

RC 44
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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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

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.

9 MR. HERSCHORN

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.

23 MR. CHAIRMAN

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

MR. HERSCHORN, EXAM. BY MR. RUBY

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?

MR. HERSCHORN, EXAM. BY MR. RUBY

- 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.

MR. HERSCHORN, EXAM. BY MR. RUBY

- 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

MR. HERSCHORN, EXAM. BY MR. RUBY

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.

MR. HERSCHORN, EXAM. BY MR. RUBY

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

MR. HERSCHORN, EXAM. BY MR. RUBY

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?

- 1 A. I believe it is, My Lord. Yesterday I believe characterized the
2 prosecutorial discretion in the context of my involvement
3 here, or my thought processes in this case, substantial
4 likelihood of conviction. I think is somewhat akin to the...
- 5 Q. Under...
- 6 A. Whether a jury would convict.
- 7 Q. But in addressing that issue, under 110(1)(c), you first would
8 have to decide whether or not the person being investigated
9 is an official or employee of a government, is that correct?
- 10 A. Yes.
- 11 Q. Then...
- 12 A. I don't think that was a dispute in this case.
- 13 Q. That would not appear in this case to be in dispute.
- 14 A. No.
- 15 Q. Mr. Thornhill, probably not an employee, but more likely
16 would be an official of the government. Secondly, you would
17 then have to decide whether or not you were satisfied that
18 there had been a reward, advantage, or benefit of any kind
19 directly or indirectly conferred upon the official of the
20 government. Is that correct?
- 21 A. Conferred on, I believe, My Lord.
- 22 Q. Conferred, all right, on it.
- 23 A. Yes.
- 24 Q. If your decision was in the affirmative on these two counts,
25 then the question of intent would not be relevant. Is that

MR. HERSCHORN, EXAM. BY CHAIRMAN

1 what you're saying?

2 A. My recollection of the Williams decision and the
3 characterization of the necessary intent in that case, I think,
4 would prompt me to answer yes to your question, that that
5 would be sufficient.

6 Q. Your big, I gather in summarizing your evidence, your
7 concern was that you weren't satisfied that the second
8 component could be...

9 A. Could be established.

MR. CHAIRMAN

10
11 Thank you. Mr. Coles? Again, in this case, we are in a
12 position similar to Mr. Herschorn. Mr. Ruby has the right to
13 cross-examine him on his testimony of yesterday and Mr.
14 Pink and Mr. MacDonald will reserve the right to re-examine.

MR. RUBY

15
16 Thank you, My Lord.

17 **MR. GORDON COLES, still sworn, recalled, testified as**
18 **follows:**

EXAMINATION BY MR. RUBY

19
20 Q. Mr. Coles, there was a meeting to discuss this matter with
21 Messrs. Gale and Herschorn. Can you tell me how long a
22 meeting that was?

23 A. I don't remember, counsel. I would think it was probably a
24 matter of hours. I don't recall specifically.

25 Q. When you met with them, did you tell, did you discuss the

1 issue of cutting off, ending the question of whether or not Mr.
2 Thornhill had obtained the money by false pretences and
3 whether or not the banks had committed a crime under
4 Section 110(1)(b)?

5 A. I don't recall any discussion about cutting anything off, no.

6 Q. Did you discuss those two counts?

7 A. Not that I specifically recall.

8 Q. Would it not be responsible not to discuss those two, since the
9 effect of your decision that no charges be laid was to end any
10 investigation or prosecution into those two matters?

11 A. Well, from my recollection, and we're going back to some
12 eight years, my recollection was from the police report, I
13 didn't see any basis for those allegations.

14 Q. Well, taking the false pretences one for the moment, were you
15 aware of how the pretence occurred, the alleged false
16 pretence?

17 A. I don't recall at this point specifically.

18 Q. Does the word "Albatross Motel" mean anything to you?

19 A. No.

20 Q. In that regard.

21 MR. MERRICK

22 My Lord, I'm going to object to this line of questioning.

23 MR. CHAIRMAN

24 Yes, that last... You're not going to have evidence concerning
25 that area.

1 MR. RUBY

2 Q. You took no steps to inquire as to what the false pretence
3 might be?

4 A. I didn't see, as I recall, I didn't see anything in the report that
5 satisfied me there was a basis for any such offence.

6 Q. You knew that R.C.M.P. officers of quite senior level thought
7 there was such an offence?

8 A. I knew in their final report they identified that as one of the
9 offences to be considered, yes.

10 Q. That they wanted to investigate further. Yes?

11 A. I think there may have been a reference to that. I did not at
12 any time direct that they couldn't investigate further, if that
13 was their wish. That was their area of responsibility, not
14 mine.

15 Q. You didn't think by your decision not to prosecute Mr.
16 Thornhill that you were cutting off that investigation at all?

17 A. I don't recall addressing that in those terms, no.

18 Q. Is that a fair characterization of what, in fact, happened, that
19 by your decision, publicly made, not to prosecute him, you did
20 not cut off any further consideration of those offences?

21 A. Well, I was advised that the R.C.M. Police were not going to
22 continue their investigation and that may have been
23 influential in their determining that position, yes.

24 Q. Say that again, because I didn't follow it.

25 A. Well, I was advised by a letter from the Chief Superintendent

1 that they were not going to continue any further
2 investigation. Now whether or not what you said, the press
3 release had had that effect. I can see that it may have, but I
4 don't know. The R.C.M. Police are the best people to answer
5 that. That was their decision, not mine.

6 Q. Didn't you intend it to have that effect?

7 A. Certainly not.

8 Q. You had no idea that would happen?

9 A. I hadn't considered that as an eventuality or any other such
10 consequence. My advice on that was because of the interest
11 that the public and the media quite properly had shown and
12 that they were waiting for the A.G.'s decision, and it seemed
13 to me that when the decision was made, it should be
14 announced. And I didn't consider the effect that may have
15 had on the R.C.M. Police whatsoever. Certainly there was no
16 intention on my part to have that kind of influence.

17 Q. And yet you formed the view that once you decided the
18 matter, that was the end of it as far as the R.C.M.P. was
19 concerned or should be.

20 A. In respect to those charges, yes.

21 Q. So then how could you not have been aware that that would
22 be the effect of what you did?

23 A. I beg your pardon?

24 Q. Then how could you not be aware that that, indeed, would be
25 the effect of what you did?

1 A. Well, the R.C.M. Police, for whatever reasons they may have
2 thought appropriate, may not necessarily have accepted my
3 view on that point.

4 Q. When you met with Mr. How to communicate your decision
5 and to give him your advice, did you tell him that the R.C.M.P.
6 opposed the position not to lay any charges and wanted to
7 investigate the bank fraud and the false pretences allegations
8 further?

9 A. Not that I recall.

10 Q. Why not?

11 A. Well, I was giving to him my advice and my opinion on my
12 evaluation of the facts. And that's what I did.

13 Q. Aren't you being less than fair with him if you don't apprise
14 him of the fact that the police force is taking the exact
15 opposite view? Yes, here's my advice, but they don't agree.

16 A. Well, I'm not sure that I can agree with that, counsellor. I'm
17 not sure that at that point I knew they were taking the exact
18 opposite view. They had raised, identified three or four
19 offences that they, in your opinion, thought the evidence
20 supported, certainly to the extent of being, of there being
21 reasonable and probable grounds for the laying of charges in
22 respect to those. I took a different view of the facts.

23 Q. Well, let's examine that. They said to you in writing, "We
24 want to prosecute Mr. Thornhill under 110(1)(c)," right?

25 A. I'm not so sure that they said that.

1 MR. PINK

2 I don't want to get semantical, but they didn't say that.
3 They said they wanted to consider laying a charge under Section
4 110(c).

5 MR. RUBY

6 Q They thought the laying of charges under 110(1)(c) was
7 warranted. That's what they said to you, right?

8 A. To that effect, yes.

9 Q You said "it's not warranted and we're not going to," is that
10 not correct?

11 A. Well, I said it wasn't warranted because, in my opinion, the
12 facts did not support the prosecution of such charges.

13 Q Now are not those two views opposed, contradictory?

14 A. Well, no... Well, I suppose it's a matter of where you come
15 from. You know, the police, in my view, the degree or the
16 nature of the evidence to lay a charge based on reasonable
17 and probable grounds is considerably less than what the
18 Crown is obliged to establish for a successful prosecution of an
19 offence. So I'm not so sure that they are opposed. They
20 certainly addressed different responsibilities and different
21 concerns, yes.

22 Q They thought charges were warranted. You know what the
23 word "warranted" means? Justified, I assume? Appropriate.
24 You thought they were not warranted. Are not those views
25 diametrically opposed?

1 A. I'm not so sure that they said... I'm not so sure. My
2 understanding was that they had identified certain offences
3 and recommended charges. Now implicit in that, obviously
4 they thought they had reasonable and probable grounds for
5 doing so. That's what I would have interpreted and
6 understood from their statement.

7 Q. You're saying that the suggestion that the R.C.M.P.'s position
8 was not, in fact, opposed to yours. That's your evidence?

9 A. I'm saying that at that point in time, I didn't, my recollection
10 is I didn't understand them to be opposed to my position.
11 They didn't know my position at that point in time, so I don't
12 know how they could be opposed to it.

13 Q. You knew that you were not accepting an R.C.M.P.
14 recommendation, correct?

15 A. Yes.

16 Q. Did you not think it appropriate to tell your superior that that
17 was the case?

18 A. My recollection is that I didn't interpret or understood their
19 letter in the sense that you are suggesting that it's a
20 recommendation. They were recommending that these
21 charges ought to be considered. That's my recollection of my
22 understanding of their letter.

23 Q. Let's take a look at it then. Have you got Exhibit 164 in front
24 of you?

25 A. Yes.

- 1 Q. Take a look at 17 just by yourself, if you would.
- 2 A. Yes.
- 3 Q. Recommendation #1. He says he has established a *prima facie*
- 4 case under Subsection C. Your view was opposed to that?
- 5 A. Yes.
- 6 Q. He recommended that a prosecutor be appointed to take the
- 7 matter before the courts. Your view was opposed to that?
- 8 A. Yes. The position I took, yes, was opposed to that, yes.
- 9 Q. "I have shown some evidence Mr. Thornhill obtained funds by
- 10 false pretences and I would like to discuss the matter with a
- 11 prosecutor." Your view is opposed to that?
- 12 A. Well, I expressed the position that my evaluation of the
- 13 report, police report, that there was, in my opinion, not
- 14 evidence to support the charges.
- 15 Q. Your view was opposed to that, was it not?
- 16 A. I wouldn't characterize my view in those terms. I said that I
- 17 had before me the investigator's report and that's what I was
- 18 speaking to.
- 19 Q. He says, "I have shown some evidence Mr. Thornhill obtained
- 20 funds by false pretences." You didn't agree with that.
- 21 A. I was... My view was I was looking for evidence that would
- 22 support the allegations and that evidence, in my opinion, was
- 23 lacking.
- 24 Q. Right, and he says, "I've got it," and you say, "It's lacking."
- 25 That's a view that's opposed, in ordinary English, is it not?

1 A. Well, I can't add to what I've already said, counsellor.

2 Q. What does the word "opposed" mean to you?

3 A. It wasn't a case, as far as I was concerned, of opposing his
4 statement that he had some evidence. I was trying to satisfy
5 myself from the facts in the report that there was evidence to
6 support a prosecution of those charges. That, I found lacking.

7 Q. You found no such evidence; namely, that Mr. Thornhill
8 obtained funds by false pretences.

9 A. Well, I saw no evidence that, in my opinion, as I recall, would
10 justify the laying of a charge of that kind.

11 Q. Did you see any evidence that Mr. Thornhill obtained funds
12 by false pretences?

13 A. I don't recall.

14 Q. There was none, as far as you can recollect, is there?

15 A. Well, not that I recall.

16 Q. So that's a view that's opposed to this, is it not?

17 A. Well, I can't add to what I said my recollection to be.

18 Q. He says, "I found it," you said, "I didn't," and you don't think
19 that's opposed?

20 A. My position was certainly opposite to that. If it pleases you,
21 yes, it was opposed in the sense that I did not find evidence
22 to support a prosecution of those charges.

23 Q. No. 3, that the four chartered banks involved in the
24 settlement have violated the Criminal Code, Section 110(c).
25 Your position was opposed to that?

1 A. Yes.

2 Q. And No. 4 is a conspiracy, and your position was opposed to
3 that. And then when he found there was evidence, you say
4 there wasn't. Correct?

5 9:03

6 A. I found no evidence that in my opinion satisfied the laying
7 of a charge under that section in the report.

8 Q. You found, to use the language in number 4, that there was
9 no evidence that the four chartered banks, Mr. Thornhill and
10 others, had conspired to have Mr. Thornhill receive a
11 benefit, correct?

12 A. In my assessment of the report, that is so.

13 Q. Your view is opposed...

14 A. Of what, I'm sorry, of a benefit?

15 Q. To have Mr. Thornhill receive a benefit, that was the
16 conspiracy suggested in number 4.

17 A. Right, a benefit, yes, that's right.

18 Q. And that...

19 A. I saw no evidence of conspiracy, yes.

20 Q. And that view was opposed to the RCMP view, they found
21 some evidence, you found none, right?

22 A. I didn't find evidence to satisfy me on the laying of such a
23 charge, that's right.

24 Q. Did you find none or some?

25 A. I don't recall. There may have been some.

1 Q. In a number of those matters, your views are indeed
2 opposed to those of the RCMP, you agree?

3 A. Well, my assessment of the evidence that was available
4 through that report has certainly led me to a different
5 conclusion than what they drew.

6 Q. It's a fairly narrow question, sir, may I ask you answer it.
7 On a number of those issues, your view is, in fact, opposed
8 to that of the RCMP, is that true?

9 A. Yes.

10 Q. All right. Why would it not be part of your responsibilities
11 as Deputy Minister when making a decision of this sort or
12 recommendation of this sort to apprise your superior that
13 your views and the RCMP views were opposed on this
14 matter?

15 A. Well, I took the position, and I don't recall to the extent that
16 that particular question I addressed specifically. I took the
17 position that I was to evaluate the report and give the
18 Attorney General my opinion and advice, which is what I
19 did and I did it in the form and...and that's all.

20 Q. Would you agree with me that one possible explanation, one
21 possible motive for not telling the Minister that the RCMP
22 was opposed to your view was to make sure that the
23 decision turned out the way you recommended and no other
24 way. That's one possible interpretation.

25 A. Well, that may be yours, it certainly wasn't my intention or

1 purpose, and certainly not mine.

2 Q What other interpretation, what other motive can you give
3 me for why you wouldn't do that?

4 A. Because I was coming from the position of being satisfied
5 that there was evidence to justify a prosecution of the
6 allegations. I found that lacking in my opinion and the fact
7 that the RCM Police may have had...been satisfied that that
8 there was sufficient evidence for the laying of a charge on
9 reasonable and probable grounds and in my opinion that
10 was perfectly acceptable from their point of view, but mine
11 was a different responsibility and required evidence beyond
12 that.

13 Q Did you give Mr. How the RCMP report to read?

14 A. No, I did not.

15 Q Tell me what other explanation you can give me for not
16 giving him the report than the one I put forward that you
17 wanted to make sure that the decision came out in your
18 way?

19 A. Normally when I give advice to the Minister, I don't take in
20 the files and...they're available, if he wants them, he'll ask
21 me for them. I give my advice or my opinion, I don't take in
22 all the files and he would not expect me to, I would not
23 think.

24 Q You thought he would not expect.

25 A. Well, this is not the normal way in which I express an

1 opinion and advice. I make reference to the fact there
2 is...I've had reports, I've considered them and they're
3 available to the Minister. I did not see...I did not in this
4 particular instance for no particular purpose or design or
5 intention keep them from him.

6 Q. You've termed yesterday significant the fact that the
7 Premier had indicated he had knowledge of the efforts by
8 Mr. Thornhill to settle his indebtedness with the banks.
9 What was the Premier's knowledge so far as you were
10 aware at that time? What exactly did he know?

11 A. Well, before I answer that, you know, that was...that was
12 one of the questions that would be involved if I thought the
13 facts warrant the laying of a charge and prosecution, that
14 there had been a statement by the Premier. And I don't
15 recall, at this point my recollection is that he had knowledge
16 that Mr. Thornhill was negotiating with the banks in an
17 effort to settle his indebtedness. That may not...that may
18 not be the correct paraphrase of his remarks, but that
19 was...that's my recollection and beyond that I don't have any
20 particular recollection.

21 Q. To your knowledge at the time did the Premier know that it
22 was to be twenty-five cents on the dollar?

23 A. I have no knowledge.

24 Q. Did you ask? Did you inquire? Did you find out?

25 A. No. In my assessment of, if I may at this point, counsel, in

1 my characterization of the transaction, it was a civil
2 transaction involving a debtor and creditor relationship and
3 it did...in my opinion, it was not the kind of advantage, as far
4 as I could understand from the cases I pursued...I did not
5 find any cases directly on that to my recollection, it did not
6 fall within, in my view, the context of the provisions of
7 subsection (c).

8 Q. How long...

9 A. So, I...so basically my position was, and was that it was a
10 civil, not a criminal, transaction in the course of a creditor-
11 debtor relationship and did not attract the criminality of
12 subsection (c).

13 Q. How long did you take to do the legal research you've been
14 speaking of?

15 A. Oh, I don't know. I read what cases I thought was useful
16 and helpful to me and the cases I read, particularly the ones
17 that have been referred to in the course of these hearings, it
18 seemed to me this transaction was completely different
19 from a case where gifts were made for no particular reasons.
20 They were...and received for no particular reasons. They
21 tend to distinguish in the cases that I read, the Cooper, the
22 Ruddock and Williams case seemed to me the factual
23 situations were such that I was of the opinion that these
24 facts disclosed a civil transaction between a debtor and
25 creditor and there was no...and were outside of the

1 parameters of subsection (c).

2 Q. You'll agree with me, I think, that whether or not they are a
3 civil transaction is irrelevant if, in fact, the facts fit within
4 110(1)(c).

5 A. Yes, sure.

6 Q. You thought the Premier would have consented in writing.

7 A. I didn't get that far except it was knowledge, I had that fact
8 or that information before me and I...and if there were to be
9 a prosecution, it seemed to me that there was...there was
10 that prospect, that aspect of the element of the offence
11 would not have been able to be established.

12 Q. Did you have any idea whether or not he really would have
13 consented and whether that would have taken place?

14 A. No.

15 Q. So you're speculating.

16 A. Yes, but as I said, in my...my assessment of the facts and the
17 opinion that I...the position I took was that the transaction
18 did not get itself into the section.

19 Q. Do you usually speculate in favour of prospective accuseds
20 as a matter of practise in your role as Deputy Minister...

21 A. I would....

22 Q. ...or do you usually make inquiries to find out what the facts
23 are before you form judgements?

24 A. I wouldn't characterize my position as one of speculation.

25 Q. You did.

1 A. I formed the opinion that the transaction did...was not one
2 within the context of subsection (c).

3 Q You never reached the issue of whether or not the Premier
4 would have consented, that's what you're saying to me.

5 A. That's right.

6 Q Yesterday at page 15,044 you were asked the following
7 questions and gave the following answers, line 10,

8 Q Well, the reason then you thought
9 there could be no conviction or no
10 reasonable grounds for conviction is
11 because there was no benefit, in your
view.

12 A. Yes.

13 Q And also because the Premier had...
14 was knowledgeable of it and would have
15 consented.

16 A. Yeah, and the absence of any
17 particulars about the banks' dealing
with the government too.

18
19 Do you remember those questions and those answers?

20 A. Yes. And my recollection in saying that...that if there had
21 been these other elements were not...were not there to
22 convince me that a charge could be successfully prosecuted,
23 but I did not need to in the view that I took of the facts, I
24 did not need to canvass those particularly other than I made
25 the comment that there was prosecutorial difficulties in

1 respect to what I recall from the facts.

2 Q. It would be wrong for a Deputy Minister making his decision
3 to speculate on a matter like that, would it not?

4 A. Well, as I said before, Mr. Ruby, I didn't consider that
5 speculation. I was expressing an opinion of what was before
6 me.

7 Q. But it's wrong to speculate on a matter like that, leaving
8 aside for the moment the question of whether you
9 speculated or not, it would be wrong to speculate on a
10 matter like that, would it not?

11 A. Well, the Crown has to...has to make some decisions in the
12 course of a prosecution. It has to evaluate whether it has
13 evidence or it doesn't have evidence or whether if that
14 evidence is admissible what weight will be given to it. And,
15 I suppose, in the course of that exercise one does speculate.
16 One speculates in that sense, of course.

17 Q. This...

18 A. Nothing wrong with that.

19 Q. Nothing wrong with speculation.

20 A. Not in the context that I've said that there is that kind of
21 speculation. Nobody knows until the end of the day.

22 Q. And you agree with me this is not speculation as to the
23 contents of your case. It's speculation as to a possible
24 defence the proposed accused might put forward, correct?

25 A. Well...

1 Q. It's not part of your case to prove the Premier would have
2 consented.

3 A. Well, no, but the...the Crown has a responsibility to take into
4 account all facts that are known and are relevant and the
5 statement by the Premier certainly was a fact to be taken
6 into consideration.

7 Q. And the issue of whether or not the Premier would have
8 consented, as you testified under oath, was that a fact or
9 was that speculation?

10 A. Oh, I didn't think I had said it in those terms, of course, that
11 was speculation. I had no knowledge what the Premier...

12 Q. No, do you when you're deciding whether to lay charges in
13 ordinary cases, do you speculate as to what possible
14 defences the accused might have or do you find out about
15 them if it's in within your power to make inquiries and get
16 that knowledge?

17 A. No, this is...this is part of the context of that subsection. I
18 mean it...

19 Q. What part is it, tell me the section that...the element that
20 writes of this? Which element?

21 A. Well, I don't...I don't have it before me, but it says that
22 unless, words to the effect that unless a consent from a
23 superior...

24 Q. The words are in writing.

25 A. It is in writing, yes. But I mean if that...if that be so, well,

1 that's the end of any charge under that section.

2 Q. Yeah, but you knew there was no consent in writing here,
3 right?

4 A. No, I didn't know that.

5 Q. And you didn't bother asking to find out?

6 A. Because as I said, counsellor, the view I took of the
7 transaction did not fit within the parameters so there is no
8 question of any defence being needed if the facts did not
9 come within the context of that section. The view I took of
10 them was that they did not.

11 Q. Tell me if I'm wrong, it seems to me that if there was a
12 consent in writing, your task is really simple, there can't be
13 any prosecution, and it would have taken you about a
14 minute to decide that, isn't that fair?

15 A. I was not investigating. I was not investigating the facts. I
16 was given an opinion on the police investigation.

17 Q. You're telling me you didn't know whether or not there was
18 a consent in writing. Do you want to take that back?

19 A. No, I didn't know whether there was a consent in writing or
20 not. I had no knowledge whether there was or wasn't.

21 Q. Wouldn't it have been simple to pick up the phone and find
22 out?

23 A. In hindsight, certainly, but at the time I did not do that.

24 Q. Instead you spent hours doing research, hours at meetings,
25 hours formulating press releasing, dealing with difficult

1 political consequences and it never occurred to you to pick
2 up the phone and ask the Premier, "Did you consent in
3 writing?"

4 A. I didn't spend hours preparing press releases. I didn't spend
5 hours considering political consequences. I wasn't
6 concerned with political consequences.

7 Q. No, you weren't. It would be wrong for a Deputy Minister to
8 be concerned with political consequences, wouldn't it?

9 A. I'm not answering...I'm not in a position to answer yes,
10 whether it is wrong or not, I'm saying in the context of this
11 case I was not concerned with political consequences.

12 Q. Would it or would it not be wrong for a Deputy Minister in
13 deciding whether or not to charge someone to concern
14 himself with political consequences, Deputy Minister of
15 Justice?

16 A. Of course, I think it would be wrong.

17 Q. That's what I thought to.

18 A. There...but to answer your question in a general sense, there
19 are times when matters are dealt with at the Deputy
20 Minister level when political consequences have to be
21 considered.

22 Q. Okay. If you...

23 A. But not...not in a case like this.

24 Q. If you weren't sure whether or not there was a consent in
25 writing from the Minister, why wouldn't you ask the RCMP

1 to find that out about you, is that normal...find that out for
2 you? Isn't that the normal course of events?

3 A. If I had come to a different conclusion than what I had on
4 the facts, probably so. But I had come to the conclusion that
5 the facts did not bring this transaction within the context of
6 subsection (c).

7 Q. Okay. If you look in the gray document book at page 34, I
8 guess it's page, starts at page 31. There's your
9 memorandum to Mr. How. I take it your evidence is that
10 you intended to convey through this that the problem was
11 there was no benefit and, therefore, the case ought not to be
12 prosecuted, is that right?

13 A. Well, the benefit, you know, if there was a benefit, it was
14 not...it's not the kind of benefit that was contemplated by...

15 Q. Right.

16 A. ...by sub (c).

17 Q. Can you show me where it says that?

18 A. No, I don't think...I don't think I...I don't think I do say that
19 there. I gave him my opinion that there...that there was not
20 a basis for the laying of a charge. It doesn't spell that out.

21 Q. What was the reason why you told him? What reason did
22 you assign in this memo for not laying the charge? What
23 was the reason?

24 A. Oh, I think the memo has to speak for itself. My reason was
25 that I did not see the that there was a basis for the laying of

1 the charges.

2 Q. I understand that, sir. That's what you've said twice. What
3 was the reason why there was no basis in this memo? What
4 does it say? What was the reason assigned in this memo?

5 A. Well, in respect to...in respect to the allegations that would
6 have come under section 1(a), there is an absence of
7 intention. I found there was an absence of intention. I
8 didn't see...I didn't see the, as I say, in my assessment of the
9 facts did not characterize the transaction as to coming under
10 (c) and I saw no evidence that satisfied me that there was a
11 basis for laying charges in respect to any other offence.

12 Q. I know that you say that the facts didn't fall within the
13 offence. What was it about them? Was it the mental
14 element? Was it the *actus reus*? Was it the presence or
15 absence of a benefit? Was it the guilty intent? What was
16 missing?

17 A. Well, it...

18 Q. As far as the memo is concerned.

19 A. Well, my characterization of the transaction, they had
20 been...it was debtor-creditor relations over a number of
21 years, going back to the early seventies. There were
22 protracted efforts on the part of the banks to collect. There
23 was some third party accommodation at one point in time,
24 and there was an offer which...of further accommodation by
25 a third party on behalf of Mr. Thornhill, which was accepted

1 by the banks, and I considered this to be in their efforts to
2 try to collect from an insolvent debtor, who had no...in
3 respect to debts that were unsecured, and I characterized
4 that as not an unusual transaction for a creditor to try to
5 recover whatever and the most he could. In this case, the
6 most he could was what was available from a third party.
7 And I characterized that as not having this criminality that
8 the other cases had where somebody out of the blue makes
9 a gift to somebody. This was nothing. And I did not
10 characterize it in that context.

11 9:25 a.m.

12 Q. As a lawyer, you know what I mean when I say "necessary
13 ingredients of the offence," or "elements of an offence," don't
14 you?

15 A. Yes.

16 Q. And you'll agree with me that it's very basic, first year
17 criminal law, that if the necessary ingredients or elements of
18 an offence are present, then a person gets convicted, right?

19 A. Sure.

20 Q. Sure.

21 A. If the evidence supports, yeah.

22 Q. Which element of the offence...

23 A. But I...

24 Q. Was missing here, in your view, at this time?

25 A. I did not see this as the benefit contemplated and provided

1 for in the section.

2 Q. And that's what you were intending to convey in this memo.

3 A. I don't know if I intended to convey that in the memo. My
4 purpose of the memo was to advise the Minister whether in
5 my opinion there was a basis to warrant the laying of charges.

6 Q. And to tell him why there was no basis, correct?

7 A. Well, I had to give him my opinion and to the extent that I
8 did here, that's what I thought was adequate.

9 Q. I'm going to suggest to you, sir, that what you say in this
10 memo is that the reason why the case can't be prosecuted is
11 that one of the elements of the offence; namely, the criminal
12 intent required, is missing. That's your point. You don't agree
13 with it?

14 A. Yes, overall, yes.

15 Q. That's what you're trying to say.

16 A. Yes.

17 Q. That's the point of this memo.

18 A. Yes, in essence, yes.

19 Q. Not whether there's a benefit, but whether there's a criminal
20 intent.

21 A. No, but you asked me the basis for that and I told you. The
22 basis for that, in my opinion, was the way I characterized the
23 transaction. There is no, the benefit to the extent that you
24 may describe this as a benefit to Mr. Thornhill or, for that
25 matter, to the banks who got money that they would not have

1 otherwise received, was of the kind I described to you.

2 Q. Just let me go back to basics, then. Two elements of any
3 offence-- *actus reus* and *mens rea*, right?

4 A. Yes.

5 Q. The benefit is part of the *actus reus*, is it not?

6 A. Yes, which I found...

7 Q. The intent, and you found that lacking you say?

8 A. Yes.

9 Q. The intent is part of the *mens rea*, is the *mens rea*.

10 A. Yes.

11 Q. In this memo, did you intend to communicate that there was
12 a problem with the intent or with the *actus reus*, the benefit?

13 A. Well, I think the latter, and I, was what I specifically
14 mentioned here, yes.

15 Q. Good. Tell me, show me where you said that?

16 A. In Paragraph 10, I would say.

17 Q. Do you ever say that there's no benefit here, in my view, no
18 *actus reus* of this offence?

19 A. No, I did not. I don't recall it being specifically stated.

20 Q. It's not addressed by you at all.

21 A. Not in this memo, other than in my conclusion that there was
22 not evidence of that, in my opinion. And that would
23 incorporate both considerations.

24 Q. But the only evidence you refer to in the entire memo is the
25 evidence of *mens rea*, the mental element, correct?

1 A. That's probably correct.

2 Q. So it would be kind of foolish to think that the evidence in
3 that last sentence referred to the physical element, the *actus*
4 *reus*, would it not?

5 A. Well, I mean I don't know. I told you that in my opinion the
6 way I characterized the transaction, it didn't fit into the
7 parameters of that subsection and that being so, I simply
8 dismissed that as a basis for laying of a charge.

9 Q. This memo focuses on intent, yes?

10 A. I suspect that's so, yes.

11 Q. And the position you're taking here is simply that he didn't
12 have a guilty mind and that's why we're not going to charge
13 him. There's no basis for anything. Yes?

14 A. In respect to the nature of that transaction. It did not fit into
15 the criminality that subsection (c) was there to deal with.

16 Q. But the nature of this memo, what you're saying is that he
17 didn't have a guilty mind and that's why I'm not going to
18 prosecute him, isn't that so?

19 A. Well, no, not exclusively. I said, I made reference to that but
20 I went on to say that, in my opinion, the evidence did not
21 support the laying of charges.

22 Q. You say "accordingly." What does the word "accordingly" do if
23 not refer to the previous analysis? "Accordingly, in my
24 considered opinion, there is not evidence to warrant the
25 laying of any charges." What is the word "accordingly" meant

1 to do, if not refer to the previous analysis?

2 A. Well, I don't know. Accordingly, is a conclusion. It's a
3 conclusion.

4 Q. Meant to point you to the previous analysis?

5 A. Probably.

6 Q. And in the previous analysis, there's no mention of the fact
7 that this is not a proper benefit, a benefit within the meaning
8 of the law.

9 A. No, I did not raise that in this memo.

10 Q. So this memo is exclusively concerned with the proposition
11 that he has no guilty mind and that's why he's not going to be
12 prosecuted. Isn't that so?

13 A. I think that's a reasonable interpretation from it.

14 Q. Yesterday, you were asked the following question and you
15 gave the following answer, at page 15,036:

16
17 Q. Okay. Well, let me just take you to
18 the opinion that you gave to the Minister
19 and let me just as a preface, so you might
20 understand my questions, I have the
21 impression in reading this opinion, and I
22 have read it on several occasions, that
23 what you are telling the Minister is that
24 Mr. Thornhill did not have the requisite
25 intent under Subsection (c). He didn't have
a guilty mind and that, therefore, no
charges should be laid. Now that's the way
I read it.

A. Well, that was not my intent.

1 MR. MERRICK

2 My Lords, I wonder, in fairness to the witness, a copy of the
3 transcript might be put in front of him as well. We've all got it,
4 we're all following along.

5 MR. RUBY

6 Q. Do we have a spare copy? I'm sorry. 15,036.

7 A. I'm sorry?

8 Q. 15,036. Line 5.

9
10 Q. Okay, well, let me just take you to
11 the opinion that you gave to the
12 Minister, and let me just preface, this is a
13 preface, so you might understand my
14 questions. I have the impression in
15 reading this opinion, and I've read it on
16 several occasions, that what you are telling
17 the Minister is that Mr. Thornhill did not
18 have the requisite intent under Subsection
19 (c). He didn't have a guilty mind and that,
20 therefore, no charges should be laid. Now
21 that's the way I read it.

22 A. Well, that was not my intent.

23 Q. That was not your intent?

24 A. No.

25 Q. Was it your intent to tell the Minister that
there was no benefit here or that because
the Premier would have approved it,
therefore we shouldn't go ahead and lay a

charge?

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A. It was a combination of those factors.

Can you read down to the bottom of the page? You can read that yourself. Now how can that answer stand with what you've told us today?

A. I don't have any difficulty.

Q. You have no difficulty reconciling the two positions?

A. I'm not sure I understand your question. I did not, the way I characterized the transaction, I did not, in my opinion, it did not fit within the context of the offence provided in Sub. (c)

Q. Today...

A. Because the nature of the transaction.

Q. Today you admitted that the reason you assign in that memo for not prosecuting was the absence of intent. Yesterday, you said that wasn't what I intended to write at all.

A. Well, I'm sorry, I... This question that you referred to me here had to do with a charge under Subsection (c).

Q. Yes.

A. Certainly intention is very, very relevant to a charge under, if my recollection serves me correctly, it's (1)(a), but I may not be correct on that. And when it came to questions on Sub. (c), I have told you then...here and my recollection is I attempted to make the same statement yesterday, and thought I had, that my characterization of the facts did not, in my opinion,

1 attract the provisions of Subsection (c).

2 Q. Is there anything else you want to add by way of
3 explanation? I take it the answer is no?

4 A. No.

5 Q. All right. I suggest to you that what's happened here is that
6 you've realized that this argument about no intent flies
7 squarely in the face of the case law which you had at the
8 time, which defines intent clearly and shows that Thornhill, in
9 fact, had it. And so you are now taking the position that your
10 real ground for refusing a prosecution wasn't intent at all,
11 because you know that argument is not going to pass muster
12 here. Isn't that what's going on?

13 A. Not at all. Not at all.

14 Q. Is there any other explanation you can give me for why all of
15 a sudden the memo which focuses on intent was never
16 intended to do so at all?

17 A. I never said it was never intended to do so. I said that in
18 respect to a charge under (c), that was my opinion.

19 Q. Page 15,036: "That's the way I read it. He didn't have a
20 guilty mind and, therefore, no charges should be laid. Now
21 that's the way I read it. Well, that was not my intent."

22 A. In respect to a charge under Subsection (c). There was
23 another section of... Subsection of Section 110 that was also to
24 be considered.

25 Q. At page 34, the materials in Paragraph 10, you say:

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The crux of the matter is to determine whether there was evidence of the necessary criminal intent to characterize the settlement proposed on behalf of Mr. Thornhill and accepted by the banks as constituting a fraud on the government.

Leaving aside the phrase "fraud on the government," that infers to Section 110(1)(c), does it not?

A. I don't think it pertains necessarily to (1)(c). That was a general statement that I made.

Q. It applies to both C and B, all that section, does it not?

A. And A?

Q. All three of them then. Certainly it applies to C, correct?

A. Well, I was making a general statement. I don't know that I was intending it to specifically apply to C. C has its own special elements.

Q. Did you feel it was appropriate to render an opinion without considering the elements of Section C and whether or not they had been fulfilled?

A. Well, I thought I had when I concluded that, in my opinion, the facts did not, the facts were of a civil nature and did not, were not of any, of the criminality that was contemplated in Sub. (c) and the cases I looked at, I saw no factual situations that would be helpful.

Q. Every case has different facts, don't they?

A. Yes, but the ones that I considered showed a gift, a gratuitous

MR. COLES, EXAM. BY MR. RUBY

1 gift that a donor advanced and the person received. It wasn't
2 of the nature, the kind of transaction we're talking about
3 here.

4 Q Turn back to page 34 with me, if you would.

5 A. Yes.

6 Q The last words of that line, when you focus on what the crux
7 of the matter is:

8
9 To determine whether there is evidence of the
10 necessary criminal intent to characterize the
11 settlement proposed on behalf of Mr. Thornhill
and accepted by the banks as constituting a
fraud upon the government.

12 Were you looking for evidence of real fraud?

13 A. No, that was a reference to the caption of the whole section, as
14 I recall. Section 110 is under that kind of a caption. I wasn't
15 looking for evidence of fraud.

16 Q You weren't actually just inventing an additional requirement
17 for Mr. Thornhill. There had to be something in the nature of
18 fraudulent activity in the ordinary sense.

19 A. No.

MR. MERRICK

20
21 I think, My Lords, just for the record. Mr. Ruby should note
22 that the Criminal Code does entitle this whole section using those
23 words "fraud on the government."

MR. RUBY

24
25 I know, as we'll get to in argument at some point. The

1 interesting thing is this section doesn't require any fraud.

2 COMMISSIONER EVANS

3 Let's make your arguments to the Commission, not to the
4 counsel.

5 MR. RUBY

6 Q One of the tasks that you perform routinely as an employee of
7 the Crown over many years is the writing of memoranda on
8 legal subjects?

9 A. Yes.

10 Q Do you ordinarily have any difficulty in communicating what
11 you intend in those memoranda?

12 A. Well, not from where I sit, but I suppose that question is
13 better answered by others.

14 Q You've done thousands of them over your career?

15 A. Oh, I wouldn't estimate.

16 Q Hundreds, certainly.

17 9:40 a.m.

18 A. Certainly.

19 Q Yesterday at page 15044, line 21, there's a matter I want to
20 ask you about. Okay. In number 2 he says:

21 Q That I have shown some evidence that Mr.
22 Thornhill obtained funds by false pretences
23 and I would like to further discuss this
24 matter with a prosecutor.

25 And it refers to the Section involved.

MR. COLES, EXAM. BY MR. RUBY

1 Q. What, if anything, did you do with respect to
2 that recommendation?

3 A. Well that and the next one that you will
4 come to about conspiracy, I didn't consider
5 them serious statements. I saw no basis for
6 them in the reports that I examined and
7 considered.

8 Q. So not even serious enough to comment on
9 to the Minister?

10 A. No, I well, I did it to the extent that I didn't
11 see any basis of any wrongdoing on the part
12 of Mr. Thornhill.

13 And then you say at line 14:

14 A. That was intended to cover both the false
15 pretences and the conspiracy suggestion.

16 You didn't consider them serious statements?

17 A. Not on the basis of what was disclosed in the police report. I
18 didn't see any evidence to support charges under those
19 Sections. That's my recollection.

20 Q. Do senior officers of the RCMP often come to you with
21 suggestions that persons, perhaps important persons, be
22 charged but they're not serious?

23 A. Well, serious may be a poorly chosen word. I meant it in the
24 context of the, of evidence that would be required to support
25 the charges. I wasn't trying to be facetious with the
identification of those Sections by the police officers.

Q. Judge How told us yesterday that one of the things you told

1 him in a meeting, though it's not in your memorandum that I
2 can find, is that your view was, among other things, that the
3 Minister might well not be an official at all, within the
4 meaning of the Code. Do you recall that?

5 A. No.

6 Q. Did you address your mind to that issue at all?

7 A. No.

8 Q. Did Mr. Thornhill live near you at the time?

9 A. Yes.

10 Q. Where?

11 A. He lived on Portland Street and I lived on an upper street,
12 Summit Street.

13 Q. How far away would those be? I'm not familiar with the
14 geography?

15 A. I'd have to do a little calculation. I would say about 500
16 yards.

17 Q. Between your property and his property?

18 A. Yes.

19 Q. And did you know him in the community in which you lived?

20 A. Oh, of course.

21 Q. You saw him socially?

22 A. Never. I shouldn't say never. No, the answer is "no" in the
23 sense that I've never been to his home, he's never been to my
24 home. I think he was on the verandah once. I had no social
25 contact with him.

1 Q. You had no social contact with him at all?

2 A. Not since I've been in government. I didn't have any before
3 government. I had contact with him at university. He was
4 known to me in university.

5 Q. You were asked questions by Mr. Merrick yesterday at page
6 15093, at line 15.

7 Q. All right. And to sum it all up, one of the
8 things that I've asked the last couple of
9 witnesses in arriving at your conclusions or
10 your decision, did anybody put any
11 pressure on you?

11 A. No, none whatsoever.

12 Q. Did you receive any phone calls from Mr.
13 Thornhill?

14 A. Never spoke to him before, during or
15 after.

16 Do you remember those questions and those answers?

17 A. Yes

18 Q. I take it the last answer it not true.

19 A. Well, it's in the context of this matter.

20 Q. What you meant to say was, "I never spoke to him about this
21 charge before, during or after."

22 A. About this investigation. That's right.

23 Q. But you have spoken to him before, during and after.

24 A. Well, of course I...I work for the Government. He's a Minister
25 of the Crown, or he was. I thought that was understood. It

1 certainly was not intended to imply otherwise.

2 Q. I wanted to give you a chance to clear it up because I think
3 it's important and I'm glad you have. Did you have any
4 conversation with anybody who was inquiring about the state
5 of the Thornhill matter during this period other than your
6 superior or persons in your Department?

7 A. No. There may have been some conversation with news
8 media inquirers.

9 Q. Other than that none. No other Ministers of the Crown, no
10 other persons have spoke to you about this.

11 A. That's right. And the RCM Police, of course.

12 Q. Yes.

13 MR. RUBY

14 Thank you for your patience, sir.

15 EXAMINATION BY MR. PINK

16 Q. Mr. Coles, I just want to address a couple of areas with you.
17 You were asked some questions yesterday regarding the
18 instructions or the request to the RCM Police that they deal
19 directly with the Department on this investigation and you
20 were shown the various internal memos in the RCMP after
21 Mr. Gale wrote his letter in July. Could you look at page 17 in
22 the Exhibit 165, please? That's a memo from Mr. Gale to
23 yourself?

24 A. Yes.

25 Q. And that wasn't shown to you yesterday.

1 A. Yes.

2 Q. Does the indication of Mr. Gale accord with your
3 understanding of what the situation was at that time?

4 A. Yes.

5 Q. You had a meeting with Chief Superintendent Feagan in
6 November, the meeting at one point yesterday was described
7 as "stormy," I think it was in Chief Judge How's testimony.
8 Can you describe your overall relationship with Chief
9 Superintendent Feagan?

10 A. Well I thought I had excellent relationship with him before
11 and at that time and certainly subsequent to that time.

12 Q. And what type of matters did you have to deal with him on?

13 A. A whole range of matters. He, as the Chief Superintendent,
14 would meet with me from time to time on matters of
15 priorities and policing. During planning he would present his
16 suggestions for police resources and planning and priorities in
17 the upcoming year. We would discuss a whole range of things
18 under the contract including responses from the public,
19 detachments' locations, manpower resources. Then from time
20 to time he would meet with me to discuss matters of mutual
21 interest. He would report on police activity, crime levels,
22 drug investi-, matters that would come under the Federal
23 component of their responsibilities. He would brief me as to
24 the state of those matters.

25 Q. You had that similar relationship with Chief Superintendent

1 Feagan's successors as well?

2 A. Yes.

3 Q. Did the disagreement with the RCM Police on this matter
4 impact in any way upon the relationship that you had with
5 the Force?

6 A. None whatsoever and none, and certainly not with Chief
7 Superintendent Feagan after this matter was behind us. I
8 continued to have very good relationships and rapport with
9 the Chief Superintendent.

10 Q. We talked yesterday about the review of the RCMP reports in
11 the Department. Am I correct that it was agreed from the
12 outset that the ultimate decision was going to be made by
13 you?

14 A. That I was going to advise the Minister and, with my opinion
15 on the matter, yes.

16 Q. And Mr. Gale and Mr. Herschorn were apprised of that?

17 A. Oh, yes.

18 Q. They were asked to provide you with certain advice?

19 A. Yes, we discussed the matter from time to time and I received
20 whatever advice they offered.

21 Q. And whatever requests were made of them by you they
22 complied with.

23 A. As I recall, yes.

24 Q. Just one thing I didn't understand yesterday. In Mr.
25 Herschorn's memo which starts at page 25, you were directed

1 to page 27 where there's the handwriting overlaying the
2 typed copy where 1978 is changed to 1979. Is that '79 your
3 writing?

4 A. I don't recall. I don't know.

5 Q. You spoke yesterday about the contact with the press and you
6 alluded to it earlier this morning. Could you just elaborate
7 upon that, please. What type of press contact was there from
8 the time it became known that the RMCP report was in the
9 Department?

10 A. Well, as I recall there was a lot of interest, quite naturally,
11 and the media were endeavouring to learn what decisions
12 were taken as soon as they were and probably, from their
13 point of view, before they were taken. And they would all
14 call. I don't know how many calls would be involved, but
15 there would hardly be a day go by when there wouldn't be a
16 number of calls inquiring whether or not the decision has
17 been made or when it might be made or, there was a lot of
18 interest and a lot of activity as I recall.

19 Q. And that was the reason for your decision to make the
20 Minister's ultimate decision public.

21 A. Yes. I thought that once the decision was made that it was
22 important to respond to this, the inquiries that were being
23 made and...

24 Q. Just one final question, sir. You spoke about a *prima facie*
25 case in the terms that the RCMP used it to lay an information.

1 You also spoke about the level of evidence that was required
2 in order to carry on with the prosecution. Can you just
3 elaborate upon that? What's the difference between those
4 two onuses or standards?

5 A. Well, the reference to *prima facie* case, in my opinion, has to
6 deal with the prosecutorial process. There are some offences
7 which you have to, particularly indictable offences, you have
8 to establish, the Crown has to establish whether it's called a
9 *prima facie* case before the case is moved forward. The other
10 situations, as I expect, from cases where there's provision for
11 rebuttable presumptions. You have to, the Crown has to
12 establish a certain level of evidence before that is answerable.
13 So *prima facie* cases, in my opinion, has to do with the
14 prosecutorial process where the police, they, who have the
15 right to lay a charge, only need to be satisfied that they have
16 reasonable and probable grounds for the laying of a charge.
17 But there's, you know, the requirements of the Crown for a
18 prosecution requires evidence to go much beyond that which
19 would satisfy the laying of a charge. I don't know if that
20 answers your question but that would be my...

21 Q. And Mr. Herschorn made reference to the substantial
22 likelihood of conviction tests. Where does that fit in?

23 A. Well, I think when Crown counsel are asked to give advice, in
24 my view, that's what they are, that's the position they are
25 considering is that, you know, in their assessment or

MR. COLES, EXAM. BY MR. PINK

1 evaluation of the evidence, will it support the prosecution and
2 meet the requirements of the prosecution. And if, in their
3 judgement, it falls short of that, then it's questionable in my
4 opinion whether or not a charge should be laid but...

5 Q. And I take it that it's in the exercise of the prosecutorial
6 discretion that one determines if the prosecution should go
7 forward.

8 A. Yes.

MR. PINK

9
10 Thank you, sir.

RE-EXAMINATION BY MR. MacDONALD

11
12 Q. I'm sorry, Mr. Coles, I didn't think I was going to have any
13 great questions of you but that last exchange just leaves
14 me... perhaps, I don't understand it. I always understood a
15 *prima facie* case means that unless there is an answer given
16 by the defence, that the prosecution succeeds once they
17 establish a *prima facie* case.

18 9:54 a.m.

19 A. Well, I think you have to deal with the particular charges
20 because if the *prima facie* case establishes all the elements
21 of the...all the elements required of the Crown, yes.

22 Q. Well, that's the only thing a *prima facie* case means, that
23 you've established all of the elements required by the
24 section. It can't mean anything else to a lawyer.

25 A. But it's part of the pros...it's part of the prosecutorial, not the

1 police exercise.

2 Q. Let's start out with this, do you agree with this, that a *prima*
3 *facie* case means that all of the elements of the offence have
4 been established and in the absence of a defence, of some
5 defence, the Crown will succeed and a prosecution must be
6 entered?

7 A. Yes, yes.

8 Q. Okay. So when the police say that they have a *prima facie*
9 case, do you say the prosecutor then must go beyond that?

10 A. Well, the prosecutor has to satisfy himself that the evidence
11 is adequate to discharge his responsibilities.

12 Q. Well, the prosecutor's responsibility, sir, is to establish that
13 there is a *prima facie* case.

14 A. Yes.

15 Q. If the police say that they believe there is a *prima facie* case
16 you then, I'm quoting from what you said earlier and what I
17 think you just said to Mr. Pink, the prosecutor's
18 responsibility is different. Now can you tell me in what
19 way...

20 A. No.

21 Q. ...it's different?

22 A. No, I...if I said that I obviously didn't mean to say that.

23 Q. Would you accept this? If there are reasonable and
24 probable grounds to establish a *prima facie* case that the
25 police have done all they can be required to do?

1 A. Yes.

2 Q. Now, with that in mind, what further responsibility does a
3 prosecutor have?

4 A. Well, I...it's just to satisfy himself who...that there is
5 evidence to establish the...prove the case of the prosecution.

6 Q. Mr. Herschorn said, and I believe you impliedly agreed with
7 this to Mr. Pink, that a prosecutor has to consider whether
8 there was sufficient evidence to establish a substantial
9 likelihood of conviction. Do you support that?

10 A. I don't know, I don't know if I would say substantial. He
11 has to be satisfied that the evidence is of such a weight and
12 that it, if admissible, will establish a prosecution, yes.

13 Q. As Deputy...

14 A. That's...

15 Q. I'm sorry. As Deputy Attorney General, when you were in
16 this province, would you accept that before a prosecutor
17 should proceed to prosecute a case, he must be satisfied that
18 there is a substantial likelihood of a conviction being
19 obtained.

20 A. I don't know if I'd use the word "substantial." He has to be
21 satisfied that there is evidence that if admissible will
22 support a conviction under the offence.

23 Q. What's the test applied by a court in a preliminary inquiry
24 to decide whether a case should go ahead?

25 A. Well, whether or not there is sufficient evidence to warrant

1 it going ahead.

2 Q. Isn't it is any evidence...any evidence on each element of the
3 offence on which a properly instructed jury could convict?
4 Isn't that the test?

5 A. Yes, I agree with that.

6 Q. Any evidence. Are you suggesting that in this province any
7 potential accused is given the benefit of a prosecutor saying
8 "Is there a substantial likelihood of conviction going to be
9 entered here?

10 A. No, I didn't say that.

11 Q. But that's the test that was applied in this case.

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

13 Q. What was the test? The police said there was a *prima facie*
14 case.

15 A. Well, in my opinion I did not find evidence in the report to
16 support that.

17 Q. Would you say, Mr. Coles, in this case that there wouldn't
18 even be enough to support...that it would have been thrown
19 out at a preliminary had it gone ahead? There was no
20 evidence of the elements...of each element on which a
21 properly instructed jury could convict?

22 A. No, I didn't say that.

23 Q. Do you say then that this matter could not have been
24 thrown out at a preliminary?

25 A. On a preliminary, I don't know. I didn't address it in those

1 terms.

2 Q. That would seem to me to be a pretty fundamental point
3 that you should have looked at, sir. That's what every other
4 accused has to face in this province. Why was it different
5 here?

6 A. Well, all I can do is repeat what I've said earlier. The way I
7 characterize the transaction, it did not fit, in my opinion, the
8 context of the section.

9 Q. Do I...and my final question, sir, do you...do I take it from
10 what you've told me that the test that was applied in this
11 case by Mr. Herschorn, according to his evidence, is an
12 incorrect test?

13 A. No, I'm not in a position to say that.

14 Q. Well, then do you accept his test that you must...

15 A. I'm saying...

16 Q. Please listen to my question. If you're not prepared to
17 accept it, then do you agree with me, do you accept Mr.
18 Herschorn's test which he said he would apply, he would
19 have to see whether there was a substantial likelihood of
20 conviction. Do you accept that?

21 A. Well, as I said earlier, I would not require substantial
22 evidence.

23 Q. You would...

24 A. I would have to be satisfied on the evidence, but I would
25 not...I would not think that degree is necessary.

1 Q But there would be more of a degree than normally is
2 required to be found by a judge on a preliminary inquiry.

3 A Oh, yes, a preliminary does not determine the question of
4 guilt or innocence.

5 MR. MacDONALD

6 Okay. Thank you, that's all I have, My Lord.

7 MR. CHAIRMAN

8 Thank you, Mr. Coles. Now despite our best efforts,
9 we're...Thursday is always a dreadful day, isn't it? We're running
10 a bit behind schedule. What I propose to do is you have to bring
11 something to our attention, Mr. Ruby, and we'll take a short
12 break. There are two witnesses listed to be heard today and
13 hopefully we will continue on and finish them hopefully by one
14 o'clock. One of my colleagues has duties to perform in another
15 province this afternoon. This is only to impress you that we work
16 harder than anyone else.

17 MR. RUBY

18 Well, my matter will wait until Monday, My Lord.

19 MR. CHAIRMAN

20 Well, all right.

21 MR. RUBY

22 There's no harm being done.

23 **BREAK - 10:00 a.m.**

24

25

1 10:16 a.m.

2 CHAIRMAN

3 Mr. Orsborn.

4 MR. ORSBORN

5 Thank you, My Lord. The next witness is Commissioner
6 Robert Simmonds.

7 COMMISSIONER ROBERT SIMMONDS, duly called and sworn,
8 testified as follows:

9 EXAMINATION BY MR. ORSBORN

10 Q. Can I have your full name, please, Commissioner?

11 A. Robert Henry Simmonds.

12 Q. And do I understand that you are currently living in Vienna?

13 A. Yes.

14 Q. And that you're presently working with the United Nations?

15 A. Yes, that is correct.

16 Q. Working with a police response for countries around the
17 world in connection with drug crimes?

18 A. Yes, that's correct.

19 Q. And you are a retired commissioner of the RCMP?

20 A. Yes.

21 Q. And when did you retire, sir?

22 A. 31st of August 1987.

23 Q. And how long were you commissioner?

24 A. Ten years.

25 Q. Would you briefly describe for the Commission your career in

1 the RCMP prior to becoming commissioner?

2 A. Well I joined the Force in April of 1947 and served most of
3 my younger years in the Provinces of Alberta and British
4 Columbia doing general detachment work and criminal
5 investigation work and gradually assuming increased
6 command responsibility until 1976. I was moved from
7 British Columbia to Ottawa to be the Deputy Commissioner of
8 Administration in the Force and then one year later was
9 appointed Commissioner.

10 Q. A pretty rapid rise from British Columbia to Commissioner in
11 a couple of years?

12 A. Well, perhaps, but...

13 Q. You didn't say no.

14 A. You don't do that in the RCMP.

15 Q. As Commissioner, I take it, you had the overall responsibility
16 for the entire operations of the RCMP in Canada?

17 A. Yes, statutorially you assume responsibility for all the activity
18 of the Force.

19 Q. Now in 1980 you were in the position of Commissioner?

20 A. Yes.

21 Q. In the months of April, May, June, et cetera, were you aware
22 that an investigation was being conducted by the RCMP in
23 Nova Scotia concerning Mr. Thornhill?

24 A. What is the timeframe?

25 Q. In, say the summer months of 1980. Were you aware that an

1 investigation was being conducted?

2 A. Yes, I was certainly aware there was an investigation. I'm not
3 sure I have the timeframe exactly in my mind. But I'm aware
4 of the Thornhill investigation.

5 Q. Prior to the announcement by the Attorney General that no
6 charges were to be laid, prior to that time, were you made
7 aware of any concerns that the Force had in the manner in
8 which the investigation had proceeded?

9 A. Not in any unusual way. I mean it's, I perhaps should qualify
10 that. It's not unusual for there to be concerns when you're
11 dealing with sensitive and investigations very close to the
12 political level, but I was not aware of any major problems in
13 the investigation.

14 Q. Had anybody brought to you any problems about the
15 relationship between the Force and the Department of
16 Attorney General?

17 A. No, not in a specific way at all. Not to, in a way that would
18 cause me to be concerned and say I should intervene.

19 Q. If I could direct your attention to page 11, sir, in the booklet
20 of materials, Exhibit 165. These pages have the page
21 numbers at the top of the page.

22 A. 11?

23 Q. Page 11, sir. I understand this to be a note written by Mr.
24 Venner who would be the Director of Criminal Investigations,
25 apparently sometime in June 1980, and generally the note

1 refers in fairly strong terms to the relationship between the
2 RCMP and the Department of Attorney General in Nova Scotia.
3 Were any concerns brought to your attention about the
4 relationship generally between the Force and the Department
5 in Nova Scotia?

6 A. No, not at that time. In fact, I saw this note for the first time
7 the day before yesterday and I was quite surprised at its
8 content because based on what is in it, I would have thought
9 that probably somebody would have come to me and said
10 there are some problems. But I had an ongoing relationship
11 with the Government of the province, the office of the
12 Attorney General, and with the Commanding Officer of the
13 Division and so on, and was quite unaware that there were
14 any issues that would cause a note like that to be written.

15 Q. Would Mr. Venner report to you?

16 A. He would, as DCI on the chart, he would report to the Deputy
17 Commissioner of Criminal Operations who would report to me.
18 But Mr. Venner and I were very close throughout our whole
19 career so, although the chart says he reports that way, we had
20 plenty of conversations about various things.

21 Q. Are your offices close together?

22 A. Yes, they're on the same floor and not many offices apart.

23 Q. Would you have expected that if he were seriously concerned
24 about the relationship in Nova Scotia that he would have
25 advised you?

COMMISSIONER SIMMONDS, EXAM. BY MR. ORSBORN

1 A. I would have expected that, yes. On the other hand, I must
2 try and put that in some context because at that particular
3 time the Force was wrestling with a lot of other problems.
4 There were other commissioners of inquiry underway in the
5 country and I was very engaged in reorganizing of the
6 Security Service and making changes within the organization
7 which was really taking an awful lot of my time. So I think
8 it's fair to say that the senior staff officers would not come to
9 bring problems to me unless they thought they were beyond
10 their ability to straighten them out. But I'm a little surprised
11 when I read this memo because it's indicative of, you know,
12 of problems that...

COMMISSIONER EVANS

14 May I find out to whom was that directed?

COMMISSIONER SIMMONDS

16 It looks to me as though it went up to the Deputy
17 Commissioner of Criminal Operations.

COMMISSIONER EVANS

19 But who was, that was...

COMMISSIONER SIMMONDS

21 At that time that was Raymond [Kincato?].

MR. ORSBORN

23 Q. Were you made aware of a concern of the "H" Division in Nova
24 Scotia following the announcement by the Attorney General
25 that no charges would be proceeded with in the Thornhill

1 matter?

2 A. Yeah, I became, you know, generally aware of the concern in
3 conversations with the Commanding Officer of the Division
4 which was Chief Superintendent Feagan and general
5 discussions that this case did not seem to be handled in quite
6 the routine way and there were concerns.

7 Q. Chief Superintendent Feagan communicated directly to you?

8 A. I have to be careful with that because I can't say for sure
9 whether it was one-to-one or through the Deputy or
10 whatever. But I do talk to, or when I was the Commissioner I
11 would talk with my CO's in the Divisions quite regularly on
12 the telephone and so on and we'd meet at conferences and
13 one thing or another and I would always, you know, ask them
14 about problems and how things were in the Division and so
15 it's very probable that Hugh Feagan would have talked to me
16 about his concern directly, although I have no absolute
17 recollection of that.

18 Q. Do you recall the nature of the concerns that were expressed
19 to you?

20 A. Well, the principal concern seemed to be that, on the
21 investigation, was that it was being dealt with in a different
22 way than normal. I mean the relationship with the Crown was
23 different in the sense that it was, in most cases they're dealt
24 with by a prosecutor that works with the police or that you go
25 to for advice when you want advice that a prosecutor can

1 give. But this one was being handled from directly within the
2 Department as opposed to the prosecutor's office. And that
3 caused some concern because it was different.

4 Q. Are you able to tell us whether or not these concerns were
5 brought to your attention only after the public announcement
6 was made by the Attorney General?

7 A. I can't tell you what date but I do know as a result of those
8 concerns I was, insisted that there be a review of the whole
9 matter at the Headquarters level so it would be totally
10 removed from what I would call any local concerns or
11 perceived pressures or anything else. It would be brought up
12 to Headquarters to be reviewed by senior officers of the Force
13 to...

14 Q. Are you able to tell us specifically how this review came to be
15 conducted?

16 A. Not specifically, you know, I obviously approved it or it
17 wouldn't have occurred. But I'm not sure the exact series of
18 discussions that led to it, but it's typical of the kind of case
19 that we would review at Headquarters because of concerns in
20 a division and so on.

21 Q. To summarize the evidence that we've heard to date. Once
22 the announcement was made by the Attorney General that no
23 charges were to be proceeded with, Chief Superintendent
24 Feagan then contacted Headquarters and said, "We better take
25 a look at this" and the wheels got in motion for a review.

1 A. Yeah.

2 Q. Would that be a fair characterization of how things could
3 happen?

4 A. Yeah. I... the CO of the Division and the CIB Officer of the
5 Division, I'm quite sure, just based on normal practice in the
6 Force, would be having on-going discussions with the DCI,
7 which was Venner, probably with the Officer in Charge of
8 Commercial Crime, because it was being investigation by that
9 division of the Force and they do report their findings directly
10 to Headquarters even on provincial cases for the work of the
11 Commercial Crime branch and I would assume there was
12 quite a lot of discussion back and forth which eventually led
13 to the decision to make, "Well, we'll have it reviewed in
14 Headquarters."

15 Q. You're not able to tell us, I take it, whether or not you
16 specifically instructed, on your initiative that a review be
17 undertaken.

18 A. I'm not sure if it was on my initiative or not but certainly I
19 would have agreed to the review and it was appropriate and
20 necessary in that case.

21 Q. How would you expect such a review to be carried out within
22 the Force?

23 A. Well, in cases of that nature where there is some, you know,
24 controversy, and even controversy between levels within the
25 Force sometimes as to the case and the correct next step and

1 the interpretation that should be given to evidence and so on,
2 what...the normal procedure is that, it would come up and be
3 reviewed by the DCI and by the Deputy of [OPS?]. These are
4 very experienced policemen that had themselves done a lot of
5 investigative work before they got into those offices and they
6 would review the work, ask questions and come to
7 conclusions.

8 Q. You would expect a review to be carried out by those two
9 individuals?

10 A. Yes. And with whatever other assistants they might want,
11 you know, in terms of experts in any particular area of crime.
12 I'm not sure, I did not participate in that review at all but I'm
13 quite sure that, likely, that the officer in charge of the
14 Commercial Crime Branch would be involved in it and so on.
15 And there would be quite a discussion. And of course the
16 Division, the investigators and the senior people in the
17 Division would also be involved in the review.

18 10:30 a.m.

19 Q. We understand that the review, at least initially, was
20 conducted with a number of people from "H" Division and
21 with senior personnel from commercial crime, Deputy
22 Commissioner Quintal, the DCI, Mr. Venner, and I guess
23 Assistant DCI, Mr. Riddell.

24 A. Yes, he was

25 Q. That would not be an unusual group to...

1 A. No, no.

2 Q. To review such a matter such as this.

3 A. It would be quite normal.

4 Q. Did you receive any written report of the review?

5 A. No.

6 Q. Did you receive any minutes?

7 A. Not, I didn't receive any documents. I could have had access
8 to documents, if I had asked for them, but I would be briefed
9 by the Deputy Commissioner on his findings and so on.

10 Q. Were you, in fact, briefed by the Deputy Commissioner?

11 A. Yes.

12 Q. That's Mr. Quintal?

13 A. Yes.

14 Q. We do have an exhibit, sir, which is Exhibit 167, which is not
15 in your booklet but is a typed extract of the Deputy
16 Commissioner's notes. He does note on page three of those
17 notes under the date "80-12-23", 23rd of December,
18 "Discussed with the Commissioner." And I believe that's the
19 first reference to a briefing of yourself. Would it be fair to
20 conclude that that would be the date on which you were
21 briefly by the Deputy Commissioner?

22 A. I'm quite sure it would because Quintal was, kept very careful
23 notes of what he did and if that's what his notes say, I'm sure
24 that's right.

25 Q. Do I understand that prior to this you had been out of the

1 country?

2 A. Yeah, I had been away from headquarters a lot in the latter
3 part of that year and in January of '81. I had been, I think it
4 was the 8th of November, I had gone to the Philippines and
5 then I had to go to Australia and New Zealand and I was not
6 back in my office until, I believe the 4th of December, and
7 then again after the New Year, I was away for a good part of
8 January.

9 Q. Were you away in company with the Deputy Commissioner?

10 A. The Deputy Commissioner was with me on part of that trip.
11 We went to an Interpol conference in Manila together. He
12 went off in another direction to a drug conference in Asia and
13 I went on down to...

14 Q. During your travels with him, was there any informal
15 discussion about this case and the review that had taken
16 place?

17 A. I can't answer that with certainty. You know, we discussed a
18 lot of things. It was not the focus of our visit, that's for sure.
19 We had a lot of other things we were concerned with.

20 Q. You wouldn't be discussing that in the Philippines, anyway, I
21 wouldn't think.

22 A. Well, we had a lot of other things to worry about there, I can
23 tell you.

24 Q. Can you indicate to us the nature of the briefing that you
25 eventually received from the Deputy Commissioner?

COMMISSIONER SIMMONDS, EXAM. BY MR. ORSBORN

1 A. Yeah, my understanding at the end of the review was that the
2 final conclusion was that it was not a case to put before the
3 courts and I can't recall all the details. I know we had a fair
4 discussion and I asked a number of questions and so on and
5 he told me, after a very careful review, that they had come to
6 the opinion that it was not a case to lay a charge on, in its
7 present state, at least.

8 Q. Do you recall if he advised you that this large-scale meeting
9 had, in fact, been convened and the review took place like
10 that?

11 A. Well, I was certainly aware of that. You know, again, I'd like
12 to try and put this into context. Like at the headquarters of
13 the force on the day of that review, which was the 5th of
14 November, I was at headquarters that day. There's a very
15 good probability at lunch down in the officer's lunch room
16 that I would have been perhaps even sitting with the C.O. and
17 chatting about things in the force. So I was well aware that
18 the review was under way.

19 Q. If I could direct your attention again to 167, the Deputy
20 Commissioner's notes on the first page. And it is in his note of
21 the decision of the review meeting and the decision reads:

22
23 They are to write back to A.G. and say they feel
24 very strongly about the matter and outline their
25 reasons why they disagree with the evaluation
of the Department of Attorney General. We feel
a charge is warranted under 110(1)(c).

1 Did the Deputy Commissioner brief you that a decision along
2 those lines had been reached at the meeting?

3 A. At that time?

4 Q. When he briefed you?

5 A. No, I don't think so. I was aware there was some different
6 views at various levels about the quality of the case, if I can
7 put it that way. But when he, you know, briefed me finally
8 on the issue, it was with the decision that had been reached
9 that, between he and Venner primarily, and I think Venner
10 did most of the research on the file.

11 Q. I understand.

12 A. That it was not a case to proceed with in its present state.

13 Q. Okay, if I could direct your attention to page 57 of the
14 booklet, Commissioner. And I understand these to be a
15 record of the proceedings at headquarters on the 5th of
16 November and I believe that Superintendent Feagan and
17 Deputy Commissioner Quintal have indicated that these are
18 generally accurate. The conclusions on page 57 of that
19 meeting indicate that it was their conclusion that the evidence
20 supported a *prima facie* case on the 110(c), that a further
21 approach should be made to the Attorney General, and that
22 subject to the result of further discussions with the Attorney
23 General, it was the force's intention to proceed. Was anything
24 in that nature conveyed to you by the Deputy Commissioner,
25 that conclusions of that nature had, in fact, been reached at

1 that meeting at which he was present?

2 A. No, not in specific terms. At the time of my involvement at,
3 towards the end of the matter, the decisions had already been
4 reached, that there was no... it was not a case to proceed with
5 in its present state. And certainly it was never brought to my
6 attention that there were problems like this, because if I had
7 known that, I mean the relationship I have with the
8 provincial Ministers was such that I would have... I would
9 have picked up the phone and said, "Well, what's going on and
10 what's the problem?" Or I would have gone and visited the
11 Minister or whatever because I believe you, you know, you
12 solve problems when they're apparent. So I was a little
13 surprised to see this in the last few days.

14 Q. Do I understand that in preparing for your testimony and
15 reading those minutes was the first time that you had seen
16 them?

17 A. Yes, I can say quite certainly I'm sure it is.

18 Q. Our understanding of the sequence of events is that following
19 this meeting at which these conclusions were reached, Chief
20 Superintendent Feagan then returned to Halifax, went to the
21 Department of Attorney General to convey these feelings, and
22 said, "Let's take a second look at it," or "Let's talk about it."
23 Got nowhere and then wrote back to HQ again and said, "I've
24 still got a problem. I want your direction." Were you aware
25 that following this November meeting with all these people

1 present that there had been further, a further approach made
2 to the Attorney General which had been fruitless?

3 A. No. I have to be careful of that answer, though, because I
4 would assume that throughout an investigation like that,
5 there would be contact between the Department and the
6 force. So it would be quite normal and natural for there to be
7 ongoing discussions.

8 Q. But you were not, apart from an expectation of ongoing
9 discussion, you were not made aware that following the
10 review, the force had tried to..

11 A. I was quite unaware...

12 Q. Persuade the Attorney General.

13 A. Yeah.

14 Q. That things should proceed and were, again, rebuffed.

15 A. Well, at that time, I was quite unaware of the discussion that
16 was described in here when the Commanding Officer had gone
17 to see the Minister and while waiting to get into his office, the
18 Deputy Minister arrived and apparently there had been quite
19 an exchange of views and they did not come to consensus on a
20 number of issues. That, I was unaware of at that time.

21 Q. Was it your understanding, Commissioner, and I don't want to
22 put words in your mouth, but correct me if I'm wrong, that
23 this meeting or review had taken place in Ottawa. They
24 looked at it and said, "There's no case," and that was the end
25 of it?

COMMISSIONER SIMMONDS, EXAM. BY MR. ORSBORN

1 A. Yeah. That's very close to being right. In fact, there's a
2 couple of documents in this book that you gave me to review
3 yesterday and I went through them last night and there are a
4 couple of documents that portray the situation, as I
5 understood it, quite well. And one of them is a handwritten
6 note from Assistant Commissioner Venner to one of the
7 officers in the commercial crime branch. It's at page 119,
8 where without going into any details on the strength of the
9 evidence, but what he says is, you know:

10 The issue, I believe, has been somewhat
11 over...(and there's some missing words on the
12 side from copying but I think it is)...overtaken
13 by events. But I think you may be able to agree
14 with me now when I suggest that the first
 sentence in your second paragraph is not factual.

15 He's making reference to another document that you have.
16 The R.C.M.P. decided not to proceed. It happens that in this
17 particular case, that was the same course of action preferred
18 by the Attorney General but it might not have been nor might
19 the two positions coincide the next time this comes up. A
20 decision was made based on the evidence or the lack of it.
21 And that was always my understanding. And then another
22 document I find, the next one over, where the officer-in-
23 charge of the commercial crime branch who at the time was
24 Superintendent Bob Roy, was interviewed. And, again, I don't
25

1 have any recollection of being aware of that, although I may
2 have known because I used to read the press clippings every
3 day. But where he puts, makes the point is that, no, we didn't
4 proceed because he uses the word "airtight" and he should
5 explain what that means, if it's important to know. But he
6 says that, no, it was a question of the evidence, the sufficiency
7 of the evidence to make the case with reasonable expectations
8 of a successful case, which is not an unreasonable test, I think,
9 for police to apply. So that describes the understanding that I
10 had at the end of the process.

11 Q. Just so we're clear, Commissioner, the handwritten note from
12 the DCI on page 119, I believe is replying to a memo from
13 Inspector Kozij, which is found on page 102?

14 A. Yeah.

15 Q. And in the second paragraph there, Inspector Kozij said:

16 It was the Attorney General who decided not to
17 proceed with the charge in this case.

18 And this, I believe, is the sentence to which Mr. Venner is
19 responding.

20 A. That's right. What he's saying is that we came to the same
21 conclusion. We might not the next time, but we came to our
22 conclusion based on the evidence. Not because the Attorney
23 General said so. I mean that's how I read that note of
24 Venner's, and certainly that was my understanding
25

1 throughout this case.

2 Q. At page 93, and following, Commissioner, there is the letter
3 dated December the 17th from Deputy Commissioner to "H"
4 Division which conveys the instructions that the matter is not
5 to be proceeded with.

6 A. Yeah.

7 Q. Again, until preparing for this hearing, sir, had you read that
8 letter?

9 A. No.

10 Q. No?

11 A. No. Well, I'd better be careful. I'm going by memory but I'm
12 fairly sure I had not, but...

13 Q. And I take it that you would not have been aware then that
14 in writing this letter, that it is apparently a change of heart or
15 a change of decision from the conclusions reached at the
16 review meeting.

17 A. Yeah. Well, based on the documents that I've seen now, it
18 struck me when I was reading them that following the
19 review, the initial meeting of the review. The review isn't
20 just one meeting. I mean these people listen and they take
21 notes and they listen to the investigators and then they do a
22 lot more work than that. I mean they would be looking into
23 case law. They would be discussing it and so on. But, initially,
24 after the first discussion, it seems that they had a different
25 impression than they later came to after they completed their

1 work.

2 Q. Yes, to be fair, Commissioner, the evidence from Deputy
3 Commissioner Quintal is that following that meeting in
4 November, that certainly no further investigation, and I
5 believe he used the words "No further research was
6 conducted."

7 A. Into the case?

8 Q. Yes.

9 A. Well, I don't know what he means by those words, but
10 Venner, I'm quite sure, would have researched a number of
11 cases and, in fact, there's an indication in some of these
12 documents that he may even have touched base with the
13 Department of Justice, which is unusual on a provincial case.

14 Q. Would you have expected to be involved in the decision itself
15 as to whether or not the matter should proceed in the face of
16 opposition from the Nova Scotia Attorney General?

17 A. No, if the decision had been, if the review team, if the Deputy
18 had come in to me and said, "look, there should be a charge in
19 this case, but the Attorney General said there won't," well,
20 then I would have been very involved. Because I would have
21 been in touch with the Attorney General to discuss that issue.
22 Because I would always insist on the right to the police to lay
23 charges if they feel they must. I mean that's a controversial
24 point, but it's a point that I've always maintained.

25 Q. So if you had been aware that the difficulty was a roadblock

1 the interpretation that should be given to evidence and so on,
2 what...the normal procedure is that, it would come up and be
3 reviewed by the DCI and by the Deputy of [OPS?]. These are
4 very experienced policemen that had themselves done a lot of
5 investigative work before they got into those offices and they
6 would review the work, ask questions and come to
7 conclusions.

8 Q. You would expect a review to be carried out by those two
9 individuals?

10 A. Yes. And with whatever other assistants they might want,
11 you know, in terms of experts in any particular area of crime.
12 I'm not sure, I did not participate in that review at all but I'm
13 quite sure that, likely, that the officer in charge of the
14 Commercial Crime Branch would be involved in it and so on.
15 And there would be quite a discussion. And of course the
16 Division, the investigators and the senior people in the
17 Division would also be involved in the review.

18 10:45 a.m.

19 A. You know, I don't want to put words in their mouth but my
20 basic understanding was that there was some difficulty, there
21 was some obvious defences that we had not got evidence to
22 offset where they used, and these are all things that would
23 weigh on their mind, I'm sure. But they, and that was my
24 understanding. And really Venner's memo which says it was
25 the problem with the evidence, now I can't recall specifically,

1 but I do know there was discussion about the defences
2 available. I do know that there was some arguments back
3 and forth between the various section or subsections of
4 Section 110 as to intent, and all of those things had been
5 examined from what I would call a legal point of view in the
6 course of the review. And the conclusion of those senior
7 officers was it was not a case to proceed with.

8 Q. I'd just like to refer you to a couple of extracts from Deputy
9 Commissioner Quintal's evidence. You have a transcript in
10 front of you there, sir, reading from Volume 84, the booklet
11 on the top left-hand corner of the table. And I refer you to
12 page 14792. And reading from line 20 close to the bottom of
13 the page, 14792. I think the question preceding that:

14 Q. For some reason you didn't proceed to lay the
15 charge and presumably you exercised your
16 discretion not to proceed to lay the charge.

17 A. To put it as honestly as I can on what I recall
18 now, I was faced with the dilemma, do we
19 proceed or not knowing very well the
20 consequences. So I carefully weighed all the facts
21 that I had at that time to determine whether, in
22 fact, we had a sufficiently strong case to go and
23 lay a charge in spite of the directives received
24 from the Attorney General's Department. My
25 evaluation at that time was we didn't have, we
did not have a sufficiently strong case and,
therefore, I didn't think we should proceed.

Q. You said that you were sort of afraid of the
consequences that were going to flow from the

proceeding in the face of the directive from the Attorney General's office.

A. In terms of the difficulty of the relationship between the Attorney General's Department and our Force.

Q. Yeah. But that's really the reason you didn't proceed is because you foresaw some future difficulties in your relationship.

A. Not quite, sir. If I had been convinced that we could have obtained a conviction, I would have gone ahead regardless of the consequences.

Q. Well, do you have to concern yourself as to whether you're going to obtain a conviction or do you only concern yourself as to whether you have reasonable and probable grounds to lay the charge?

A. Well I felt in this particular case we had to consider whether, in fact, a likelihood of getting a conviction was there.

And again, quickly, sir, to page 14800, the question at line 14.

Q. Now you have indicated to us that the consequences to the RCMP in this case of proceeding with a charge were a relevant factor in making your decision not to proceed. That is, the consequences of a daily relationship between the AG and the RCMP.

A. Well, it was a factor you could not ignore.

And there is an answer to the same vein on the following page that you can't ignore the fact that you have to have a

1 working relationship. Did the Deputy Commissioner in his
2 discussions with you make any reference to the fact that the
3 possible problems with a working relationship in Nova Scotia
4 were a factor in his decision?

5 A. I don't think he ever said that that at all influenced his
6 interpretation of the evidence and it was based on that, the
7 decision as to proceed or not to proceed. But certainly he
8 would be aware, I mean you couldn't help but be aware that
9 in the background that if we did decide to go, take another
10 course of action, that it would undoubtedly cause some, you
11 know, some problems. But that's not for him to worry about.

12 Q. In your view is, taking those possible consequences into
13 account at all an appropriate factor for the Force to take into
14 account in deciding whether or not to proceed?

15 A. It should not be the basis for a decision.

16 Q. No, I didn't ask that, sir. I asked you if it was a factor to be
17 taken into account at all.

18 A. No. But it's there. I mean you can't deny the fact it's there.
19 You're faced with it and you have to, and it's always in your
20 mind. But it should not be the basis for a decision. And, you
21 know, just let me enlarge on that a bit. The basic relationship
22 between the Force and the Government of Nova Scotia was
23 very good and there were, I would be surprised really that
24 any of the officers would feel that this particular case and the
25 problems with this case would, you know, would bring that

1 crashing down. Because I would visit when I'd be in the
2 Division, I'd always visit with the Attorney General. I would
3 also see him at Federal/Provincial conferences of justice
4 ministers and so on which I would always attend as part of
5 the Federal delegation. When I'd meet with the Attorney
6 General in his office, the CO would be present and I'd meet
7 with the Deputy and so on and I was unaware that there was
8 any, you know, deep problems at all, and in fact, we had a
9 very good relationship with the government of this province
10 in terms of the contract.

11 Q. If I could direct your attention to page 81 of the booklet of
12 materials.

13 A. 81.

14 Q. Yes, sir. Page 81. And I believe this to be a note of Mr.
15 Venner's, a DCI, I'm not able to give you a date. I can suggest
16 that it might have been written when he was thinking about
17 the decision that had to be made, and I direct your attention
18 to the middle of that extract where it says, "Contract to police
19 force should solicit the advice on the point of whether or not
20 the peace officer should lay a charge. There may be one
21 ultimate answer but when this is not apparent, then AG is the
22 last word."

23 A. Well I don't agree with that.

24 Q. You don't agree with that?

25 A. No. I mean my position is well known I think, and it's been

1 publicly stated and written on as a result of other cases
2 where I've had to take a stand and been questioned before
3 Parliamentary committees and so on, and I've always taken
4 the position that in a controversial case the police must be
5 free to lay a charge if they feel they should. The Attorney
6 General has the clear right to stay that charge and not
7 prosecute it, but then the matter is in front of the public and
8 it's in a court and people can make their own assessment.
9 Because that exists, the very fact that that principle exists
10 really is the best guarantee that it shouldn't ever become a
11 problem because everybody is very careful in making their
12 judgements on a totally professional basis because they know
13 that that could happen. That is the ultimate step. I must also
14 say, and again, when I was doing criminal cases I used to
15 answer questions "yes" and "no" when I could and I'm getting
16 a little, I'm elaborating a bit now, but the whole question of
17 how these cases are handled is, in a sense, interesting. And I
18 believe that it shows the value of having the policing
19 arrangements that we have in this country. Because it
20 provided for an opportunity for a review by very experienced
21 policemen, totally apart from the local scene. And, you know,
22 if there is a value to the way the policing is done through
23 these contracts, that's one of them. Because if there is local
24 heat, which can happen, you know, or perceptions of it can
25 develop, there is another mechanism one step back by police

1 to review it with very senior and experienced people and
2 come to decisions. And if they come to the decision they
3 should...the charge should proceed, then they should be
4 allowed to lay it provided they can find a judge or justice that
5 will accept the information.

6 Q. I may come back to that, sir, but were you ever advised in
7 this case that, or made aware that there was any local heat, as
8 you put it?

9 A. Well, I became aware as it went along that there was, that
10 there were strong differences of views, even, I think, within
11 the Force with respect to the weight the evidence should have
12 and the possible defences and so on. But more than that, I
13 mean, that can be resolved within the organization, and you
14 come to a decision in the end and it's respected. But I was
15 aware that there was a feeling that because the case was not
16 handled in the normal and routine way, suspicions developed.
17 And I think that's a fair way to express it. If the case had
18 gone normally to a prosecutor, as is normal, I doubt if any of
19 these issues would have come up. And I'm not suggesting for
20 one moment that because it wasn't handled that way there
21 was any impropriety or any wrong decisions because I have
22 no reason to believe there was. But the mere fact that it was
23 not handled in the ordinary way allows some of these, you
24 know, misunderstandings and concerns to develop.

25 Q. Were you aware that there were these strong differences of

1 opinion within the Force before you were briefed by a Deputy
2 Commissioner on December 23rd?

3 A. No. And it was even later than that I become more aware.

4 Q. And is it fair to say that those strong differences developed
5 only because of the final decision that was made?

6 A. Well...

7 Q. And that they were not apparent prior to that?

8 A. Well I guess it's all part of it. But, you know, I mean it's not
9 the first time there were differences. When I was a corporal
10 I didn't always agree with my boss either. But nevertheless,
11 there were different views in terms of the strength of the
12 case. I'll put it that way. But again, all that was handled
13 within the organization and decisions made at the appropriate
14 level.

15 Q. Insofar as the final decision of the Deputy Commissioner and
16 the DCI was influenced by this conclusion here, if it was at
17 all...

18 A. Yes.

19 Q. About the AG being the last word, do I take it that to that
20 extent, at least, the conclusion would be in error?

21 A. Yeah. I don't know what, you know, I don't know if you're
22 going to be interviewing Venner or if he's going to be before
23 you, but I'm sure that his view of the right of the police to lay
24 charges is identical to mine. I mean these are issues we used
25 to discuss throughout our careers and...

1 Q. Just to ask you a couple of questions about the letter that the
2 Deputy Commissioner eventually sent starting at page 93 of
3 the booklet. Page 93 and following and turning first to page
4 94, the top paragraph on that page, he writes towards the
5 conclusion of that paragraph, "Careful study convinces us that
6 at least no overlooked automatic defence or justification for
7 such behaviour on the part of Mr. Thornhill exists. Some
8 reasonable and probable grounds, to lay a charge under
9 Section 110 (1)(c) against Mr. Thornhill appear to be present."
10 In his briefing, did the Deputy ever suggest anything along
11 those lines to you?

12 A. No. I would say by the time he briefed me with conclusions
13 he'd come to a different opinion.

14 Q. Yes. And to be fair to him, he does set out some, a number of
15 factual matters on the following pages and some concerns
16 about what a jury might do that lead him to believe that it
17 should not be proceeded with.

18 A. Yes.

19 Q. In the following paragraph though, Commissioner, on page 94,
20 he says, "Having said that, however, we do not agree with the
21 position of the Officer of Charge in your Commercial Crime
22 Section when he states in memorandum... (et cetera)..that all
23 that is necessary is that there are reasonable and probable
24 grounds to believe that an offence has been committed and
25 reasonable and probable grounds to believe that the person to

1 be charged committed that offence before proceeding." And
2 do you agree, sir, as a statement of principle that something
3 beyond reasonable and probable grounds is necessary before
4 proceeding?

5 A. Well you're opening up the whole question of discretion and
6 what it means and when it should be applied and it's a very
7 awkward one. In principle, though, yeah, there are occasions.
8 I mean...

9 Q. Don't misunderstand my question, sir. Do you agree as a
10 statement of principle that something beyond reasonable and
11 probable grounds is necessary?

12 A. No.

13 Q. Before proceeding.

14 A. It's not necessary, it's not essential.

15 Q. No, reasonable and probable grounds would be...

16 A. Is sufficient.

17 q. Would be sufficient...

18 A. Yes.

19 Q. And then beyond that the discretion would come into play?

20 A. Yeah, that's right.

21 Q. And the letter then goes on, as I say, to isolate a number of
22 factual considerations he took into account. And I don't
23 propose to go through those with you except he does says that
24 they weighed on his mind and he considered them. At page
25 96, Commissioner, at the conclusion of the first big paragraph

1 there he says, "I do not presume to be a substitute for the
2 courts but these are factors that needed serious consideration
3 before embarking on a course of action in defiance of a
4 specific directive of the Attorney General. He is to be advised
5 that in the present case we will abide by his directive." And
6 this is your Deputy Commissioner speaking, having had the
7 benefit of discussions and drafting of Tom Venner. Were you
8 aware, sir, that there, you were abiding, were you made
9 aware that in not proceeding you were abiding by a directive
10 of the Attorney General?

11 A. Yeah, I would never, I would not have chosen those words
12 but Quintal was here and he can explain them. But what I
13 would say is that our review of the case indicated that we
14 came to a conclusion that it was not a case to proceed with,
15 not necessarily because the Attorney General said so. Because
16 we had come to that conclusion based on the evidence.

17 Q. Well, he reiterates on page 97 in his Conclusion (b). He says,
18 "In this case after very careful consideration of all the facts
19 involved we decided to abide by his instructions that charges
20 are not to be laid as conveyed at the meeting of 80/11/12,"
21 which was a meeting that followed the review that took place
22 in Ottawa.

23 A. I see.

24 Q. And...

25 A. Well, I can presume, of course, that we're drawn into that

1 kind of discussion because of other correspondence where,
2 you know, I noticed in the file somewhere one of the officers
3 in the Commercial Crime Branch making that an issue. You
4 know, should be comply with the directive.

5 Q. Sure.

6 A. That became the issue instead of was the evidence sufficient.
7 And I presume that that sort of thing got some discussion
8 during the conversations and obviously, I mean you never
9 want to go head-to-head with a Minister but that does not,
10 that never does remove the principle that if you feel you
11 have the right case to proceed with, you should be allowed to
12 proceed.

13 11:00 a.m.

14 Q. I take it that had you been aware that there was some
15 consideration being given to the weight of the directive of the
16 Attorney General, that you would have intervened at the
17 provincial level.

18 A. Yeah, if any of the officers had come to me and said, "We're
19 not going to proceed with this because the Attorney General
20 doesn't want us to, but I think we've got a case," I would have
21 said, "Wait a minute, let's talk about that. And I'll go and see
22 the Minister if I have to to see what's worrying him because
23 that's not acceptable.

24 Q. Do I understand that you had not reviewed this file and the
25 correspondence until you were preparing for this hearing?

1 A. I had never gone through, and to this day I've never
2 reviewed the investigational file. I've seen these extracts that
3 Commission is considering and so on, but I have never read
4 the detailed investigational file or any statements or examine
5 exhibits or anything of that nature at all.

6 Q. Having reviewed what you have, do you have any comments
7 or concerns about the procedure and conclusions that were
8 adopted by the force in looking at the matter? Not the
9 investigation as such, but after the matter was raised in
10 November.

11 A. No, I think that, I mean, you know, one may... There may be
12 different views with respect to the quality of the decision, but
13 the process was followed properly. And as far as I can see,
14 there was absolutely no influence brought, improper
15 influence brought into that process excepting, as you say, in
16 the background there was always the knowledge that the
17 Attorney General had already taken a position. So it was real.
18 It was there. But that would not really affect officers like
19 Venner and Quintal in coming to a judgement on the quality
20 of the case. I mean I'm quite sure of that, but you'd better
21 hear that from them.

22 Q. Okay. Just turn for a moment, sir, to February,
23 January/February, 1981 and we have on, in the documents,
24 sir, at page 117, a letter that you forwarded to Mr. How.

25 A. Yeah.

1 Q. Are you able to tell us how that letter came to be written?

2 A. Well, my recollection is that at the end of January, I think it
3 was the 29th of January, I had gone out to a conference at the
4 University of British Columbia and I was a speaker at that
5 conference and it was a conference on police accountability,
6 and Mr. How was there. And during the course of that couple
7 of days of conference out there, we were chatting, as I was
8 with a lot of other people, and he... This case came up in a
9 brief way and I said that we've done our review and the
10 judgement of the officers at headquarters is it's not a case to
11 proceed with. And my recollection is, and it's vague, but was,
12 "Well, will you give me that in writing?" And, "Sure, I'll give
13 it to you in writing." You're the Attorney General. I'm quite
14 prepared to tell you what we did.

15 Q. Did you have any idea of the use to which the Attorney
16 General wanted to put it?

17 A. No. I presume, I mean I'm not even sure altogether what use
18 he did put it to, but I knew I was giving it to an Attorney
19 General who is also a Minister of Justice and I was just giving
20 him the facts of what the force had done.

21 Q. The covering letter on page 116 speaks of a conversation with
22 Mr. How and a letter to which minor corrections were made.
23 Was there more than one draft of the letter?

24 A. You know, I saw that as well and I have no recollection at all.
25 Obviously, there must have been. There must have been

1 something that required greater clarity or something.

2 Q. Mr. How, in fact, testified that once he received the first
3 letter, it wasn't as clear as he would have liked about the fact
4 that the decision was taken independently by the R.C.M.P. and
5 he asked you to...

6 A. Yeah.

7 Q. Clarify it. Does that refresh your memory at all?

8 A. Well, I expect that's right, but I don't precisely remember
9 that. You see, the letter is... May I discuss the letter?

10 Q. Please.

11 A. You know, this letter is made or is written on my
12 understanding, of course, that, you know, we discussed the
13 review process and that it was concluded that it was not a
14 case to proceed with. And what I was really pointing out in
15 this letter was, well, two or three things, but one is that had
16 we come to a different conclusion, we would have felt free to
17 proceed because one of the principles that I maintained was
18 that we had that right. And that if we had come to that
19 decision, I think later on in the letter, I explained what we
20 would have done. We would have come back to them to see if
21 we could get them to agree. If they failed to agree, we would
22 go out on our own if necessary. And I wanted that to be
23 understood. We were not proceeding, not because he had told
24 us not to proceed, but rather because we had arrived at that
25 conclusion ourselves. But had we come to a different

1 conclusion, we would have proceeded. I mean that's the
2 purpose of that letter and it's an accounting under the
3 contracts. The Commissioner accounts to the Minister for the
4 activity of the force and so on and it was an accounting to him
5 of how we handled this case.

6 Q. You say in Paragraph 4, Commissioner, page 117:

7
8 We also maintain that as a matter of principle
9 that police officers have the right to lay charges
10 independent of any legal advice received if they
11 are convinced that there are reasonable grounds
12 to do so and provided, of course, that a justice
13 will accept the charges.

14 And from your earlier evidence, I take it that you believe
15 that is a proper statement of the principle?

16 A. Yeah.

17 Q. And I take it also from your comments about the Deputy
18 Commissioner's statement of principle, as expressed in his
19 letter, that this principle then would be at variance with the
20 principle the Deputy suggested, because he has suggested that
21 we need something beyond reasonable and probable grounds
22 before, as being necessary.

23 A. Yeah, well, don't read the words "reasonable grounds" in my
24 letter in the judicial sense, necessarily. I mean are there
25 grounds reasonable to proceed? And there can be a whole lot
of things go into that. I mean apart from just reasonable and
probable grounds that you swear to in the information. I

1 mean there are other factors that... We're getting back into
2 whole area of discretion. But if there are reasonable grounds
3 to proceed and we think it's an appropriate case to proceed
4 with, my stand is that we have the right to do so.

5 Q. But would you agree with me that that is at variance with the
6 principle as suggested, as written by the Deputy
7 Commissioner on page 94 when he says:

8 We do not agree with the proposition that all
9 that is necessary is reasonable and probable
10 grounds.

11 A. Well, no, we're a little apart there.

12 Q. Yes, okay. And, in fact, again, insofar as his decision was
13 influenced by his view of the principle, if it was, his decision
14 would be in error to that extent.

15 A. Yeah, but I would have to really know...

16 Q. I understand.

17 A. You know, the circumstances. Like I mean there are many,
18 many cases where you've got reasonable and probable
19 grounds to believe there's an offence you don't proceed to
20 court with. If we went to court with everything we believed
21 there was reasonable and probable grounds for, there
22 wouldn't be enough judges or courts in the land.

23 Q. But that's where you do get into your exercise of discretion.

24 A. Yeah, exactly.

25 Q. In the final paragraph on that page, Commissioner, you say:

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I instructed that the file be carefully reviewed within the force.

I take it that you are not sure whether you in fact instructed it or whether it happened and you approved it.

A. I certainly approved of it, which in the force, is an instruction. If the Commissioner says, "Yes, you can have your review," that means get on and have the review. I mean so the words, you know, can mean different things to different people. But within the context of the R.C.M.P., I said, "yeah, get on and review that case."

Q. And in the second page of that letter, page 118, the review you refer to is the meeting on November the 5th. At least that was the kick-off.

A. That was the kick-off, yeah.

Q. And it would be your belief, in accordance with an old practice that even following that meeting, there would be further review by the Deputy Commissioner and DCI?

A. Yeah, I mean that's just normal, and I'm aware...I mean I'm not unaware of the fact that there was some agony over the file and that they were looking at it very carefully. And that Tom Venner, who is a very experienced man and done a lot of this kind of work, too, wouldn't come to a conclusion in a hurry. And he was the man that basically was researching and handling that file. He would take it to the Deputy and the

1 Deputy would be involved in the discussion. The Deputy
2 would take responsibility for the decision and tell me of that
3 decision. But there is no question that it would have been
4 carefully researched beyond just that meeting.

5 Q. Okay, the second paragraph on that page, you say:

6
7 At the completion of the review, he came to the
8 same conclusion as had the Deputy Attorney
9 General. That being that the circumstances of
10 the case as reflected in the file combined with
11 evidence, et cetera, did not warrant the laying of
12 a charge nor the continuation of investigation.

13
14 Now reading your letter as a whole, and particularly going
15 back to your earlier statement of principle, a reasonable
16 interpretation of that was that there were not reasonable
17 grounds to lay the charge.

18 A. I, yes, that's reasonable.

19 Q. And was that your understanding?

20 A. Yeah.

21 Q. That was your belief.

22 A. My understanding always was that it was a case that very
23 likely could be quite easily defended and so you don't just
24 throw it up in the air and make the guy defend himself.
25 Because there are problems in terms of the weight of the
evidence.

Q. Was the Deputy Commissioner the only person that would

1 have briefed you on the matter?

2 A. He would be the only person that would, you know, that
3 would give me what I would call "a formal briefing". At the
4 lunch table, there may have been conversations among the
5 senior officers that I would have overhead. But in terms of
6 the procedures, it would be the Deputy Commissioner.

7 Q. Reading from the transcript, again, Commissioner, at Volume
8 84, page 14,804, towards the bottom of the page, Mr.
9 MacDonald is directing the Deputy Commissioner to this letter
10 and he says at Line 21/22: "Now this is the paragraph I'd like
11 to direct your attention to" and he directs his attention to the
12 paragraph we've just looked at, and the question:

13 Q. Is that an accurate reflection of the
14 conclusion you came to?

15 A. Not quite. I would not have said it in those
16 terms.

17 Q. In fact, you came to the conclusion
18 that there were reasonable and
19 probable grounds to warrant the laying
20 of the charge but the case wasn't strong
21 enough to go against the wishes of the
22 Attorney General.

23 A. Yes.

24 Had you been aware of those sentiments of the Deputy
25 Commissioner at the time, would you have written this

1 paragraph?

2 A. Perhaps not in those terms because my understanding always
3 was was the way it was expressed in the document I pointed
4 out earlier from Venner, in which he says that, you know, the
5 problems with the evidence, or the weight of the evidence.

6 Q. Now on that point about the weight of the evidence, and again
7 I'm reading from the transcript at page 14,793. It's a passage
8 we read before, 14,793 at Line 12. Deputy Commissioner
9 says:

10
11 If I had been convinced that we could have
12 obtained a conviction, I would have gone ahead
13 regardless of the consequences.

14 And all the phrase that's been used as sort of a substantial
15 likelihood of getting a...

16 MR. BISSELL

17 Excuse me, the word that appears below that is just "a
18 likelihood", not "a substantial likelihood". Line 20.

19 MR. ORSBORN

20 Q. Okay. Line 19 and 20:

21 I felt in this particular case we had to consider
22 whether, in fact, a likelihood of getting a
23 conviction was there.

24 And his earlier comment about being convinced that we had
25 to get a conviction. In your view, is that the same threshold

1 standard for laying a charge as you had enunciated in your
2 letter? And I'm not talking about an exercise of discretion.

3 A. Yeah.

4 Q. I'm talking about a basic threshold to meet before you even
5 get to your exercise of discretion.

6 A. Well, I think a responsible policeman would always consider
7 whether the likelihood of conviction was there. And that
8 doesn't, I would certainly not say, though, that you have to
9 know whether there's going to be a conviction because you
10 never know what it'll happen before a jury in the hands of
11 good defence counsel or whatever. But I think if you felt that
12 you did not have a chance for conviction, it would be quite
13 irresponsible to move. You'd probably do more investigating,
14 but you certainly wouldn't proceed to the court if you thought
15 you couldn't, didn't have a chance of success.

16 Q. Again, sir, the test of a likelihood of conviction or being
17 convinced that we could obtain a conviction, is that a different
18 threshold test than reasonable grounds?

19 A. Yeah, it is divisible. It is divisible.

20 Q. And it would be a higher test?

21 A. Yeah, I have trouble with that, being definitive on that. I
22 mean what does "reasonable and probable grounds" really
23 mean? And I can only say, though, that it would be a very
24 strange circumstance to have a policeman that didn't think he
25 could succeed with a case demanding that he lay a charge. I

COMMISSIONER SIMMONDS, EXAM. BY MR. ORSBORN

1 mean that just doesn't happen.

2 Q. You say in the following paragraph...

COMMISSIONER EVANS

3
4 Q. What you're saying is one is a legal test and the other is a
5 practical test?

6 A. Yes, I think so. Yes, I think that's a distinction. It's very
7 difficult, though, to be definitive in those areas. There's a lot
8 of judgement involved in all of these sort of cases.

MR. ORSBORN

9
10 Q. You say in the final paragraph on 118, in the middle of that
11 paragraph:

12
13 What is important, of course, that this is a
14 judgement reached entirely within the force and
with outside influence or direction. [sic]

15 I guess what I'd like to ask you. I point out two or three
16 factors that took place in the process...

17 A. Yeah.

18 Q. By which this case was handled. We have a public
19 announcement by the Attorney General.

20 A. Yeah.

21 Q. That charges would not be proceeded with. We have a, not a
22 charitable exchange between Mr. How... Mr. Coles and
23 Superintendent Feagan saying that there's going to be
24 problems with the working relationship if charges are
25 proceeded with. And we have, at least as the Deputy

1 Commissioner construed it, a directive or instructions from
2 the Attorney General. Are you able to indicate, in your view,
3 whether or not those factors influenced in any way the
4 eventual decision of the R.C.M.P.?

5 11:15 a.m.

6 A. Well that's a very tough question because I don't know what
7 was always in the minds of those officers when they did their
8 review. In going through some of these documents now I can
9 see it was obvious the matter that was on their mind but I
10 would be very surprised if it really deterred what I would
11 call their professional judgement on the evidence.

12 Q. Well knowing what you know now, would you have written
13 that paragraph in the same way you wrote it?

14 A. I perhaps would have written it differently.

15 Q. What would you have said?

16 A. Well, what I probably would have said would be, you know,

17
18 Draw a lesson from this case. When cases of this
19 nature come along that are very sensitive, and
20 politically sensitive, for goodness sakes don't
21 take it outside of the normal realm of handling
22 cases whether he's a politician or a plumber.
23 Deal with the Crown in the usual way and just let
24 it proceed. Because the perceptions of bad
25 motives suddenly arise when it's handled in a
different way.

And it was clear some of those perceptions had developed
during the course of this investigation. I'm not here to judge

1 whether or not there were any but I have no reason to
2 believe there were from what I know but it certainly allowed
3 those misunderstandings to develop and it could be avoided.
4 Whenever you get a very politically sensitive case, whether
5 it's at the Federal level or the Provincial level, to just make
6 sure it follows the normal route.

7 Q. I'd ask you to consider this suggestion from the police point of
8 view.

9 A. And just let me say, and I might have said something like
10 that in a letter, you know, in terms of what I'd say differently
11 today.

12 Q. Generally is it fair to say, from the police point of view, that if
13 you've got your reasonable and probable grounds in a
14 practical sense. In practical sense there's no defence you've
15 overlooked. That that's your threshold and threshold before
16 you exercise your discretion. But in this case because of the
17 decision by the Attorney General, because of the pressures
18 felt by the Force in terms of their working relationship, that
19 the Force took an extra cautious approach and said,

20
21 We've got to have a higher threshold, we better
22 make sure that we're not going to lose this
23 because if we lose, if we proceed anyway we're
24 going to have problems and if we lose we're
25 going to have egg all over our face so we will
 look at the evidence that much harder than we
 would normally look at it.

1 Is that a fair characterization?

2 A. I think it's fair to say that because of that position they would
3 be super cautious. And in being super cautious I'm quite
4 sure, I wasn't there but I'm quite sure that Venner would
5 have gone into case law, he would have looked at things that
6 had been said in various appeal courts on cases with respect
7 to evidence and in respect to *mens rea* and Section 110 is an
8 unusual sort of a Section in any event. It's basically slanted
9 at only just a narrow part of the population and I'm sure that
10 he would have done an extraordinarily careful research
11 because of that. I mean you would not seek a confrontation,
12 that is for sure, so you would look at it very carefully.

13 Q. You were more concerned about losing this case than you
14 would be otherwise.

15 A. Well, we're concerned about all of those but we don't really...

16 Q. That's not an unfair characterization.

17 A. Well yeah but it, I'm not sure that it should stand just that
18 bald. I mean we don't go to court with the expectation of
19 losing cases and when we lose them we analyze to see why
20 and try and learn from that so we're better prepared for the
21 next one. But it's because of the peculiar situation it, if we
22 had gone to court and insisted on laying a charge and then
23 failed in that charge, it certainly would have required another
24 level of dealing with the problems. But it would not be at
25 their level. That would be between me and the provincial

1 Attorney General and if it was not satisfactorily resolved
2 there it would be the provincial Attorney General and the
3 Federal Solicitor General with respect to contract and so on.

4 Q. Given the, just looking again at that last paragraph, you say,
5 "Had we come to a different a conclusion we would have
6 sought further discussion with the Deputy Attorney General
7 following which if differences had not been reconciled..." Isn't
8 that, in fact, exactly what happened that your meeting in
9 November reached a conclusion that charges should proceed.
10 You sought further discussion with the Deputy Attorney
11 General, the differences were not reconciled and then the
12 Force looked at it again.

13 A. Well it, that's what appears to have happened looking back in
14 the record. At the time when this case was wrapped up for
15 my information, though, I understood that we'd reached a
16 conclusion.

17 Q. You were not aware of that process.

18 A. No. There were a lot of things I was unaware of in terms of
19 the daily discussion between the Division and Headquarters'
20 branches and so on.

21 Q. You mentioned the lessons that may be learned in terms of
22 treating a case such as this in normal channels. Is that your
23 view of how, say, a high profile case should be treated?

24 A. As far as possible. It isn't always possible because sometimes
25 events take over. The difficulty with those kind of cases is

1 it's hard to deal with them as though they're routines because
2 of a lot of factors. I mean the media is very involved and
3 following your investigators around. Sometimes you have
4 take all kinds of precautions to try and investigate
5 impartially, without being subject to those pressures. The
6 present, the developing state of the law has made it more
7 difficult. There was a time when the police could go on the
8 basis of rather, you know, not very definitive information
9 could go and look at a situation to determine whether or not it
10 really deserved a deeper look at it. And you used to be able
11 to get search warrants and do various things to come to that
12 conclusion. At some stage you might cut it off, say, no, there's
13 nothing there. Today, because of the present state of the law,
14 those search warrants become open to the press almost
15 immediately. The person that's being investigated or the firm
16 or whatever, especially in this commercial crime area, is
17 exposed and even if the police later on come to the conclusion
18 not to proceed, you may, that person may have been
19 destroyed in one way or another and so the whole system is
20 fraught with difficulty now because of the state of the law
21 and the emerging state of the law.

22 Q. Picking up your last point about people being destroyed. You
23 expressed in fairly strong terms the right of the police to lay a
24 charge notwithstanding any influence or direction from the
25 Attorney General. Given that unfettered right, how within the

1 police force do you best protect that the charges are not laid
2 where they should not be laid?

3 A. Well you have a review process. But what you really have to
4 try and, as best as you can, is have, you know, mature,
5 responsible, experienced people that are making those
6 decisions. And also, like I mean, despite that, the principle
7 that you must have that right at the end, normally you expect
8 a lot of discussion between your police and the Crown that
9 will be prosecuting the case. Normally you expect to be
10 touching base with them in terms of, you know, gaps in your
11 evidence or problems in presenting it and one thing or
12 another. And that is what normally goes on. But if it falls
13 apart, and that generally only happens in a case of high
14 profile and, or political profile cases, the police have to
15 reserve that right.

16 Q. If your Deputy Commissioner had come to you on November
17 the 6th and said, "We've had this meeting, we think charges
18 should go but we've got a real problem down in Nova Scotia,
19 they don't agree with us", do I take it from your earlier
20 evidence that at that stage you would have become
21 personally involved?

22 A. Yes. What likely would have happened is that I likely would
23 have called directly to the Attorney General and said I
24 wanted to meet with him, arranged to discuss it with him and
25 try and come to the proper understanding. And, you know,

COMMISSIONER SIMMONDS, EXAM. BY MR. ORSBORN

1 based on experience that I've had in a variety of jurisdictions
2 normally you can sort those things out if it's done at the
3 correct moment. Once a public position has been taken it gets
4 more awkward.

MR. ORSBORN

5
6 Thank you, Commissioner.

EXAMINATION BY COMMISSIONER EVANS

7
8 Q. I'd like to ask you, first, on page 81 what is that anyway? I
9 know it's written by Venner but did it go any place or was
10 that just in a file or...

11 A. Page 81? I don't know what that is. It looks to me like it was
12 notes he was making on a phone call or something and he just
13 put it on the file. But I really can't explain it.

14 Q. But it wasn't intended to go to any individual in the Force.

15 A. I wouldn't think so. It's not addressed to anyone.

16 Q. No.

17 A. And the issue they seem to be discussing there is the question
18 of outside counsel.

19 Q. Right.

20 A. And I see in some of the documents that's addressed. And in
21 one of the documents that's in here I see he's saying well I
22 haven't put in something about the Commissioner's view on
23 this because I don't think it's necessary. Because on that
24 particular issue, I mean that is a very controversial issue in
25 terms of our contract policing. When is it appropriate to go

COMMISSIONER SIMMONDS, EXAM. BY COMMISSIONER EVANS

1 and talk to a lawyer in the Federal Department of Justice?

2 And when it comes to advice on the casework we have a very
3 clear line. That we don't go for case advice on a provincial
4 case to the federal department. You might go the federal
5 department for some administrative questions or procedural
6 questions and so on but my other point has always been, and
7 this seems to be what they were discussing I gather, was that
8 there are cases when it is appropriate to go and get an
9 independent outside counsel to come in and assist you if you
10 feel that you're getting bad advice or advice for the wrong
11 reasons from the Crown.

COMMISSIONER EVANS

12 Thank you.

CHAIRMAN

13 Mr. Ruby?

MR. RUBY

14 Thank you, My Lord.

15 Two items of production, first of all, if I might. Commission
16 counsel can assist. The earlier draft of the letter to Mr. How, has it
17 been found and obtained? Is it available?
18

MR. ORSBORN

19 No.

MR. RUBY

20 Lost? Or just not looked for?
21
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24
25

DISCUSSIONMR. ORSBORN

Well, as far as being looked for we've looked through all the files and it's not there.

MR. RUBY

All right.

Secondly, some days ago I asked, through Commission counsel, if counsel for the Government of Canada would make available the Rutherford letter that's referred to in one of the materials. Have you had a chance to do that? Is it available?

MR. BISSELL

We indicated to Mr. MacDonald our position on that.

MR. MacDONALD

Yes, My Lord. I believe that letter is referred to on page 109 of the book.

CHAIRMAN

Page 109?

MR. MacDONALD

Yes. And the date...

MR. BISSELL

But that's a letter on a different file, a different subject and a different time after this, same subject but a different file, in a different time period and it's legal advice. And for all of those reasons, which I think are valid reasons, we take the position that we're not prepared to produce the letter.

DISCUSSIONCOMMISSIONER SIMMONDS

1 Perhaps I can be helpful a bit. If, Counsel, if I start to
2 violate any of the understandings object but the division of where
3 you go for advice is an interesting one. If they were discussing a
4 policy issue, a policy that should guide the Force in the conduct of
5 its operations, it would be quite legitimate to go to the Federal
6 Department of Justice to get legal views and assistance. If you're
7 discussing policy because of the problems of a case, then you have
8 to be careful that you're not going to that lawyer to get advice on
9 the case which is in a provincial domain. But you might be
10 discussing policy issues behind it and the Federal Government
11 remains responsible for the policies under which the Force
12 operates in terms of its operational procedures and so on. So
13 maybe that's helpful, I don't know.

MR. RUBY

14 It would seem from the document at page 109 that the
15 Rutherford letter was of importance in formulating the responses
16 that we've been examining. And I'd like to know to what extent
17 that advice was followed and to what extent it wasn't and for that
18 purpose I need production of the letter. So I would ask for
19 production of the letter.

MR. BISSELL

20 The date on which the Rutherford letter is received is
21 February 9th, '81, or which it appears in this. I don't see how it's
22 relevant to any of the subject that the letters and decisions were
23
24
25

DISCUSSION

1 made before February 9th, '81, and again, it's a matter of advice,
2 solicitor-client advice. And I think it's most inappropriate and my
3 friend knows that.

CHAIRMAN

4 Well, I don't propose to rule on it now. I want to get this
5 cross-examination out of the way.
6

MR. RUBY

7 Thank you.
8

EXAMINATION BY MR. RUBY

9
10 Q. I take it that you never read the file and, therefore, made no
11 independent judgement on the matter yourself.

12 A. That's correct.

13 Q. You mentioned in the course of your evidence that, with
14 regard to, I think, the false pretences aspect of this case that
15 you didn't think anything by way of charges was warranted
16 and I have a note in its present state. What needed to be
17 done in your view?

18 A. Well not having read the file I don't know if there was
19 anything else that could be done. I mean was there any stone
20 that we hadn't turned? Were there any areas that we hadn't
21 examined and looked at? If there were any missing that
22 could have produced something new then, of course, they
23 should be looked at. I can only conclude from the Deputy's
24 letter though that when he says, "No need to investigate
25 further", that they had turned all the stones and having

1 turned them all it was at the state where they didn't feel it
2 was suitable to proceed.

3 11:30 a.m.

4 Q. That would not be an appropriate response if, in fact, the
5 investigation was incomplete and had not yet been completed.

6 A. I would agree.

7 Q. You said there was a good relationship between you and the
8 R.C.M.P. and the Department of Justice and the Attorney
9 General's office in Nova Scotia. Would you take a look with
10 me in this gray volume at page 65? First of all, were you
11 aware of this document? This is a note from the Thornhill
12 file. Had you ever seen it?

13 A. No.

14 Q. From Mr. Feagan. He says halfway down page 65, in the
15 middle of that paragraph:

16
17 And now that he had made a decision on that
18 facts, (he being Coles) it should be no concern of
19 mine to question his decision and, further, he
20 questioned the motivation of my advisers within
21 the force and that I had a great deal of nerve to
22 suggest that after senior lawyers of his
23 department had reviewed the matter and come
24 to conclusion, that they could be wrong. And
25 that if I went so far as to lay a charge, I was
treading on dangerous ground.

23 That's a most peculiar response from someone with whom
24 you have a good relationship, don't you agree?

1 A. Yeah, I was quite surprised to read that.

2 Q. And then Mr. How arrived, the next line indicated, and he
3 outlines, again, his feelings and then at page 66, about eight
4 lines down:

5
6 He (Mr. Coles) pointed out that he and the
7 Attorney General were responsible to the people
8 of the province. That he was a senior attorney
9 acting for and on behalf of the Department and
10 that he had, after careful research, not only
11 given an opinion, but had made a decision on the
12 case. And by presenting argument about his
13 decision, I was placing myself and the force in a
14 most serious position. He stated that I had
15 absolutely no business questioning a decision of
16 the Department, and he intimated that he and I
17 would not be able to continue to work together
18 in future, if I displayed such a lack of confidence
19 in him. He suggested that I go home and reflect
20 on the whole matter.

21 Do you find that as a peculiar response from the Deputy
22 Attorney General as I do?

23 A. Well, this is Feagan's version of the conversation. I haven't
24 seen the other version, if there is one, but I am surprised if
25 that's an accurate reflection of the tone of that discussion.

26 Q. This is not the way, I take it, in which Attorneys General
27 usually respond to senior officers of the R.C.M.P.?

28 A. Now this is the Deputy Attorney General.

29 Q. It's Deputy, thank you very much.

30 A. Yeah, I find it rather unusual, particularly because I had had

31

1 lots of dealings myself with Mr. Coles and other officers in
2 that Department and with successive Attorneys General and
3 had always had a, what I call a very healthy relationship and,
4 by and large, I think the relationship of the Division with the
5 Department was a very healthy one as well, although it seems
6 to have come apart on this issue.

7 Q. You said in the course of your evidence this morning, and I'm
8 paraphrasing it but I hope I have it accurately. If someone
9 had come to me and said, "We've got a case, but we're not
10 going to proceed because of the A.G.'s direction that we
11 shouldn't, I would have said, 'Hey, wait a minute because
12 that's not my view'."

13 A. Yeah.

14 Q. What does "got a case" mean to you?

15 A. Well, in police jargon, that means we have a good sustainable
16 case that should be put before the courts and the evidence is
17 sufficient and it's one we should proceed with. I mean that's
18 what it means in general terms.

19 Q. Does it mean sufficient to... Are you predicting the likelihood
20 of a conviction or are you predicting sufficiency for a J.P. to
21 issue process and take the charge?

22 A. Well, I think you always have in the back of your mind the
23 likelihood of a conviction, knowing full well that in the hands
24 of skillful lawyers, the best of evidence can be reduced to
25 nothing at times. But you certainly proceed with the

1 assumption that you've got a case that is likely to lead in that
2 direction.

3 Q. Because the language that you've been asked about in Volume
4 84 raises some of the same ambiguities that I see now in your
5 answer and I just want to try and clarify some of them. If
6 you look at page 14,793. You've looked at it before. Is the
7 language in that case "convinced that we could have obtained
8 a conviction, likelihood of getting a conviction." Now would
9 you agree with me that, first of all, if you've got reasonable
10 and probable grounds, you've got at least a reasonable chance
11 of getting a conviction. That's implied in reasonable and
12 probable grounds. It's impossible to conceive of a case where
13 there are reasonable and probable grounds to think that "x"
14 committed a crime and, at the same time, say there's no
15 chance of a conviction?

16 A. Well, I can think of cases because I give you cases where the
17 police know who committed the crime but you know you
18 have no chance of conviction.

19 Q. No, but cases where you also have reasonable and probable
20 grounds.

21 A. Yeah.

22 Q. To believe it.

23 A. Yeah, I think it's included in that.

24 Q. All right. So when you raise the standard to a likelihood of
25 getting a conviction, you're predicting what a jury will do.

1 Yes?

2 A. Yeah, you're making a judgement on the likelihood of, the
3 weight of the evidence that will likely be applied.

4 Q. Isn't that really for someone else to do? It's not something
5 you're trained for.

6 A. I accept that as being fairly right, although I don't know
7 people that are better at making judgements in the likelihood
8 of cases succeeding than an experienced policeman.

9 Q. How about experienced defence counsel? I won't quarrel
10 with you on that.

11 A. They never expect the Crown to succeed.

12 Q. Maybe we're always far too optimistic. You'll agree with me
13 that it's not every case where you ask yourself, "Is there a
14 likelihood of success?"

15 A. No, I think it's always in the back of your mind. As I said
16 earlier, you just don't go to court and lay charges against
17 citizens if you don't think you can succeed.

18 Q. But in most cases, you'd agree. If you don't think you can
19 succeed with it, if there's no chance of succeeding, you're not
20 going to lay the charge. But, in most cases, really I suggest all
21 you ask is, is there a reasonable chance of success?

22 A. Yeah.

23 Q. You don't say is it likely I'll succeed? Is there a reasonable
24 chance of success?

25 A. Yeah.

1 Q. Agreed?

2 A. I think that's fair.

3 Q. Now, in this case, it seems the higher standard was used.

4 A. Well, the person that made the decision was before you and
5 he could be questioned about that standard that he actually
6 applied. There is no question by the fact that public
7 pronouncements had been made. They would be "super
8 cautious," I think was the word that was used by the counsel
9 here. And that is true, they would be.

10 Q. If you turn the page to Line 9 on 14,794. It seems clear from
11 that passage at Lines 9 to 15, and I'll give you a moment to
12 read it.

13 A. Yes.

14 Q. That the consequences were taken into account in deciding
15 whether or not the charge should have been laid, the possible
16 acquittal, the possibility of an acquittal, correct?

17 A. It would appear from, that Quintal is saying that. That he did
18 consider that.

19 Q. Now the possibility of an acquittal exists in every case, but it's
20 never taken into account, I take it, in terms of the
21 consequences of it. Because there aren't any consequences to
22 an acquittal ordinarily, are there, for the force?

23 A. Not for the force.

24 Q. And here, the consequences of the force have become a factor
25 in the decision-making process of this case, if Inspector

1 Quintal's evidence is accepted.

2 A. I think there is no doubt that... I mean it was a problem,
3 anyway. If it wasn't a problem, we wouldn't be here today.
4 And whether or not there was a charge or not a charge or an
5 acquittal or not acquittal, I saw in these notes somewhere
6 where one of the officers had sent me an optimistic note
7 saying that the C.O. of the division thinks it's calming down
8 and I said that this one won't ever calm down because I'm too
9 familiar with the, with what happens in these kinds of cases.
10 It will come out. It will be aired at some stage and that's why
11 we must be sure that what we've done is right and
12 sustainable. And I don't know how much weight was going
13 on in Deputy Commissioner Quintal's mind or in Tom Venner's
14 mind when they reviewed it. But my impression has always
15 been, as stated by Venner in another memorandum, that it
16 was really on the basis of the evidence that they, and the
17 possible defences that they came to the conclusion. And I
18 accept that.

19 Q. You'll agree with me that if you're going to make a proper
20 decision about whether or not to lay a charge, it's important
21 to consider all the relevant factors...

22 A. Yeah.

23 Q. And only relevant factors. Yes?

24 A. Yeah.

25 Q. What will happen to the force as a consequence of an

1 acquittal is not a relevant factor, I think you'll agree.

2 A. I would agree.

3 Q. So it was improper and wrong for them to consider it in this
4 case, if as the evidence indicates, it was done.

5 A. Yeah, if you take it literally. But you don't go looking for a
6 fight.

7 Q. No, but you don't go in fear, either.

8 A. No, exactly.

9 Q. You can't be afraid of the Attorney General.

10 A. I agree with you completely. And that's what we say. Had it
11 been a case where, a good case to proceed with, we would
12 have proceeded. And that is exactly the judgement I think
13 those two officers came to, based on the briefing I got from
14 the Deputy Commissioner.

15 Q. And that decision, whether it was or not, I'm not going to deal
16 with it.

17 A. Yeah.

18 Q. It should be one that did not consider at all any possible
19 consequence for the force from the Attorney General.

20 A. That, yeah, I would agree with you. That should not be the
21 basis for the decision at all.

22 Q. It shouldn't be considered at all. It's not part of the decision-
23 making process.

24 A. No, but it's there. I mean it's there. It's up there and it's in
25 your mind whether you want to put it out of it or not. But it

COMMISSIONER SIMMONDS, EXAM. BY MR. RUBY

1 should not have had any bearing at all on their interpretation
2 of the value of the evidence and the defences available to the
3 evidence and so on.

4 MR. RUBY

5 Thank you, sir. Those are my questions.

6 MR. SAUNDERS

7 We have no questions.

8 MR. CHAIRMAN

9 Mr. Ross?

10 MR. ROSS

11 No questions.

12 MR. CHAIRMAN

13 Mr. Merrick?

14 EXAMINATION BY MR. MERRICK

15 Q. Sir, my name is John Merrick and I represent Mr. Thornhill in
16 this matter. I just want to clarify a few matters to make sure
17 that I've understood your position on them. We've talked
18 about this very thorny question of discretion and I take it
19 that it's your position, based on your years of experience, that
20 even the police officer, when it comes time to lay an
21 information, has that area of discretion which may enter into
22 the decision which he or she may make.

23 A. There is a principle of police discretion which always
24 exists and it is most frequently applied at cases of a much
25 lower nature. Everyday on traffic work, you see offences that

1 you decide not to prosecute, and yet the evidence is clear. So
2 it's there, it's an element that a policeman has.

3 Q so that even a police officer, in deciding whether or not to
4 proceed to lay the charge, has that discretionary area which
5 they have to cover in making up their mind.

6 A. That area exists.

7 Q And I take it that in exercising that discretion, they are, in a
8 sense, arriving at the test or the statement that I took down
9 from you at the beginning of your evidence, whether or not it
10 was a case to put before the courts in rough practical terms.

11 A. Yeah.

12 Q Is that a fair way to characterize it?

13 A. Yes, yes.

14 Q And I take it, sir, that you would not dispute the fact that an
15 Attorney General or a Crown prosecuting officer, who is an
16 agent of an Attorney General, also has that same sort of
17 discretionary area.

18 A. Well, as to whether or not he'll prosecute?

19 Q Yes.

20 A. Well, I'm not going to get into that area. I mean the Attorney
21 General certainly has the right to stay a charge, if he feels it's,
22 for whatever reason. And I don't know what tests he should
23 apply. There is something called the public interest. There is
24 something called the administration of justice and the
25 perceived fairness of the administration of justice. Those are

1 sort of things that I should think would be very much in an
2 Attorney General's mind if he decided to stay a charge
3 publicly.

4 Q. So you would not be surprised by or critical of anybody
5 suggesting that an Attorney General or a Crown prosecuting
6 officer, and even deciding whether to recommend or agree
7 with the laying of charges, takes that discretion into account.

8 A. Yeah.

9 Q. Let me put it a little simpler for you, if you're having trouble
10 with the question. Would it be fair to say that even a Crown
11 or an Attorney General, if it's in the Deputy Attorney
12 General's hands or Attorney General's hands, really faces the
13 same sort of question, whether it's a case to put before the
14 courts.

15 A. Whether it's a case to prosecute.

16 Q. Yes.

17 A. And I separate that from laying of a charge.

18 Q. Yes.

19 A. And normally there should be no division between the
20 investigators and the prosecutor on the laying of the charge,
21 but sometimes it does arise. And when it arises, it's
22 important for the police officer to be able to do what he
23 thinks is right. After all, he can be dealt with if he's
24 capricious or foolish or taking silly charges before the courts.
25 The judges aren't at all shy in reminding policemen that

COMMISSIONER SIMMONDS, EXAM. BY MR. MERRICK

1 they're stepping well beyond their normal expected role.

2 11:45 a.m.

3 Q. Now I take it, sir, that based on your knowledge of what was
4 going on at the time it was your understanding that the
5 exercise of the decision within the Force on whether to
6 proceed with this matter was being done on an assessment of
7 the evidence that was available to the Force.

8 A. That was my understanding.

9 Q. Yes. And I take it that you were confident that that
10 assessment was being done by experienced police officers
11 who you had delegated the task to.

12 A. Yes, it was.

13 Q. In fact, you told us that Mr. Venner was a very experienced
14 officer. I haven't heard what his experience is. Can you give
15 me a brief overview of it?

16 A. Venner at one time or another in his career has handled just
17 about every kind of difficult case there is. He's done it in a lot
18 of areas of the country. His young years were in the Province
19 of Alberta where he handled all kinds of, firstly, local crime
20 and then more serious crime. He did a lot of commercial
21 crime work, a lot of drug work. Then he was in the Province
22 of Ontario where he was responsible for the supervision of
23 some very large and major cases there and, you know,
24 controversial cases. And he's a man of great experience and
25 tremendous integrity.

COMMISSIONER SIMMONDS, EXAM. BY MR. MERRICK

1 Q. And at the point in time you would have presumed that
2 notwithstanding that this business of the AG in Nova Scotia
3 may have been in the back of the mind, that Venner and
4 Quintal would have been making their assessment on the
5 evidence as free as possible from that consideration as they
6 were able to do so.

7 A. That would be my judgement but, you know, they are the
8 people that can answer that.

9 Q. And quite so and we've had one of them here and he has
10 answered questions. I'll put it to you, sir, that based on what
11 you've been told and what you've seen to date you have
12 nothing to indicate that that was not, in fact, the case that
13 went on.

14 A. Well what I can say is what I've seen now. I'm rather
15 surprised at the amount of to-ing and fro-ing that was going
16 on between Headquarters and the Division and between the
17 Division and the Department or the Deputy Attorney General.
18 I mean that comes as a bit of a surprise to me because I was
19 unaware that there was that much agony in the case.

20 Q. Yes.

21 A. Although I was aware that there was some, you know,
22 different views and so on. But I'm rather surprised that
23 because of what I read that I didn't become much more
24 directly involved although I must say I was not very
25 available during that critical period of time because of other

COMMISSIONER SIMMONDS, EXAM. BY MR. MERRICK

1 duties that I had. I was away a lot of the time out of Ottawa
2 during December and January which seemed to be two critical
3 months. But also in looking at my diary at that period of time
4 when I was there, I was almost totally tied up with meetings
5 in the Privy Council office over a whole series of difficult
6 issues dealing largely with the security service and the
7 MacDonald Commission and some of the reorganization we
8 were trying to accomplish.

9 Q. I appreciate that you say you're now understanding, perhaps
10 for the first time, the amount of agony that may have been
11 gone through in arriving at this decision, but I don't take it
12 from your evidence that you're suggesting that you're
13 satisfied at this stage that either Venner or Quintal
14 wrongfully were distorted in their decision on the evidence.

15 A. No, I'm quite sure that neither of those men would be
16 improperly influenced. But it is true, as other counsel have
17 suggested, that always is the knowledge in the back of their
18 mind that the Attorney General's already taken a position
19 which is awkward and obviously would make them very
20 cautious. But they're not the kind of men that can be bent
21 because of things said by other people.

22 Q. You were asked about whether further investigation or other
23 rocks had to be overturned...

24 A. Yeah.

25 Q. And whether there were other things to be done. I take it

COMMISSIONER SIMMONDS, EXAM. BY MR. MERRICK

1 you would have assumed from the experience of these
2 officers that they would have addressed themselves to the
3 question of whether there was any further investigation that
4 properly should have been by the Force in relation to any of
5 the charges.

6 A. Well, you know, as I say, I didn't read the file but my
7 conclusion is that the investigators in "H" Division had done a
8 first-class job. They had looked at things and they had
9 turned up a lot of information, some of which is before you
10 now and I think they did a good job. The real question was,
11 what did it establish?

12 Q. Yes. But my point to you is this. You would have expected
13 your review officers to make a determination if they thought,
14 in the face of that first-class job, whether there was anything
15 else to be done.

16 A. I'm sure you're right. If the basis of all that experience, the
17 officer in charge of the Commercial Crime Branch, the Director
18 of Criminal Investigation and the Deputy Commissioner for
19 OPS, if they had said, "Look, why don't you go over here and
20 do this?" Or "Why didn't you do that?" Or "Have you checked
21 this?" Or "Go out and get a search warrant and find that." I
22 mean if they had seen that they would have said, "Go and do
23 it."

24 Q. And that was part of their responsibility to find and report
25 on if they found it.

COMMISSIONER SIMMONDS, EXAM. BY MR. MERRICK

1 A. Yes, that would be included in the review process.

2 Q. And you know nothing to indicate that either of them
3 suggested that there was further investigation that should
4 properly have been carried out.

5 A. No. I go by the record.

6 Q. You were asked about whether the police ever laid charges
7 when charges should not be laid applying whatever test you
8 want to apply. And you said, "Well that's what the review
9 process is for to stop that." And, sir, would you say that
10 perhaps this is what has happened in this case? That the
11 review process looked at this and came up with a different
12 conclusion than the local officers on the scene.

13 A. Well I'm not even sure that everybody at Headquarters or
14 everybody at Division had the same views. But the ultimate
15 decision at the end of the review by the officers that are
16 charged with that responsibility was that it was not a case to
17 proceed with.

18 Q. That's right. And the purpose of that review was to make
19 sure that charges were not laid in cases where they shouldn't
20 be laid.

21 A. Well I suppose that's one of them, one of the purposes. We're
22 looking at the sufficiency of the investigation and everything
23 else, you know.

24 Q. You were confident at the time that notwithstanding the
25 position adopted by the Deputy Attorney General that if your

COMMISSIONER SIMMONDS, EXAM. BY MR. MERRICK

1 officers considered that this was a charge that should have
2 been proceeded with they would have recommended
3 proceeding.

4 A. Yes.

5 Q. And, in fact, sir, I take it on hearing all of the evidence that
6 the decision here as to whether to proceed with charges,
7 ultimately was a decision made by the RCMP.

8 A. Yes.

9 Q. And I take it, sir, that it was made without any sort of
10 political pressure or fear of favour or whatever the oath of
11 office goes on to cover.

12 A. Well there was certainly, I certainly didn't feel any. As has
13 been pointed out by counsel, though, the officers examining it
14 were aware of the position that had been taken by the chief
15 law officer of the Crown, the Attorney General, and had made
16 some public statements and statements, I believe, in the
17 Provincial House. So they could not be unaware of that. But
18 it would not be the basis for their decision.

19 Q. You said at one point in your evidence that, and I forget the
20 exact context in which you used these words that it was
21 important to insure that what the Force did was right and
22 sustainable.

23 A. Yeah.

24 Q. I take it, sir, that on the report that was given to you, when
25 the Force made the ultimate decision as to whether charges

COMMISSIONER SIMMONDS, EXAM. BY MR. MERRICK

1 were to be laid in this case, you were satisfied that that
2 decision was right and sustainable.

3 A. I think it was certainly the right decision and, you know, I
4 don't want to appear at all, you know, flippant because it's a
5 very serious matter, but I remember at the time when
6 Quintal was talking to me about this, I said well, and I think
7 my exact words almost, "Well, I'd sure rather be on the
8 defence side than the Crown side from what you're telling me
9 of this case if we were to proceed because you're showing me
10 some obvious weaknesses."

11 MR. MERRICK

12 Thank you, sir, that's all I've got.

13 CHAIRMAN

14 Mr. Pringle?

15 EXAMINATION BY MR. BISSELL

16 Q. My Lord, I just have one question. Commissioner Simmonds,
17 you've been referred to a number of passages in Mr. Quintal's
18 letter to Chief Superintendent Feagan and I just want to refer
19 you to one more and ask you for your comment as has been
20 done in the past. And that's at page 96 of the book. There
21 you will see a paragraph that begins, "The opposite
22 argument..." and I would ask you to go the second sentence of
23 that paragraph where it says, "It seems very unlikely,
24 however, that a jury of 12, no matter how instructed, would
25 ever unanimously agree that a conviction was appropriate."

COMMISSIONER SIMMONDS, EXAM. BY MR. BISSELL

1 A. Is this page 96?

2 Q. Page 96. You see the paragraph that begins, "The opposite
3 argument..."

4 A. Oh yes, okay.

5 Q. And the second sentence of that paragraph.

6 A. Yes.

7 Q. And I'm going to ask you for your comments. Is that, in
8 terms of an assessment of the case's reasonable chance to
9 succeed?

10 A. I think it's a very valid comment and something to consider.

11 MR. BISSELL

12 Thank you, sir. That's all.

13 RE-EXAMINATION BY MR. ORSBORN

14 Q. Just one, My Lord, very quickly. Commissioner, you
15 mentioned in a question in your reply to Mr. Merrick that you
16 said the Deputy Commissioner, "I'd rather be defence counsel
17 because they are obvious weaknesses here in the case." In
18 your current review of the documentation does it surprise
19 you that these obvious weaknesses were not evidently
20 recognized or at least recorded in the minutes of the review
21 which took place on November the 5th?

22 A. Yeah, I asked a question about those minutes because, when
23 I first saw them the day before yesterday in Ottawa, and I
24 said who prepared them because they're not signed and
25 when, were they prepared relative to the meeting. And I see

COMMISSIONER SIMMONDS, RE-EXAM. BY MR. ORSBORN

1 some notes saying well this is the best recollection I've got of
2 our sort of view and opinion.

3 Q. Did you determine who they were prepared by?

4 A. No. The, Chief Superintendent Docker who had prepared a
5 book for me to look at when I got in from Vienna, did not
6 know and I didn't have time to do any research. I just read
7 the documents and, but, you know...

8 Q. Did it surprise you that these obvious weaknesses were not,
9 did not jump off the page at you?

10 A. I sus-, well, I don't know what should be in the minute. But I
11 would know that coming out of that that certainly Venner and
12 Quintal would have a lot of questions on their mind, I'm sure,
13 and would look at it further. I mean...

14 Q. Thank you.

15 A. But, you know, I can't speak for them.

16 CHAIRMAN

17 Thank you very much, Commissioner Simmonds.

18 WITNESS WITHDREW

19 11:56 a.m. - BREAK

20

21

22

23

24

25

MR. GALE, EXAM. BY MR. SPICER

12:10 p.m.

1 MR. CHAIRMAN

2 Yes, Mr. Spicer?

3 MR. SPICER

4 Thank you, My Lord.

5
6 GORDON GALE, recalled and previously sworn, testified as
7 follows:

8
9 EXAMINATION BY MR. SPICER

10
11 Q. Mr. Gale, if I could ask you to turn to page seven of that
12 volume in front of you? It's a note of April the 10th which
13 indicates reference to one of those Thursday meetings. Have
14 you had an opportunity to review this volume in the last little
15 while in preparation for these hearings?

16 A. Our counsel went over it with me one day.

17 Q. Okay, if I could just direct your attention to this note. It
18 indicates that you brought up, on the third line:

19
20 Mr. Gale introduced a matter of present
21 controversy relating to the Honourable Roland
22 Thornhill and possible contravention of the
Section 110 of the Code.

23 Do you remember doing that?

24 A. I don't have any direct recall of that particular meeting.

25 Q. While you may not have any specific recollection of that

1 meeting, do you remember bringing up with the R.C.M.P. the
2 question of Roland Thornhill?

3 A. I recall it was brought up with the R.C.M.P. Now I...

4 Q. Do you remember bringing it up yourself?

5 A. I may have brought it up myself. I really can't recall this
6 meeting. I know there was a meeting but I can't recall
7 whether I brought it up or they brought it up or it was known
8 that this was going to be brought up at the meeting.

9 Q. The note would seem to indicate that one of the factors that
10 might have caused it to have been brought up was the fact
11 that the Premier had mentioned outside the Legislature that
12 Thornhill had accepted the benefits, financial benefits, while
13 holding office as a Minister. Does that twig your memory at
14 all as to whether or not that was a factor?

15 A. Well, that could certainly be one of the factors for bringing it
16 up because of...

17 Q. Prior to the knowledge or the statement by the Premier that
18 Thornhill had accepted the benefits while holding office, did
19 you have any knowledge of any inquiries being made by the
20 R.C.M.P. concerning Mr. Thornhill?

21 A. No, I don't recall having any knowledge of any inquiries about
22 Mr. Thornhill prior to that time.

23 Q. Prior to that point in time, and that would have been around
24 April or so of 1980.

25 A. Yes.

1 Q. Do you have any recollection of Chief Superintendent Feagan
2 indicating to you that the R.C.M.P. would be proceeding with
3 an investigation and you agreeing with that?

4 A. I don't have any direct recollection at this point in time. I
5 certainly would not... I certainly would have agreed with
6 them to proceed with an investigation.

7 Q. Once the investigation had commenced, do you remember
8 whether or not you would have advised Mr. Coles that that, in
9 fact, was taking place?

10 A. Oh, yes, I would have advised him that that was taking place.

11 Q. Would you have advised anybody else in the Attorney
12 General's Department that it was taking place?

13 A. Mr. Herschorn, undoubtedly.

14 Q. Would you have had any discussions with Mr. Thornhill about
15 it?

16 A. No.

17 Q. If I could ask you to turn over to page 10, there's a note, a
18 letter directed to yourself of May the 21st. I just want to
19 direct your attention to the last paragraph. Page 10.

20 A. Yes.

21 Q. The last couple of sentences of the last paragraph:

22
23 As you know, inquiries made in February were
24 preliminary in nature and were carried out to
25 determine if there was any grounds to the
allegations being circulated at that time.

1 Did you have any knowledge in February that inquiries were
2 being carried out?

3 A. I can't recall any knowledge prior to the April date that any
4 inquiries were being carried out. Now whether they told me
5 in April that such inquiries had been done before, I don't
6 recall either.

7 Q. Once the investigation was under way, did you give any
8 direction to the R.C.M.P. as to whom they were to report to in
9 respect of this investigation?

10 A. Yes, I gave the R.C.M.P. the direction that was given to me by
11 the Deputy Attorney General, that the R.C.M.P. were to report
12 to the Department and that when they had concluded their
13 investigation, that the matter would be reviewed within the
14 Department to determine whether or not there was a basis for
15 prosecution and if there was, that the, a prosecutor would be
16 appointed for that prosecution.

17 Q. Are you able to tell us at what point you gave that direction
18 to the R.C.M.P.?

19 A. Well, I'm not able to tell you whether it was at the meeting
20 with Feagan or MacInnes, or whether it was shortly
21 thereafter.

22 Q. Are you able to tell us whether, if it wasn't at the meeting,
23 whether it was indeed shortly thereafter or some time later, a
24 month later?

25 A. Well, I don't think it would have been anything in the range

1 of a month. I would think that if it was not at that meeting,
2 that it was within a week of that meeting.

3 Q. Did you receive the direction from Mr. Coles to so direct the
4 R.C.M.P. That is, to tell the R.C.M.P. to report directly to Mr.
5 Coles?

6 A. To report directly to the Depart... Yes, I received that direction
7 from Mr. Coles.

8 Q. Did Mr. Coles explain to you at the time why it was that he
9 wanted that done?

10 A. My recollection is that it was because he did not want
11 anything to get out on the matter. That he wanted it treated
12 as... So that information would not get out, that he felt that
13 that would be best done by having it dealt with entirely
14 within the Department as opposed to involving prosecutors.
15 That Mr. Thornhill was a member of government and that it
16 should not have this matter go, become public knowledge
17 unless there was something to it.

18 Q. Did Mr. Coles express any concern to you that if it were left in
19 the hands of the prosecutors that it would become public?

20 A. Not in such words, but he indicated that he wanted it kept
21 entirely within head office, if you will. The reports would
22 come to me but they would be addressed to the Deputy
23 Attorney General. But normally they have attention to my
24 name. So that when the mail came in, I would see the report.

25 Q. Did you also indicate to the R.C.M.P. that in addition to

1 reporting to the Attorney General's office, that they were not
2 to have contact with any prosecutor?

3 A. Well, I thought that I had given them the instructions in such
4 a way as to tell them that we did not want them to lay
5 charges until such time as the investigation had been
6 completed, they had been reviewed by the Deputy Attorney
7 General and a decision made as to whether or not the
8 evidence supported charges. And I thought that implicit in
9 that was that they not go to anyone else outside of the
10 Department. I recall telling them that if they had any
11 questions about the matter, that during the course of their
12 investigation, that they should refer those to the Deputy or to
13 myself and that we would try and deal with those questions.

14 Q. Do you remember telling anybody in the R.C.M.P. explicitly
15 that they were not to have contact with any prosecutors?

16 A. No, I don't recall telling them explicitly that they were not to,
17 but I thought that in the terms that they were told, that that
18 got to preclude them having contact in accordance with what
19 the Deputy Attorney General had wished.

20 Q. If I could just ask you to turn to page 18. This is your letter
21 of July 25th which comes after, I take it, you found out that
22 the R.C.M.P., in fact, had been in contact with Kevin Burke,
23 prosecutor. Correct?

24 A. Yes.

25 Q. About six lines down in that letter, it says:

1 Such action (referring to the contact with Burke)
2 by Inspector Blue is directly contrary to the
3 instructions of the Deputy Attorney General
4 relayed through me to Superintendent Christen,
5 Chief Superintendent Feagan, and Inspector
6 MacInnes.

7 Now do you remember telling each of those individuals that
8 there were to be no discussions with Crown counsel?

9 A. At this point in time, I can't say that I told each of them. I
10 know that it was unusual for me to meet with Superinten...
11 Chief Superintendent Feagan. So I would assume that if I had
12 not told him of the April 10th meeting, that the direction
13 would have been given to Christen or MacInnes.

14 Q. You go on to say:

15 Those instructions were that no charges were to
16 be laid nor was any contact to be made with
17 prosecutors concerning this matter.

18 It looks from this letter, Mr. Gale, that you're indicating to
19 them that you did tell them specifically that there was not to
20 be any contact made with prosecutors. Are you not able to
21 confirm that today?

22 A. Well, I'm not... I can't tell you that I said "Don't contact
23 prosecutors." I can tell you that I told them if they had any
24 questions arising during the course of the investigation, that
25 those questions should be referred to me or to the Deputy
 Attorney General and we would give them whatever

1 assistance or advice they needed at that time. In other
2 words, I thought that it was understood that until they had
3 concluded their prosecutions, that we would act instead of, in
4 the stead of a prosecutor that they might normally contact.

5 Q. Some time later, Mr. Coles issued a press release in respect of
6 this course of action and I just want to take you to that. It's
7 on page 58.

8 A. You'll have to excuse me on my slowness in gathering some of
9 the pages, but some of them have so many page numbers.

10 Q. This one says "Press Release," page 58. Have you got it?

11 A. Yes.

12 Q. Second paragraph:

13
14 Mr. Coles said that although he has not seen the
15 statement attributed to the assistant prosecuting
16 officer, he restates his previous advice that it
17 was (and this is what I want to ask you about)
18 that it was clearly understood policy and
19 accepted practice between the R.C.M.P. and the
20 Attorney General's Department that in matters of
21 major or involved criminal investigations,
22 particularly those involving allegations of so-
23 called commercial crime and fraud, the police
24 investigation into the facts is referred to the
25 Deputy Attorney General or other senior lawyers
in the Department to assess the report and
determine whether the facts support any
allegation of wrongdoing... (It goes on.) If the
facts disclose evidence, then a prosecutor is
assigned.

Did you understand that to be a clearly understood policy and

1 accepted practice between the R.C.M.P. and the A.G.'s office in
2 connection with crimes of the nature referred to in that press
3 release?

4 A. No, I did not. I understood that the normal procedure was
5 that they would have contact with prosecutors during the
6 course of their investigation, if they felt that was necessary.
7 That they, on high profile matters, that their reports would
8 also be submitted to the Department so that we would be
9 kept abreast of what was transpiring on the matter.

10 Q. Indeed, isn't it the case, Mr. Gale, that this was the only case
11 of which you are aware where this practice was followed?
12 That is, that the R.C.M.P. were told not to have contact with
13 the Crown prosecutor and the matter was to go directly to the
14 Attorney General's office.

15 A. Yes, this is the only case in my time there that I'm aware that
16 this has happened.

17 Q. There's a note on page 20 of this volume from Superintendent
18 Christen dated the 5th of August. In the second paragraph,
19 you're referred to there, and I just wanted to ask you about
20 the sentence which says:

21 In view of Mr. Thornhill's position in the
22 provincial government, it would be the wish of
23 the Attorney General to brief the Premier
24 concerning any decision to prosecute.

25 Do you remember advising Superintendent Christen of any

1 desire to brief the Premier?

2 A. I think that I... It was my understanding that the Attorney...
3 The deputy Attorney General, who was acting on the stead of
4 the Attorney General. The Attorney General indicated that he
5 didn't want to become, deal with the matter, that the Deputy
6 Attorney General felt that if charges were going to be laid,
7 that the Attorney General should so be advised and that the
8 Premier, presumably, I understood, the Premier would be
9 advised that the charges were either going to be immediately
10 laid or had been laid.

11 12:25 p.m.

12 Q. And would that be, to your understanding, an advice to the
13 Premier after the decision had been made to go ahead and lay
14 charges?

15 A. Oh, yes.

16 Q. Do you have any knowledge yourself, sir, as to whether or not
17 the Premier was being kept advised as this investigation
18 progressed?

19 A. No, I have no knowledge.

20 Q. No knowledge.

21 A. Of whether he was advised or not.

22 Q. On page 24, it's a letter again to yourself, this time from Chief
23 Superintendent Feagan of September 11th enclosing the RCMP
24 investigative material. Did you review the RCMP
25 investigative material yourself?

1 A. I read the reports when they came in and then simply either
2 passed them on or put them in the file waiting for their final
3 reports.

4 Q. Did you consider at that time that it was any of your
5 responsibility to analyze the RCMP reports with a view to
6 deciding whether or not there was enough evidence to go
7 ahead?

8 A. Not at that particular point in time. I expected that after they
9 made their concluding report in which they would give us
10 some type of summary akin to a brief to a prosecutor on the
11 thing that I would probably, at that time, be involved in
12 reviewing the reports and making some assessment.

13 Q. Chief Superintendent...

14 A. I might add that I did not, I'm not the one that received this
15 letter. I don't know when I saw this letter. That is not my
16 handwriting on it.

17 Q. Not your handwriting where it says, "Received September the
18 11th?"

19 A. No, sir.

20 Q. Did you ever analyze the RCMP reports yourself?

21 A. No, as far as I can recall there was one meeting with Mr. Coles
22 at which Mr. Herschorn was present and there were general
23 discussions on the case. I had not gone into that meeting
24 having gone through the file and reread the reports that I had
25 received or read reports I may not have received.

- 1 Q. On page 25 there's a memo from Mr. Herschorn to yourself.
2 Can you tell us how Mr. Herschorn came to write that memo
3 to you?
- 4 A. I can only tell you that either Mr. Coles asked me to have a
5 memo prepared or he asked Mr. Herschorn to have it
6 prepared. I tend to think he asked Mr. Herschorn and that
7 Mr. Herschorn addressed it to me as being his immediate
8 superior.
- 9 Q. Did you have any understanding of what it was that Mr.
10 Herschorn then was asked to do. What his job was with
11 respect to this memo.
- 12 A. At this point in time I don't know what the purpose of the
13 memo was. I don't know, other than looking at it to say it
14 seems to bring out some of the facts of the case.
- 15 Q. Did you review it at the time?
- 16 A. I think I probably looked at it quickly but I don't know what
17 the purpose of it, I cannot now recall what the purpose of it
18 was so I don't know what attention I gave it other than to
19 send it on to Mr. Coles.
- 20 Q. Do you remember whether at the time you looked at the
21 RCMP reports to see whether or not what Mr. Herschorn was
22 concluding was consistent with a fair reading of the RCMP
23 material?
- 24 A. No, and I don't really have a great recall of any, I don't have
25 any recall of this memo as such which tends to confirm in my

1 mind that it was, as one asks of Martin Herschorn by Mr.
2 Coles and that for some reason Mr. Herschorn directed it to
3 me and that, and since it seems to be something that is
4 abstracting from some of the reports that I just sent it on. I
5 have no conscious recollection of this particular memo.

6 Q. You indicated to us a couple of minutes ago that this was the
7 only case of which you were where the RCMP had been told to
8 report directly the Attorney General's Department and not to
9 have contact with the prosecutor.

10 A. Yes.

11 Q. Was it your view also in this case that it was the Attorney
12 General's office that was going to make a decision as to
13 whether or not a charge was to be laid?

14 A. It was my understanding that a decision would be made as to
15 whether or not there was a case to go forth to the courts.
16 Whether we agreed with the RCMP recommendations or
17 conclusions. That if we thought that there was a case that
18 looked as if it could go forth to the courts that a prosecutor
19 would be assigned and it would then take its normal course
20 on the matter. I have always understood that it's the right of
21 the police to lay a charge. They often consult with the Crown
22 and whether it be a prosecutor or someone else in the Crown.
23 That they retain and it's the right to lay a charge and we
24 retain the right to just continue proceedings by entering a
25 stay here.

1 Q. Did you have any idea from your understanding of what the
2 position in the Attorney General's Department that this case
3 was being treated differently in that respect?

4 A. Well, you know, this case was, I'm not sure I understand your
5 question, quite frankly.

6 Q. Look at page 18, last part of that letter.

7
8 Your investigators are to cease to have contact
9 with the prosecutors concerning this
10 investigation and to concentrate on getting their
11 long-awaited report into the Department
12 summarizing the evidence and the charges
13 proposed...

14 A. Right.

15 Q. "...based on the evidence so that it can be reviewed and then
16 forwarded for prosecution if the evidence supports charges."
17 You're the author of that letter. Was it your intention in
18 writing that letter to be saying to the RCMP, "We're the ones
19 that are going to decide whether or not charges should be laid
20 here."

21 A. It's difficult to answer directly. We, as I recall, we were going
22 to look at the reports to determine whether or not there is,
23 what appeared to be a *prima facie* case. But the use of the
24 word "charges" is probably unfortunate in that it's really, as I
25 understood it, to be a review to determine whether or not the
evidence would support charges, prosecution. I might add
that as it turned out that charges, that it was decided that

1 there was a case that if the charges were laid that we weren't
2 going to prosecute that I had expected that there would be a
3 discussion with the police prior to any final decision being
4 taken on that or a public position being taken.

5 Q. Well what did you mean then, Mr. Gale? You wrote the letter.
6 You said, "Charges proposed based on the evidence so that it
7 can be reviewed and then forwarded for prosecution if the
8 evidence supports charges." What were you trying to tell the
9 RCMP?

10 A. Well that if we agreed that there is a basis for the charges
11 then we would forward it on to arrange for a prosecutor.

12 Q. And if you didn't agree?

13 A. Well that, if we didn't agree then I would have expected that
14 in the normal course of events there would have been some
15 discussion with the RCMP and, to show them why we thought
16 the case would, if charges were laid, that we could not
17 prosecute the case.

18 Q. And in this particular case, are you able to tell us whether or
19 not in your view as the person writing this letter of July 25th
20 to the RCMP, in your view, if there hadn't, if the AG's
21 Department had concluded there wasn't sufficient evidence,
22 did you think it was the right of the AG's Department to say,
23 "We don't think a charge should be laid in this case."

24 A. No, I think, yes, I think the Attorney General's Department
25 has the right to, acting as a legal adviser, to say that we don't

1 think a charge should be laid based on the evidence, the law.
2 But that does not preclude the police from laying a charge if
3 they're of a different mind or different view.

4 Q. And it's your view, I take it, at the end of the day the RCMP
5 or any police force have that right regardless of what the
6 view is of the AG's...

7 A. Yes, that's right.

8 Q. Even though you may not want to go ahead and prosecute.

9 A. That's correct. If they say, if we tell them we don't think
10 there's a basis for it, they say they're going to lay the charges
11 and I think at that point in time it's understood that they are
12 going to lay the charges, they have the right and that there
13 undoubtedly will be a stay of proceedings put in.

14 Q. I just direct your attention to page 77 and 78, in particular,
15 78, is a reference to a conversation with yourself. And the
16 first full paragraph on page 78.

17
18 In speaking with Mr. Gordon Gale, Director of
19 Criminal, on the 14th of November [this is
20 Superintendent Christen] he implied both he and
21 Martin Herschorn supported the Deputy AG's
22 findings and again referred to the Queen v
23 Cooper.

24 Do you have any recollection of this discussion with
25 Superintendent Christen?

A. I remember Superintendent Christen indicating that he, there
was some difficulty with the Attorney General's or the Deputy

1 Attorney General's views on it. I recall that I indicated that it
2 might well be a matter within prosecutorial discretion and
3 that I personally did not have any great difficulty with the
4 Deputy's view, the Deputy's conclusion not to, that charges
5 were not warranted if one wanted to apply prosecutorial
6 discretion to the matter.

7 Q. Was the Deputy AG's conclusion that charges were not
8 warranted one that you agreed with?

9 A. It was one that I was prepared to accept if...

10 Q. That's not what I asked you. I asked you whether or not
11 you agreed with it.

12 A. Yes, I agreed that this was a case where charges need not be
13 laid so, yes, to that extent I agreed with him.

14 Q. If you'd been asked the question yourself *de novo* without
15 having had the benefit of Mr. Coles' view, are you able to tell
16 us your view would have been?

17 A. No, I'm not able to tell you because I had not given the case
18 an in-depth study that seems to be referred to here. There
19 was no in-depth study of this case by me.

20 Q. So when Mr. Coles indicates from time to time that cases were
21 also considered by senior staff members, as he does on page
22 103, is he incorrect in that?

23 12:40 p.m.

24 A. Well, I probably read the Cooper case. I probably read those
25 cases which were annotated either under the section, Martin's

1 Criminal Code or under the section in the Tremere's version,
2 publication. And I probably looked at those cases, but that...
3 But I had not sat down to give it any in-depth consideration
4 and, quite frankly, would not have given those cases a great
5 deal of consideration at that point in time. As I say, there's
6 this one meeting. I'm not sure if there was a general
7 discussion. I had not prepared for it.

8 Q. Did you know what the meeting was to be about when you
9 went to it?

10 A. Oh, when I went to it, but I hadn't any great, as I recall, there
11 was no great advance notice of the matter.

12 Q. Was there any advance notice as to what the meeting was to
13 be about?

14 A. Oh, I think probably told one day that he wanted to meet
15 with us the next day to talk over the Thornhill investigation.

16 Q. Were you ever asked by Mr. Coles to provide an opinion
17 based on your expertise in the criminal law as to whether or
18 not charges were warranted?

19 A. No, I was not asked to provide an opinion. At that particular
20 meeting, various, as I recall, various things were batted back
21 and forth. But, you know, possibilities that might be
22 considered. But I wasn't asked to prepare anything after it
23 nor was I asked to prepare anything before it.

24 Q. Do you know when the meeting took place?

25 A. No, I can't be precise. It would have been after, some time

1 after he had received that letter, that report that I said I was
2 not, had the handwriting received on and I think that was in
3 October.

4 Q. Yes, September.

5 A. It had to be some time between then and...

6 Q. Some time between then and October 29th, I take it.

7 A. Well, certainly probably before October 29th because I think
8 his own opinion is dated the 23rd of October, if I'm not
9 mistaken. So it had to be before that. I think when I left, my
10 understanding of it was that Mr. Coles was going to look at the
11 matter some more and try and reach some conclusions on it.

12 Q. Was it your... Sorry.

13 A. I don't know whether I left with the view that there would be
14 any further meetings, but it was not the type of meeting that
15 I would have thought was conclusive.

16 Q. Was it your experience that Mr. Coles would take it upon
17 himself from time to time to involve himself in a detailed
18 analysis of the criminal law, in the sense of the elements and
19 defences. Is that the sort of thing that he did?

20 A. From time to time, he would do that, yes.

21 Q. Were you satisfied that he was knowledgeable enough in the
22 criminal law to carry out that type of work? I say that in the
23 context that he indicated to us in the last set of hearings that
24 he didn't consider himself to be an expert in criminal law.

25 A. Well, I certainly didn't consider him an expert in criminal law.

1 His background in law had not been in the criminal area
2 whatsoever.

3 Q. Did you not think in that context that you might have borne
4 down on this particular case a little bit and provided him with
5 some advice?

6 A. Mr. Coles, if he wanted to deal with a matter, dealt with it. If
7 he wanted advice, he would ask for it.

8 Q. Do I take it that he didn't ask for advice in this case and he
9 just took it under his own wing?

10 A. Well, after that one general discussion meeting, it appears
11 that he took it under his own wing, because I was never
12 asked for any advice on the matter.

13 Q. At the time that Mr. Coles issued his press release at the end
14 of October, were you consulted at all about that, the
15 correctness of the final conclusion reached by Mr. Coles?

16 A. No, I wasn't consulted about it. I think I found out about it.

17 Q. Did you know about it in advance?

18 A. I may have been told that there was going to be a press
19 release and that he was dealing with the matter. Other than
20 that, I can't really say with any certainty. I don't recall
21 seeing the press release and the opinion at the time and I
22 think it was some time after that I would have seen it.

23 Q. Mr. Coles' opinion to the Attorney General, on page,
24 commencing on page 31 through to page 37. Have you had an
25 opportunity to read through that, Mr. Gale?

1 A. Yes, I have.

2 Q. Did you see it at the time in October of 1980?

3 A. I have no recollection of seeing it at that time. I have an
4 impression in my mind that I saw it some time later, but not
5 at that time. I certainly wasn't, didn't see it before it was
6 issued.

7 Q. I just want to direct your attention to page 36, towards the
8 bottom of the page where he indicates:

9
10 I am of the opinion that the protracted
11 discussions, the nature of the settlement, and the
12 circumstances under which the offer was made
13 on behalf of Mr. Thornhill and accepted by the
14 banks do not disclose evidence of the kind of
intention necessary to constitute any criminal
wrongdoing on the part of either the chartered
banks or Mr. Thornhill.

15 Do you agree with that conclusion?

16 A. Yes, I agree to an extent with it. Intention is not, in a general
17 language sense rather than in a legal sense.

18 Q. Let's go back to page 35 for a minute, third paragraph:

19
20 Similarly, for Mr. Thornhill to be guilty of any
21 offence any Section 110, the offer made on his
22 behalf to settle his indebtedness with the banks
must evidence a criminal intention to either
accept or offer to accept an advantage.

23 Do you agree with that conclusion, based on your
24 understanding of the requirements of Section 110(c)?

25 A. Well...

1 MR. PINK

2 My Lord, I think Mr. Coles yesterday indicated that there
3 was a typo there and the reference there should have been to
4 Section 110(1)a.

5 MR. CHAIRMAN

6 That was in his evidence yesterday?

7 MR. SPICER

8 That was evidence yesterday.

9 Q. What's your understanding of the intention requested by
10 Section 110(c)?

11 A. Simply knowledge that the, that you have accepted something
12 and that the people deal with the government, have some
13 dealings with the government.

14 Q. And that's the extent of it.

15 A. Yes.

16 Q. Did you ever convey that opinion to Mr. Coles?

17 A. I may have during our general discussion afterwards. No, I
18 don't think I have.

19 Q. Did he ever inquire of you as to what you thought was
20 required?

21 A. No.

22 Q. And you don't have any direct recollection as to whether or
23 not you told him, "Look, this is what's required here under
24 110(c)."

25 A. Well, I suppose if we discussed the Thornhill matter at all in

1 that general discussion that I would have said that what's
2 required under 110(c) is such and such.

3 Q. If you go on on page 35, that same paragraph, there's a
4 reference to, there's a quote:

5
6 Any matter of business relating to the
7 government or with a guilty mind 'demand or
8 accept from a person who has dealings with the
9 government an advantage or benefit.'

10 That's directly from 110(c), isn't it?

11 A. Well, I presume it is. I haven't memorized the sections and I
12 haven't compared all them. Well, the quotation parts are,
13 appear, from a quick review, to have come from 110(c).

14 Q. Mr. Gale, let me ask you this, you're a person who has been
15 with the Department for a number of years who has expertise
16 in the Criminal law. You're aware that there's an important
17 matter being dealt with in the Department involving an
18 analysis of the criminal law. You know, as you told us, and
19 indeed, as the Deputy A.G. has told us himself, that he doesn't
20 have... he doesn't consider himself to be an expert in the
21 criminal law. Are you, as a person with that expertise and
22 having been in the Department for a number of years, happy
23 with the way this was handled? Are you happy with the fact
24 that Mr. Coles took it under his wing, rendered the opinion
25 that he did, knowing as you knew that he doesn't have the
expertise in criminal law? Are you content with that?

1 A. No, I'm not content with it. I would have preferred that I or
2 others who might have more knowledge in criminal law on a
3 day-to-day operation review the matter and give our views
4 to it.

5 Q. Did you have a degree of discontent at the time that this was
6 occurring that you weren't being consulted?

7 A. Well, I think that after I found out the conclusion on it, yes,
8 that I... After the general discussion and Mr. Coles said that he
9 would work on the matter, I had assumed that, you know, he
10 would educate himself in the reports and the law on the
11 matter and try to get into a position to come to a conclusion
12 on it. That he would then, any conclusion that he came to,
13 that he would then have it vetted by...

14 Q. But he didn't.

15 A. By someone else who was more experienced in criminal law.

16 Q. Right, and he didn't do that.

17 A. No.

18 MR. SPICER

19 Thank you.

20

21

EXAMINATION BY MR. RUBY

22

23 Q. How long, to your recollection, was that meeting with Mr.
24 Coles and Mr. Herschorn?

25 A. Oh, something of about an hour or, an hour and a half at the

1 very most.

2 Q. And you said that it was a general discussion. What do you
3 pose that to? What other kind of discussion did you have in
4 mind? This is the general.. What... I want to get some content
5 to that.

6 A. We didn't get down to reviewing each facet of the report,
7 what it meant. We didn't get down to reviewing each facet of
8 the case law and how that tied in or did not tie in with it. So
9 it was not an in-depth type of discussion of that nature. It
10 not an analysis of the, an in-depth analysis of the case.

11 Q. You said that some possibilities about the case were batted
12 about. What were the possibilities that were batted about, to
13 your recollection?

14 A. Well, one of the questions was whether, I think was batted
15 about, certainly one that, you know, I had in mind at the time
16 was, or troubled me, I suppose, somewhat at the time was is
17 the law really such that if a person was trying to get out a
18 financial problem of long standing, was this the type of thing
19 that was meant, the section was meant to do. You know the
20 general understanding is that the section is meant to deal
21 with government corruption and was this really corruption
22 and the questions I would have wanted to look into more
23 would have been, was it really a benefit or an advantage to
24 look at a little case law to see how those terms might have
25 been described. Those were sorts of questions that were in

1 my mind. So you can see that it was a very initial type of
2 discussion on the matter.

3 Q. It's the beginning of a process, I think...

4 A. Yes.

5 Q. Was the way in which it was described. You've indicated that
6 you were clearly aware of the mental element required or the
7 intent required under Section 110(1)(c). You knew that at the
8 time.

9 12:55 p.m.

10 A. Yes.

11 Q. And you would have discussed that, as well, in that meeting.
12 It's one of the major issues, I suggest.

13 A. It probably was discussed that, you know, this is the type of
14 case where there isn't that much required. He's got to be
15 conscious.

16 Q. That's right. And that would have, of necessity, been part of
17 the initial discussion. You couldn't have an initial discussion
18 without raising that matter and discussing it.

19 A. Well it probably was discussed but I have no, my memories
20 of the meeting are not detailed. They're general and, as a
21 consequence, somewhat vague.

22 Q. You agree with me it's hard to imagine a discussion of a
23 preliminary nature about this case and this charge that
24 wouldn't raise that issue. It's a pretty basic part of the
25 discussion, that commencement as you've described.

1 A. Yes. I would think it was, would be, it's the sort of thing that
2 could have been raised there and, but I can't now say it was
3 or it wasn't.

4 Q. I appreciate you can't remember that. I'm saying that,
5 suggesting to you that I would be surprised if that was not
6 raised at this kind of initial meeting. Are you saying you
7 agree with you that or you don't agree with that?

8 A. I can only answer you by saying that it is one of the things I
9 think could well have been raised at this meeting.

10 Q. It's one of the things any experienced criminal lawyer looks
11 to at the beginning, agreed?

12 A. Yes.

13 Q. And that's you, you're an experienced criminal lawyer.

14 A. [Well....for payment?].

15 Q. All right. At page 78 there's a reference to the Canadian
16 Distilleries' investigation that I asked someone else about and
17 they didn't know what that was about. Is that also, I don't
18 want to go into it in detail, but is that a political case as well?

19 A. I'm sorry. I didn't catch your last remark.

20 Q. If you look at page 78.

21 A. Yes.

22 Q. The Canadian Distilleries' investigation.

23 A. Right.

24 Q. Is that also a political case?

25 A. It involved, yes, I suppose it's a political case in that it

1 involved political parties.

2 Q. So it appears that there was a rule being established that was
3 applicable in two cases, this one and Canadian Distilleries and
4 both were political cases. Is that fair?

5 A. Well in the Canadian Distillers one, I'm not aware of the police
6 being told that it would not, that the reports were only to
7 come to us and that they were not to have any contact with
8 prosecutors. But certainly the police did come to us with this
9 case and they...

10 Q. Once again, in this case...

11 A. They asked if they should be proceeding with an investigation
12 and they were told to do so by the Attorney General and, but
13 to keep us advised of what was going on.

14 Q. Once again, in this case, if you read the last half of that first
15 complete paragraph on page 78. There's a separate rule being
16 established that in that case the prosecutor is being told not
17 to include any recommendation just the charges in his report
18 to the Deputy Attorney General. It's the Deputy Attorney
19 General on his staff who will decide. That's a rule you're
20 establishing for political cases it looks like, is that so?

21 A. Well, I don't recall any such statement being made to the
22 police, quite frankly. I would be surprised if, at that stage.
23 I don't recall a case being dealt with other than the so-called
24 Thornhill case the way it was and I don't recall this type of
25 direction going to them even though it's stuck in the RCMP

1 letter.

2 Q. You'll agree with me that it would be quite wrong for the
3 Attorney General's office to set up a special rule for political
4 cases but the ordinary methods of investigating and
5 recommending charges were not to be followed but, rather,
6 they were all to be handled in a special way. That would be
7 wrong, would it not?

8 A. Yes, it would be wrong to handle them in a special way since
9 it was a complicated type of case. We, I know we were
10 having difficulties trying to find prosecutors that could be
11 freed up to deal with the case but that was the only special
12 consideration that I'm aware of.

13 Q. And that's irrelevant to the direction that purports to be
14 relayed in this memorandum.

15 A. Yes.

16 MR. RUBY

17 Thank you, sir.

18 EXAMINATION BY MR. PRINGLE

19
20 Q. Just one area area. Mr. Gale, do you remember when you, as
21 you've testified, first spoke to the RCM Police about their not
22 having contact with the prosecutor in this case?

23 A. Well only to the extent that I answered. If it was not at the
24 meeting with...

25 Q. Yes.

1 A. Chief Superintendent Feagan and McInnes that it would have
2 been, I would have thought, within a week of that.

3 Q. Yeah. You wrote on the 25th of July 1980 a memo to Mr.
4 Coles and you say that you had spoke to Inspector McInnes
5 and reminded him that that matter had been discussed with
6 him. I can take you through these pages in some depth but I
7 think to summarize and save time I can tell you that at page
8 12 of the case book that's in front you, there's a memorandum
9 to file by Inspector McInnes saying that he thought that any
10 such advice would be tantamount to obstruction. And that's
11 dated the 24th of July 1980. At page 20 there's a
12 memorandum by Inspector, Superintendent Christen, the
13 Officer in Charge of the Criminal Investigation Officer for the
14 province who says that, and I'll quote this,

15
16 I personally contacted Mr. Gale on the 31st of
17 July, 1980 concerning his statement that he had
18 advised me Crown counsel was not to be
19 contacted on this matter until the Attorney
20 General had been fully apprised of the evidence.
21 I informed Mr Gale I had no recollection of his
22 having done so and I am certain if he had I
23 would have remembered. He acknowledged
24 possibly he had not advised me personally of the
25 Deputy Attorney General's wishes in this regard.

22 Do you recall speaking with Superintendent Christen about
23 that?

24 A. I recall that there was some discussion from Superintendent
25

1 Christen that that...that he wasn't aware of that particular
2 requirement. I had a strong view that either he or McInnes
3 had so been told and in telling one I assumed would go to the
4 other.

5 Q. Well you've seen what McInnes wrote to file about it, "that it
6 was tantamount to obstruction in his opinion." And I can tell
7 you that the, Superintendent Feagan testified here in Volume
8 83, page 14508 that he has no recollection of being told that
9 be you and that the first, in fact, that they really heard about
10 it was the 25th of July 1980 letter from you.

11 A. Well I have testified already as to what I told them. Of how
12 they interpreted that is a question I cannot answer. They'll
13 have to tell you that and you'll have to make your decision on
14 it.

15 Q. Sure. Do you have any recollection specifically of meeting
16 with any of them and telling them that?

17 A. I don't have a specific date and time at this point in time, I
18 have a view that I did tell them that. I further reinforce my
19 view in that I would have written the letter of July 25th...

20 Q. Who did you tell? Which one?

21 A. Well I normally met with Christen.

22 Q. Christen, okay. That's the one you pick.

23 A. And if he was not available his assistant would come over.
24 And at that time it was McInnes.

25 Q. And you do have some recollection of Superintendent

1 Christen contacting you and discussing with you as he set out
2 in page 20 of this book in his memorandum of August the 5th
3 that he called you when he heard about that in July and said
4 that wasn't so?

5 A. I don't recall whether he called me or at some stage that I
6 met with him and he indicated that he didn't really know that
7 that was the way it was to go.

8 Q. All right. Who had experience in prosecuting commercial
9 crime matters in the prosecutors in Halifax at the time, 1980?

10 A. Nobody really.

11 Q. Was Kevin Burke one of them?

12 A. Nobody really.

13 Q. Kevin Burke had done some, hadn't he?

14 A. Kevin Burke was working on the Canadian Distillers' file as I
15 recall.

16 Q. Which is prior to that.

17 A. Which was prior. I'm not sure when the cases went to court.
18 I haven't looked at that.

19 MR. PRINGLE

20 Okay, thank you.

21 CHAIRMAN

22 Mr. Merrick?

23 MR. MERRICK

24 No, My Lord.
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MR. PINK

We have no questions, My Lord.

CHAIRMAN

That's all, thank you, Mr. Gale.

1:05 p.m. - ADJOURNED TO 19 September 1988 - 9:30 a.m.

REPORTER'S CERTIFICATE

I, Margaret E. Graham, Court Reporter, certify that the foregoing is a true and accurate transcript of all the evidence taken by way of recording and reduced to typewritten copy.



Margaret E. Graham

DATED THIS 15 day of ~~September~~ 1988 at Dartmouth, Nova Scotia