

15655 12:40 p.m.

1 Q. You're not aware of that.

2 A. No.

3 MR. RUBY

4 Thank you, sir.

5 MR. PINK

6 We have no questions.

7 CHAIRMAN

8 That's all, thank you very much, Mr. Coles.

9 WITNESS WITHDREW

10 ADJOURNED TO 2:15 p.m.

11 2:20 p.m.

12 MR. SPICER

13 We're indeed, going to start with Mr. Pink, My Lord.

14 JOEL PINK, duly called, testified as follows:

15 EXAMINATION BY MR. SPICER

16 Q. Mr. Pink, you were admitted to practice law in Nova Scotia in
17 1969?

18 A. That's correct.

19 Q. Graduated from Dalhousie.

20 A. That is correct.

21 Q. And you've carried out pretty well exclusively a criminal law
22 practice since that time?

23 A. That is correct.

24 Q. You practiced in all levels of the courts of Nova Scotia.

25 A. That is correct.

1 Q. And I take it over the years you've had occasion to negotiate
2 a fair number of plea bargains.

3 A. I have.

4 Q. Can you give us any idea of how many? Ballpark.

5 A. Oh God, hundreds. Almost every case you're involved in if it's
6 going to be a guilty plea you do some negotiations.

7 Q. And would you have negotiated those sorts of bargains in
8 breach of trust and fraud cases?

9 A. Yes, I have.

10 Q. Can you give us some idea of how many of those cases?

11 A. I would say in the range of close to 50 to 75.

12 Q. You're the author of a book that's published by the C.L.E., the
13 Continuing Legal Education Society, called "Sentencing in the
14 '70s - A Guide for the '80s"?

15 A. That is correct.

16 Q. How did you come to be the author of that, was it a request
17 from C.L.E. or how...

18 A. No, it was back in 1983 or '84, being interested in the
19 sentencing process and I often found that lawyers, in making
20 representations to the courts, were not completely familiar
21 with the guidelines set down by our own Court of Appeal so
22 what I did is I did a complete review of all cases handed
23 down by our Court of Appeal in 1970 and I drew up this
24 paper which I entitled "Sentencing in the '70s - A Guide for
25 the '80s" and it takes all of the sentencing cases up until, I

1 think, 1984, 1985.

2 Q. Okay. So you're pretty familiar with sentencing principles as
3 they're applied in Nova Scotia.

4 A. Yes, I think I am.

5 Q. If you could have a look at page 50 of the volume you have in
6 front of you. You were defence counsel representing Billy Joe
7 MacLean?

8 A. That is correct.

9 Q. On page 50-51 is a letter from yourself sometime after, if you
10 want to flip back to page 47, you'll see the information and
11 the handwritten date of April the 8th, 1986, up at the top of
12 it. Were you retained by Mr. MacLean subsequent to the
13 information being laid?

14 A. Yes, I was.

15 Q. And on April the 28th you're writing to Norm Clair who is the
16 prosecutor in this particular case. And if I could paraphrase
17 your letter, I take it that one of the things you're looking for
18 here is disclosure of information from the Crown.

19 A. At that time the only document that was available to me was
20 the information and because of the nature of the case I felt it
21 was important that I have access to all information, all
22 statements, all receipts that the Crown was relying upon so on
23 April the 28th I made that request of Mr. Clair.

24 Q. At the end of your letter you indicate, "I'd ask you to
25 reconsider my request." Had there been a previous request

1 that hadn't been responded to positively?

2 A. At one time, if I remember correctly, I was advised by Mr.
3 Clair that they would give me the basis of the evidence upon
4 which the charges were laid. They were somewhat concerned
5 because of who my client was and because of some
6 allegations made that there may be or there was some undue
7 pressure being placed on some of the witnesses. So some of
8 the witness' statements were not, in fact, given to me or not
9 made available to me at that time. Eventually when I was
10 able to convince them that that was not going to be the case, I
11 had nothing but the fullest cooperation of the Crown and I did
12 receive full disclosure.

13 Q. And is that what you're adverting to in the third paragraph
14 where you say, "I appreciate that you're somewhat concerned
15 about my client bringing pressure upon certain witnesses."

16 A. That is correct.

17 Q. But the resolution of that issue was that you were eventually
18 provided with everything you asked for?

19 A. That is correct.

20 Q. Are you able to tell me whether or not you were provided
21 with copies of the documents or whether you had to go down
22 and dictate from seen copies at the Crown's office.

23 A. The practice back then was normally that you would have to
24 go to the Crown and dictate, especially the statements. As far
25 as any documents go they gave me copies of the documents.

1 But I can't say for sure, at this stage, whether or not they did
2 not even give me copies of the statements. But if my
3 recollection serves me correct I had to dictate those.

4 Q. And were you satisfied by the end of this disclosure process
5 that you had received access to everything that you'd
6 requested?

7 A. Absolutely.

8 Q. If I could just ask you to turn back for a second to the
9 information and if you could, in general terms, describe to us
10 the nature of the offences that were, Mr. MacLean was being
11 charged with.

12 A. Well the first charge on the information is the blanket clause
13 of the fraud, where he was charged with defrauding the
14 Province of Nova Scotia in an amount in excess of \$1000.

15 Q. That's what we've been referring to as the umbrella charge.

16 A. That's the umbrella charge. Then there were eight, if I
17 remember correctly, nine other charges dealing with
18 knowingly making false documents.

19 Q. Were those of two types, forgery and uttering forged
20 documents?

21 A. That is correct.

22 Q. What's the distinction between those two?

23 A. Well, if you want it in a layman's terms...

24 Q. I do.

25 A. Versus the legal terms, in a layman's term forgery is when

1 you use somebody's signature and you don't have their
2 permission to do so. And when you utter a false document
3 you're uttering a document that you yourself know is not true
4 and you're relying upon someone else to accept the
5 truthfulness of that document.

6 Q. Okay. Page 52. It's a letter dated September 2, 1986, from
7 yourself. And you say, "Further to my several telephone
8 conferences with you..." and you're now, I take it, involved in
9 a plea bargaining situation, is that correct?

10 A. Yes. It was after the, I had full disclosure. After there had
11 been an opinion done and I had formal instructions from Mr.
12 MacLean then did I approach Mr. Clair, and if I'm not
13 mistaken, this was my initial approach where we agreed to
14 plead guilty to two counts of uttering. And as I say in the
15 second paragraph, "In return for my client pleading guilty to
16 these two counts, the Crown will withdraw the other counts
17 plus they will ask for fines which will be discussed between
18 counsel."

19 Q. Was the initial approach made by yourself to the Crown?

20 A. Yes, it was.

21 Q. I take it you had an opportunity to assess the Crown's case.

22 A. Yes, I did.

23 Q. On the charges. Based on your experience and your
24 familiarity with the sentencing principles in Nova Scotia, can
25 you tell us what your conclusion was as to what your client

1 was probably facing in the event that this matter went
2 forward to trial?

3 A. If my client had gone forward to trial, and being familiar with
4 the principles of our, set down by our Court of Appeal, and
5 depending on the amount that the Crown was able to prove,
6 then it was my opinion that my client would probably be
7 facing jail.

8 Q. Do you have a view as to what kind of period of incarceration
9 you'd be looking at?

10 A. Well, once again, using my experience, and that's all I can do,
11 is that for frauds if the amount accepted was in the range of
12 21, 25 or \$26,000...

13 Q. That was the suggestion, wasn't it, on the part of the Crown?
14 It was in that ballpark?

15 A. It was in that ballpark, that is correct.

16 Q. Yes.

17 A. It was my opinion that my client probably would have gone
18 to jail for a year to 18 months.

19 Q. In frauds involving those kinds of amounts, are you able to
20 tell us whether or not it's the general rule that a period of
21 incarceration is what's looked for?

22 A. See, that's a difficult question mainly because each case is
23 based on its own set of facts and there are exceptions to
24 everything.

25 Q. Sure. Forget about the exceptions for the moment, though, if

MR. PINK, EXAM. BY MR. SPICER

1 you had to say is it a general principle that for the most part
2 in fraud cases involving 20, 25, \$30,000.

3 A. If there's a breach of trust, if the amount involved is in the
4 range of 20 to \$25,000, it would be my opinion that that
5 person would probably be going to jail.

6 Q. And that would have been the law as far as you knew in Nova
7 Scotia in 1986.

8 A. Yeah. There are three basic cases that are often referred to.
9 One is known as the Parry case, one is known as the Carter
10 case and the other one known as the Morrison case. Those
11 were the three cases that were referred to prior to Billy Joe.

12 Q. And those are cases that we've been referred to in the last
13 day or so. I believe you had an opportunity to look at Parry
14 in the last few minutes...

15 A. Yes, I have.

16 Q. And the one we're talking about, P-A-R-R-Y. Okay, you
17 approached the Crown on September the 2nd with this
18 proposal.

19 A. I think I should also point out, Mr. Spicer, that even sometime
20 prior to September the 2nd, 1986, I think I was left with the
21 impression that they did not wish Mr. MacLean to go to jail.
22 Now whether or not, I can't remember exactly when my
23 conversations would have been with Mr. Clair on that point.
24 It may have been after September the 2nd or it may have
25 been prior to September the 2nd.

MR. PINK, EXAM. BY MR. SPICER

- 1 Q. Was it your assessment of the strength of this particular case,
2 on the facts of the case as you knew them, that there was a
3 strong likelihood of conviction?
- 4 A. Well it's always been my practice that I never plead anybody
5 guilty unless I can satisfy myself that there would more than
6 likely be, more in likelihood be a conviction, otherwise I
7 would never had pleaded guilty.
- 8 Q. All right. So is the answer to my question then, yes.
- 9 A. That is correct.
- 10 Q. Mr. Clair gets back to you, if I could just ask you to turn to
11 page 60, on September the 12th, some ten days later and at
12 the outset refers to a telephone conversation of today's date.
13 Did you have any contact in the interim, that is between the
14 2nd and the 12th with Mr. Clair?
- 15 A. I could very well have but I do not remember at this stage.
- 16 Q. You had an opportunity to review this letter of the 12th?
- 17 A. Yes, I'm familiar with this letter.
- 18 Q. Can you tell us essentially what's happening here? What's
19 been worked out.
- 20 A. Well, I had made an offer to them whereby we would plead
21 guilty to two counts of uttering. Mr. Clair responds to my
22 request by, in essence, saying that no, they will only accept
23 guilty pleas to four counts and then in the meantime we may
24 have had some discussions about the amount of the fine.
- 25 Q. If I could just stop you there for a second. Was there a

1 suggestion by Mr. Clair before you got the point of saying he
2 would accept pleas to the four uttering counts that what they
3 wanted was a plea to the fraud charge? A plea of guilty to
4 the fraud charge.

5 A. There's no doubt about it that sometime during our discussion
6 Mr. Clair tried to convince me to plead guilty to the fraud
7 charge.

8 Q. Yes.

9 A. But I made it very clear to him from the very outset that we
10 will not plead guilty to any fraud charge.

11 Q. Sorry, you were saying, go ahead. Take us through the letter.

12 A. Then after I made the initial offer of two counts they came
13 back and told me four counts and then in the meantime I'm
14 sure that we had some discussion about the fine. And \$5000,
15 needless to say, I was very happy with.

16 Q. Why were you happy with that?

17 A. Well because of what the sentencing principles were in this
18 province and in light of the fact they were asking for the fine
19 and in light of the fact that I felt a \$5000 fine for this type of
20 offence was most reasonable.

21 Q. Tell us how you got to that? What happened with the
22 discussion about whether or not there was to be
23 imprisonment and how you got from there to the fine.

24 A. See, I don't really think there was ever any discussion with
25 the Crown regarding imprisonment. If my recollection serves

MR. PINK, EXAM. BY MR. SPICER

1 me correct, from the very outset the message was given to me
2 that the Crown was not looking for imprisonment but were
3 looking for a fine.

4 Q. Did that surprise you?

5 A. Well let me say this, is that the fine, I felt, was a very good
6 deal for my client.

7 Q. Let me ask you the question again. Did it surprise you?

8 A. Did it surprise me?

9 Q. Did you consider it to be out of the ordinary?

10 A. In my business I don't think anything surprises me but I was
11 very happy with the suggestion that they made.

12 Q. It wasn't something that you expected to come directly from
13 the Crown without a request?

14 A. Well let me put it this way. When you suggest a fine for the
15 offences for which my client was charged with, I grabbed it
16 once I was satisfied that, in all likelihood, my client would
17 have been found guilty.

18 Q. I think you may have mentioned this a couple of minutes ago.

19 Did you indicate that the Crown had taken the position that
20 they weren't interested in Mr. MacLean going to prison?

21 A. That is correct.

22 2:35 p.m.

23 Q. And that was said to you by Mr. Clair.

24 A. My only dealings I had with anybody, I think, in this whole
25 thing were with Mr. Clair.

MR. PINK, EXAM. BY MR. SPICER

1 Q. All right.

2 A. I may have had the odd social comment with Mr. Herschorn,
3 but we were not really talking about this matter seriously.
4 All my serious negotiations were carried on with Mr. Clair.

5 Q. The five to ten thousand dollar figure, the fine, was there
6 any negotiation about the amount that would be asked for
7 prior to this figure being produced of five to ten thousand
8 dollars?

9 A. I honestly don't remember that. There may have been but I
10 don't think so. I think the first figure was, of course, five
11 thousand dollars. And then when I was able to convince
12 myself that it was a very good deal for my client, I then go
13 back to the Crown and I wanted to go in with a joint
14 recommendation.

15 Q. To the court.

16 A. Right. Not saying that the court would, of course, buy it,
17 but often if there's a joint recommendation between Crown
18 and defence and you know your judges well enough, a lot of
19 judges, of course, will accept the joint recommendation of
20 both counsel. And that's what happened. So after they gave
21 me the range, I, of course, go back to the Crown and suggest
22 that let's go in with a joint recommendation on four counts
23 with a total fine of five thousand dollars.

24 Q. And at this stage of the game, where are we with respect to
25 the question of restitution on September the 12th?

MR. PINK, EXAM. BY MR. SPICER

1 A. There was never any question that we were going to make
2 restitution.

3 Q. Formally through the court proceeding.

4 A. As you can see from my comments during the sentencing
5 process, our position was is that we were legally entitled to
6 the money. How we obtained the money was wrong. But
7 my client, as I said in open court, felt that he was legally
8 entitled to that money. So there was a dispute between the
9 province and my client as to the amount of restitution.

10 Q. So there was never agreement on the amount involved?

11 A. There was never an agreement on the amount involved.

12 Q. I notice in the sentencing representations, and you don't
13 need to turn to them for the moment, but for others'
14 information, at page 74, there is reference to the total
15 overpayment as calculated by the Auditor General with
16 respect to the four counts he pleaded guilty to as being
17 twenty-one thousand, seven ninety-eight fifty-five.

18 A. That is correct.

19 Q. I take it that that's the Crown's position. That was never
20 agreed to by yourself.

21 A. That was never agreed to by ourselves, and I think the case
22 law is very clear that when it comes to restitution and there
23 is a dispute between the parties, that the criminal courts
24 don't become involved in the civil aspects and they leave it
25 up to the civil courts to make that determination. So

MR. PINK, EXAM. BY MR. SPICER

1 therefore, that's the reason why the Crown did not get an
2 order for restitution.

3 Q. And it wasn't part of the package as far as you were
4 concerned.

5 A. It was not a part of the package.

6 Q. You get back to Mr. Clair on September the 15th, it's on page
7 62, and you raise this matter that you just spoke of, that is,
8 an agreed fine of five thousand dollars. Was that so that
9 you would be able to go in with your joint representation to
10 Judge Atton?

11 A. That is correct.

12 Q. Okay. Are you able to tell us whether or not that amount
13 was agreed to by the Crown?

14 A. I think what I was able to do with Mr. Clair in the end was
15 that he agreed that he would ask for a minimum fine of five
16 thousand dollars. He would forget about the ten thousand
17 dollars. And my position was is that I was going to go in
18 and make the recommendation of five thousand dollars.

19 Q. You've been around the courts for quite awhile, Mr. Pink.
20 What does it mean, as far as you know, when somebody
21 goes in and says "We'd like a minimum fine of five thousand
22 dollars"?

23 A. Well.

24 Q. What do you take that to mean?

25 A. See you always have to remember that even though defence

MR. PINK, EXAM, BY MR. SPICER

1 counsel and Crown counsel agree as to what the sentence
2 should be, the court is not bound by our recommendations.

3 Q. Sure.

4 A. And I asked for a fine of five thousand dollars, the Crown
5 asked for a minimum fine, which is within that range of five
6 thousand dollars. And in this particular case, after our
7 representations, Judge Atton gave six thousand dollars.

8 Q. In your letter of September the 15th you also make the
9 request that the Crown will not use the words "fraud,
10 forgery or that my client personally benefited." Was that an
11 unusual request?

12 A. It's an unusual request, but if I can obtain something that
13 my client felt it was to his benefit I would try to obtain it. I
14 do not think that we finally agreed upon that, but once again
15 upon reading the representations made by Mr. Clair at the
16 sentencing hearing, "fraud, forgery or that my..." Well, in
17 fact, he said that my client did personally benefit by
18 twenty-one thousand dollars. So I don't think we really
19 agreed on that.

20 Q. But that wouldn't be the sort of request that you would
21 normally make of Crown counsel, even in this sort of case.

22 A. I think it's because of the personality that you're dealing
23 with here. Mr. MacLean, as you know, was a public figure
24 who was still a member of the provincial Legislature. When
25 we went in there, he had not had ...he had no plans on

MR. PINK, EXAM. BY MR. SPICER

1 resigning from his position, as he made it very clear
2 thereafter, and he felt for his own career that if you could
3 convince the electorate that there was not fraud involved or
4 forgery involved or that he did not personally benefit, which
5 were in fact my representations to the court, that that would
6 go along to help him. I tried to get the Crown to agree to it
7 and they may very well have agreed partially to it, but not
8 in total.

9 Q. Could you characterize for us the approach that the Crown
10 was taking with respect to this plea bargaining?

11 A. What my impressions were is that they were completely
12 willing to talk to me, to discuss with me, and to settle the
13 matter if they could possibly settle it in return for getting
14 guilty pleas from my client, Billy Joe MacLean.

15 Q. Are you able to differentiate that from other circumstances
16 or is that a not uncommon way for the Crown to deal in
17 Nova Scotia?

18 A. I think in the practise of criminal law, plea bargaining has
19 its place and it's a very important part of the criminal
20 justice system, otherwise our courts would be bogged down
21 much worse than they are now. It is not unusual for the
22 defence and Crown to get together to discuss a joint
23 recommendation on the sentence.

24 Q. Are you able to tell us, from your own experience, whether
25 or not there are some circumstances where the Crown is

MR. PINK, EXAM. BY MR. SPICER

1 more likely to want to deal than in other cases? In other
2 words, the sorts of factors that will make them feel
3 conducive towards that sort of arrangement.

4 A. It's been my experience that when you're going to plea
5 bargain that you only can plea bargain from the Crown's
6 weaknesses and your strength. And that is normally the
7 case. I cannot necessarily say that it happened in this case.

8 Q. Why not?

9 A. My own opinion was that the Crown had a very strong case
10 against my client.

11 Q. And there weren't many strengths that you could rely on, I
12 take it, the converse of that.

13 A. That is correct.

14 Q. So having said that then, would this be...accepting that as the
15 case, that the Crown had a strong case, would this then be in
16 your experience an unusual situation for the Crown to be as
17 ready to deal as you have indicated they were?

18 A. I think if there were any surprises it was the fact the Crown
19 was willing to give me four counts of uttering rather than
20 pushing me a little further and going for the fraud charge.
21 Now it was made very clear to them that my client was not
22 guilty of fraud.

23 Q. Yes.

24 A. And that my client was not guilty of forgery. So therefore,
25 the only charges left were, of course, the uttering.

MR. PINK, EXAM, BY MR. SPICER

1 Q. And I know you don't like the word "surprise," but I can't
2 think of another one for the moment. Were you surprised at
3 all that there was no suggestion that your client ought to
4 serve some time?

5 A. I think in reflection, the answer to that question would
6 probably be yes. But time was never mentioned to me.

7 Q. Right.

8 A. It was never a consideration.

9 Q. But thinking back on it now.

10 A. That's right.

11 Q. After the arrangement was worked out, Mr. Pink, the
12 sentencing hearing, I believe, was on October the 3rd and it
13 was heard before Judge Atton.

14 A. Uh-hum.

15 Q. Did you and Mr. Clair see Judge Atton prior to the hearing?

16 A. If I remember correctly October 3 was the date on which
17 the preliminary hearing was suppose to commence.

18 Q. Right.

19 A. And prior to the preliminary hearing commencing, Mr.
20 Atton...Mr. Clair and myself went in to see Judge Atton at
21 which time we told him what, in fact, was taking place.
22 And it was during that meeting with Judge Atton the
23 sentence was also mentioned that there would be a joint
24 recommendation. But, of course, in talking to a judge about
25 any agreement between counsel, you make it very clear that

MR. PINK, EXAM. BY MR. SPICER

1 the judge is not bound by any suggestions that may be made
2 by counsel.

3 Q. And there's nothing particularly unusual about going in and
4 advising the judge of what's going on, is there?

5 A. Well, to advise a judge what's going on is not unusual.

6 Q. Yes.

7 A. You've got to be very careful in this business as to who you
8 deal with in going in and telling the judge what the
9 sentence...the joint recommendation on the sentence is going
10 to be.

11 Q. It wasn't out of the ordinary to do that with Judge Atton, is
12 that what you're saying?

13 A. Well, I felt that we could go in and discuss the matter with
14 Judge Atton and he will not be offended. Some judges are
15 offended.

16 Q. Okay.

COMMISSIONER EVANS

17
18 Did you indicate that there was going to be a joint
19 submission?

MR. PINK

20
21 I'm almost sure we did, My Lord.

COMMISSIONER EVANS

22
23 That you did not.

MR. PINK

24
25 That we did.

MR. PINK, EXAM. BY MR. SPICER

1 COMMISSIONER EVANS

2 Because why I'm asking, you had indicated that the joint
3 submission was going to be five thousand, if there was going
4 to be a joint submission.

5 MR. PINK

6 That is correct. It was a five thousand dollar joint
7 submission, and I think what...

8 COMMISSIONER EVANS

9 You wound up with six.

10 MR. PINK

11 I wound up with six. I was happy with six.

12 COMMISSIONER EVANS

13 I'm sure you were.

14 2:45 p.m.

15 MR. RUBY

16 Q. And is it a joint submission if one party is saying a
17 minimum fine of five thousand and the other person is
18 saying five thousand?

19 A. Yeah, I think what we were basically agreeing with is that
20 there should not be jail, there would be a fine in the range
21 of \$5,000.

22 Q. I see. If you're able to, I'd like you to take the situation of
23 breach of trust, arguably, the kind of dollar amounts that
24 the Crown was speaking of, those circumstances occurring to
25 a person other than a Cabinet Minister, in other words,

1 somebody off the street. Are you able to offer us any view
2 as to whether or not, based on your experience, that you
3 think you could have got a similar deal for Joe Blow as
4 opposed to Billy Joe?

5 A. Well, if I can look at it post-Billy Joe and prior Billy Joe.
6 Prior to the Billy Joe MacLean case, and I've got to emphasize
7 the fact that there are always exceptions. I mean if, for
8 example, you have a female offender who is the mother of
9 three children who may be a bank teller and who may have
10 stolen ten, fifteen thousand dollars, and there's been
11 restitution, you may be able to convince the Court that that
12 person should not go to jail.

13 Q. All right. Let me add another fact to it. This is a
14 businessman.

15 A. Okay. If you're going to use the fact of a businessman and
16 there's nothing else unusual, it's been my experience, prior
17 to Billy Joe, that that person would go to jail.

18 Q. Are you saying that Billy Joe changed the way you look at
19 these cases?

20 A. Up until recently, the answer is yes.

21 Q. Up until MacIsaac.

22 A. Well, there's MacIsaac, there's a couple of other recent
23 decisions from our Court of Appeal that somehow had to get
24 around Billy Joe.

25 Q. Yes.

MR. PINK, EXAM. BY MR. SPICER

1 A. Because after the sentence on Billy Joe, it was the normal
2 routine of defence counsel, when dealing with people who
3 have stolen or been charged with breach of trust up in the
4 range of fifteen, twenty thousand dollars saying, "Look, Billy
5 Joe didn't go to jail, so how can you send my client to jail?"

6 Q. Were those sorts of representations successful for awhile?

7 A. For awhile.

8 Q. Are you telling us that in your view the disposition of the
9 Billy Joe case changed what you understood to be the
10 existing law in Nova Scotia?

11 A. I'm not so sure if it changed the law as it gave defence
12 counsel an added...an argument whereby they could argue
13 that their client shouldn't go to jail.

MR. SPICER

14 Just a moment, please. Thanks very much.
15
16

EXAMINATION BY MR. RUBY

17
18 Q. Mr. Pink, one of the things you said that I want to ask you
19 some more about is that you said with regard to part of the
20 disclosure you had to dictate statements. Explain what
21 that's about?

22 A. It was the practise of the Crown not to give us the use of
23 their Xerox machines or photocopying machines. So what
24 you normally do is they say, "Yes, you can have a look at the
25 statement," but you would have to dictate it into your

1 dictating...dictation machine and take it back to your office
2 and have your secretary type it up.

3 Q. Why is that?

4 A. I'm not quite sure, because...it may very well be they did
5 not have the equipment or they did not want to waste the
6 time of their secretaries in doing that for us. But things
7 have definitely changed since the start of this Commission.
8 We now get everything.

9 Q. I wouldn't want to suggest this Commission was having a
10 pre-dispositioned impact on anything, but I'm glad you now
11 get disclosure.

12 A. No. Disclosure, Mr. Ruby, in this province and there's been a
13 lot of talk about disclosure. And not for me to comment on
14 what His Honour Judge Cacchione said, all I can do is give
15 you my own personal experience with disclosure. And that
16 is, I have never had any difficulty in getting from the Crown
17 material that I want. One of the problems that the Crown
18 was faced with is that they were not getting the statements
19 that the police had in their hands. So therefore, they couldn't
20 give me full disclosure until the last moment.

21 Q. Is the experience that you've had the same as my own, that
22 there are some lawyers who get disclosure easily and some
23 lawyers who just don't get it?

24 A. I can't disagree with that.

25 Q. You said with regard to page 62, if you'd turn to it, that the

1 Crown did, in fact, suggest that your client personally
2 benefited to the amount of twenty-one thousand dollars.
3 And you concluded from that, I think, if I understand your
4 evidence, that there was no agreement on that aspect of the
5 Crown not using the words, "fraud", "forgery" or that your
6 client "personally benefited."

7 A. See I don't honestly...

8 Q. I don't see that in the text.

9 A. Okay. I don't honestly remember whether or not we
10 formally agreed to it. If you read the Crown's submissions
11 at the time of sentencing, they did not use the word "fraud",
12 they did not use the word "forgery".

13 Q. And they didn't use the word "personally benefit" either.

14 A. Well, other than that they say that he received twenty-one
15 thousand dollars.

16 Q. Yes.

17 A. I guess it really boils down to one of interpretation as to
18 what the Crown did, in fact, say and I think that Mr. Clair
19 would be in a much better position to comment on that than
20 I can. But I don't honestly remember that I tied the Crown
21 down to not using those words.

22 Q. All right. At page 78 you'll see the one reference I can find
23 to that subject matter from Mr. Clair's evidence.

24 A. Uh-hum.

25 Q. Mr. Clair's submissions. Sorry, that's your submissions.

MR. PINK, EXAM. BY MR. RUBY

1 A. Yes, it is.

2 Q. At the top of page 78, third line, you outline that the amount
3 was paid to Mr. MacLean. There was never any doubt that
4 the amount was, in fact, paid to Mr. MacLean, was there?

5 A. Oh, no, he received that money.

6 Q. That was going to have to be part of the evidence in any
7 event, correct?

8 A. But the question is is whether or not he was legally entitled
9 to it.

10 Q. Yeah. And you can think now as you look at this document
11 no suggestion where the Crown said that there was personal
12 benefit by your client.

13 A. I have not studied this document in great detail, Mr. Ruby,
14 but... So I honestly cannot say whether or not they did, in
15 fact, say that my client personally benefited.

16 Q. Okay.

17 A. Because as you can see from my submissions, we took the
18 position that he was legally entitled to that money.

19 Q. Yes. And ordinarily if you're dealing with a case like this,
20 will you agree with me that on sentencing a position taken
21 that we were entitled to this money would be a very
22 negative factor from the point of view of the accused?

23 A. Oh sure.

24 Q. I mean it might well be devastating to any claim for
25 leniency at all. You agree?

1 A. If I understand you correct, if you're talking about a charge
2 of uttering and if the amount that he was paid was twenty-
3 one thousand dollars, and if you can show that...and your
4 position is that he was legally entitled to it, there's no doubt
5 about it in my mind that the sentence would be much less
6 than if he was not entitled to it.

7 Q. Just as a matter of practise, tell me if you agree. The key to
8 any leniency from a court on a charge like this in
9 circumstances like this is the kind of remorse that's
10 evidenced by paying back the money?

11 A. Yeah, that's one consideration. I think you've got to go
12 further though. I think you have to say, you know, you can
13 have an uttering charge where a person puts in a false
14 receipt, but if he's legally entitled to that money, I think the
15 circumstances are different than if he personally benefited
16 and was not, in fact, entitled to that money.

17 Q. Right. But the Crown, clearly given the facts that it had in
18 its possession, could not agree to a position, namely that
19 your client was legally entitled to that money.

20 A. They could not agree to that.

21 Q. And wasn't going to agree to it.

22 A. They were not going to agree to it and I was not going to
23 agree to it.

24 Q. So you'll agree with me then that ordinarily in this kind of
25 case any plea for leniency would require, as the core of the

1 submission, a willingness to pay back the money.

2 A. Normally you're right. And if there, in fact, is a dispute and
3 if, in fact, it is of major importance to the Crown's case and if
4 there is a dispute, they, of course, have to call the evidence.

5 Q. That's right. And then you would have been left with a
6 bitter factual battle which one might think you'd have some
7 difficulty winning.

8 A. Probably.

9 Q. Yeah.

10 A. I'm not saying I would not win it.

11 Q. I'm not saying that either. But you'll agree with me, I think,
12 that the sentencing is the poorest possible occasion to have
13 that kind of a fight?

14 A. That is correct.

15 Q. Okay. It's not a time when you want the Judge to see your
16 client in a mode where he's saying, "No, I want to keep the
17 money."

18 A. That is correct. Or that he's not legally entitled to the
19 money.

20 Q. That's right.

21 A. I mean that's the issue here, was whether or not Billy Joe
22 MacLean was legally entitled to the twenty-one thousand
23 dollars or he was not.

24 Q. And in the end result you achieved a result for your client
25 where that issue never got disputed in a public forum.

1 A. That is correct.

2 Q. It's a good deal, I think you said. Would you agree with me
3 it's a spectacular deal?

4 A. Well, all I can say to you, Mr. Ruby, is that it was a very
5 good deal for my client. As one newspaper reporter said to
6 me immediately after the sentencing hearing, "It was the
7 deal of the century."

8 Q. The deal of the century.

9 A. I didn't agree with that.

10 Q. Oh, God forbid. Did it cross your mind, even though you
11 didn't agree with that, that one of the reasons why you got
12 what some were terming "the deal of the century" were
13 political? Did that cross your mind or didn't it?

14 A. I think that's one of the things that you consider, but I
15 really didn't look at it in that aspect. Now I was there to do
16 a job for my client and do him the best possible job I could
17 and that's what I feel I did.

18 Q. Let...

19 A. Now who was calling the shots, I cannot say.

20 Q. Let me make it clear to you, I'm not faulting you. You've
21 done a spectacular job in my view for your client. But I do
22 want to make it clear that one of the things you considered
23 as the reasons why you made such a...achieved such a result,
24 you considered whether or not the reasons were political, is
25 that correct?

MR. PINK, EXAM. BY MR. RUBY

1 A. It all depends on how you interpret "political". Now as I say,
2 I don't know who was calling the shots in making the final
3 decisions. I put forward the proposals, I got response back
4 from Mr. Clair and we finally came to a mutual agreement.
5 Now only in light of what I heard this morning, it's only
6 people like Mr. Giffin and Mr. Coles who can say whether or
7 not they were politically motivated in coming to that
8 decision.

9 Q. You cannot know. I understand that. What I want is an
10 answer to the question whether or not you considered at the
11 time that one of the reasons might well be because political
12 considerations were being brought to bear on this case.

MR. SAUNDERS

13
14 My Lord, before the witness answers the questions, and in
15 fairness to the witness, is anything advanced before this forum to
16 ask Mr. Pink to speculate on that?

MR. RUBY

17
18 It's not mere speculation, with respect, it's...

MR. SAUNDERS

19
20 How does it matter whether or not Mr. Pink reflected on
21 whether there was a political consideration behind whatever was
22 done here?

MR. CHAIRMAN

23
24 In fact, in all these cases that's a two-edged sword. Some
25 defence counsel, I suspect, acting for a person in that position

COMMISSION/COUNSEL DISCUSSION

1 would be very apprehensive that because of his position the
2 sentence would be heavier than normal.

3 MR. RUBY

4 I quite agree. It's a real fear that political involvement
5 might work adversely to you.

6 MR. CHAIRMAN

7 Yes.

8 MR. RUBY

9 But I intend to argue at the end that this was such a
10 charming deal that it's explicable only based on the assumption
11 that political considerations, in fact, were brought to bear. And
12 with this man's expertise in sentencing, I'd like to know whether
13 this was a thought that occurred to him, whether he considered
14 that possibility.

15 MR. PINK

16 In answering the question...

17 MR. SAUNDERS

18 Just a minute.

19 MR. PINK

20 Sure.

21 MR. CHAIRMAN

22 He's already told us, Mr. Ruby, that he doesn't...he doesn't
23 know what motivated...

24 MR. PINK

25 I do not know what motivated the final decision or who

COMMISSION/COUNSEL DISCUSSION

1 made that decision.

2 MR. RUBY

3 We have a result that is inexplicably favourable to the
4 accused and I'd like to know whether one of the considerations he
5 thought might have influenced it, given his experience in the
6 criminal law, were political. It's either admissible or it's not.

7 COMMISSIONER POITRAS

8 But isn't this all speculation? It might have influenced it.

9 MR. RUBY

10 No, because if you're left with no explanation other than that
11 one, based on your expertise in criminal law, then that one is a
12 conclusion you can come to. The man is an expert in the field of
13 sentencing, vast experience.

14 COMMISSIONER POITRAS

15 Sounds like speculation to me.

16 MR. CHAIRMAN

17 I have to rule against you on that question, Mr. Ruby. It is
18 speculative and I appreciate Mr. Pink has a lot of experience in
19 criminal law. How much experience he's had defending people in
20 that position is something else. I don't know. I think I would
21 know because these things are always carried in the press. I'd
22 like to hear Mr. Pink explain to us two things. One, on page 63,
23 maybe you're coming to that, are you?

24 MR. RUBY

25 No, My Lord, I was not going to go to that.

MR. PINK, EXAM. BY CHAIRMANMR. CHAIRMAN

1 You see the memorandum there from Mr. Herschorn to file.
2
3 And he says at the end of the first paragraph, presumably relying
4 on what had been transmitted to him by Norman Clair. "Mr. Pink
5 did indicate, however, that his client was not in a position to make
6 restitution." Is that correct?

3:00 p.m.

7 A. As I interpret that, My Lord, is the fact that we do not agree
8 that we owed the government at that time anything.

9 Q. What, if any, consideration did you give to the, what appears
10 to be a suggestion in this memorandum, but from the point of
11 view of recovering money. Forget for a moment whether
12 there was money owing.

13 A. Right.

14 Q. If there were monies in the hands of the Crown, earned
15 pension monies.

16 A. My client, at that time, had other counsel who were handling
17 the civil aspect. He had a chartered accountant and he had
18 two lawyers from the Patterson Kitz firm that were
19 negotiating with the government regarding his pension,
20 regarding amount of restitution and things of that sort. So I
21 had no part to play in dealing with the government on
22 restitution. Because, as I said, it was our position that he
23 owed the government nothing.

24 Q. But were you aware of the suggestion that whether he owed
25

MR. PINK, EXAM. BY CHAIRMAN

1 the government money or not, there was already money in
2 the hands of the government?

3 A. Oh, I was aware of that. They had his pension.

4 Q. Yes.

5 A. I was aware of that.

6 Q. Belonging to him, so that there would be no difficulty in the
7 government recovering the monies in the event it was
8 decided that the money was, indeed owing.

9 A. That is correct.

10 MR. RUBY

11 In light of your ruling, I have no further questions.

12 MR. PRINGLE

13 I have no questions.

14 EXAMINATION BY MR. SAUNDERS

15

16 Q. Mr. Pink, if I could take you first, sir, to the communication
17 that you had in the first instance with the prosecutor, Mr.
18 Clair, and that's at page 50 of the booklet?

19 A. Yes.

20 Q. And this, sir, is your letter to Mr. Clair dated April 28th,
21 1986?

22 A. Yes.

23 Q. And I wasn't clear when I heard you speak on direct, Mr.
24 Pink, what the date of the information being sworn was. Was
25 that April the 8th, 1986?

MR. PINK, EXAM. BY MR. SAUNDERS

1 A. I'm not quite sure about that, Mr. Saunders, because the copy
2 that I have here in the file is... It says at the top "April 8,
3 1986."

4 Q. Yes, in someone's handwriting, but the...

5 A. It's not sworn to.

6 Q. The informant page is not declared or completed.

7 A. No.

8 Q. So you can't tell me exactly when it was in April that you
9 were first engaged.

10 A. No, I cannot.

11 Q. In any event, it was some time, to the best of your
12 recollection, after Mr. MacLean was arraigned on the
13 information?

14 A. That is correct. No, not arraigned. It was after the charge
15 was laid.

16 Q. Yes, and you state in the first paragraph of your letter to Mr.
17 Clair that the dates for the preliminary inquiry have been
18 fixed.

19 A. Yes.

20 Q. And it was set for five days hearing commencing on the 14th
21 of October, 1986. So I take it it's clear from this letter that
22 back in April, you were beginning your preparations for this
23 five-day preliminary inquiry.

24 A. That is correct.

25 Q. And you deliberately wrote to Mr. Clair, as the Crown

MR. PINK, EXAM. BY MR. SAUNDERS

1 Prosecutor in the case, asking for three things in your letter.

2 A. Um-hum.

3 Q. And I refer you to the first paragraph. First, you wanted to
4 hear from Mr. Clair the witnesses to be called. You wanted
5 him to show you any statements given by those witnesses.
6 And, finally, any documentation upon which the Crown
7 intended to rely. Correct?

8 A. That is correct.

9 Q. And I suggest to you, Mr. Pink, that these requests on your
10 part of the Crown were in keeping with your retainer with
11 your client to diligently defend his case.

12 A. Absolutely.

13 Q. And did you see it as your obligation, sir, as defence counsel
14 to make those types of requests of the Crown?

15 A. Yes. That, Mr. Saunders, was the normal practice within the
16 Crown. They would give me or show me any statements that
17 they had. They would give me any documentation that they
18 were going to rely upon. So my request here is not an unusual
19 request. It's a normal request.

20 Q. Yes, but you were merely putting it on the record with the
21 Crown.

22 A. That is correct.

23 Q. And in order to fulfil your mandate as defence counsel and
24 start your preparations for this preliminary inquiry some six
25 months ahead, you sought that information from the

1 prosecutor.

2 A. That is correct.

3 Q. And, again, just to put a final point on it, you felt that that
4 was in keeping with your obligation as defence counsel and
5 your retainer contract with the accused?

6 A. Absolutely.

7 Q. You spoke a couple of times on direct, Mr. Pink, that
8 notwithstanding any agreements you had with the Crown, and
9 notwithstanding any representations you made either jointly
10 or individually to the Court, that it was up to the Court to
11 decide what penalty to impose upon Mr. MacLean.

12 A. The final disposition in any matter is always in the hands of
13 the Court.

14 Q. Quite so. And whether or not, I suggest, sir, counsel reminds
15 the judge of that in any pre-hearing meeting, that is the fact,
16 that the judge is the one who determines what he or she
17 considers to be the appropriate penalty.

18 A. See, in many cases, what a court will do will, even after the
19 recommendations are made by the Crown and defence, they
20 may adjourn sentence and come back at a later date in order
21 that they can review the law themselves to see whether or
22 not the sentence is within the range. But the final
23 determination as to what the sentence is going to be is solely
24 in the hands of the judge.

25 Q. And notwithstanding any representations made by defence or

1 Crown, and not depending, I suggest, on who those persons
2 are.

3 A. Absolutely.

4 Q. Sir...

5 A. I mean that's the judge's responsibility.

6 Q. Thank you. At page 47, when we look at the various counts
7 in the information, just so that I can have it clear, sir. The
8 blanket count is the first one, which is the fraud charge and
9 that was the one that you were not inclined to plead your
10 client guilty to, correct?

11 A. Correct.

12 Q. Then we proceed through the other counts of the information.
13 Number two is the uttering charge involving Maureen O'Leary
14 and Gordon Grady related documents?

15 A. Correct.

16 Q. The third one is the matter relating to forgery of documents
17 pertaining to Roberta MacKinnon?

18 A. That is correct.

19 Q. And then the fourth count...

20 A. And I should point out there that we were not going to plead
21 guilty to that one.

22 Q. I understand that. I was just going to take you to the fourth
23 count, which is the uttering offence contrary to Section
24 326(1)(b) of the Code.

25 A. Yes.

MR. PINK, EXAM. BY MR. SAUNDERS

1 Q. Dealing with those allegedly forged documents involving
2 Roberta MacKinnon.

3 A. That is correct.

4 Q. and that, Mr. Pink, is the first count on which you entered a
5 plea of guilty for Mr. MacLean, correct?

6 A. That is correct.

7 Q. On page 48, sir, is the fifth count, one involving forgery. And
8 then if I can call it, a "linked count," number six, is the
9 uttering offence related to those forged documents pertaining
10 to the dates June 1st, '82 through November 30th, '82?

11 A. That is correct.

12 Q. And it was count number six, the uttering charge, that you
13 entered a plea of guilty to?

14 A. Yes, I think you're right there.

15 Q. Yes. Count seven and eight are linked again. The first one
16 dealing with forgery pertaining to documents involving one
17 Joan Briggs. And count number eight is the uttering charge
18 relating to those same forged documents and I suggest that
19 that's an offence to which you pleaded Mr. MacLean guilty?

20 A. Correct.

21 Q. And, finally, the linked counts nine and ten. Nine being the
22 forgery count; ten being the uttering count relating to those
23 forged documents and Frances DeCoste. You entered a plea of
24 guilty to that uttering charge.

25 A. Correct.

MR. PINK, EXAM. BY MR. SAUNDERS

1 Q. And is it correct, Mr. Pink, that under the Criminal Code, the
2 provisions dealing with penalty for uttering carry a broader
3 range of incarceration than do the penalties for fraud?

4 A. That, I cannot answer right off, Mr. Saunders, because we
5 normally treat uttering and forgery almost in the same
6 category of offence. And whether or not... Right now, I don't
7 honestly remember whether or not there is a distinction
8 between the uttering and the forgery when it comes down to
9 the end result.

10 Q. I suggest to you, Mr. Pink, and I'm just referring to a 1986
11 Criminal Code that the maximum penalty for an uttering
12 offence is 14 years.

13 A. That is correct.

14 Q. By indictment.

15 A. Yes.

16 Q. Whereas the maximum penalty for fraud is ten years.

17 A. That may very well be.

18 Q. Yes. And given that range of penalty, Mr. Pink, and given the
19 provisions of the Criminal Code which speak of fines in lieu of
20 other penalties, is it not correct that it was impossible for the
21 trial judge to have imposed only a fine upon Mr. MacLean
22 upon his pleading guilty to those four counts of uttering?

23 A. That is correct.

24 Q. And that is by virtue, sir, of Section 646(2) of the Code?

25 A. I'll accept the section that you stated, but I think you are

1 right.

2 Q I have it here, if you wish.

3 A. No, that's fine.

4 Q Thank you. That being the provision that says that a court
5 may not impose on a penalty section like uttering a penalty of
6 a fine alone.

7 A. That is correct.

8 Q And that if a fine is imposed, it has to be in lieu of something
9 else, correct?

10 A. That is correct.

11 Q In addition to sentence. Now if I understand the order in
12 which you proceeded with Mr. Clair, the first proposition you
13 made was to plead your client guilty to one count of uttering
14 or two?

15 A. Two counts.

16 Q Two. Did the Crown first come to you and ask for a plea of
17 guilty to the umbrella blanket charge of fraud, which you
18 rejected?

19 A. No, I commenced the plea bargaining process.

20 Q And the Crown rejected your first proposal of a plea of guilty
21 to two counts of uttering.

22 A. Yes, and I am sure somewhere along the line that Mr. Clair
23 and I, myself, it was either before the initial letter or
24 subsequent to the initial letter, he tried to bring in the fraud
25 charge and I, of course, would not agree to that.

MR. PINK, EXAM. BY MR. SAUNDERS

1 Q. Yes, and can I have it from you, Mr. Pink, why it was that you
2 were so deliberate and emphatic and not being willing to
3 plead your client guilty to the blanket count of fraud?

4 A. Because upon assessing the facts, as I saw them, and applying
5 it to the law, I could not satisfy myself that my client was
6 guilty of the fraud charge.

7 Q. Did you also consider the case law prior to September of '86
8 involving dispositions in fraud and breach of trust cases and
9 did you have concern that were your client to have pleaded
10 guilty to fraud, you would be in a more difficult situation on
11 sentence than pleas of guilty to uttering?

12 A. My initial opinion had to deal with the charge itself. And
13 there's no doubt about it. From my experience, I was able to
14 relate the sentencing process to what would happen to a
15 person who was convicted of fraud. But...

16 Q. That is to say, the cases you were having regard to, were the
17 sentences imposed in fraud, breach of trust kinds of cases?
18 Yes?

19 A. I mean that's always... That's always in the back of your
20 mind.

21 Q. Sure, and did you think you would be on a better footing in
22 making the representations...

23 [MICROPHONE MALFUNCTION]

24 BREAK

25

1 3:59 p.m.

2 MR. SAUNDERS

3 Q. All right, thank you. Mr. Pink, I believe I was to the question
4 where I asked you having regard to the cases pertaining to
5 penalties for fraud and breach of trust, did you think you
6 were on better footing in making the representations at the
7 sentence hearing were you to have pleaded guilty to uttering
8 charges?

9 A. The difference between uttering and forgery and getting your
10 client to plead to one, basically is psychological. As far as the
11 end result goes, it really doesn't matter.

12 Q. But psychological in the sense of what representations you
13 could make the sentence hearing?

14 A. No, I don't think it makes a bit of difference.

15 Q. Did you find any cases dealing with uttering in your research
16 before the hearing in September?

17 A. Not that I recollect.

18 Q. The cases that you were dealing with involved fraud and
19 breach of trust?

20 A. Basically it dealt with breach of trust.

21 Q. Yes. And I suppose it's trite to say that given that each case
22 is different and depends on its circumstances, you were
23 trying to isolate and present the ones that were best for Mr.
24 MacLean's point of view.

25 A. Well, as you'll note in the sentencing submissions, I don't

1 think any cases were mentioned at the time of the sentence.

2 Q. That's true. And so were you trying to isolate and give as
3 mitigating circumstances the best features as far as Mr.
4 MacLean was concerned?

5 A. That is true.

6 Q. Now I noticed in your answer to the question on direct, Mr.
7 Pink, you said that your client was pleading guilty to the
8 offences of knowingly making false documents, knowingly
9 uttering false documents.

10 A. That is correct.

11 Q. I put it to you, Mr. Pink, that the wording of the counts in the
12 information are that Mr. MacLean uttered forged documents.

13 A. Then it gets down to a layman's interpretation of what is
14 meant by forgery.

15 Q. Well, quite apart from whatever the layman's definition is,
16 the counts to which you pleaded your client guilty...

17 A. Yes.

18 Q. Were uttering forged documents...

19 A. That is correct. And when you look at the definition of
20 forgery, it includes what, in fact, my client pleaded guilty to.

21 Q. The word used in the information is "using documents as
22 though they were genuine knowing that the documents were
23 forged."

24 A. Correct.

25 Q. And the Sections of the Criminal Code dealing with the offence

1 of uttering say that it's uttering forged documents, correct?

2 A. That is correct.

3 Q. Now you said on direct, Mr. Pink, that you thought that the
4 Crown had a strong case on all counts upon your review of the
5 situation?

6 A. That is correct.

7 Q. Did Mr. Clair, the prosecutor, ever review with you what he
8 considered to be the weaknesses of the case?

9 A. No, he did not.

10 Q. I take it you would be surprised if a Crown were to have
11 taken you into his confidence and gone through the
12 weaknesses of a case?

13 A. Not at all.

14 Q. You would not have been surprised.

15 A. No, I would not have.

16 Q. In any event, Mr. Clair did not do that with you.

17 A. No, he did not. See, you've got to remember I had
18 interviewed the witnesses that he intended to call, so he may
19 very well...there may have been some weaknesses in his case
20 that I was not aware of.

21 Q. Quite so. And would you accept that the best person to state
22 whatever weaknesses there were in the Crown's cases, the
23 Crown, Mr. Clair.

24 A. Absolutely.

25 Q. And what you and Mr. Clair did discuss, if I heard you right in

1 direct, was his concerns about contact between your client
2 and those witnesses.

3 A. That was initially when we were talking about disclosure.

4 Q. Yes. And you talked about that in your first communication
5 with Mr. Clair.

6 A. That is correct.

7 Q. That being the April letter. And you said to Mr. Clair that if
8 he had any problems then he could use the remedies that are
9 there under the Code for witness tampering.

10 A. That is...

11 Q. Is that so?

12 A. That is correct.

13 Q. Did Mr. Clair come to you on more than one occasion
14 expressing his concerns that witnesses were being
15 approached by your client?

16 A. That could very well have been.

17 Q. You say that when the option of a fine was discussed between
18 you and the Crown, you grabbed at that option, you grabbed
19 at the fine as I recorded it in my notes. But that, I suggest,
20 Mr. Pink, was against the background and the realization that
21 under Section 646 of the Code it was open to the trial judge,
22 in fact, he had to impose something in addition to a fine alone.

23 A. Oh, he did.

24 Q. Yes.

25 A. We have probation.

1 Q. Yes. And you had the one day in lieu of custody.

2 A. That is correct.

3 Q. Recorded as time served.

4 A. Yes.

5 Q. I suggest, sir, it was open to the trial judge, Provincial Court
6 Judge Atton, to have imposed a custodial sentence on Mr.
7 MacLean notwithstanding your representations.

8 A. Oh, absolutely.

9 Q. Yes.

10 A. And I honestly right now forget exactly what the end result
11 was other than the \$6000 fine and the one-day jail sentence.
12 I'm not, I do not think that Mr. MacLean was, in fact, placed
13 on probation, but he may have.

14 Q. No.

15 A. I don't think so.

16 Q. I don't think he was. I think the penalty was a fine..

17 A. And the one day.

18 Q. And one day...

19 A. He had to get the one day because you cannot get a fine if the
20 penalty's over five years.

21 Q. That's right.

22 A. In lieu of.

23 Q. That's by virtue of 646 subsection (2).

24 A. That is right.

25 Q. Right. Now having regard then to that Section, the Provincial

MR. PINK, EXAM. BY MR. SAUNDERS

1 Court judge imposed, in addition to the fine, the one day in
2 lieu.

3 A. He had to.

4 Q. Thank you.

5 A. That's right. And that one day was served as a result of his
6 court appearance.

7 Q. Yes. Now to put too fine a point on it, Mr. Pink, but am I
8 correct in saying that you and the Crown never agreed on the
9 exact amount of the fine that would be recommended by
10 either side?

11 A. My understanding is that the Crown forgot about the \$10,000,
12 they were going to go, and as Mr. Clair did, he talked about a
13 minimum fine of \$5000. I agreed to a fine of \$5000 then we
14 left it open to the judge to make the ultimate decision.

15 Q. Let me just take you to the letter that you received from Mr.
16 Clair. At page 60, this is his letter to you dated September
17 the 12th. And isn't it clear from the second paragraph of that
18 letter from Mr. Clair to you that he was not binding himself to
19 a 5000 minimum?

20 A. Oh yes, that's exactly what he said.

21 Q. Yes.

22 A. But I wanted him to drop the 10,000.

23 Q. I suggest to you, sir, by him saying to you in written
24 correspondence that he wasn't going to be bound by a
25 minimum figure of \$5000 that he wanted it left to the court

1 to set it's own range.

2 A. That is correct. That was the initial letter I received, but
3 following the receipt of that letter I'm sure that there were
4 further telephone conversations between Mr. Clair and myself
5 which called for my response of September the 15th.

6 Q. Well, I have no record of any telephone contact between...

7 A. No.

8 Q. The two of you. And all I have is his letter to you of
9 September the 12th and your letter to him of September 15th
10 which is at page 62.

11 A. That is correct.

12 Q. And I suggest it may have been that these letters crossed in
13 the mail between the two of you.

14 A. No.

15 Q. You say that...

16 A. I'm almost, I can't be certain because I don't have the date of
17 receipt ...

18 Q. Yes.

19 A. But I'm almost certain that I received the September the 12th
20 letter, then there was subsequent telephone conversation
21 between Norm and myself which resulted in the, my letter of
22 September the 15th.

23 Q. Well, Mr. Pink, I put to you that letter at page 62 and suggest
24 that you are, in that letter, asking for his confirmation
25 whether he would agree to such a thing.

MR. PINK, EXAM. BY MR. SAUNDERS

1 A. And that's why I...

2 Q. But I don't see anything confirming whether, in fact, he
3 agreed to it.

4 A. Well, all I can say is somewheres down the road that there
5 was that conversation.

6 Q. Do you have any note of that conversation?

7 A. No, I do not, other than I know that, if you look at our...the
8 submission that he made to the court, "We would recommend
9 a minimum fine of \$5000..." is at page 76 for all matters.

10 Q. Yes.

11 A. And that's why I'm saying, and confirms what I suspect, that
12 we agree that fine, we would ask for a minimum fine of
13 \$5000 and I would ask for a fine of \$5000.

14 Q. In any event, the learned trial judge imposed a fine greater
15 than the representations made by either counsel.

16 A. Absolutely. He could have put my client in jail for a year, too.

17 Q. Yes.

18 MR. RUBY

19 Excuse me. You might be assisted by looking at the last
20 paragraph on page 63.

21 MR. SAUNDERS

22 Q. Thank you. My friend has drawn my attention, Mr. Pink, to
23 the last paragraph, bottom of page 63, which is a
24 memorandum from Mr. Herschorn to the file confirming that
25 on September the 12th, which is the date on which Mr. Clair

1 wrote you, that you were seeking a firm representation from
2 the Crown of a fine in the amount of \$5000.

3 A. Correct.

4 Q. But what I don't have is a confirmation whether, in fact, Mr.
5 Clair ever agreed to your inquiry of the 15th of September.
6 But you know of no written record, sir, confirming that?

7 A. No, there's no written records other than that I know we had
8 the conversation.

9 Q. Yes. Now, Mr. Pink, you ask in that same letter to Mr. Clair
10 whether or not he will confirm to you that he will not use the
11 words "fraud, forgery or that your client personally
12 benefited." And I ask you, did Mr. Clair ever accept that
13 notion on your part?

14 A. I have no recollection of Mr. Clair accepting those
15 recommendations.

16 Q. Thank you. In fact, if one looks at the counts to which you
17 pleaded your client guilty, those clients[sic] by the
18 information and the Criminal Code use the words "forgery", do
19 they not?

20 A. Yeah, that's what the legal term is. But...

21 Q. Well those were the counts to which Mr. MacLean pleaded
22 guilty.

23 A. That's right. That is correct.

24 Q. Yes. And at page 74 of the transcript in the opening of Mr.
25 Clair's representations to the court on sentencing, he refers to

1 "false documents, breach of trust, shattering faith and
2 confidence in the public, uttering forged documents" et cetera
3 on the part of your client accused. Correct?

4 A. That's correct.

5 Q. All right. Now I heard you say on direct, Mr. Pink, that
6 because the provincial court does not want to become a
7 collection agency to impel or compel restitution, that that was
8 the reason that the Crown did not get an order for restitution?

9 A. No, that's not, no, that's not quite. There's a case of the
10 Supreme Court of Canada called [Salinski?]...

11 Q. Yes.

12 A. Which, in essence, states that if, in fact, there is dispute over
13 an amount of money owed between two parties, the criminal
14 courts is not the court in which that should be litigated. That
15 should... leave that up to the civil courts.

16 Q. Yes, I understand that, sir. But isn't it a fact that you knew
17 from the communications you had with Mr. Clair that the
18 Department was not seeking a court-ordered restitution on
19 the part of Mr. MacLean...

20 A. That is correct.

21 Q. Because they had access to his pension and intended to set off
22 the amount that way.

23 A. Well that's, that was their understanding...

24 Q. Yes, well that...

25 A. That was, we did not agree to that. We always disputed that

1 we owed the government any money.

2 Q. I've heard you say that. But I just want to clear that you
3 knew from Mr. Clair, and in particular, I draw your attention
4 to page 61 of the book, that being his letter to you of the 12th
5 of September that government had access to Mr. MacLean's
6 funds.

7 A. Oh, absolutely. I knew that.

8 Q. Thank you. And as well, that was the representation made by
9 Mr. Clair to the court.

10 A. That is correct.

11 Q. That being that they didn't intend to ask for a court-ordered
12 restitution given that background. And for the record, the
13 representation by Mr. Clair to that effect is at page 77.

14 A. But you see he, my understanding though, Mr. Saunders, even
15 if they wanted to go after the pension, and they had the
16 pension, they would still have to determine the amount owed.
17 And that was still subject to a civil proceeding which would
18 sometime be determined by another court.

19 Q. I understand that.

20 A. If, for example, we had agreed that the amount owing was
21 \$21,000 and what the Crown could have got was a judgement
22 in the Provincial Court which could have been enforced
23 through a superior court order. But we did not agree that we
24 owed the government anything.

25 Q. No, I understand that that was still in dispute between

1 yourselves and government.

2 A. That is right.

3 Q. But the point is that the representations made by Mr. Clair to
4 you in his letter were made by the Crown to the court.

5 A. Yes, that is true.

6 Q. All right. You said to Mr. Ruby that some defence counsel just
7 don't get disclosure or have difficulty getting disclosure from
8 the Crown in your experience. And why do you suppose that
9 is, Mr. Pink?

10 A. And I think they have a legitimate reason for doing that
11 because there's a lack of trust between Crown counsel and the
12 defence counsel. Or that the defence counsel somehow has
13 abused his right to disclosure somewhere along the line.

14 Q. Yeah, may very well have reached undertakings with the
15 Crown?

16 A. Absolutely. But I should point out that, once again, if we can
17 see results of what's happening here, is that now it is the
18 practice of the Crown to give you full disclosure to everything.

19 Q. Yes. In your representations to the court on sentence, you
20 refer to Mr. MacLean's service to his community and his age
21 and the number of dependents in his family. I take it that
22 those are not unique representations to be made in any kind
23 of sentence application?

24 A. Not at all.

25 Q. Nor, I suggest, unique to come from the mouth of Crown

1 counsel at the same hearing?

2 A. That is correct.

3 Q. As was the case when one looks at Mr. Clair's representations
4 to the court?

5 A. Absolutely.

6 Q. And in his final disposition, the learned trial judge had regard
7 to the fall from grace of Mr. MacLean on account of his guilty
8 pleas to these four very serious offences?

9 A. Absolutely.

10 Q. And at page 85 he had regard to the general principles of
11 sentencing which I know you have addressed in the book you
12 wrote on sentencing in Nova Scotia.

13 A. That is correct.

14 Q. And did you note when you were at the hearing, and I put it
15 to you now at page 86, the judge's reference to,

16
17 This fall from grace in Mr. MacLean's case to
18 have been a strong form of general deterrence to
19 other members in the same situation from
20 committing the same offence given the
perception that the Crown was ready to go after
anyone.

21 A. That is correct.

22 Q. And you accept that, sir?

23 A. Yes, I do.

24 Q. And you argued, Mr. Pink, that Mr. MacLean did not receive
25 personal benefit of approximately \$21,000 and you argued as

MR. PINK, EXAM. BY MR. SAUNDERS

1 well that the fault, to a considerable extent, lay with the
2 wording of the Regulations and the uncertainty in the
3 language used?

4 4:15 p.m.

5 A. That is correct.

6 Q. Do you concur that the learned trial judge did not find your
7 representations persuasive, in that respect?

8 A. That is correct.

9 Q. And, for the record, at page 86, we have the remarks of the
10 trial judge on those points.

11 A. That is correct.

12 Q. On the other hand, the trial judge did accept the Crown's plea
13 of mitigation on account of the saving of time and expense
14 and, in particular, the hardships of these witnesses in having
15 to attend?

16 A. That is correct.

17 MR. SAUNDERS

18 Thank you, Mr. Pink. Those are my questions.

19 MR. CHAIRMAN

20 Thank you, Mr. Pink.

21 MR. PINK

22 Thank you, My Lords.

23 EXAMINATION BY COMMISSIONER EVANS

24 Q. I'd like to ask you one last point.

25 A. Yes, My Lord?

MR. PINK, EXAM. COMMISSIONER EVANS

1 Q. Have you ever practiced or appeared in the courts in the
2 Sydney area?

3 A. Yes, I have.

4 Q. Did you have any trouble getting disclosure from Crown
5 counsel in that area?

6 A. Not in the so-called new generation, I have not.

7 Q. I take it there was something different in an earlier
8 generation.

9 A. That is correct.

10 Q. That's back in the early seventies then, you're saying?

11 A. Yeah, when Mr. MacNeil was there.

12 Q. I see. Do you have any hesitation in interviewing witnesses
13 who have given statements to the police?

14 A. No, my practice is that I will be, I do interview those
15 witnesses. However, what I do, out of courtesy to the Crown,
16 I will notify them that I'm going to do it.

17 Q. But if they said no, that wouldn't stop you?

18 A. Absolutely not.

19 Q. Is one of the reasons for the Crown withholding copies of
20 witness statements, is that the statements are signed, and in
21 the absence of a signature, there may be some difficulty in
22 cross-examining that witness on the statement when it comes
23 to court?

24 A. I've never had that difficulty. The only reason that they have
25 ever withheld a written statement, if they had one available,

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1 would be because they are fearful that it may get into the
2 hands of my client and there may be some repercussions on
3 the part of the, to the witness. But I am sure that would be a
4 consideration if they had an unsigned statement.

5 Q. Well, we're all pleased to think that the Commission at least
6 has brought some benefit to the defence bar and that the
7 disclosure rules have changed for the better.

8 A. Absolutely, My Lord.

9 Q. Thank you.

10 A. Thank you, My Lords.

11 THE WITNESS WITHDREW.

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