

1 4:15 p.m.

2 MR. ORSBORN

3 My Lord, a final witness for today would be Mr. Martin
4 Herschorn who is not unfamiliar to you. I might also advise you
5 that our anticipated schedule of witnesses for tomorrow will be
6 Mr. Gordon Coles, Mr. Gordon Gale and Mr. Joel Pink.

7 MARTIN HERSCHORN, previously sworn, testified as follows:

8 EXAMINATION BY MR. ORSBORN

9 Q. Mr. Herschorn, in late 1983 and into 1984, were you Assistant
10 Director of Criminal or Director of Prosecutions?

11 A. Assistant Director of Criminal at that point.

12 Q. When were you made Director of Prosecutions?

13 A. My best recollection is March of 1986.

14 Q. In late '83, early '84 were you aware of any work being done
15 within the Department of Attorney General with respect to
16 concerns raised by the Auditor General over Mr. MacLean's
17 accounts?

18 A. I don't recall being apprised of the matter. I may have heard
19 through indirect routes, or seen something on someone's desk
20 but I don't ...

21 Q. Did you play any part in the review of that material by the
22 Attorney General's Department?

23 A. In 1983 or '84?

24 Q. Yes.

25 A. No.

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September 30, 1988


To: All Solicitors

From: Margaret Graham

Re: Daily Transcripts

In Volume 84, September 13, page 14811, Line 11, the phrase "drawing any proper conclusions" should read "drawing improper conclusions." In Volume 87, September 19, please insert the attached page 15489A which was inadvertently left out.

I apologize for any inconvenience this has caused.



M. Graham

15489A CHIEF SUPT. MacGIBBON, RE-EXAM. BY MR. MacDONALD

1 carried out an inspection, or an investigation based on the
2 same allegations and following a complete investigation
3 concluded that there was sufficient evidence to lay charges,
4 charges were laid, a conviction was secured.

5 A. You're telling me that I ...

6 Q. Did you not know that?

7 A. I, well I guess I read the papers like most people. That's my
8 only source of information.

9 MR. MacDONALD

10 Okay. Thank you. That's all, thank you.

11 CHAIRMAN

12 Thank you very much, Chief Superintendent MacGibbon.

13 WITNESS WITHDREW

14 BREAK

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- 1 Q. Were you aware subsequent to April 1985 that the RCMP was
2 investigating the matter?
- 3 A. Yes.
- 4 Q. Did you receive copies of the RCMP reports as they came in to
5 the Department?
- 6 A. I believe I would have had access to them, would have
7 probably perused them.
- 8 Q. did you have any involvement in the assignment of a
9 prosecutor to the file?
- 10 A. Not to my recollection, no.
- 11 Q. Do you have any knowledge of how a prosecutor was
12 assigned?
- 13 A. I believe the matter would have been dealt with by Mr.
14 Thomas, the prosecuting officer for Halifax County.
- 15 Q. And would that be the normal course of events?
- 16 A. Yes, unless there had been a direction from the Department
17 that some other route should be followed.
- 18 Q. Did you have any involvement in the drafting of the
19 information which was laid in April '86?
- 20 A. No, I did not.
- 21 Q. If I could ask you to turn to that information which is found
22 at page 47 and following...
- 23 A. Yes.
- 24 Q. In the Exhibit 173, and perhaps I might just ask you to
25 explain to us the counts that are included in there. Am I

1 correct in reading this information that it includes one count
2 of fraud under Section 338(1)(a) of the Code?

3 A. Yes.

4 Q. And that it includes five counts of uttering under 326(1)(b)?

5 A. Yes.

6 Q. And four counts of fraud, forgery under 325(1).

7 A. Yes, that's my recollection.

8 Q. Uttering is the use of documents that you know to be forged,
9 is that right?

10 A. I think that's a fair interpretation of the offence.

11 Q. Okay. And with respect to fraud, do I understand correctly
12 that that is an indictable offence, punishable by up to ten
13 years imprisonment?

14 A. I believe fraud is a dual-character offence and in this case it
15 was charged indictable, yes.

16 Q. Yes. And uttering an indictable offence is up to 14 years?

17 A. That's my recollection, yes.

18 Q. And forgery up to 14 years indictable?

19 A. I believe so.

20 Q. On page 50 and 51, Mr. Herschorn, there is a copy of a letter
21 from Mr. Joel Pink who was defence counsel for Mr. MacLean,
22 writing to Mr. Clair talking about some difficulties with
23 disclosure and mentioning some difficulties with alleged
24 pressure on witnesses. Do you have any knowledge of that
25 and did you have any discussions with Mr. Clair concerning

1 disclosure?

2 A. No.

3 Q. Were you involved in the process of plea bargaining involving
4 Mr. MacLean?

5 A. Yes, I was.

6 Q. I have distributed, My Lords, an exhibit, numbered as 174,
7 which is a three-page exhibit, including two pages policy
8 statements, negotiations with defence counsel concerning plea
9 and sentence and attached to which is a memorandum dated
10 November 22nd, 1985, from Mr. David Thomas to all
11 prosecutors. And I can advise you that this statement is
12 taken from the Crown Prosecutor's manual of the Department
13 of Attorney General.

14 EXIHIBIT 174 - POLICY STATEMENT FROM CROWN PROSECUTOR'S
15 MANAGER OF THE DEPARMTENT OF THE ATTORNEY GENERAL
16 WITH ATTACHMENTS

17 A. If I could just clarify, the first two pages are contained in that
18 memorandum, the third page, Mr. Thomas' memorandum to
19 his staff of November 22nd, 1985, is not contained in...

20 Q. Not contained in the manual.

21 A. No.

22 Q. But is addressed to the subject matter contained in the
23 manual.

24 A. Yes. It is directed to prosecuting, assistant prosecuting
25 officers in Halifax County.

1 Q. As Director of Prosecutions from March 1986 and following, is
2 it your responsibility to assist in the development of policy
3 concerning plea bargaining?

4 A. Yes, it has been since my appointment as Assistant Director of
5 Criminal.

6 Q. And it would, accordingly, then be your responsibility to see
7 that this policy is followed?

8 A. Yes.

9 Q. Could you review for us briefly, Mr. Herschorn, the situations
10 in which plea bargaining may take place? I realize that the
11 three of them are set out here but I'd ask you, if you would,
12 to indicate for us the procedure which your policy requires in
13 each case. And that is, who are approvals required from in
14 each case before a plea bargain may be entered into.

15 A. Well as the memorandum indicates which respect to the first
16 scenario, "An offer from defence counsel to plead his or her
17 client guilty in return for the Crown reducing the charge to a
18 less serious included offence." There the decision making is
19 left with the prosecuting officer for the County. He's given
20 some guidance there. There's an exception to that where the
21 charge is murder and there it is necessary to seek the
22 approval of the Department before a plea of guilty to a less
23 serious included offence of manslaughter is entertained.
24 Basically beyond that type of situation any other
25 arrangement, prosecuting officers are urged to consult with

1 the Head Office of the Department.

2 Q. Over on the second page it says, "Assistant prosecuting
3 officers are advised they must seek the approval of the
4 prosecuting officer prior to concluding any negotiations with
5 defence concerning plea and sentence."

6 A. Yes. That was a, that paragraph constitutes an addition to
7 what was an earlier draft of this policy statement. I can't be
8 precise as to when that would have been inserted but I
9 suspect it would have been shortly before November 22nd,
10 1985 which is the date of the third page, the attachment from
11 Mr. Thomas and I say that because I assume Mr. Thomas'
12 memorandum was prompted by the revised, issuance of the
13 revised statement with that added paragraph.

14 Q. I'm not clear from the policy statement in which situations
15 the prosecutor must go to the Assistant Director or the
16 Director and in which cases he can stop at the prosecuting
17 officer for the County.

18 A. Well, I'd refer you to the third full paragraph on the first
19 page, page 7.20 it's marked, wherein it states, "Any
20 arrangement proposed which goes beyond the Crown agreeing
21 to reduce the charge to a less serious included offence must
22 be approved by the Assistant Director or Director Criminal."
23 The memorandum still retains the previous terminology of
24 positions in the Department, ie. Director of Criminal and
25 Assistant Director of Criminal.

1 Q. Yes. And then when it says on the second page that, "They
2 must seek the approval of the prosecuting officer prior to
3 concluding any negotiations" do they then have to go beyond
4 the prosecuting officer to the Assistant Director or Director
5 Criminal?

6 A. Yes, that was inserted to insure that the prosecuting officer
7 for the County was ultimately responsible for the decisions of
8 his assistants, is advised and concurs with the position that
9 the, which is eventually referred to the Department for final
10 concurrence.

11 Q. And does this policy apply to negotiations strictly on sentence
12 as well as with respect to plea?

13 A. It applies to both. I should add that this policy statement is
14 currently under review. The exercise that has been ongoing
15 with Professor Archibald, Bruce Archibald, and his research
16 work on the role of the Crown Prosecutor, and prior to that
17 point it was recognized that this policy statement is not as
18 complete and as thorough as it should be in covering, in
19 defining what is meant by plea bargaining. Although you'll
20 note that the term "plea bargaining" has been steered away
21 from in the title, it's referred to rather as "Negotiations with
22 Defence Counsel Concerning Plea and Sentence." But what
23 we're talking about is the common prevalence of plea
24 bargaining.

25 Q. Yes.

1 A. And it is a statement which is under review at present.

2 Q. Well is it fair to say, then, that at least in 1986, all plea
3 bargaining required your approval or Mr. Gale's approval?

4 A. In terms of the...

5 Q. Except for matters involving...

6 A. A reduction of a charge.

7 Q. Only an included offence.

8 A. Yes. That's the wording of the statement. I think it's
9 acknowledged, it's acknowledged by myself that, while that
10 may be the policy that in practice there are arrangements
11 which are entered into which, in which there hasn't been that
12 consultation. And it's a matter of not having sufficient staff,
13 really, to adequately monitor that. As I indicated in earlier
14 evidence, in terms of support staff to Director of
15 Prosecutions, there was none beyond a secretary.

16 Q. What are the factors that persuade the Crown to enter into
17 plea bargaining the first place?

18 A. An approach from a defence counsel. A reassessment of the
19 case by the prosecuting officer and a determination that there
20 may be some difficulties in establishing some of the essential
21 elements of the offence that's been charged. But there is a
22 basis for acceptance of a plea to a less serious included
23 offence. That would be one. No other areas, really, spring
24 into mind at the moment. I know there are a number of
25 others...

MR. HERSCHORN, EXAM. BY MR. ORSBORN

1 Q. Are you suggesting that it's not unlike a civil negotiation
2 where you weigh your chances of success?

3 A. No. It's not at all like a civil negotiation.

4 Q. It's not one of the prime factors.

5 A. It's not, the use of the term "bargain" is a misnomer in my
6 perception of the term. It's not a matter of the Crown
7 bargaining away something just for the simple, for the sake of
8 a bargain, for expediency.

9 Q. No, I didn't mean to suggest that. But you indicated that one
10 of the factors that would persuade you to enter into it was
11 some assessment of difficulties in the case.

12 A. Difficulties in the ability of Crown to adduce evidence of all
13 the essential elements of the principal charge.

14 Q. Yes. And the point I was making is that in a civil case you
15 look at your possible chances of winning or losing. If you're
16 100 percent sure that you'd win you might not negotiate at all
17 but given there's always the possibility of losing there's some
18 benefit to negotiation.

19 A. That can be...

20 Q. Is that the same sort of principle?

21 A. That can enter into it at times. It's not always that scenario.

CHAIRMAN

22
23 Would it take into the account the anticipated length of the
24 trial and the cost to the State of going through a preliminary and
25 then...

MR. HERSCHORN, EXAM. BY MR. ORSBORN

1 A. To date, My Lord, in my understanding that has not, those
2 have not been factors which have been taken, we have no
3 direction from the Attorney General to take that type of
4 factor into consideration.

CHAIRMAN

6 So when judges hear pleas from defence counsel about all
7 the money that's been saved to the State, we can ignore it.

8 A. Well it's not ignored, My Lord. Formally there's no direction
9 in that area. In practical terms a prosecutor will be cognizant
10 of that and will put it into the balance, I think, in making his
11 determination.

MR. ORSBORN

13 Q. All right, I'd ask you turn, Mr. Herschorn, to page 52, a letter
14 from defence counsel dated September 2nd, 1986. I would
15 understand this to be the first approach by defence counsel in
16 respect of a negotiation in this matter?

17 A. I cannot answer that. You'd have to ask that of Mr. Clair.

18 Q. The first one we have on the record, thank you. Do I
19 understand that the position being put by defence counsel is
20 that his client would plead guilty to two counts of uttering
21 and in return for that the Crown will withdraw all other
22 charges and will press for a fine rather than for any
23 imprisonment?

24 A. That seems to be the thrust of the letter, yes.

25 Q. And on page 53 Mr. Clair writes you a lengthy letter,

1 September the 8th, 1986, in which he sets out the details of
2 the charges and the estimated amounts of money involved in
3 each one of them. And would I take it that he is sending you
4 this because he is asking for instructions on the matter so that
5 you may be advised?

6 A. Mr., I guess that's a fair statement, yes. He was seeking,
7 rather than, I guess instructions or concurrence with the
8 parameters of an arrangement which had been discussed
9 between the Crown and defence counsel.

10 Q. Had you instructed Mr. Clair to respond directly to you?

11 A. No, I think it just happened in the normal course of events.
12 There was no specific instruction. Mr. Clair knew to whom
13 he should turn in such matters. There's reference in the
14 memoran-, in the policy statement to my position.

15 4:30 p.m.

16 Q. Would it be normal that he would approach you directly
17 rather than going through Mr. Thomas?

18 A. In a case, in this type of case, yes. In fact, virtually in most
19 types of situations where this policy statement came into
20 play and there was a decision to be made by the head office
21 of the department, Mr. Thomas' approach has been to refer
22 the assistant prosecutor directly to myself.

23 Q. I note in his letter that Mr. Clair does not make any
24 recommendations to you. Would you have expected him to
25 provide recommendations?

1 A. I wouldn't use the terms "recommendations." I was...there
2 were certain parameters of which I was aware of the
3 discussions which had ensued to that point between Mr.
4 Pink, defence counsel, and Mr. Clair, and this letter I recall...I
5 think this was a request, this was prompted by a request
6 from me for clarification of an earlier, much more concise
7 letter which Mr. Clair had sent to me, I think sometime after
8 September 2nd, but prior to September 8th. I don't see it
9 included in the material, but...

10 Q. I see.

11 A. My recollection was another letter which he...in which he
12 had outlined in rather brief form the essence of the charges
13 and I went back to him and asked him for an expanded
14 detailing of the evidence in support of the charges.

15 Q. That's a factual review being provided to you.

16 A. Yes.

17 Q. Did you request either Mr. Thomas or Mr. Clair to give you
18 their opinion on the request from defence counsel?

19 A. Yes, not in that structured fashion. There is a flow of
20 dialogue which ensues between myself as the director of
21 prosecutions and the prosecuting officer on the point. We
22 discussed the merits of entertaining the proposal made by
23 the defence counsel.

24 Q. Did they express any opinion to you on what approach
25 should be taken?

- 1 A. I was aware from those discussions, I believe it was...my
2 source of information would have been those discussions
3 that Mr. Clair had had discussions with Mr. Pink concerning
4 a Crown position on sentence which included a fine,
5 included, I think at that point, the Crown seeking restitution,
6 the obligatory under the Code nominal day in jail, sort of
7 thing, to respond to the requirements of, I believe, Section
8 646 (2) and...
- 9 Q. Did either...
- 10 A. I think those were the essential parameters of what was
11 discussed.
- 12 Q. Did either Mr. Thomas or Mr. Clair express to you the view
13 that...
- 14 A. I had no discussions with Mr. Thomas on this matter.
- 15 Q. Did Mr. Clair at any time express the view to you that a fine
16 by itself, leaving aside the one day, would not be an
17 inappropriate sentence to agree to?
- 18 A. I believe...I can't be certain, either because he stated it to
19 me directly or because I was aware of the position he had
20 taken in preliminary discussions with defence counsel, that
21 he was of the view that a fine was not inappropriate here or
22 what...to put it in the positive, was appropriate here.
- 23 Q. I'm sorry.
- 24 A. That a fine was appropriate here.
- 25 Q. Of itself.

1 A. Yes.

2 Q. By itself.

3 A. By itself without a period of incarceration.

4 Q. Uh-hum. After you received the letter from Mr. Clair on
5 page 57, you write a short memorandum to Mr. Giffin
6 enclosing both the information and Mr. Clair's letter.

7 A. Yes.

8 Q. Why would you ask for Mr. Giffin's direction in this case?

9 A. The case was of an obvious profile and it was one that, in
10 my view, warranted the concurrence of the Attorney
11 General and the Deputy Attorney General in the eventual
12 decision taken by the Attorney General's Department.

13 Q. Had you on any previous occasion involving a plea bargain
14 had occasion to approach the Attorney General directly?

15 A. Yes.

16 Q. And can I ask you if that was in any kind of a "political"
17 kind of a case? I'm not looking for the details, but sort of a
18 generic description.

19 A. No, I don't recall there having been any precedent of any
20 sort of "political" case that comes to mind. Certainly in cases
21 of profiles, a murder situation where manslaughter was
22 being discussed, as one example, there would be discussions
23 with the Attorney General.

24 Q. So in your discretion, if a matter is viewed as high profile
25 you may involve the Attorney General with respect to...

1 A. Not necessarily high profile. Anything that I feel in my
2 assessment warrants the concurrence of the Minister, and
3 that is hard to categorize the types of cases that I would
4 want to discuss with him.

5 Q. It's my recollection...

6 A. It may be, if I could just continue for a second, it may be a
7 matter in which the particular crime was notorious in the
8 area and there was public concern about it and I wanted to
9 ensure that he was...I would want to ensure that the
10 Minister of the day was comfortable with the position which
11 his agents would be taking before the courts.

12 Q. Were you instructed to communicate with Mr. Giffin, or was
13 it your initiative?

14 A. No, this would be my initiative, I think.

15 Q. You appeared to have copied Mr. Coles, but there is no
16 reference anywhere to Mr. Gale? Was Mr. Gale involved in
17 this process at all?

18 A. No, he was not.

19 Q. It's my recollection from Mr. Gale's earlier evidence that he
20 was aware of only one situation in which the Attorney
21 General was directly involved in approving a plea bargain. I
22 take it your evidence is contrary to that?

23 A. Sorry, your source was Mr. Gale.

24 Q. My recollection is when Mr. Gale testified previously before
25 this inquiry he did indicate, without giving any details, that

1 he was aware of only one case where the Attorney General
2 had been directly involved in plea bargaining negotiations.

3 A. Well, certainly I can think of examples in murder-
4 manslaughter situations where there have been discussions
5 with the Minister. I would differ with that.

6 Q Did you, in fact, meet with Mr. Giffin to discuss the
7 arrangement?

8 A. Yes, I did, myself and Mr. Coles, the Deputy Attorney
9 General.

10 Q And can you indicate to us the views of Mr. Giffin? Well,
11 before you do that. Did either you or Mr. Coles make any
12 recommendation to Mr. Giffin?

13 A. I think Mr. Coles would have assessed the points which were
14 under discussion and made a...made his position known to
15 the minister. I, as well, would have basically given him my
16 thoughts on the matter.

17 Q Had you previously involved Mr. Coles in discussions
18 concerning plea bargaining?

19 A. On this case.

20 Q In other cases.

21 A. In other cases.

22 Q Yes.

23 A. Yes.

24 Q What position did you express to the Minister?

25 A. I felt that the position being put forward by the prosecuting

1 officer was a...basically a tenable one. I had some concerns
2 which were voiced at the meeting as to whether the Crown's
3 representations ought to include a period of imprisonment,
4 but I...and it's difficult for me to recall the precise views of
5 Mr. Coles or Mr. Giffin at the time as expressed at that
6 meeting, but I think it's...what I can say is I think the
7 consensus was at the end of the day that the position that
8 Mr. Clair had brought forward for consideration was one
9 which we could concur in.

10 Q. And if I understand you correctly, was it Mr. Clair's position
11 that a fine of itself would be acceptable?

12 A. Yes, there is...I'm not sure if it's here, but there is...there is
13 correspondence in the Department's files which concur,
14 which reflect that. I don't see that here.

15 Q. You respond to Mr. Clair on page 58 and 59, and if I read
16 that correctly, you give him two alternatives on plea. One is
17 to plea guilty to the first count of fraud or, alternatively, if
18 the defence doesn't like that, to four counts of uttering, and
19 that you would agree that a fine is appropriate, and the
20 range should be five to ten thousand dollars, and then you
21 speak to an order for restitution.

22 A. Yes.

23 Q. Why would your preference be to a guilty plea on the first
24 count of fraud as opposed to uttering or forgery?

25 A. I think the...my view would be premised on the fact that the

1 fraud count, the first count on the indictment was so-called
2 an umbrella count, it encompassed all the fraudulent or
3 deceitful activity on the part of the accused, and it would
4 have been our preference for a plea to have been entered to
5 that count.

6 Q. Just run that by me again.

7 A. The first count, if I could refer you to the indictment.

8 Q. Uh-hum.

9 A. If you look at page 47.

10 Q. 47.

11 A. The, you'll see the date set out in the first count, the 1st day
12 of January, 1982, through the 1st day of March, 1986.

13 Q. Uh-hum.

14 A. And if you contrast that with the dates set out in the nine
15 counts that follow, you'll see that there's a correlation there,
16 that that encompasses all of the time frames set out in the
17 nine counts that do follow. And that count, in my...it was my
18 understanding, and I think it's reflected in Mr. Clair's report
19 letter to me, is...is to use not uncommon parlance, an
20 umbrella count which encompasses all of the alleged
21 criminal activity. That would have been and was the
22 preferred position at the outset.

23 Q. So there was nothing in your mind about the distinction in a
24 fraud charge as opposed to an uttering or forgery charge.

25 A. No, I would have been comfortable with the...more

1 comfortable actually with the entering of a conviction for
2 fraud here.

3 Q. You would have been more comfortable with a conviction
4 for fraud.

5 A. I think...well, the letter I think states the position of the
6 department as we took it, and...

7 Q. That was your first choice.

8 A. "The department is of the view that a plea of guilty under
9 the first count would be more appropriate than the entering
10 of one or more pleas to individual counts of either uttering
11 or forgery."

12 Q. But did you view it as more appropriate simply because it
13 was an umbrella count or something in the nature of the
14 offence itself?

15 A. No, I think the former because it was an umbrella count.

16 Q. Did you have any concerns about the strength of your case
17 on any of the counts that were in the information?

18 A. I had understood from Mr. Clair that there were concerns in
19 two areas, I think, with respect to one count, and here I'm
20 going from memory. I can't really pin it to the appropriate
21 count. It might have been the one involving Ms. or Miss
22 DeCoste concerns...I believe she was a fairly elderly lady and
23 there was some concerns there. Overall there were concerns
24 and they're alluded in Mr. Clair's ...in the communication
25 from Mr. Pink to Mr. Clair, I think, earlier which we alluded

1 to, of approaches being made by the accused person to
2 witnesses, and there were concerns there as well.

3 Q. What type of concerns?

4 A. Concerns that the Crown's case at a trial would not unfold as
5 per the evidence we had going into the trial.

6 Q. Because approaches had been made or allegedly made to
7 witnesses.

8 A. Yes.

9 Q. It's our understanding that Mr. Clair will testify that he
10 believed he had a good case on all counts. Do you quarrel
11 with that?

12 A. He's in a much better position to give evidence on that point.
13 I didn't address my mind to...

14 Q. But in terms of what he advised you, did he give you any
15 different advice?

16 A. No, not that I recall. It probably would have been
17 consistent with what he...

18 Q. If you have a good case on all counts why do you bargain at
19 all?

20 A. Well, particularly where you have an umbrella count
21 followed by nine counts which are really part and parcel, in
22 a sense components of the umbrella count, it's not...it's not
23 inappropriate nor uncommon for a plea to be entered, either
24 that way or the reverse as was done here, the...you're
25 entering of pleas to four substantive counts with the Crown

1 not offering evidence on the umbrella count.

2 Q. What factors led you to agree that a fine of itself would be
3 appropriate to ask for rather than a period of
4 imprisonment?

5 A. Number one, the position which the prosecuting officer was
6 advancing in his discussions with me on the point. Number
7 two, the absence to my knowledge of any precedent for a
8 MLA being convicted in circumstances such as these.

9 Q. If I can just stop you there.

10 A. Yes.

11 Q. Can you just explain to me in what sense the absence of
12 precedent for a MLA being convicted in circumstances such
13 as these would lead you to chose a fine over imprisonment?

14 A. Well, I guess to expand on that, the generally stated position
15 of the courts that a first offender, as I understood
16 Mr. MacLean to be at this point in time, is generally,
17 receives a sentence which does not include incarceration.

18 Q. A first offender for what types of offences?

19 A. For...for a variety of...I would say generally across the board
20 with certain obvious exceptions.

21 Q. Does that prevent you from asking for it?

22 A. No, it does not, but it's a factor which would weigh in a
23 prosecutor's mind in assessing the case, one factor.

24 Q. Did you have any authority in your jurisdiction to suggest
25 that for first offences involving fraud, theft, forgery or

1 whatever in the amounts of twenty to twenty-five thousand
2 dollars that imprisonment was not appropriate?

3 A. No, I think there was...I think there are some cases, there
4 were some cases at this relevant point in time which...in
5 which incarceration resulted, in which incarceration...

6 Q. In which it did result.
7 4:45 p.m.

8 A. Yes.

9 Q. So were you, in effect, going against the tide by saying that...

10 A. No, I...

11 Q. Will accept the final...

12 A. Not in the face of what I understood to be the position of the
13 prosecutor in the matter and the position that the police, as I
14 understood, were in agreement, a position which I understood
15 the police to be in agreement with the R.C.M.P. investigator, I
16 didn't feel it inappropriate. The prosecutor had the best
17 gauge on viability of that point.

18 Q. Do you normally involve the police in discussions on plea and
19 sentence?

20 A. Yes.

21 Q. Why is that?

22 A. Because to use them as a sounding board, what their opinion.
23 They have a key role to play in the matter and I don't think
24 it's appropriate for the Crown to enter into an arrangement
25 without having consulted with the police.

1 Q. And, to your knowledge, did the police share the view that a
2 fine of itself was appropriate?

3 A. Yes.

4 Q. Was that view expressed to you directly?

5 A. I believe so. I can't state definitively.

6 Q. By whom?

7 A. It would have been by Mr. Clair.

8 Q. But not by the police directly.

9 A. No.

10 Q. In your Department, are there any categories of offences in
11 the nature of fraud in which you have a policy of requesting
12 imprisonment for a first offence?

13 A. Not to my knowledge.

14 Q. I understand that there are cases involving what is called
15 "welfare fraud", where there is possible frauds in the
16 Department of Social Services. Do you have any knowledge of
17 a policy which would support imprisonment on a first offence
18 of welfare fraud?

19 A. No, I do not.

20 Q. You were again... If you turn to page 60, I'm sorry.

21 A. 60?

22 Q. 60, yes. Make that 63. Do I understand that following your
23 letter to Mr. Clair that you were contacted by him and he
24 indicated that Mr. MacLean's defence counsel was prepared to
25 go along with a guilty plea on the four most serious uttering

1 charges. That the range of fine was appropriate and that
2 restitution would not be possible.

3 A. Yes.

4 Q. And did you subsequently discuss that matter with the
5 Attorney General?

6 A. I did.

7 Q. And also with Mr. Coles?

8 A. I have no specific recollection of discussing this particular
9 point with Mr. Coles.

10 Q. And do I understand that the Attorney General had no
11 difficulty with that position?

12 A. No, as the memo indicated, and I'll quote it:

13
14 The Attorney General indicated that with respect
15 to restitution, the province would have other
16 means of recovery of the defrauded monies
17 through access to funds Mr. MacLean would be
18 entitled to from the province; i.e., pension funds
19 or the annual stipend. Hence, the Attorney
20 General was of the view that the entering of a
21 plea of guilty to four counts of uttering with the
22 Crown seeking a fine in the range from five
23 thousand to ten thousand dollars would be
24 appropriate.

21 Q. And that was relayed back to Mr. Clair?

22 A. That's right. I would assume that I was unable to involve the
23 Deputy Attorney General in such discussions because of the
24 urgency of getting a decision to Mr. Clair.

25 Q. In the normal course of events, would you have involved

1 him?

2 A. If time had permitted, I probably would have, yes. It's
3 normal to attempt to involve the Deputy when discussing
4 matters with the Minister, so that the Minister has the benefit
5 of the Deputy's advice.

6 Q. Do I understand then that there was a further request for Mr.
7 Pink to firm up the amount of the fine to five thousand
8 dollars, rather than in the range of five to ten?

9 A. I believe there's a letter which suggests that.

10 Q. That's suggested at the bottom of page 63 at least.

11 A. Yes, it's suggested there. That was related to Mr. Clair. I
12 think Mr. Clair, as the transcript of the sentencing proceeding
13 will indicate, maintained a position before the court, before
14 His Honour Judge Atton, of a minimum five thousand dollar
15 fine. In other words, five thousand dollars as a minimum for
16 the judge's consideration.

17 Q. Was that the instructions that you were given by the
18 Attorney General?

19 A. It wasn't a matter of instructions. We were, this... It was a
20 matter of what the Attorney General would be comfortable
21 with. The end decision was left to the prosecuting officer, Mr.
22 Clair. He had the general parameters of what the Department
23 was comfortable with.

24 Q. Do you know if Mr. Giffin was getting information elsewhere
25 about the availability of funds that the province could hold

1 back from Mr. MacLean?

2 A. I have no particular knowledge of Mr. Giffin's sources of
3 information. Perhaps his own experience as an MLA. I know
4 that Mr. Clair had had discussions with the Speaker's office
5 concerning that aspect of the matter.

6 Q. Mr. Pink tries again on September 15th. It's found at page
7 62, confirming the agreement that in return for a guilty plea
8 on four counts of uttering, an agreed fine of five thousand
9 dollars. Again, I take it that your instructions to the
10 prosecutor was that the five thousand would be a minimum
11 acceptable amount?

12 A. My evidence is that those were not necessarily my
13 instructions. That was, as I understand it, the position which
14 Mr. Clair took with Mr. Pink and that that is reflected in the
15 transcript.

16 Q. Did you give him instructions?

17 A. I don't recall giving specific instructions on that point beyond
18 the earlier...

19 Q. Range of...

20 A. Parameter given, yes.

21 Q. But you do say on page 63, the bottom of page 63, that Mr.
22 Giffin had agreed that a Crown representation to the effect of
23 a firm representation from five thousand dollars was
24 satisfactory.

25 A. Yes, I would have, I assume would have relayed that

1 information to Mr. Clair.

2 Q. And, reasonably speaking, he would take from that that the
3 Attorney General's position was that a five thousand dollar
4 minimum was acceptable.

5 A. Yes.

6 Q. Mr. Pink asks on September 15th, page 62:

7 The Crown will not use the words "fraud",
8 "forgery", or that my client "personally
9 benefitted."

10 Was that request made known to you?

11 A. I don't believe at the time, no. I think I learned of that from
12 reading this letter on subsequent occasions.

13 Q. I think in a reading of the sentencing, sentencing hearing that,
14 generally, Mr. Clair, in fact, acceded to that. He might have
15 used the word "false" a couple of times, but those words
16 "fraud", "forgery," and "personal benefit" were not used.

17 A. I wouldn't characterize that as that, Counsel. I would say that
18 Mr. Clair was constrained by the counts to which the accused
19 person had plead guilty. In a situation where other counts, in
20 other counts, the Crown had offered no evidence. So the
21 Crown is restrained by those factors in terms of what it can
22 state.

23 Q. Well, you're not really restrained from...constrained from
24 using the word "forgery," if you're dealing with an uttering
25 charge, are you?

1 A. No, I don't believe Mr. Clair was so constrained, but I'd have
2 to review the transcript to confirm that.

3 Q. Okay. Looking at this process as a whole, Mr. Herschorn, it
4 appears that the defence pretty well got everything they
5 wanted. The fraud charge was dropped. The range of fine,
6 being suggested as applicable, was settled at the minimum
7 rather than anywhere in between. There was no order for
8 restitution at the request of the defence, and I appreciate
9 there were some other avenues open. And my own reading
10 of the sentencing hearing is that the defence counsel's wish
11 about not using perjorative words was also granted.

12 A. All I can say, Counsel, is that's your characterization. It would
13 not be mine. I would not characterize this as a situation
14 where the defence got everything it wanted. The defence
15 ended up with convictions on four serious criminal offences.

16 Q. When the Crown went into this process, was it the Crown's
17 view that it, the Crown, should get as much as possible from
18 Mr. MacLean, both by way of fine and a sentence?

19 A. No, I don't think that the position a responsible Crown should
20 take in any discussion. It's not a matter of seeking the
21 utmost. It's seeking what's appropriate in the context of the
22 authorities.

23 Q. Well, you can...

24 A. Perhaps in that limited context perhaps, yes, seeking the
25 maximum that the range of sentence as articulated by the

1 Appellate Courts is indicated.

2 Q. Were you concerned with fairness?

3 A. Always concerned with fairness.

4 Q. Fairness to Mr. MacLean?

5 A. Always concerned with fairness to Mr. MacLean, as we were
6 concerned with the fairness with respect to any accused
7 person.

8 Q. We've heard evidence from Mr. Endres when he was dealing
9 with compensation for Mr. Marshall, that he was not
10 concerned with fairness and that his sole approach was to
11 give as little as possible in the compensation negotiations. I
12 appreciate that the two matters are diametrically opposed in
13 what is being dealt with, but in terms of the approach of the
14 Crown, is it fair to say that in philosophy and in principle, that
15 the same approach is not being used?

16 A. Yes, it is fair to say that. The prosecuting officer is under an
17 ethical obligation to be fair to accused persons, to insure that
18 there's a fair trial upon the merits.

19 Q. Is it your view, based on your experience with the Crown's
20 office, Mr. Herschorn, that if John Q. Public, not an MLA, were
21 in the same situation, had the same circumstances as this, that
22 he would be able to get the same deal?

23 A. Yes, it is.

24 Q. A small point on the restitution, my final question. The
25 amounts that Mr. Clair set out in his very early letter to you

1 when he went through the counts and the evidence, the
2 estimated amounts were something over \$28,000. The
3 restitution that was mentioned in the sentencing hearing was
4 21,800 and change. Do you have any knowledge of whether
5 or not that amount changed simply because the calculations
6 had been refined, or whether the amount changed because a
7 number of charges were dropped?

8 A. I can't answer that. That question would be better directed to
9 Mr. Clair. I'm sure he can definitively answer it.

10 MR. ORSBORN

11 Thank you.

12 EXAMINATION BY MR. RUBY

13
14 Q. Mr. Herschorn, if you'll turn with me to page 47, which is the
15 information that was laid. You've referred to Count 1 as an
16 umbrella, or global count.

17 A. Yes, sir.

18 Q. It doesn't seem to me to include the monies charges to the
19 nonexistent company for the nonexistent constituency office,
20 because it particularizes the fraud in terms of travel and
21 living allowances. Do you agree with that?

22 A. I wouldn't, Mr. Ruby. I believed that the meth... the form
23 through which a member submitted his claims for
24 reimbursement of expenses is generally entitled "Statement
25 of Travel and Living Allowance" and it may be used for

1 broader purposes by the MLA. I'm not certain of that, but
2 that's my impression or understanding.

3 Q. Thank you. You've told us that in terms of the approach of
4 the Crown in Nova Scotia to negotiations which, I'll call "plea
5 bargaining" because I'm used to calling it plea bargaining, if
6 you don't mind, that the saving of the state money and court
7 time is not a factor for consideration?

8 A. It's not a factor which appears at present in our policy
9 statement. It's not a factor that I have been requested by the
10 Minister or Deputy to instruct prosecutors on. But, yet, I'm
11 sure it's a factor of which prosecuting officers are cognizant in
12 their everyday practice and influences them in the position
13 they take in plea bargaining discussions.

14 Q. There's nothing wrong with taking that into account then.

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

16 Q. It's a proper part of the plea bargaining process?

17 A. Not as a formal criteria that one would for that reason alone.
18 But as one factor to be considered in a mix of others.

19 Q. Take a look with me at page 75, if you would, which is a
20 passage from the, starting at Line 15, from the Submissions of
21 Crown Counsel, Mr. Clair, in this particular case. Page 75, at
22 Line 15:

23
24 In the Crown's recommendation, I have taken
25 the following factors into consideration. Before
making a recommendation, I asked the court

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1 also. Mr. MacLean has no previous criminal
2 convictions. By my calculations, he is now
3 presently 49 years of age. He has plead guilty
4 before preliminary hearing or trial saving the
5 courts valuable time and money.

6 Would you have wanted that taken into consideration by
7 Crown Counsel, first of all?

8 5:00 p.m.

9 A. I think, Mr. Ruby, that's a different factor. I think it's, there
10 he's alluding, counsel is, the prosecutor is alluding to the
11 factor of what is obvious. That the entering of a plea of guilty
12 does save time and expense to the State. But that's a
13 different factor, I think, from whether the prosecuting officer
14 rests his decision to enter into a plea bargaining arrangement
15 solely on the criteria that an extreme amount of money will
16 be saved or time of the courts...

17 Q. And if I understand you correctly, you're just saying is that
18 should not be the sole criterion, but it is a relevant factor to
19 consider.

20 A. It can be a relevant factor, yes.

21 Q. And as for completeness you see nothing wrong with a judge
22 considering that as part of the mitigation in the case, the
23 saving of the court time.

24 A. No, I ...

25 Q. The bottom of page 86.

A. I think such an eminent text is Ruby on Sentencing may
include that as a factor which has been recognized by the

1 courts as appropriate.

2 Q. I believe it does. I want to come now to your view of the
3 propriety of a fine in the amount of \$5000. First of all, would
4 you agree with me that one of the principles in the assessing
5 the fine is that one tries, through the fine, to approach the
6 amount of the loss suffered. Is that so?

7 A. I think that's generally speaking correct, yes.

8 Q. Here the loss is about \$21,000.

9 A. That's right.

10 Q. Why, then, a fine of 5000? It seems petty and to minimize
11 the seriousness of the offences. Do you not agree?

12 A. No, I wouldn't, I think it's a, I think there are other factors
13 which impact upon, on that point. The loss of reputation, the
14 disgrace which is brought upon an individual having been
15 convicted of a criminal offence. The obvious amount of
16 publicity which accrued, accrues and did accrue in this case,
17 to the accused person which has, and it's an own inherent
18 deterrent factor.

19 Q. These are factors which are relevant to a case like this? This
20 was a high-profile person, I take it. Especially relevant to
21 such a case.

22 A. Yes.

23 Q. You took those into account.

24 A. Yes, I think those would have been part of the thought
25 process. I should, I think I alluded to earlier, I, at a point in

1 my deliberations over this case, had some concerns as to
2 whether the prosecuting officer ought not to include
3 incarceration as part of the position. But as I think I
4 expressed it earlier, the consensus following the meeting with
5 the Attorney General and the Deputy Attorney General and
6 myself was that the position which Mr. Clair was bringing
7 forward was one that we could live with.

8 Q. Did you take into account that this was a case that is certainly
9 akin to, if not a case of breach of trust by the accused?

10 A. Yes, I believe Mr. Clair alluded to that in his sentencing
11 remarks.

12 Q. You'll agree with me that the usual rule in courts at appellate
13 levels all across Canada, and I think Nova Scotia as well, is
14 that in cases of breach of trust, leaving aside the trivial cases,
15 the ordinary result which the courts have required is a period
16 of incarceration, usually a substantial one.

17 A. Well obviously I didn't think that was the constraining factor
18 in this particular set of facts.

19 Q. But you knew that was the rule.

20 A. I can't...

21 Q. In breach of trust cases.

22 A. I can't state that I did at that point in time, no.

23 Q. You didn't know that.

24 A. No. I didn't look at authorities on criminal breach of trust.

25 Q. You didn't look at Ruby on Sentencing.

1 A. Perhaps not at that point in time.

2 Q. Did you do any research preparatory to accepting this offer
3 from Mr. Pink?

4 A. I think I did some. I can't, I wouldn't classify it as extensive.
5 I recall being concerned about the decision in the Province of
6 British Columbia where a former provincial Cabinet minister
7 was convicted, I believe of fraud, in relation to, or perhaps
8 theft it was, the Davis case, I think it was, of theft in relation
9 to exchanging first-class air tickets for economy air tickets
10 and then pocketing the difference. There, if I recall correctly,
11 a monetary penalty was imposed.

12 Q. It was a trivial amount, was it not? I can't remember the
13 exact amount but it was \$100 or something like that?

14 A. I don't recall the amount being that small but I don't believe
15 it was the same amount of money involved as in this case.

16 Q. And there was the explanation in that case that he thought
17 that he had a right to do that.

18 A. I believe, as we have here. Mr. MacLean, perhaps if not in
19 court, certainly out of court attempted to explain away his
20 criminal activity.

21 Q. It's a little hard to explain away as saying, "I've got a right to
22 do it" putting names of somebody else on documents, don't
23 you agree?

24 A. I certainly do.

25 Q. That's not something you could have seriously considered as

1 being mitigating?

2 A. No.

3 Q. Because it's not credible, right?

4 A. Exactly.

5 Q. So the Davis case really is not very apt as a comparison,
6 having that as a differentiating factor.

7 A. No. You asked me the question whether I conducted any
8 research and I responded by referring to that case. I may
9 have, that's the only one that springs into mind. I may have
10 looked at some other authorities.

11 Q. But certainly that one would not have been one which would
12 have held you to the conclusion that a fine was appropriate. It
13 seems to go the opposite way. It's got special factors.

14 A. No, I wouldn't necessarily categorize it that way. I think it
15 was a case of a provincial Cabinet minister, which is the
16 situation here, who was convicted of a criminal offence and
17 received a monetary penalty as opposed to incarceration for
18 a, depending on how you categorize it, a breach of trust-type
19 situation.

20 Q. Why should a Cabinet minister, you keep focusing on the fact
21 that you're looking for a case of a Cabinet minister. Why
22 should a Cabinet minister be treated differently than anybody
23 else who commits a substantial breach of trust?

24 A. Because this particular accused was, in fact, a Cabinet minister
25 and, hence, one looks for authorities. Just as one looks for in

1 other sentencing situations relevant authorities with similarly
2 cast accused.

3 Q. See, I have never done that. If a robbery is committed by a
4 cab driver who's my client I don't look for other cases
5 involving cab driver robbers. I look to other cases involving
6 robbery generally. Don't you work that way?

7 A. No, the factor is the age and circumstances of the accused in
8 the, as I understand, the decisions of our Appeal Court are
9 certainly relevant and are often considered by our Court of
10 Appeal.

11 Q. And aren't they of limited relevance except in terms of
12 reform and rehabilitation is a consideration which, as you, I
13 think, will agree in cases of substantial fraud are not very
14 significant factors.

15 A. That may be a fair characterization, yes.

16 Q. Perhaps we can mark this and give it a number because I'll
17 be using it with other witnesses as well, My Lords.

18 EXHIBIT 175 - PHOTOCOPIES OF CASES APPEARING ON SENTENCE

19 Q. Take a look at Robillard and Charbonneau. You said loss of
20 reputation and disgrace and publicity particularly in the case
21 of somebody who is of high standing in the community, a
22 public figure, is a matter that you considered. If you turn to
23 page 273 the Quebec court quotes a judgement of Madame
24 Justice L'Heureux-Dubé, a 1984 decision and reported then.
25 It was reported in the C.C.C. series at the time you made your

1 decision. Tell me if you agree with what she says about that
2 factor and how to deal with it. On page 273 she says,

3
4 With respect to individual considerations, it is
5 evident that every time a crime is committed by
6 a public figure, a person in authority, a star, etc.,
7 all the factors emphasized to us, or almost all of
8 them, are present: the crime and the
9 punishment are given much more publicity, the
10 shame and the disgrace are therefore amplified,
11 the financial loss resulting from the loss of
12 employment is a function of the higher income.
13 In this sense, it is true that for such a person the
14 punishment appears cruel.

15 Popular wisdom has it that the farther one falls,
16 the more it hurts. More elegantly, the proverb
17 goes: noblesse oblige. Of course, that does not
18 make law, but the law does not ignore common
19 sense and what have been characterized here as
20 mitigating circumstances are rather inevitable
21 consequences to which a person in such
22 circumstances exposes himself, which he must be
23 ready to deal with, and to have been able to
24 appreciate, particularly when there is no
25 question of spontaneity or single offence.

18 That's true here, is it not? No question of spontaneity or
19 single offence?

20 A. The facts didn't indicate that, no.

21 Q. That's right.

22
23 To reason otherwise, in order to be consistent,
24 one would have to adopt the principle that the
25 higher a person is in society or the greater his
function in society, the more he is known and

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1 the lighter should be his sentence and,
2 conversely, the more humble or obscure a
3 person, the more severe should be his sentence.
4 I do not accept this proposition: the scales of
5 justice must not provide for such unequal
6 treatment. Justice must be the same for all,
7 famous or unknown, rich or poor. I would
8 quickly add however that this does not mean,
9 and must not be interpreted as meaning, that the
10 same sentence must be imposed on all persons
11 for the same crime. The jurisprudence has
12 developed certain criteria, both objective and
13 subjective, which should be considered in order
14 that the sentence imposed be fair and
15 appropriate to the crime committed and to the
16 person who committed it. The mere fact that the
17 crime was committed by a rich or a poor person,
18 but a famous or unknown person, with all the
19 consequences flowing therefrom, must not in my
20 view be one of these factors. Rather, they are
21 non-aggravating circumstances.

22 Would you agree with me that you have treated them not as,
23 as she puts it, non-aggravating circumstances, but as
24 mitigating factors?

25 A. To some degree, yes.

Q. To a total degree, yes?

A. No, to some degree.

Q. To the extent that you consider them at all, you accepted
them as mitigating. That's what you told me.

A. Yes.

Q. I take it you did not agree with this view when you made the
decision as to accept the \$5000 fine.

A. No, I have the greatest of respect for the decision which you

1 cite. It is a decision of a Quebec court, not of a court in Nova
2 Scotia and I think there are other authorities which I cannot
3 cite to you off the top of my head, which cast the legal point
4 in slightly different terms.

5 Q. This was not a view you shared in any event.

6 A. Which view is that, sir?

7 Q. The view of Madame Justice L'Heureux-Dubé.

8 A. Not to the same degree, no.

9 Q. All right. Have you heard of any case where fines have been
10 imposed with a substantial amount being the consequence of
11 the crime where, first of all, it was planned and deliberate?
12 Any such case?

13 A. Difficult for me to count, Counsel, to answer your question
14 without researching it. I'm placed at a disadvantage in
15 attempting to answer that question off the top of my head.

16 Q. I understand that you're recalling. Do you recall any such
17 case?

18 A. Planned and, your factors were again, planned and
19 deliberate?

20 Q. Planned and deliberate.

21 A. Substantial amounts of money?

22 Q. Yeah.

23 A. And a resulting monetary penalty as contrasted with
24 imprisonment?

25 Q. Yes.

1 A. Yes I can.

2 Q. Which one would that be?

3 A. In the social welfare fraud area, particularly where female
4 offenders are involved. There are precedents in this province
5 where Crown appeals have resulted from monetary penalties
6 imposed and the Appeal Court has not varied the, has
7 affirmed the decision of the trial court with respect to
8 sentence.

9 Q. Would you agree with me that the rationalization in that case,
10 where that occurs, and assuming it to be the case, is it the
11 welfare mother is pushed to this by circumstances of poverty
12 by virtue of the fact that she's on welfare in the first place.
13 Isn't that the principal rationale behind those cases where
14 non-custodial terms have been imposed in welfare fraud?

15 A. That may be one aspect of it, yes.

16 Q. Is it not the principal one? The sympathy, we'll go for that
17 aspect of the case.

18 A. I don't think the courts express themselves in terms of
19 sympathy for the individual. But that may underlie the
20 decision.

21 Q. You'll agree with me that's not an underlying factor here.

22 A. No. No.

23 Q. This was a rather sophisticated crime involving putting in
24 false documents?

25 A. Yes.

1 Q. Preparing them on machinery and so forth? That's a factor I
2 think you'll agree with me usually militates in favour of a
3 harsher penalty, not a lighter penalty?

4 5:15 p.m.

5 A. Yes, although I don't know whether I'd categorize this activity
6 as sophisticated in the commercial crime sense of
7 sophisticated frauds. Perhaps you'd go the reverse and say
8 it's somewhat unsophisticated in terms of the lack of thought
9 used by the accused person in perpetrating his criminal acts.
10 There were obvious, as events unfolded, there were obvious
11 areas where he was going to be tripped up on, and he was.

12 Q. This was an offence that he committed, not in a private
13 capacity but in his capacity as an MLA?

14 A. Yes.

15 Q. You'll agree with me...

16 A. Yes.

17 Q. That's ordinarily an aggravating factor of a very serious
18 nature?

19 A. Yes, it is.

20 Q. Because of the position which he holds.

21 A. Yes.

22 Q. And they would ordinarily militate in favour of a custodial
23 term.

24 A. Yes, I think that was a factor which initially had me of the
25 view that incarceration ought to be considered. But there was

1 the whole parameter of the case and a particular...of concern
2 to me as I was being informed by the prosecutor was
3 concerns about the viability of the prosecution, premised
4 upon pressures that were being brought to bear upon Crown
5 witnesses.

6 Q. That, I understand, because that's in both our experiences
7 common. If you haven't got anything in hand, you take what
8 you can get, rather than see someone go off and be acquitted
9 completely. That's a decision prosecutors make from time to
10 time in appropriate cases.

11 A. Yes.

12 Q. So if that was the impelling rationale, that would supersede
13 all the others, would it not?

14 A. That was, again, a factor. I can't, I have difficulty categorizing
15 one as opposed to the other as predominant.

16 Q. And did you believe that your case had fallen apart?

17 A. No.

18 Q. Then why would it be taken into consideration?

19 A. Because it's always a concern to the Crown, both pressures
20 being brought to bear on witnesses and also just the anguish
21 or inconvenience which results to witnesses in being
22 subjected to a criminal trial.

23 Q. Yeah, but you don't usually plea bargain cases away in order
24 to avoid difficulty for witnesses.

25 A. No.

1 Q. And when you do, it's in a rare category of cases of sexual
2 assaults and so forth, correct, or incest?

3 A. Yes.

4 Q. The details are particularly humiliating.

5 A. In those situations, yes.

6 Q. Not in this class of case.

7 A. No, although there was perhaps a unique aspect in terms of
8 the proximity of Mr. MacLean to the persons who would be
9 Crown witnesses, the long-standing relationships that had
10 developed between those persons.

11 Q. But if you had no information that the case was falling apart,
12 why would you take that into consideration?

13 A. The prosecuting officer was alluding to it as a factor and that
14 was brought to my attention and I took it into consideration.

15 Q. Was it a factor that there was some risk or that he was
16 worried about it or that he had some reason to believe it was
17 going to fall apart?

18 A. I think he had some worry about it, I would put it in that
19 category.

20 Q. Almost any prosecutor would have a worry. The worries
21 usually don't materialize, correct?

22 A. Well, no, here it went beyond that. I'd refer you to Mr. Pink's
23 correspondence where he acknowledges there had been some
24 pressures brought to bear. I can't find the reference at the
25 moment.

1 Q. I didn't think he had acknowledged it, I thought he had side-
2 stepped it, but that's...

3 A. Again, Mr. Clair is in a much better position than I to speak
4 definitively on the factual underpinning of what you're asking
5 me.

6 Q. Page 50, Mr. Pink in the last paragraph says:

7
8 I appreciate that you are somewhat concerned
9 about my client bringing pressure upon certain
10 witnesses but let me assure you that if, in fact,
11 he does so, the Crown has the remedies available
12 in order to prosecute him further. He has
13 assured me that he will not contact any of the
14 witnesses to be called other than for personal
15 businesses and that these witnesses may be
16 involved with which are of concern to my client.

17 A. I understand Mr. Clair has some evidence which will bear on
18 this. I'd rather not get into it, if I can avoid it.

19 Q. But you had no evidence that any witness had come forward
20 and said, "I'm changing my story" or "I'm not going to testify."

21 A. No.

22 Q. All right. And if you had such a situation, you would no
23 doubt have commissioned a police investigation with a view
24 to laying charges of obstruction of justice, correct?

25 A. Yes.

Q. And that was not done. If you look...

A. Although I should, you know, my role as, I would not be the
predominant... the principal person making that assessment.

1 It would be more so Mr. Clair and, hence, I think the question
2 is better directed to him.

3 Q. But if Mr. Clair had overlooked that for some reason, you
4 would have suggested it because you're an experienced
5 prosecutor.

6 A. Hopefully.

7 Q. Were you familiar in your research with the case of Perry,
8 Dennis Perry? It's an unreported case dated September 12,
9 1979? A decision of the Nova Scotia Court of Appeal and
10 delivered by the Chief Justice?

11 A. Perry? P-E-R-R-Y?

12 Q. Yeah. It's in the pile before you, P-E-R-R-Y.

13 A. Oh, I'm sorry, It is here?

14 Q. Take a look at it and see if you're familiar with it. Perry was
15 charged with a series of frauds and thefts empowered in a
16 company he organized and helped to finance.

17 A. Yes, I am familiar with that one.

18 Q. You're familiar with this case?

19 A. Yes.

20 Q. And he made a false representation to the Federal Business
21 Development Bank. The amounts seem to be about \$36,000.
22 total.

23 A. Yes.

24 Q. So the amount is not dissimilar, though it's somewhat larger
25 than the one we're concerned with.

1 A. Yes, somewhat larger.

2 Q. He is an accountant, he had a good family, he had no assets of
3 substance, and he had exhibited remorse and so forth.

4 A. Mr. Ruby, it was precisely that case which prompted my
5 concerns.

6 Q. And the court took a suspended sentence and said at the top
7 of page three:

8
9 We are unable to see that there is anything
10 exceptional about these offences. They were
11 typical so-called white colour thefts or frauds.
12 They occurred over a considerable period of
13 time, nearly a year and a half. They obviously
involved premeditation. The fraud of the bank,
in particular, required considerable planning and
sophisticated arrangements.

14
15 About the same level of sophistication, I'd suggest, as Mr.
16 MacLean's case? Yes? You'd agree?

17 A. Without knowing more precise terms of the evidence that
18 supported these counts, I can't answer that question.

19 Q. The court went on:

20
21 There is no doubt of this man's otherwise good
22 character and his repentance. This is not a case
23 where rehabilitation or personal deterrence is
24 concerned. We must emphasize, however, that
25 those committing this type of offence and others
tempted to act similarly, must be shown that
they cannot escape severe punishment merely
by repentance or restitution and that a

substantial measure of public deterrence has to be administered.

And, in the event, they sentenced him to one year in jail and one year probation. You were aware of that case?

A. Yes, I was.

Q. And this was the one, you say, which gave you the pause.

A. I think, if I recall my thought processes, I had some involvement with this particular case or file in terms of the appeal which ensued and it was one case that stuck in my mind as being relevant and, hence, prompted me to have some concerns as to whether a position in the Billy Joe MacLean case, which did not include Crown representation for incarceration, was appropriate.

Q. Why didn't you stick with that position? Why did you abandon it?

A. I would say I was persuaded, although I would start at the outset by saying that it was ultimately a decision for the Attorney General to make, having involved him in the decision-making process. The factors such as public embarrassment, loss of reputation, these factors didn't exactly pan out as subsequent events revealed. It was my view that that coupled with the concerns about the possible intimidation of witnesses and the Crown securing convictions on four counts, which represented a large part of the criminal activity which the Crown initially alleged as having been

1 involved here, that that represented an adequate deterrence,
2 an adequate Crown position. It's a position shared by the
3 Attorney General, the Deputy Attorney General, the
4 investigating police officer, and the prosecuting officer who
5 initially recommended the proposal.

6 Q. You come back to those mitigating factors that Madame
7 L'Heureux Dubé discussed, and I don't want to take you
8 through that again, but would you turn to Morrison, because
9 it seems to me that this Nova Scotia Court of Appeal and
10 Morrison had dealt, though more briefly with the same
11 factors with the same effect. Morrison is in the package that
12 is before Your Lordships.

13 A. Yes.

14 Q. It's a decision of October 6th, 1975 and the Chief Justice at
15 page 102, it was again a fraud case. And at page 102, at line
16 15 approximately, speaking about of what the trial judge had
17 said in giving a low sentence as a reason for a low sentence:

18
19 He then concluded that the respondent having
20 lost his family and his profession had suffered
21 enough or almost enough. I do not consider that
22 society has the right nor indeed the need to
23 exact further retribution from this accused. He
24 then directed suspension of sentence for two
25 years. With much reluctance, I must disagree
with the learned judge. I am respectfully of the
opinion he overlooked the inescapable duty of
imposing for a calculated crime of this sort a
sentence which would reflect a substantial

element of deterrence to others.

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Were you familiar with that case?

A. Yes.

Q. And that comment?

A. Not with that comment, in particular, but I am familiar with the case.

Q. Had this been present to your mind, would you agree with me that you would not have given the weight you did to the mitigating factors of loss and suffering and so forth?

A. I can't recall whether it was current in my mind at the time or not. It is a case which involves a lawyer in a position of, obvious position of special duty, as the headnote to the case indicates, and there are some distinguishing factors.

Q. Well, let's just look at that. Page 101, Line 13. This was not a fraud qua lawyer. But in the investment scheme, people trusted him because he was a lawyer. The court said:

Furthermore, even had no client been involved, we must especially denounce crimes of fraud and forgery committed by a member of the bar, a sworn officer of this court. Such a man has a special duty.

Would you not agree that an MLA is in exactly that position?

He has a special duty because of his position?

A. I would agree. However, this authority to which you're referring is, does not refer to an MLA. It refers to a lawyer.

Q. Sure, but you're just agreeing that it should be treated exactly

1 alike.

2 A. I don't dispute the fact that it could have application.

3 Q. It does seem applicable, doesn't it, that language, "special
4 duty"?

5 A. It could have application to this situation, yes.

6 Q. Morrison got two years imprisonment?

7 A. That's my recollection, yes.

8 Q. And, lastly, Your Lordships have been very patient with me,
9 on the question of the plea bargain itself, the substantial part
10 of it, were you familiar with the case of Terrance Power,
11 which was delivered shortly before you made your decision
12 on March 11, 1986 by the Nova Scotia Court of Appeal?

13 A. Yes.

14 Q. You didn't accept what Madame Justice L'Heureux Dubé said
15 because you said it wasn't the law in the Province. But look
16 at page two, middle paragraph.

17 So far as we are aware, four years is the longest
18 sentence imposed in this province against a
19 professional person for offences of this nature.
20 The respondent was a lawyer of some years
21 standing. He had been disbarred by the Nova
22 Scotia Barrister's Society. He has declared
23 bankruptcy. He and his family have
24 undoubtedly suffered much agony and anxiety
25 as a result of the ill-conceived ventures which
 led the respondent to this unhappy fate. As a
 lawyer, he was in a position where much trust
 and confidence were placed in him by those with
 whom he had dealings.

1 Isn't that opposite to this particular case?

2 A. No, with respect, I would say those are comments directed at
3 the legal profession, and not at MLA's. However, I don't
4 dispute the underlying premise that I think you're trying to
5 articulate, that that type of comment, denuded of the
6 references or the context of a lawyer, is applicable and has
7 some bearing on the situation. I don't dispute that.

8 Q. In particular, I'm suggesting to you that the court took into
9 account the submission that he had suffered much agony in
10 his family and anxiety and so forth, but didn't give it any
11 weight. They upheld a four-year sentence. Isn't that so?

12 A. Yes, in Terrance Power, that was the case.

13 Q. So they didn't give any effect to that submission, in the
14 context of a serious fraud. Yes?

15 A. Very serious fraud involving hundreds of thousands of
16 dollars.

17 Q. It must have been very large. They don't have the numbers
18 here, but was it hundreds of thousands?

19 A. My recollection is, if not higher. Many innocent people were
20 defrauded in that situation.

21 Q. A much more serious case than this one, is that fair?

22 A. In dollar terms, yes, and certainly in anguish caused to
23 members of the public and financial loss, much more serious.

24 Q. In terms of the impact of the crime on the public, much more
25 serious.

1 5:30 p.m.

2 A. Well that's, I would say so, yes.

3 Q. Yeah. I'm not suggesting that's not the case. The last area
4 that I want to, oh sorry, one more area before I leave it. You
5 say you took into account the position of the prosecutor and I
6 don't understand that very much. You explain it to me
7 because it seems to me that if he comes and says, "I think the
8 fine is appropriate" the decision ultimately remains for those
9 higher up to make and not for him. Why would you give
10 weight to his position?

11 A. I would always give weight to the opinion of the prosecutor
12 who has carriage of the file. His views on the case are very
13 important, it may be very persuasive to me.

14 Q. You have no idea whether he did any research at all. No idea
15 of the breadth of his experience for this kind of case.

16 A. Well I did, to the contrary. I did have, I was involved in the
17 hiring of Mr. Clair, coming here from the Province of Alberta,
18 where he had been a prosecutor for a considerable period of
19 time. I forget the precise number of years he spent in
20 prosecuting. And once in Nova Scotia he had been involved in
21 commercial crime work and, hence, I was aware of his
22 background.

23 Q. All right.

24 A. And I consider him a very competent, thorough prosecuting
25 officer.

1 Q. I suggest to you that the position stands or falls on its merits.
2 And either what he says persuades you that he's right or it
3 doesn't, but that the fact that he took the position should not
4 be a matter of substance. Do you agree with that?

5 A. I'm not sure I follow you, Mr. Ruby.

6 Q. Let me rephrase it. I may not be as clear as I might and
7 we're late in the day. I'm suggesting to you that when the
8 prosecutor puts forward a position what you should be
9 looking at and considering is the merits of it. But the mere
10 fact that it's his position, that he puts it forward, should not
11 influence you at all. Do you agree with that?

12 A. Yes, as a general statement, I would.

13 Q. And is that what you did in this case or did you also give
14 weight to the fact that it was his position?

15 A. No, I think I would be concerned with the merits and, hence,
16 as I alluded to, my concern about whether the
17 appropriateness of a Crown position which did not include
18 incarceration. I think subsequent events, in particular,
19 another case which came before the courts several years
20 subsequently involving the same prosecuting officer, did not
21 involve a plea bargaining situation. A member of the
22 Legislature wherein a, I believe, one-year jail sentence was
23 imposed. And we all learned from previous experience.

24 Q. Let me ask you to turn with me to page 62. You didn't know,
25 as I understand it, that the Crown had agreed that they would

- 1 not use the words "fraud," "forgery" or "that my client
2 personally benefited."
- 3 A. No, I wasn't aware of Mr. Pink's request in that regard.
- 4 Q. That strikes me, and you tell me if I right or wrong, is an
5 extremely unusual request to be made and to have granted in
6 a case of this sort.
- 7 A. I don't, I can't respond to the first part of your question. It's
8 not something I've seen before. It's not something that I
9 believe Mr. Clair did agree to.
- 10 Q. It would have been wrong to agree to it, would it not?
- 11 A. You're referring to the second paragraph, are you?
- 12 Q. Yes.
- 13 A. "If your submission was to take on ..."
- 14 Q. I'm sorry, the first paragraph. That, "The Crown will not use
15 the words 'fraud', 'forgery' or suggest [is what I think is
16 missing there] that my client personally benefited." That's
17 what I suggest I've never heard of and you've never heard of.
- 18 A. I don't, I find that an inappropriate request and one that the
19 Crown should not accede to.
- 20 Q. You don't like my word "wrong".
- 21 A. No, it implies some guilt perhaps and I don't, I can't ascribe
22 that to Mr. Pink in these circumstances. He's representing his
23 client and putting forth a position to see whether the Crown
24 will buy it. In this case it was not tenable.
- 25 Q. I'm not faulting Mr. Pink. I'm too often on the same side of

MR. HERSCHORN, EXAM. BY MR. RUBY

1 the boat. But what about the Crown here? The Crown's got
2 the duty you spoke of ...

3 A. Yes.

4 Q. To be fair to the accused and to be fair, I suggest, to the
5 public.

6 A. Yes.

7 Q. This doesn't meet that need, does it? The latter need.

8 A. No, it doesn't.

9 Q. So it's wrong to do it, right? The Crown.

10 A. On that test, yes. And I don't believe the Crown Prosecutor in
11 this case did accede to the request as is evidenced by his
12 representations before Judge Atton.

COMMISSIONER EVANS

13
14 Mr. Ruby, no request from a defence counsel is unusual.

MR. RUBY

15
16 Q. If you turn to page 77. I think you'll find in Mr. Clair's
17 submissions and my friends maybe will find it differently
18 that I do that, in fact, he does live up to that bargain and then
19 Mr. Pink, at the bottom of page 77 says,

20
21 The law of uttering a false document does not
22 include the element of fraud and/or personal
23 benefit. My client maintains that at all times in
24 making the claims that he did, that there was no
25 fraud, there was no forging of signatures and
there was no personal benefit gained by him.

Mr. Pink was in a position to make that submission only

MR. HERSCHORN, EXAM. BY MR. RUBY

1 because the Crown had agreed. You'll agree with me?

2 A. Well I alluded to earlier the constraints which I feel the
3 prosecuting officer was under in these circumstances in terms
4 of what reference. He would have been on very dicey ground,
5 I think, to, in a situation where the Crown had just moments
6 before agreed not to offer any evidence with respect to the
7 offence of fraud or forgery to include extensive references to
8 those terms in his sentencing representations on what are
9 other offences.

10 Q. But the fact that no personal benefit was gained is almost
11 always, you'll agree with me...

12 A. That's so ludicrous it doesn't even merit any, there's obvious
13 personal benefit and that point was mentioned by Judge
14 Atton further in his remarks in imposing sentence.

15 Q. I know. But the only reason he ...

16 A. It couldn't even merit prosecutor attention, I don't think.

17 Q. If you turn to page 86 you'll see what the learned trial judge
18 said at line 17...

COMMISSIONER EVANS

19
20 Mr. Pink is going to be called so ...

MR. RUBY

21
22 Yes, he will.

COMMISSIONER EVANS

23
24 Will he be in a position to answer some of these questions
25 you're putting?

1 MR. RUBY

2 I think he will. I'm just pointing out to this man who thinks
3 that it was not a deal that was accepted what the transcript in fact
4 say. I'm almost through that, My Lord.

5 Q. But lastly, I want to point out to you at page 86, line 17, the
6 judge says,

7
8 I might say that I find it rather hard to accept
9 Mr. Pink's explanation, that none of this was
10 done for personal gain. It seems to me that
11 regardless of where the money goes it was being
12 done through the defendant for his own personal
13 purposes.

14 So it does appear that that was open to Mr. Pink only because
15 of the position taken by Crown counsel and not mentioning
16 any of those words or suggesting that there was personal
17 gain.

18 A. No, I can't accept that characterization at all.

19 Q. Can you find any place in the submissions of Crown counsel
20 where he suggests they were a personal gain?

21 A. It's implicit in the factual situation. It's obvious to anyone
22 with common sense, I would suggest. It's certainly obvious to
23 an experienced trial judge as the record confirms.

24 Q. I quite agree. And he clearly was not accepting this as being
25 a factual assessment on these facts.

A. From the quote that you referred the Inquiry to I...

Q. I'm sorry, I just couldn't hear you.

MR. HERSCHORN, EXAM. BY MR. RUBY

1 A. From the quote that you alluded to at page 86 I would agree.

2 MR. RUBY

3 Those are my questions, sir. You've been very patient with
4 me, thank you.

5 CHAIRMAN

6 Mr. Pink?

7 MR. PINK

8 We have no questions.

9 CHAIRMAN

10 I'm sorry...

11 MR. PRINGLE

12 No questions, My Lord.

13 RE-EXAMINATION BY MR. ORSBORN

14 Q. Just one, My Lord. Mr. Herschorn you mentioned that about a
15 year later there was a further case in which, the MacIsaac
16 case, that a term of imprisonment was, in fact, imposed, a
17 one-year term.

18 A. Yes.

19 Q. For a fraud-related...

20 A. I confess I'm a little weak. I believe it was one year. It may
21 have been nine months, but my best recollection is one year.

22 Q. Fraud-related cases? A fraud-related charge?

23 A. Yes.

24 Q. Did you consider that to be a change in the law?

25 A. I wouldn't necessarily characterize it as a change in the law.

MR. HERSCHORN, RE-EXAM. BY MR. ORSBORN

1 It's, I think it was a recognition in that particular case of a,
2 unfortunately it was an increasing problem and a need to
3 resort to a sentence which contained a greater component of
4 deterrence, individual deterrence.

5 Q. There would have been nothing preventing that recognition
6 from taking place in the MacLean case had it, in fact,
7 proceeded to court?

8 A. No.

MR. ORSBORN

9
10 Thank you.

CHAIRMAN

11
12 Thank you very much, Mr. Herschorn. I believe I can say
13 with some degree of certainty that this will be the last time you're
14 going to appear before this Commission.

WITNESS WITHDREW

15
16 5:39 p.m. - ADJOURNED TO 20 SEPTEMBER 1988 - 9:30 a.m.

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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 19 day of September 1988 at Dartmouth, Nova Scotia