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Vol. 257
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**ROYAL COMMISSION ON THE
DONALD MARSHALL, JR., PROSECUTION**

Volume 86

Held: September 15, 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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September 15, 1988 - 9:30 a.m.

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MR. CHAIRMAN

We had finished all of the cross-examination of Mr. Herschorn with respect to his evidence of yesterday except for Mr. Ruby with counsel for the Attorney General reserving the right to cross-examine after. Mr. Ruby?

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MR. RUBY

Thank you, My Lord. It would be appropriate for me to do just a few small things first, if I might. First, I want to thank the Commission and all counsel for their courtesy and kindness to us during Ms. Derrick's illness. I very much appreciate the opportunity we've had to look over the transcript and to bring witnesses back this morning who otherwise would not have had to. I've indicated to counsel that I won't require Judge How for further examination.

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MR. CHAIRMAN

You won't require Judge How.

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24
25
MR. RUBY

And I think steps have been taken to try and locate him, if we can.

MR. CHAIRMAN

And I take it Mr. Pink, you have... You do not require Judge How?

MR. PINK

No, My Lord, but unfortunately he'd be enroute, so there is

1 no way I can intercept him.

2 MR. CHAIRMAN

3 Well, the good news will be broken to him when he arrives.

4 MR. RUBY

5 One matter that I would like to put on record, if I can, is a
6 request for three witnesses to be called on behalf of Donald
7 Marshall, Jr. with regard to the first segment. I have spoken to
8 my colleagues earlier this week about it and they thought that
9 today might be an appropriate time for me to raise this matter.

10 MR. CHAIRMAN

11 Why not raise it after... Mr. Herschorn, I'm sure, and Mr.
12 Coles have other duties commencing at nine o'clock.

13 MR. RUBY

14 I'd be delighted.

15 MR. CHAIRMAN

16 And why not raise it after you've finished your cross-
17 examination of these two gentlemen and before we start the next
18 witness?

19 MR. RUBY

20 Thank you.

21 MARTIN HERSCHORN, recalled and previously sworn, testified
22 as follows:

23 EXAMINATION BY MR. RUBY

24
25 Q. Mr. Herschorn, yesterday early in your examination, you

1 indicated that there were no discussions with Mr. How on this
2 matter prior to the decision being taken, but there may have
3 been informal discussions between yourself and Mr. How
4 after the fact. Do you recall what was said in those
5 discussions?

6 A. The informal discussions?

7 Q. Yes.

8 A. No, I would have no precise recollection. He being the
9 Attorney General and I being so-called senior official in the
10 Department, our paths would cross and this case being one of
11 profile would, I think, fairly naturally come under subject
12 matter, subject of discussion. But I can't recall anything this
13 specific. As I alluded, the discussions ensued only after
14 whatever discussions were had on this particular case
15 happened after the decision was made not to lay charges.

16 Q. I read over last night the testimony you gave and I'm still not
17 clear on what it was exactly you thought with your gut
18 reaction was wrong with this case. Was it the mental element
19 or the *actus reus*. Can you describe with some particularity
20 for me what it was?

21 A. I had difficulty and still have difficulty with interpreting
22 what, whether a benefit, in the legal sense, accrued to Mr.
23 Thornhill as a result of this situation.

24 Q. Did it occur to you that one of benefits he had gotten was
25 instead of owing a hundred cents on the dollar, he got to pay

1 it off at twenty-five cents on the dollar.

2 A. I can see an argument that that could be interpreted as a
3 benefit, but I can't, I don't think that's the entire picture.
4 There are other factors. The fact that negotiations were
5 ensuing over an extended period of time. In particular,
6 perhaps the most significant factor is that evidence that was
7 in the R.C.M.P. investigation report which indicated that
8 several of the banks were considering writing off the debt.

9 Q. Okay. Tell me how the fact that the negotiations had been
10 going on over time is relevant to the issue whether or not that
11 particular offence is committed. What mental element does it,
12 or *actus reus* element does it negate?

13 A. Mr. Ruby, I was not at the time and nor have I to date applied
14 my mind to the type of question you're asking me. And with
15 respect, I think I would have to have the opportunity to
16 research these legal issues that you're raising fully before I
17 could properly answer your question.

18 Q. But, you see, you concurred with this decision.

19 A. Yes, sir.

20 Q. I'm trying to understand what made you concur?

21 A. I've already gave...

22 Q. Was it the fact that your seniors had said, "yeah, this
23 is a good idea."

24 A. No, it wasn't, sir. I've already given you my answer with
25 respect to the question of the benefit.

1 Q. Tell me how the fact that the negotiations had been going on
2 over time was relevant to the issue of whether or not there
3 was a benefit. How does it connect, in your mind?

4 A. I think the question of the negotiations over time are relevant
5 to take this situation out of other situations as were alluded
6 to, I think, later on in the day, the Williams and Ruddock
7 situations, where there was an up front transfer of valuable
8 consideration, be it money or, I think in the Williams case, it
9 was a hockey game that was given as a gift. There was a
10 proximity in time for the *quid pro quo* to the accused person
11 as considerable for his, hopefully, providing some influence
12 with respect to that particular accused in his dealings with
13 government.

14 Q. Well, the case, the air hockey game case, the case specifically
15 says, you recall I'm sure, that there was no possibility that
16 man could influence the decision. He was not the decision-
17 maker or had no part in it. And yet that was irrelevant, you'll
18 agree.

19 A. As I say, I have not had the opportunity to research the case.
20 I have not read the Williams or Ruddock decisions in many
21 years and I find it difficult to respond to your question in
22 precise terms.

23 Q. Why would you take part in a discussion and concur an
24 opinion if you hadn't read them then? Why would you do
25 that?

1 A. As was mentioned yesterday, I, the terminology, perhaps it's
2 not the best terminology, gut reaction, I had in the course of
3 the work that I was requested to do on the file, had reviewed
4 the entire investigation report and I don't think it's unusual
5 for a Crown prosecutor who had perhaps not the entire charge
6 of the file but had some involvement in the file to formulate
7 that type of opinion after reviewing the entire investigation
8 and reporting to a particular police investigation.

9 Q. Can you tell me what the relevance is of the fact that the
10 banks were considering writing off the debt prior to the
11 settlement offer being made? How does that connect up again
12 in your mind at the time?

13 A. In my mind, it connects up that if banks were considering a
14 total write-off of the debt and then down the road, twenty-
15 five cents on the dollar is received, I have difficulty in
16 construing that as a benefit conferred on the person who
17 eventually pays the twenty-five cents on the dollar.

18 Q. Tell me if I'm incorrect, but it seems to me if the bank wrote
19 off the debt, that would be an internal bookkeeping matter.
20 They would simply write it off as one of their assets, correct?

21 A. That's part of the scenario, yes.

22 Q. Writing off a debt, particularly when the debtor is a public
23 person of prominence, not going anywhere, doesn't mean you
24 don't seek to collect it if he comes into some money. Isn't that
25 so?

1 A. That's not my understanding of the term "writing off the
2 debt."

3 Q. You think writing it off meant actually just forgiving it
4 regardless of the fact that if next week, he got a hundred
5 thousand dollars, they wouldn't care, they wouldn't collect it.

6 A. It's possible that they would seek to collect it, but in practical
7 terms, in terms of the facts that were before us at the time,
8 there was an indication that it was to be a write-off. I think
9 the point you're raising is somewhat hypothetical.

10 Q. Well, in your experience with banks, your own life experience
11 at this time, did banks acts this way, that if substantial
12 amounts of money were owing, they'd just forget about
13 enforcing them, if you came into money and you had it?

14 A. I'm not in a position to speak as to standard banking practice,
15 Mr. Ruby.

16 Q. I didn't ask you about standard banking practice. I asked you
17 about your own banking practice. Is that the way your bank
18 treated you?

19 A. I have no experience with the type of factual situation you're
20 raising.

21 Q. That's not the way your bank treated you in your dealings
22 with your bank.

23 MR. PINK

24 He already said he didn't have any experience.
25

15142 MR. HERSCHORN, EXAM. BY MR. RUBY

1 MR. HERSCHORN

2 A. Number one, I don't think it's any of your business, Mr. Ruby.

3 MR. PINK

4 Now he asks the question again.

5 MR. RUBY

6 Sorry, you have to wait a second. I'm asking whether or not
7 in his own experience, in his own banking affairs, led him to
8 believe that that's the way banks acted.

9 COMMISSIONER EVANS

10 Apparently he never owed any money to a bank.

11 MR. HERSCHORN

12 Excuse me, My Lord?

13 MR. CHAIRMAN

14 Q. I take it we can assume you have not been bankrupt or on
15 the verge of bankruptcy.

16 A. No, sir.

17 MR. RUBY

18 Q. Have you ever owed money to a bank?

19 A. I... My Lord, is it necessary that I answer that type of
20 personal information?

21 MR. CHAIRMAN

22 No, it's not.

23 MR. RUBY

24 Q. If someone took a debt that you had and agreed to take
25 twenty-five cents on the dollar by way of a loan you had set

1 up from a third party, would you consider that to be an
2 advantage that you had gained?

3 MR. PINK

4 Again, My Lord, I have to object on the basis of relevance.
5 I'm not sure what the purpose of putting a hypothetical to Mr.
6 Herschorn is. Surely, we can... He's already indicated what he did
7 in his limited exposure to the file. Surely, we can limit his cross-
8 examination to what he actually did.

9 MR. CHAIRMAN

10 I think that's an appropriate question. My understanding or
11 interpretation of Mr. Herschorn's evidence, and we're getting
12 dangerously close to the area that I ruled against Mr. MacDonald
13 on yesterday. This is not going to be a forum of legal argument
14 between counsel as to the interpretation of the Ruddock and the
15 Williams cases.

16 You're under, and I'm sure you are, under the assumption
17 that we three Commissioners are not capable of interpreting these
18 decisions without help and give us all the help you can during the
19 summation. Bearing in mind what I've said on three or four
20 occasions that the purpose of this evidence is to look at the
21 practice and procedure in the Department of the Attorney General.
22 But Mr. Herschorn has said that whilst he was not called upon as I
23 interpret it, to give an opinion with respect to the, as to whether
24 or not there was a breach of Section 111(c), in providing the
25 memorandum which we have before us that he did to his superior

MR. HERSCHORN, EXAM. BY MR. RUBY

1 officer, he had an opportunity to review the file. When he heard
2 of the decision of the Attorney General, based on the opinion of
3 the Deputy Attorney General, he, in fact, said my gut feeling is
4 that it was a correct one. Mr. Ruby is simply inquiring of him as
5 to how he arrived at that gut feeling. Now that phrase itself
6 means that it is difficult in defining, but we can attempt to get a
7 definition or a reason for that conclusion. So I would allow the
8 question and I think I can anticipate the answer.

MR. HERSCHORN

9
10 A. I'm sorry, sir, could you repeat the question again?

11 Q. Sure. Someone arranges a loan whereby you are able to pay
12 only twenty-five cents on the dollar on a debt. Would you
13 not think that that was an advantage...

14 A. To the debtor?

15 Q. Yes.

16 A. Yes, I would.

17 Q. Isn't that what happened in this case?

18 A. We have evidence, as I alluded to earlier, that certain of the
19 banks were considering a total write-off of the debt.

20 Subsequent to that, a proposal comes forward from the
21 debtor, which is accepted. And I find that a different fact
22 situation from the one which you just presented to me.

MR. CHAIRMAN

23
24 Q. Mr. Herschorn, am I correct in assuming that wages of
25 members of the House of Assembly of Nova Scotia as in the

1 case of members of legislatures in other provinces are not
2 attachable in the hands of government?

3 A. The wages, My Lord?

4 Q. Yes, or whatever you want to call it. Emoluments or the
5 sessional pay, is a technical phrase.

6 A. I'm not able to answer your question, My Lord. I don't know
7 the answer to it.

8 Q. I'm not asking the reason why, but..

9 A. I know it's...

10 Q. The office of Speaker.

11 A. Civil servants, the wages of civil servants are not subject to
12 garnishee at this point in time.

13 Q. Well, it's the same thing.

14 A. Provincial civil servants. I think the federal situation has
15 changed recently. But as to the provisions of the House of
16 Assembly acted, I would assume there in your question, I'm
17 not familiar with them.

18 Q. My understanding is that in some provinces, they, by
19 legislation, wages of civil servants are now attachable or
20 subject to garnishee.

21 A. Yes. At the federal level, I understand that within the two or
22 three years.

23 Q. And all through the government of Canada. But the Members
24 of Parliament and MLA's are in a different category because
25 of some relationship with Mr. Speaker. That's only election

1 constitutional law, which is probably wrong.

2 MR. RUBY

3 Q. Your conclusion, I take it, was that there was some evidence
4 of a guilty mind of an intention but no evidence of an *actus*
5 *reus* in this case, is that fair?

6 A. That probably would be a fair assessment, although I had
7 some difficulty with the criminal intent element here,
8 notwithstanding the statements that I'm aware of in the
9 Williams case, I believe it is. I had some difficulty in
10 characterizing, great difficulty in characterizing from the
11 investigation report that I perused that this ongoing history
12 of negotiation and this deteriorating financial situation of the
13 subject and its eventual resolution, as it was resolved,
14 constituted a criminal act.

15 Q. What element of the requisite mental intent was absent, in
16 your view, in your opinion?

17 A. Perhaps at a level, a broader level than a narrow specific
18 intent. Just characterizing this entire situation as one to which
19 criminality should attach. I had great difficulty with that.

20 Q. Isn't that a quarrel with the law rather than with the
21 application of it?

22 A. No, I think what I was wrestling, what I would be wrestling
23 with there would be prosecutorial discretion at that point.

24 Q. Was there any...

25 A. The situation, any section is a very, one of the very broad

1 provisions in the Criminal Code and hence I think
2 prosecutorial discretion comes into play. You can spec... you
3 could postulate a situation where a civil servant goes out to
4 The Bay store, for example, when they have their regular 10%
5 off days on Saturday and takes the benefit of the 10% or
6 whatever discount on his purchases of that day, takes that
7 benefit. Is that a situation where, and The Bay, in my
8 example, does bus... has dealings with the government. Is
9 that a situation in which that civil servant should be charged?

10 Q. Well, the answer...

11 A. I'm not saying that's the same situation here but I say, I cite
12 it as an example of where discretion has to be exercised.

13 Q. Surely, it's the answer to your hypothetical is that The Bay
14 makes its offer to the world at large, everyone being treated
15 equally. But you and I don't usually get an opportunity to
16 write off our debts at twenty-five cents on the dollar.

17 A. I don't think the section necessarily is that narrow in its
18 application.

19 Q. I see.

20 A. A benefit of any kind, if I recall it correctly, directly or
21 indirect benefit of any benefit, directly or indirectly.

22 Q. Above and beyond what the general public would get, surely
23 you know it to be a benefit. Everyone gets the right, for
24 example, to use the public transit service.

25 A. What I'm saying, sir, is that...

MR. HERSCHORN, EXAM. BY MR. RUBY

1 Q. And, therefore, one doesn't consider it to be in law a benefit.
2 Do you agree with that proposition?

3 A. Sorry, I'm sorry, could you repeat your...

4 8:25 a.m.

5 Q. Everyone gets the right in law to use the public transit
6 service or an airline even though it...listed with the
7 government and, therefore, one doesn't consider that to be a
8 benefit because it's held out to the world at large.

9 A. No, I wouldn't characterize that example as a benefit, but I
10 would characterize my example as a benefit when someone
11 receives a discount on purchases.

12 Q. I understand your reasoning now, that's good. So your
13 opinion was that there was no intent.

14 A. I could see an argument because of the William's decision, I
15 believe it was, and the statement there as to the intent, and
16 I could see an argument, but I did not feel that a criminal
17 charge was warranted in this situation.

18 Q. Well, you said yesterday at page 14,978, line 18, when Mr.
19 Merrick was questioning you,

20
21 Q. You would agree with me that on the basis
22 of the file that you saw there was nothing
23 about the September proposal that
24 indicated...the proposal made that
25 indicated a guilty mind on the part of
either the banks or Mr. Thornhill.

A. I would agree with that.

MR. HERSCHORN, EXAM. BY MR. RUBY

1 So that was your view and your opinion.

2 A. Yes. And I think the previous answer I gave to you would
3 perhaps be an expansion of my thought processes on that
4 point.

5 Q. That was your opinion then with regard to the mental
6 element.

7 A. I did...I should in...I should clarify for you, sir, that I did not
8 at the time, not I have ever, sat down and formulated "an
9 opinion on this matter." I think my evidence on that point
10 hopefully clarified that.

11 Q. You were asked yesterday by Mr. Orsborn about the October
12 press release, in particularly the one where you're
13 mentioned as assistant director of criminal law, and you
14 agreed that insofar as it said, "And in their considered
15 opinion, the facts did not amount to evidence of a
16 commission of any offence," that was an overstatement.

17 A. Yes.

18 Q. I'm wondering whether you would also agree with me that
19 it's misleading?

20 A. I wouldn't characterize it as misleading because I don't
21 think there was any intent to mislead by the author of that
22 statement.

23 Q. Would you agree with me that it is misleading but that you
24 believe that it was done innocently?

25 A. No, I would not.

MR. HERSCHORN, EXAM. BY MR. RUBY

- 1 Q. It is not misleading in fact, in effect.
- 2 A. One may...everyone has...can have different interpretations
3 of things, and one may, I can see a line of argument that
4 someone may interpret that as misleading. I don't do so.
5 It's not my evidence.
- 6 Q. Can you tell me why you don't find it misleading? I want to
7 understand your mental processes.
- 8 A. As I alluded to earlier, it was not intended by the author to
9 mislead persons and that would be my answer.
- 10 Q. All right. Did it have the effect of misleading the public?
- 11 A. I can't answer that. I've given you my opinion, the
12 public...others in the public would have to answer your
13 question.
- 14 Q. I'm wondering why you didn't, after you saw this press
15 release which said something that was not true, that you
16 had given a considered opinion, why you didn't go to your
17 superior and say you have to retract that, change it, this is
18 not in fact what happened?
- 19 A. As I alluded to yesterday, because I concurred with the
20 ultimate decision, i. e. not to pursue criminal charges against
21 Mr. Thornhill, I was content to leave the matter stand as it
22 did.
- 23 Q. Did you also concur in the result that the investigation into
24 possible false pretences by Mr. Thornhill and into the
25 charging of the banks was cut off? Was that also what you

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1 concurred with?

2 A. That particular issue was not one that was...that I had any
3 mandate of any sort, whether specific or general, to deal
4 with and I did not apply my mind to it.

5 Q. It was not raised, I take it.

6 A. It was raised in the RC..I noted it in the RCMP investigation
7 report. It was raised by Corporal House as one issue to be
8 addressed but I did not raise it personally.

9 Q. It was not raised in the meeting with Mr. Coles and Mr.
10 Gale?

11 A. Not to my recollection, no.

12 Q. All right. This meeting with Mr. Coles and Mr. Gale, how
13 long did it last?

14 A. I have no precise recollection of how long it lasted.

15 Q. Was it a day-long meeting, was it a meeting for five or ten
16 minutes?

17 A. It would have been less than a day, probably less than half
18 a day. That's as precise, I think, as I could get. It may have
19 been only an hour, it may have only been a half hour. I
20 cannot recall at this passage of time what...

21 Q. I understand that, sir. You indicated yesterday that if there
22 had been no voluntary proposal, one or perhaps more of the
23 banks might have written off their debts. Were you able to
24 form any impression as to what their motive would have
25 been for doing that or was for doing that?

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- 1 A. I think what I indicated yesterday was that I was mandated
2 to go through the police investigation report and pull out
3 references to that fact. I wasn't forming opinions. I wasn't
4 dealing with questions of law. I was dealing with matters of
5 fact and I think that memorandum at page 25 of the
6 materials is properly characterized as one of fact, not law.
- 7 Q. I understand that, but you're not an automaton or a cipher.
8 You read the material. Were you able to form an impression
9 of what their motive was?
- 10 A. There are references in the memorandum, I guess the
11 most...for ease of reference at this point in time at page 40
12 of the materials which would bear on that issue. There
13 includes some references to political considerations. That
14 would go to motive. I don't know whether that's the whole
15 story or not because I did not apply my mind to that nor
16 have I until you asked...until you've posed this question.
- 17 Q. Well, you were able to form a view of the whole case from
18 this factual review. Surely one aspect of it is motive. Did
19 you form an opinion of what their motive was?
- 20 A. No, I did not.
- 21 Q. Just went right past you—that question.
- 22 A. I wasn't addressing the question, Mr. Ruby.
- 23 Q. You read all this material but you formed no conclusion?
- 24 A. What material are you referring to?
- 25 Q. The excerpts at pages 40 and 41 and 2 that you referred to.

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- 1 A. Not in this fashion. I would have read them as they
2 appeared in, I assume, copies of the original memorandum,
3 bank memorandums, memoranda.
- 4 Q. And you did not form any impression of what their motive
5 was, that's your evidence.
- 6 A. I don't recall doing so, no. My efforts were concentrated at
7 fulfilling my mandate which is reflected in the opening
8 paragraph of the memorandum on page 25.
- 9 Q. There was a reference in the materials you had to the
10 Premier stating he was aware of Mr. Thornhill's settlement
11 with the banks. Do you recall whether or not he was aware
12 of it at the time it was going on, or whether he was aware of
13 it afterwards?
- 14 A. I would only be aware of the references that appeared in
15 Corporal House's report. Whatever that states, and I haven't
16 got it in front of me. I have no knowledge beyond that on
17 that point.
- 18 Q. When you came to your conclusion there would be difficulty
19 in characterizing or in finding any benefit that Mr. Thornhill
20 received, what was your knowledge as to what position he
21 held in the government?
- 22 A. I assume I would have been knowledgeable of the Cabinet
23 office that he occupied at the time the settlement was
24 negotiated. At this point in time my memory is a little faint
25 on that, but I believe he would have been Minister of

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1 Development, I stand to be corrected.

2 Q. And that is a portfolio which requires control over sums of
3 money that are substantial?

4 A. To the best of my knowledge, I think I would answer yes.

5 Q. Would you agree with me that one of the results was not
6 only that he got the twenty-five cents on the dollar
7 settlement but that he avoided any public knowledge of his
8 true financial difficulty such as would have occurred in the
9 bankruptcy?

10 A. One of the results was that...

11 Q. Would have been from the proposal.

12 A. Well, as events turned out, that was far from the case.

13 Q. True. But when he made the proposal he didn't know that,
14 did he, as far as you know?

15 A. No. Well, it was a private matter at that point in time
16 between he, the debtor, and the creditor banks and I think
17 that's a safe assumption.

18 Q. And that...

19 A. He would not have anticipated the exposure of his...of his
20 private financial matters just as any other citizen, including
21 myself, as I alluded to in my rather ruffled response to your
22 earlier question.

23 Q. Don't feel badly about the response, it may well be the one
24 that I would give too. Would you agree with me that this
25 would be a substantial advantage for a public figure like Mr.

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1 Thornhill?

2 A. What would be a substantial advantage?

3 Q. To keep this matter from the public view, his own financial
4 impending, his financial insolvency.

5 A. I think I would have to answer yes to that.

6 Q. You would answer yes to the question of whether there was
7 an advantage. Are you aware that section 110(1)(c) uses
8 the word "advantage"?

9 A. If I can just refer to it, I believe that word is contained in
10 the text of the section.

11 Q. It would seem clear if that's the case, that you weren't
12 aware that that word was in the section at the time, or
13 otherwise you would have recommended charging Mr.
14 Thornhill.

15 A. No, sir.

16 Q. Is that not so?

17 A. No, sir.

18 Q. No, it's not so?

19 A. No.

20 Q. Is that because, well, perhaps I shouldn't lead you on it.
21 Why don't you tell me why the obtaining of these two
22 advantages wouldn't be an advantage that would justify the
23 laying of a criminal charge?

24 A. I wouldn't think that an advantage, i.e. keeping a matter out
25 of the public limelight, is an advantage within the legal

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1 meaning of the word "advantage" as it appears in section
2 110(1)(c) of the Criminal Code.

3 Q. So I'll be assisted by this and their Lordships would be
4 assisted, is there any case law to effect...to that effect that
5 you're aware of?

6 A. Not having researched the point off the top of my head,
7 not...not to my knowledge.

8 Q. And the section does read, "Benefit or advantage of any
9 kind," does it not?

10 A. It does. I would come back, sir, to the question and I think
11 in this point in time the subject matter of the issue we're
12 discussing and I think the issue of prosecutorial discretion
13 again comes in to play.

14 Q. It does, but unless there's some rational basis...

15 A. That section, sir, is designed to deal with corruption in the
16 government.

17 Q. Yes.

18 A. And I cannot characterize what went on here in the
19 negotiations and the final settlement of Mr. Thornhill's
20 personal obligations as corruption.

21 Q. You thought it was appropriate.

22 A. I'm not commenting on that, sir. I can't comment on it,
23 whether it was certainly appropriate, I assume, from Mr.
24 Thornhill's point of view to resolve the matter.

25 Q. You thought it wrong but not corrupt.

1 A. No, I did not. I didn't.

2 Q. You thought it right.
3 8:40 a.m.

4 A. It wasn't a question of my interpreting it as right or wrong. I
5 was looking at it from the point of view whether criminal
6 culpability should attach to this situation.

7 Q. You weren't just giving a break to a man because he was a
8 Cabinet Minister and a public figure.

9 A. NO, sir.

10 Q. The exercise of discretion for that reason would be wrong,
11 you're right? Do you agree upon that?

12 A. For what reason?

13 Q. The exercise of prosecutorial discretion for that reason.

14 A. For what reason, sir?

15 Q. Because the man was a Cabinet Minister and a public figure,
16 that would be a wrong exercise of discretion, would it not?

17 A. It would.

18 MR. RUBY

19 Thank you, sir. Those are my questions.

20 EXAMINATION BY MR. PINK

21 Q. Mr. Herschorn, I just have one question for you. Yesterday
22 you were shown a newspaper article, Exhibit 169, which had
23 the comments attributed to former Attorney General How?

24 A. Yes.

25 Q. On the assumption that those comments were, in fact, made

1 and are correctly quoted, did those comments affect you in
2 any way as you made your decision, as you reviewed this file
3 and came to your conclusions?

4 A. I was yesterday pointed to the last three or four paragraphs?

5 Q. That's correct.

6 A. Perhaps I could just peruse them. No, they didn't influence
7 my opinion.

8 MR. ORSBORN

9 I have a few questions, My Lord.

10 RE-EXAMINATION BY MR. ORSBORN

11 Q. Mr. Herschorn, you mentioned to Mr. Ruby that you were
12 wrestling with this as an exercise of prosecutorial discretion.

13 I think "wrestling" was the word you used?

14 A. If I used the word, it's perhaps... well...

15 Q. Well, anyway.

16 A. It might be appropriate, yes.

17 Q. It was an exercise of prosecutorial discretion.

18 A. Yes. I'd say "wrestled," it's not...

19 Q. I'm not...

20 A. This is not a cut and dried case. This is not one that a
21 prosecutor would look at and say, "Oh, There's clearly no case
22 here."

23 Q. Yeah, I'm not hung on the word "wrestling." I'm just looking
24 at the exercise of the discretion. In your view, is
25 prosecutorial discretion exercised once you have determined

1 that the necessary elements are there and then you are
2 considering, well, do we go or do we not go? Or is discretion
3 exercised in determining whether the elements are there in
4 the first place.

5 A. No, I think it's in the former category that you presented.

6 Q. So...

7 A. Once you determine that the elements of the offence can be
8 established, then it's a matter of assessing whether an
9 exercise of prosecutorial discretion...

10 Q. I understand. So in characterizing your thought processes in
11 this case, as an exercise of discretion...

12 A. I should perhaps, if I could just interject...that's, I think, the
13 usual situation. It may be in the latter situation that you
14 presented to me as well. I don't know if you can
15 compartmentalize the term "prosecutorial discretion" into
16 either.

17 Q. But is it fair to say that in this case then insofar as you
18 characterize it as an exercise of prosecutorial discretion, your
19 evidence is that the elements are there or were there and
20 that it was an exercise of discretion, at least in your mind, as
21 to whether or not the charge should proceed?

22 A. Because the language of this section is so broad, the
23 advantage or benefit of any kind directly or indirectly and
24 because an argument could be made, you know, one could
25 make an argument that this was, people have attempted to

1 make an argument that this is, was a benefit. Given that
2 scenario, then I think then prosecutorial discretion would
3 then come into play. I'm not necessarily conceding that it's
4 my view that this was a benefit to Mr. Thornhill in the
5 context of Section 110(1)(c) but, to play devil's advocate,
6 assuming that, then I think prosecutorial discretion would
7 come into play.

8 Q. You cast the matter as one of corruption and suggest that the
9 section you were considering was one designed with
10 corruption.

11 A. That's loose terminology. The marginal note to this section is
12 frauds upon the government.

13 Q. It's somewhat more than loose terminology. It connotes a
14 very serious criminal offence. Surely the element of
15 corruption and the element of fraud, the element of bribery.
16 And I would suggest to you that on a fair reading of the Nova
17 Scotia Court of Appeal cases that 110(1) (c) has nothing
18 whatever to do with corruption. It even speaks of a guy
19 taking a turkey. Is a guy that takes a turkey corrupt?

20 A. Well, it's with respect to the dealings with the government is,
21 I think, implicit in virtually all the provisions.

22 Q. Well, was the exercise of your judgement in this case
23 influenced by your belief that you were dealing with an
24 offence which dealt with corruption?

25 A. No, I..

1 Q. Were you looking at evidence of corruption before you
2 proceeded?

3 A. No, I was looking at the facts as presented in the R.C.M.P.
4 investigation report and looking at the possible application of
5 any of the provisions of Section 110.

6 Q. You just told my friend, Mr. Ruby, that...

7 A. I should clarify. I wasn't looking. I did not formulate the
8 opinion. I wasn't looking at it and I think it's overstating the
9 position vis-a-vis my involvement.

10 Q. I don't want to go on, but you did indicate, and this is why I
11 asked the question. You did indicate to Mr. Ruby that you felt
12 the section dealt with corruption. So insofar as you did form
13 an opinion and provide a gut reaction, was that opinion
14 influenced by your belief that the section in totality dealt
15 with fraud and corruption?

16 A. No, I wouldn't say so. I perhaps in answering that question in
17 a different context, when I looked at the police investigation
18 report, I looked at it in terms of the text of the section.

19 Q. Well, then was your...

20 A. And, hopefully, my thought processes would have been
21 responsive to that text.

22 Q. Were you aware then when you developed your view, were
23 you aware that it was an offence under the section to take a
24 turkey?

25 A. I'm not sure of the case, the turkey case that you're referring

1 to. I'd have to know more about it.

2 Q. There's no turkey case as such but it's mentioned in the trial
3 decision of Ruddock and the trial judge, Judge O'Hearn, says
4 right in Ruddock "I'm also aware that a good many civil
5 servants have never heard of this provision of the Criminal
6 Code, so they would probably be quite astonished to find that
7 in taking a gift of a turkey, or liquor, or cigars from a person
8 contracting with the Department, that they were in serious
9 breach of the criminal law. Were you aware that taking of
10 such a gift as a turkey or a cigar would put a person in
11 serious breach?

12 A. I don't know whether I'd use the word "serious" in that
13 particular context, but breach of the law, yes. That because of
14 the broadly worded provision in 110(1)(c), it could have
15 application to that situation.

16 MR. ORSBORN

17 Thank you.

18 EXAMINATION BY CHAIRMAN

19 Q. Before you leave, Mr. Herschorn, I'll avail of your experience
20 in the criminal law, to focus on that subsection once more,
21 110(1)(c). In the exercise of your prosecutorial discretion,
22 after an investigation has been completed, do you address the
23 question as to whether, in your opinion, a jury, properly
24 instructed, would reach a verdict of guilty in the event of
25 charges laid? Is that a consideration?