse. At the same time I'm aware that Mr. Merrick  
25 says that an adjournment into next week would be difficult for

MR. COLES, EXAM. BY MR. MACDONALD

1 him to comply with that procedure. Such being the case, what we  
2 propose to do is to commence tomorrow, because tomorrow is a  
3 short day, and there are two or more witnesses scheduled and we  
4 must keep some semblance of order and, in complying with the  
5 schedule which has been set forth, a realistic schedule for the  
6 conclusion of the hearings. I'm afraid, Mr. Herschorn, I'm going to  
7 have to ask you to be here at 8 o'clock tomorrow morning. So  
8 we'll start at 8 and if there's any further cross-examination of Mr.  
9 Herschorn by counsel for Donald Marshall, Jr., or by counsel for  
10 the Attorney General or re-re-direct by counsel for the  
11 Commission, you will be the first witness.

BREAK - 11:27

12  
13 11:48 a.m.

MR. MACDONALD

14  
15 My Lords, the next witness is Gordon Coles, and he has  
16 already given evidence before the Inquiry and is under oath and I  
17 don't believe there's any requirement to have HIM take another  
18 oath.

MR. CHAIRMAN

19  
20 Right.  
21  
22  
23  
24  
25