

DISCUSSIONMR. SAUNDERS

No, thank you, My Lord.

CHAIRMAN

For precisely the same reason that we advanced earlier this morning, we are satisfied that we have all the evidence that we require in order to meet, to make meaningful and relevant recommendations in this case and the application is denied.

Now, are we ready to get on with the last witness?

NORMAN CLAIR, duly called and sworn, testified as follows:

EXAMINATION BY MR. SPICER

Q. Mr. Clair, you graduated from Dal Law School in 1975?

A. That's correct.

Q. And you've practiced in, you practiced in Alberta, I believe, for a period of time.

A. Yes. After leaving the law school I actually went to Sydney, Nova Scotia, where I was employed by Nova Scotia Legal Aid for approximately two and a half years and I did criminal and family practice which was the nature of the office at that time. I left for Alberta in May of 1978 where I was employed as a Crown Prosecutor in the City of Lethbridge and I was there for approximately four years. I left that office to enter into a small law practice, a private practice with two other lawyers in the City of Lethbridge and in 1985 I then accepted a position in Hinton, Alberta as the Senior Crown Officer in that particular area responsible for the management

1 and the practice in that area. And I then returned to Nova
2 Scotia to accept a position with the Attorney General's office, I
3 actually came here in December of '85 but because I had to
4 rewrite some exams I was not then qualified to actually
5 appear before the courts until January of '86.

6 Q. And when you came back you came back to become a Crown
7 Prosecutor?

8 A. Yes.

9 Q. And was there any specific sorts of tasks that you were told
10 that you were going to be given when you accepted the
11 position?

12 A. When I accepted the position, to me it was a position as
13 Crown Prosecutor and I had no illusion, or was not told at the
14 time, our, it, for whatever reason, it became clear to me that
15 they were going to ask me to be the office float. The way the
16 office is structured there are a number of prosecutors who
17 appear in courts, in the provincial court. There are a number
18 of prosecutors assigned to county courts. And there were, at
19 that time, two Crown Prosecutors who floated. In other
20 words, when holidays and other trial commitments came up
21 that we were asked to take the overload.

22 Q. So you were one of the people who was not specifically
23 assigned to a court room on a day-to-day basis?

24 A. That is correct.

25 Q. Who was it that assigned the MacLean case to you?

1 A. David Thomas, the senior Crown officer, introduced me to
2 Nigel Green. He was a sergeant at that time, now staff
3 sergeant in the RCMP, and it was either in the latter days of
4 March or the early days of April, I cannot recall, and he just
5 said, "This is Sergeant Green and I have a case for you."

6 Q. Before we get to the specifics of that, could you tell us
7 generally if you, as a Crown Prosecutor, had a question
8 concerning plea bargaining who would the person be that you
9 would normally go to consult with?

10 A. Well it, I suppose it depends on the nature of the plea bargain
11 and this is my own experience as Crown. I'm more drawing
12 from my experience in Alberta. In provincial court where
13 there's a high volume of cases and they're a, what are
14 considered less significant, whether we're talking about
15 impaired driving or shoplifting or so forth and so on, I would
16 make the decision at that point. However, if the case were
17 more substantial or significant then I would certainly seek
18 advice from the senior people or the Chief Crown Prosecutor.
19 In this particular case, as I was assigned the Bill Joe MacLean
20 case, I did not deal with Mr. Thomas, I dealt with Mr.
21 Herschorn. That was consistent with the directives of the
22 Department at the time but also to me it was a, just a good
23 judgement. I was aware that, even though I, quite frankly
24 did not know who Billy Joe MacLean was at the time in the
25 sense that, other than he was an MLA and he was a Cabinet

1 minister, his personality was unknown to me. But I was
2 certainly aware that this was an unusual kind of case. That I
3 was told there were certainly no other cases in Nova Scotia at
4 the time involving a Cabinet minister. In fact, at that time in
5 Canada I think it was rare. My only experience was one in
6 Alberta where a minister of the Lougheed government had
7 been charged with the administrative function of it, but at
8 any rate, I thought it only reasonable to speak to Mr.
9 Herschorn and to keep him advised of any developments. But
10 I didn't, once I was assigned I don't mean to say that I
11 immediately went to him. I was given the case to prosecute
12 and I took the approach that this was a case like any other
13 case and that we would get on with it. We would prepare for
14 a preliminary and/or trial and deal with each problem as
15 they arose.

16 Q. You did, in fact, consult with Mr. Herschorn. But did you
17 receive any direction from anybody in the Department to do
18 that or did you do that of your own initiative?

19 A. I did it on my own initiative.

20 Q. Did you consult at all with Mr. Thomas?

21 A. I didn't consult with Mr. Thomas. I can remember, actually
22 the only time I spoke to him on the Billy Joe MacLean case
23 was, in fact, when there was a proposal for a plea bargain and
24 it wasn't a consultation as such, as more Dave likes to know
25 what's going on in his office and I was telling him.

MR. CLAIR, EXAM. BY MR. SPICER

1 Q. Did he give you any advice as to what you might want to look
2 for by way of a sentence?

3 A. I told him what the conditions were, yes. He told me that I
4 should ask for jail and, because I should "cover my ass." And
5 I didn't take that as a direction, I think that was just friendly
6 advice.

7 Q. Were you involved, and perhaps if you could turn to page 40-

8 ...

9 A. And that's a direct quote.

10 Q. Page 47 of the volume you have in front of you.

CHAIRMAN

12 I take that's not a rationale that you follow.

13 A. I felt that I was left to use my own discretion and I shouldn't
14 take someone else's opinion on how the case should be dealt
15 with.

MR. SPICER

17 Q. Pages 47 and 48 and 49 seem to be the information.

18 A. Yes, I see that.

19 Q. Now were you involved in the drafting of the informations?

20 A. I was asked that question before and, no, I was not. Nigel
21 Green came to me, I believe the information had already been
22 laid or already drafted. I can't remember which. He certainly
23 asked me for my opinion as to the wording and I felt that it
24 was sufficient.

25 Q. Were you involved in any consultations with the police as to

1 what charges ought to be laid?

2 A. No, I was not. Again, in the sense that I was told what
3 charges were before me, I was again asked to review the
4 evidence to see whether they were substantial but, no, I was
5 not asked to add or delete charges and I didn't see any
6 necessity to do so.

7 Q The information reveals an umbrella charge, the first one.

8 A. Yes

9 Q The fraud charge and the a series of other charges. Does the
10 information portray a number of different ways of effecting a
11 purpose, in other words, not just one way of doing something
12 but there were, in this case, a number of different ways that
13 the accused was attempting to...

14 12:20 p.m.

15 A. There were five schemes that were portrayed by the
16 information. As you say, the umbrella charge is a fraud, and
17 fraud being a misrepresentation to one's detriment. In Billy
18 Joe MacLean's case, it was kind of unusual in the sense that
19 not only we believed he manufactured some of the
20 documentation that he subsequently submitted, in addition to
21 actually submitting those documentation, and because they
22 were false or forged within the meaning of the Act, he not
23 only did the act of making the documents but using them.
24 That really is the basis of the fraud charge that he asked the
25 Speaker's office, ultimately the Finance Department, to rely on

1 these documents as genuine. And on the basis of the
2 regulations that were in place, that he would be paid money.
3 And as I understood it at that time, the Finance Department
4 had no way of investigating. Or the Speaker's office actually
5 prepared or did the initial work-ups and then they forwarded
6 it on to the Finance Department. And they had no way of
7 investigating whether these, in fact, were correct or not. They
8 took the person's word and as long as they had what they
9 considered proper receipts, they would process the claims.

10 Q. With respect to the charges that were laid, can you tell us
11 what your assessment was of whether or not the Crown had a
12 strong case?

13 A. On paper, we had a good case. That is to say that we had the
14 documentation and we had, there were a number of expense
15 claims. There were a number of receipts which I think that
16 we could certainly show that were false. But it was not
17 totally a document case, as some frauds were. We had to rely
18 on a number of witnesses, witnesses that, in fact, were either
19 or had been or were presently being employed at the time by
20 Billy Joe, to testify that they did not sign these documents,
21 that they did not give him permission to sign these
22 documents and so forth. So, yes, we had a strong case from
23 that point of view, but... And I'm not qualifying it.

24 Q. What did you consider to be the weaknesses?

25 A. Well, I'm not qualifying it. I'm just saying that it's been my

1 experience that when you go to trial, people, not being
2 professional witnesses in the sense that police officers are
3 trained to make observations, to take notes, to remember
4 everything in the sequence that they were done. They can be
5 asked questions. They can be suggested to, and if they agree,
6 thereby weakening the force and saying, they rarely testify in
7 absolutes. Yes, I did; no, I didn't. They testify in, maybe it
8 could be, or maybe it wasn't. And it's been my experience
9 that viva voce evidence from witnesses can be, or the weight
10 of their testimony, let us put it that way, can be diminished.
11 So in that sense, there was, as all cases, some element of risk
12 but, yes, I was certainly prepared to go to trial with this
13 evidence and I didn't see any, had no reason at the time. Now
14 that's when the officer first came to see me. Now I was quite
15 early on made aware of one real problem in that the count
16 relating to the Somerset Apartments, I was advised that one
17 of the witnesses who had allegedly given Billy Joe a padded
18 receipt, was not going to testify to that and was absolutely
19 refusing to testify. So then right away, that particular count
20 gave me some concern in that he was one of the principal
21 Crown witnesses that I was going to put forward as a credible
22 witness and if he did not testify or he changed his story from
23 what he had told us, it would take away from the weight and
24 there are evidentiary procedures where you can actually
25 cross-examine your own witness but the effect is perhaps

1 taking away any damage he might do to himself or to our
2 case. In effect, we remove his testimony completely from the
3 case and, therefore, it's weakened right away. So that is the
4 one that I was particularly aware of right off the bat. Now as
5 we progressed into the case, and as I recall, it was in April, I
6 was made aware that either Billy Joe himself or friends, if you
7 will, had made approaches to some of the witnesses. And, of
8 course, this... And it was made clear to me at the beginning
9 that these people were very concerned about testifying
10 against Billy Joe. Billy Joe MacLean, and as I said, I didn't
11 know who he was, but I was told that he was a person of
12 charm, influence, whatever, in the Port Hawkesbury area. He
13 was stylized as the "Boss Hogg" of the Port Hawkesbury area
14 and that characterization seemed to fit, in the sense that these
15 people owed either through his position as Cabinet Minister or
16 direct employment with him, a lot to him. And it took a great
17 deal of courage for them to come forward and say negative
18 things against him. Now, for instance, I was made aware that
19 Billy Joe had spoken to the secretary in the Cultural
20 Department directly. Not, now I never spoke to her and I
21 relied on the representations made to me, but basically he
22 was saying some negative things to her. But then he would go
23 around and say negative things about her to all the other
24 secretaries. Well, this, of course, came back to her and she
25 expressed some concerns. Another witness in the Port

1 Hawkesbury area came to us and said she wasn't going to
2 testify.

3 Q. So you had some concern about the testimony that may or
4 may not be forthcoming from some of the witnesses.

5 A. Yes. Well...

6 Q. And, indeed, if you look at page 50 of that volume. Mr. Pink
7 is writing to you in April.

8 A. Yes, I recall this letter because I had spoken to Mr. Pink. Now
9 this is still early in the proceedings. In this letter, he was
10 asking for some particulars. But, already, I was made aware
11 that this was going on and I had spoken to him once on the
12 telephone and I was told that nothing had happened and I
13 spoke to him again and I advised him that if Billy Joe or
14 people... Like because it's, as I say, it's one of these things that
15 there was no direct approach. It was more by inuendo, if you
16 will, inflection. And all I said, "If it doesn't stop, I'll have him
17 arrested," and it stopped.

18 Q. You were here yesterday when Mr. Pink was testifying.

19 A. Yes.

20 Q. I think you probably heard him indicate that on his
21 assessment of the case, assuming that it went ahead as
22 framed and Mr. MacLean was found guilty, that he thought
23 that a reasonable assessment would have been that Mr.
24 MacLean was looking at twelve to eighteen months
25 imprisonment. What was your view of the case at the time?

1 What did you think the disposition would be if you went
2 ahead and were successful?

3 A. It is one of the primary principles, if you will, is whether if
4 you do, in fact, go to trial and the case unfolds as you have
5 thought it would, that there is a distinct possibility that he
6 would go to jail. Now as to a range, no, I... I don't know that
7 that's the case because each case unfolds on its own factors
8 and the personalities involved and whatever the courts seem
9 to seize upon. There's no guideline. I mean it's, now the
10 courts have often said, "We're not going to take a cookie-
11 cutter approach to sentencing. If you've got "x" amount of
12 factors and, therefore, you're going to get "x" amount of
13 years." or whatever. They'll always look at the
14 representations of the Crown, the counsel for defence, the
15 facts of the case particularly and they will come to their own
16 conclusions.

17 Q. Would it be fair to say, though, that at the time when you
18 were assessing the case, would you have accepted that as a
19 general principle, it was likely in a case like this, breach of
20 trust case, it was likely that you were looking at a period of
21 incarceration?

22 A. There is a possibility there would be a period of incarceration,
23 yes.

24 Q. Well, is it a possibility or did you think at that stage of the
25 game it was a likelihood?

1 A. Well, once the approach had been made to me about the
2 possibility of plea bargaining, and I had to address the issue
3 directly whether or not this would be appropriate, because it
4 had been suggested to me a fine. And on my research, there
5 was no, at the time at any rate, there was no one case that
6 said that this was the situation. I found a number of cases
7 going in both directions. So as far as I was concerned, yes,
8 there was a likelihood, but there was as much a likelihood
9 that he would not be sent to jail, but a substantial fine would
10 be put in place.

11 Q. And that assessment was based on your own analysis of the
12 law?

13 A. Yeah, as I understood it at the time, yes. Now further to that,
14 as I said, as it unfolded and once we got towards what I
15 considered the finalization, if you will, or what the bottom
16 line of the defence was, I then went to... Well, first of all, as I
17 recall, Nigel Green, the R.C.M.P. officer and I were still
18 working quite closely on this case because we were still
19 preparing the matter for a preliminary at the time and I
20 would run by him each proposal and get his reaction and he
21 concurred with my approach at that time. And then I...

22 Q. What was your approach at that time?

23 A. Well, the way it unfolded was Mr. Pink made the approach to
24 myself and he initially offered us one count of uttering, and I
25 forget to which one. It was one of the latter parts. And I

1 flatly said no, I wasn't interested in that. However, then I
2 turned around and said, "But I would be interested to a plea
3 to the fraud, because as far as I'm concerned..." And I'm
4 thinking of the representations I'm going to make, that would
5 include all of the offences that were set out both in the fraud
6 and the forgery. And that was flatly rejected. He then came
7 back and offered me two counts of uttering and I still said no,
8 I wasn't... But I knew, obviously, that he was interested in
9 talking to me. So I continued to talk to him. I then, it was at
10 that point... And, of course...

11 Q. Did you ever suggest incarceration to him?

12 A. No, we never talked about it.

13 Q. He indicated to us yesterday at 15662 and again at 665 that
14 he had the impression...

15 A. I'm sorry, what reference?

16 Q. These are references to the transcript.

17 A. Oh, I see.

18 Q. He had the impression and he indicated the only person he
19 talked to was you. "The Crown did not wish MacLean to go to
20 jail."

21 A. Well, that may be his impression. It wasn't, on my part that I
22 didn't wish him to go to jail. I was seeking what I thought
23 would be a middle of the road and fair basic submission. Now
24 I make that in the sense that once a fine had been proposed.
25 As I said, I wanted to know whether, in fact, that that would

1 be appropriate and, in my opinion, based on the research, that
2 that was not outrageous. It could be stylized in some
3 circumstances, and, again, I come back to it depends on the
4 circumstance of the particular case. It may be considered
5 middle of the road sentence and that's what I was looking for.

6 Q. At the time that you were thinking about this, whether or not
7 a fine was appropriate, and before you wrote to Mr.
8 Herschorn in September 8th, and that's on page 53. Up until
9 that time, had you had any discussions with Mr. Herschorn or
10 with other senior people in the A.G.'s Department as to what a
11 reasonable range ought to be here. Or was this something
12 that you were doing on your own?

13 A. It's something I was doing on my own. Mr. Herschorn was
14 the first person I approached within the Department, and I
15 dealt exclusively with him. And the purpose... 53? Yes, I
16 think he, you know, I've talked to him on the telephone and
17 he wanted to know what the gist of the various offences were.
18 I know I wrote one memo and then he asked me for a more
19 detailed one. I think that that's the one you see here of
20 September...

21 Q. Page 53?

22 A. Yes.

23 Q. Right. At this point in time, had you already had discussions
24 with Mr. Pink concerning the reasonableness of a fine as a
25 matter of general principle as opposed to any form of

[Court Reporter's note: There is no page 15853].

1 incarceration?

2 A. As I said, we never talked about, at this point we never
3 talked about incarceration and it wasn't so much that he was
4 suggesting the reasonableness. This was his approach. He
5 suggested five thousand dollars and I said no, I felt that that,
6 you know, just to accept that alone would be too low and it
7 was my suggestion that it should be a higher range. but to
8 confirm my opinion, that is why I sought out Mr. Herschorn's
9 opinion because, again, I wanted to ensure that this was seen
10 to be an above-board prosecution, which it was, and I wanted
11 to know that my approach was correct and if it was incorrect,
12 then I was seeking his advice to tell me where I should alter
13 it and had I been told that, no, the position of the Department
14 would be incarceration, then I would have quite quickly gone
15 back to Mr. Pink and said, "Well, we're going to harden our
16 position."

17 Q. Did you have any discussion with Mr. Herschorn about
18 whether or not incarceration would be appropriate? Did he
19 raise it?

20 12:35 p.m.

21 A. I recall, the only conversation I recall having about that is
22 that he said it was within a range and consistent with the
23 case law he understood, and I took it at that. I didn't, no, I
24 didn't go further.

25 Q. What was within the range? What, the fine?

1 A. The fine.

2 Q Right. And was there any discussion about whether or not
3 incarceration, per se, was something that you ought to be
4 looking at?

5 A. Well, the possibility of incarceration is there. What I was
6 trying to put together was the minimum position, I suppose,
7 because I knew full well that this kind of a case would
8 attract...would attract some sort of incarceration of virtue of
9 section 646, I believe, and that is one of the factors that
10 would have to be taken into account. My concern was was
11 this a reasonable submission, because I knew ultimately I
12 would have to make the submission and I was concerned
13 could I do it in good conscience, and I was satisfied that I
14 could do it in good conscience.

15 I have taken the approach all along, and I think Mr.
16 Pink said it yesterday as clearly as I am about to, and that
17 is, it's not my responsibility, I don't have the power to
18 sentence anyone and it's not Mr. Pink, within Mr. Pink's
19 power. It's within the court's bailiwick. They are not
20 strictly arbiters. They, in fact, are the keepers of the
21 principles of justice.

22 And I assumed, I knew we were going to...well, once
23 the plea was going to be entered, I knew it was going to be
24 before Judge Atton, because I was told they were going to
25 re-elect. And I, at that time I was informed that Judge

1 Atton was a senior Provincial Court Judge, had been sitting
2 many years, and I assumed that he was fully aware of the
3 principles of sentencing and if I was incorrect in my
4 submission, that it was certainly open to him to say, "No, I
5 don't agree with you, Crown, and I'm going to impose any
6 sentence I see fit."

7 Q. Quite apart from that though, was it the case that when you
8 had had your discussions with Mr. Herschorn that you were
9 satisfied that the proposal that was going to go forward was
10 a proposal that was in some way consistent with what you
11 understood the law to be. You weren't just going to throw it
12 at the Judge and say, "Here make up your mind," you were
13 consistent...you thought it was a view that was reasonable.

14 A. I thought it was a view that was reasonable. I set out... I
15 wrote down all of the reasons that I took the approach I did
16 and cited them, read them word for word into the record,
17 and the transcript of the sentencing is what I felt at the
18 time. I considered all of the principles of sentencing that
19 any court would do. There is a general deterrence and a
20 specific deterrence and rehabilitation.

21 The general deterrence, now the case law, as I
22 understood it, and as I've said, there are cases going both
23 ways. But as I understood it or my impression was that this
24 was the first case of its kind. Here was a Cabinet Minister
25 charged with a criminal offence and the public would see

1 that, in fact, we were going forward with this prosecution.
2 We were not giving him an preferential treatment in that
3 sense.

4 As I said, I was preparing for preliminary and it was
5 only because Mr. Pink had approached me that I had even
6 considered or there was a possibility, because there is
7 always a possibility. In fact, I appreciate it when defence
8 counsel at least let me know what their position is. Yes, I'm
9 prepared to take to you. No, I'm not prepared to talk to you.
10 However, Mr. Pink approached me early. That was one of
11 the considerations.

12 I felt...I felt that a fine, as I said, was a middle-of-the
13 road approach. Now I like to take a practical approach to
14 sentencing. And I know all of the factors. As I said, there
15 was certainly a possibility that he would go to jail, but there
16 was an equal possibility that he would not. So I crafted my
17 submissions, if you will, to be the bottom. I was telling the
18 court this was the least I was...I wanted the court to accept.
19 If they felt jail was appropriate, so be it. But I put it to the
20 court, and I believe it's in the transcript, that I said I
21 considered...I did consider within myself. I didn't discuss it
22 with Mr. Pink, but I knew it was a possibility, did consider
23 the possibility of incarceration. I invited the court to
24 certainly consider those principles and then I reminded His
25 Honour of section 646 and I felt then it was in his hands.

1 Q. And if it's suggested to you that the law, in fact, was
2 perhaps more one-sided than you came up with, that is that
3 it was...there were probably a lot more cases going towards
4 incarceration than towards a fine in these sorts of situations,
5 are you prepared to say that if that is the case, that
6 regardless of that, you're the person who made the decision
7 as to what you were going to deal with when you were
8 dealing with Mr. Pink.

9 A. Well, just as you say, if the law is so one-sided, surely the
10 court would be aware of it.

11 Q. No, wait a second. That wasn't my question.

12 A. All right.

13 Q. The question was whether or not if it is suggested to you
14 that the law is more one-sided, that regardless of that fact
15 you were the person who was making the decision as to
16 what you were dealing with Mr. Pink about.

17 A. Yes.

18 Q. Okay. Was it ever suggested to you by Mr. Herschorn, who I
19 understand to be the only person you dealt with, is that
20 right?

21 A. Yes.

22 Q. Did Mr. Herschorn ever suggest to you, "Now wait a minute,
23 you ought to be looking for incarceration here"?

24 A. No, it was never suggested to me.

25 Q. That never happened. Did Mr. Herschorn ever quibble

1 substantially with the kind of dollar figures that you were
2 proposing?

3 A. No, we were talking the five to ten thousand dollar range,
4 and he said that that was within the range.

5 Q. In his view that was within the range. That was... The
6 figure of five to ten thousand dollars was a figure that you
7 came up with, was it?

8 A. Yes, I think I probably...well...

9 Q. Either you or Mr. Pink.

10 A. Yeah, somewhere in our conversations that was the range. I
11 know Mr. Pink didn't want a range. He wanted five
12 thousand dollars throughout. I said, no, I wouldn't be bound
13 by that. I said we're talking about a range.

14 Q. Okay. And then Mr. Herschorn writes to you on September
15 the 11th, and it's on page 58, in which he indicates that a
16 fine would appear to be appropriate. The first numbered
17 paragraph, "As to the quantum, it should be substantial in
18 the range of from five to ten." Were those figures that you
19 had already given to Mr. Herschorn at that point?

20 A. I think we discussed it.

21 Q. Yeah.

22 A. A range of what the range should be and that's what we
23 came down to.

24 Q. What happened on the restitution issue?

25 A. Well, we...that was also part and parcel of what I wanted to

1 do because I knew...I didn't want it to be seen that Mr.
2 MacLean was getting away with it. In other words, so he
3 had plead guilty but he still got away with, as it turned out,
4 approximately twenty-one thousand dollars. And I
5 approached Mr. Pink with that proposition.

6 Now I believe I was advised by Mr. Pink, and I'm a
7 little fuzzy, but I'm sure that he said something to me to the
8 effect that "Billy Joe is broke and he can't pay a fine," or he
9 can't pay restitution. And again, I take a practical approach
10 to sentencing. There's no good making empty word
11 representations to the court when you know full well that
12 they can't live up to it. I was advised by Nigel Green, again,
13 that that was correct. That, in fact, Mr. MacLean was having
14 financial problems at that time and that there were a
15 number of judgements against him in the Port Hawkesbury
16 area.

17 Now to go into court and say, well, there are two basic
18 ways that you can get money back for restitution. There's
19 one by including it as a condition of a probation order, you
20 know, a promise to pay by such and such a date and if, well,
21 if he couldn't pay it, the penalty then would be a summary
22 conviction, another fine of...well, at that time it was five
23 hundred dollars or six months in jail. The other way of
24 doing it is having it reduced to a judgement. You can enter
25 in to a judgement where the Crown then can take civil

1 actions to collect. But it wouldn't be...he wouldn't be as a
2 preferred creditor, so they would have to stand in line like
3 anyone else to get their money back. Now I mentioned this
4 to Mr. Herschorn and he got back to me and said, "Well,
5 there was a possibility that the Province could or did have
6 money sufficient to hold back." And so I know I spoke with
7 someone in the Speaker's office and I was satisfied, in fact,
8 that there was monies that could cover this... Again I wasn't
9 going to make that representation if it wasn't true. I made
10 that quite clear to them and I think I spoke to them on
11 several occasions and they said, yes, they were satisfied
12 through either pay and/or pension benefits that were due
13 him that there was sufficient monies and that is why I put
14 that representation. I wanted to make it quite clear that
15 we were not letting him off by not repaying the Province. It
16 was a practical approach. Mr. MacLean could not repay it or
17 at least I believed he could not. But, in fact, by monies that
18 he had...were due him, they could claim it back through that
19 way.

20 Q. Did Mr. Herschorn ever indicate to you during your
21 discussions with him what the Crown's attitude or the more
22 senior people in the AG's Department attitude was towards
23 this case?

24 A. No, no, I didn't know. Now I do recall meeting with Mr.
25 Giffin and as I recall the...I never met Mr. Giffin. I was in

1 Martin's office and I don't even know if I was there on this
2 particular case, because I was talking to him on a number of
3 things at the time.

4 Q. This is prior to the disposition of it, is it?

5 A. Yes. oh, yes. And I met, I think the call came to Martin and
6 he said, "Would you like to meet the Minister?" I said, "Yes,
7 I would." So we went up and, of course, that's what I was
8 dealing with, so I explained to him what was going on. But I
9 had the impression that he already knew. I mean it was...in
10 that sense it wasn't a conversation, and it certainly wasn't a
11 briefing in my view. He said, well, I told him and I didn't
12 get any particular reaction, and then we went on to talk
13 about very small talk things, nothing to do with the case, in
14 fact, and it was what I would consider a polite visit and I
15 said, "Thank you," and I left. I think we were only there
16 about ten minutes.

17 Q. Do you know at what stage of the game you were at that
18 point, where you were with respect to the plea bargaining?

19 A. Somewhere around this date I know. It was...

20 Q. When you say "this date" what are you talking about?

21 A. Prior, well, it was prior...well, I discussed it with Martin at
22 that time and let us say it was the position that I was going
23 to take, I had already made up my mind that that was the
24 position I was going to take.

25 Q. Did you indicate that to Mr. Giffin in that conversation?

1 A. No, I don't...I don't think I did.

2 Q. This was a...

3 A. I can't recall whether I put it in those terms. I mean he
4 wanted to know what was going on and I said this is the,
5 this is...I probably said, "This is the position and the
6 approach I'm going to take."

7 Q. And what was his response to that?

8 A. Nothing really. Nothing, and that's what gave me the
9 impression that he already knew because, as I say, he didn't
10 make comment on it. You know, he didn't say, this is good,
11 bad or indifferent, and we went on to other things.

12 Q. Was the state of Mr. MacLean's health of any concern to
13 you?

14 A. It wasn't a factor that I took in to account. I...

15 Q. You heard Mr. Giffin indicate this morning.

16 A. Yes, I would...I knew that he had had a heart attack, but that
17 to me was a minor factor. I mean everyone can get ill, in
18 fact, they could probably get ill having the anxiety of
19 waiting to come to trial. But the, no, the underlying
20 principles, you know. It was a first offence. He was
21 prepared to plead guilty. He was a Minister of the Crown.
22 And I...he had resigned as I understood it and I felt, maybe
23 I was being presumptuous, but I certainly felt that entering
24 a plea of guilty would certainly affect his political career.

25 The thing is, now we were talking earlier about the

1 trial, and quite frankly a trial process is a gamble. Even the
2 strongest cases I've had I've had acquittals on. I've won
3 cases that I felt that I shouldn't have. But if we were to go
4 to trial and the concern I had for my witnesses, and I did
5 have a concern for my witnesses, we would...we were
6 talking about a six-month period to preliminary and given
7 the state of trials, we would be anywhere from six to eight
8 months before we got to trial and then, of course, there is
9 always the appeal procedures, if...could be. I'm not saying
10 that there would. But they're open to them. So all of this
11 can be watered down, but the effect of Mr. MacLean
12 marching in to court and saying, "Guilty," no question. We
13 avoided that long procedure. He is there standing before the
14 public saying...when I read in the facts, I didn't water them
15 down any. I ...these were the charges, these were the facts
16 that we founded on the charges, and he says "Guilty". Now
17 Mr. Pink is an experienced counsel, and I certainly know
18 that when a person says "Guilty," that means they accept the
19 facts that are being put forward and they accept their
20 responsibility and their part. And that is, to me that's worth
21 a lot more than going to trial and having whatever may
22 happen.

1 12:50 p.m.

2 Q. Were you ever asked by Mr. Herschorn to provide any sort of
3 written analysis of the law?

4 A. No.

5 Q. Have you ever been asked for that sort of analysis in cases
6 you've had in the Department?

7 A. Not from the Department. Sometimes a judge will ask for a
8 written brief.

9 Q. Sure. But within the Department when you're making
10 decisions.

11 A. No.

12 Q. There's reference in the sentencing representations to the
13 total overpayment being the range of \$21,798 or something
14 like that.

15 A. Yes.

16 Q. Was there more money, does that represent the total
17 overpayment in respect of the charges to which Mr. MacLean
18 pleaded guilty?

19 A. Yes. Now I've had this happen before. Mr. MacLean was, in
20 fact, entitled to some monies by the virtue of submitting
21 claims. It was important for me to know how to separate
22 what monies he was entitled to and what monies he was not
23 entitled to. And that's why I asked the RCMP and the
24 Speaker's office to go back and recalculate, deducting those
25 receipts that we alleged were bogus and that is the figure that

1 we came up with.

2 Q. Does Mr. Pink's view, as he expressed it yesterday, that he
3 thought this was a pretty good deal for his client cause you to
4 reconsider at all whether or not you were a little too easy on
5 him?

6 A. No, I took the position from the outset, I had to satisfy my
7 own mind that this was a reasonable approach. Lawyering is
8 a matter of personal style. You can have a person who gives
9 nothing and someone who gives away everything. I felt,
10 based on what I knew of the case and what the courts would
11 be seeking from me that this was a reasonable approach and
12 I have no reason today to change my mind.

13 MR. SPICER

14 Thank you

15 EXAMINATION BY MR. RUBY

16 Q. Mr. Clair, as I understand it, the crux of, perhaps not all but
17 certainly many of the charges was that you got certain factual
18 documents which have been submitted for reimbursement...

19 A. That's correct.

20 Q. That you could prove very easily.

21 A. Yes. In the sense that we had documents with signatures on
22 and we had a witness to say, "No, I didn't sign the
23 documents."

24 Q. Proof that, in fact, the documents were submitted for
25 payment was easy to prove.

1 A. Oh, yes. Oh, yes.

2 Q. And they were government witnesses who wouldn't be
3 affected by anything.

4 A. Yes.

5 Q. And the crux of that, I suggest, was that the explanations
6 which were given explaining a good number of those
7 documents were not true.

8 A. Yes.

9 Q. And some of them could not be true. Correct?

10 A. Based on the evidence we had some of them could not be
11 true.

12 Q. So the core of your case, if I can put it that way, was solid.

13 A. It was solvent?

14 Q. Solid.

15 A. Solid. Yes.

16 Q. It wasn't going to go away no matter what he did with
17 witnesses.

18 A. Well let me just think now. Partially, yes.

19 Q. There were some aspects where you were having problems
20 with...

21 A. Yes. Oh yes...

22 Q. Witnesses and what have you. But the crux of it, the core of it
23 is there and is not going away and he must have known that.

24 A. Yes, I think so.

25 Q. It's not unusual in a multi-count indictment to have one or

1 two counts fall apart for lack of evidence of for witnesses
2 being unwilling or other similar reasons.

3 A. That's true.

4 Q. And it's not unusual for witnesses to be reluctant to testify
5 against former employers, former friends or present
6 employers or friends.

7 A. Yes.

8 Q. These are all common occurrences.

9 A. Yes.

10 Q. And the usual solution, I suggest, in a case that is proceeded
11 with on indictment is you put them on the witness stand at
12 the preliminary hearing and most people tell the truth, isn't
13 that true?

14 A. That's true.

15 Q. And it's very rare that someone, in fact, no matter how
16 reluctant, either refuses to testify or lies.

17 A. Yes.

18 Q. That's our Canadian experience generally, I think, and it's
19 certainly your experience here in Nova Scotia.

20 A. Yes.

21 Q. My point then is that, and I think you'll agree with me that
22 your case was not falling apart in any significant sense.

23 A. Oh no, I don't, with the exception of the one count I was
24 telling you about earlier that we had, I think, obvious
25 problems but other than that, no. At the time, as I say, on

1 paper it was a perfectly good case.

2 Q. And in reality, with the exception you've mentioned of the
3 one possible count, it's still a good case.

4 A. Yes.

5 Q. The question of the \$5000 or the fine that you agreed to, is
6 the one I want to turn to next. You'd said that you thought it
7 equally likely on the case law that he would be either
8 imprisoned or perhaps fined.

9 A. Yes.

10 Q. I take it then that you were not aware that the usual rule,
11 even for offenders, first offenders of good background, who
12 pleaded guilty, where there's a substantial amount of
13 involved in a fraud case was that imprisonment of a
14 substantial nature results. You were not aware of that.

15 A. I don't think that it is a principle at the time. There were a
16 number of, as I understood it, there were a number of
17 welfare cases where single parents had, in this province at
18 the provincial level, had debauched them to 10, \$15,000 and
19 they were not going to jail.

20 Q. And you think that those were on a par with this particular
21 kind of case. You thought that a proper analogy to seek?

22 A. No, no, nothing is ever in a par. It's just one of the factors
23 that you have to take into account and...

24 Q. Did you think Mr. MacLean's situation was similar to that of a
25 welfare mother?

1 A. Not in that sense, no. But, well when you say an absolute
2 principle in fraud cases that wasn't the case and that's what
3 I'm saying. No, I'm not saying that it was on par with those.
4 There are always different factors. But there is no one case at
5 that time that said given "x" amount of factors, therefore, this
6 is the sentence that would always result. In fact, there's only
7 a few cases or a few types of offences that I'm aware of, that
8 really does attract sort of specified sentence and that is
9 armed robbery and sexual assault or the rape types. Usually
10 there's a solid range that is always accepted and it's very
11 difficult to get yourself out of those. But when it comes to
12 fraud cases, no, I'm not, at that time, wasn't aware of any
13 leading case that says, "This is always going to be the
14 situation."

15 Q. Okay. Now let's leave aside the welfare mothers if you agree
16 that that's not the apposite comparison. Aside from...

17 A. Well, I raise that because you're say-, the principle would still
18 apply and we're talking about the offence. I'm not talking
19 how the offence occurred and I say that that's...

20 Q. Sure.

21 A. Is not the case.

22 Q. Let's leave aside the welfare mothers then and let me ask you
23 were you aware then, and can you point me now to any
24 appellate decision in Nova Scotia which indicated that a fine
25 would be appropriate for this case as opposed to

1 imprisonment. Was there a case that you can, that you
2 turned to then and said, "Heh, this is a fine case. It's similar
3 and I'm going to rely on that to form the basis of my opinion."

4 A. There's a couple of cases. There was a case of, it was a theft
5 case by a government employee by the name of Rizzetto I
6 think. I think he was, as I wasn't in the case but I know, I
7 spoke to the lawyer who did it and I think he was a former
8 lawyer and had a previous conviction and I think he got a
9 suspended sentence. Now it wasn't, it was, I don't know how
10 many thousands of dollars we're talking about. There's also a
11 case of Ruddock which is a Supreme Court decision, Appeal
12 Division, I think, 1978, and there too, they upheld, I think, a
13 suspended sentence.

14 Q. Those are the two cases that you referred to.

15 A. Well my experience with cases, unless they come out of the
16 Supreme Court or that the, Supreme Court of Canada or that
17 the Supreme Court of Nova Scotia has said this is the law as it
18 has in the case of armed robbery, they, you can rationalize
19 anything away in principles. I mean that's, so my position
20 was to say given all of those cases, is this an appropriate
21 approach.

22 Q. Well Ruddock, for example, which is reported My Lords at
23 (1978), 38 C.C.C. (2d) p. 65. It's a case where at page 66 the
24 justice of the Court of Appeal says after noting that the charge
25 is one of accepting a benefit from someone having dealings

1 with the government, a different proposition entirely.

2 A. It's a breach of trust, My Lord. And specifically a breach of
3 trust.

4 Q. That's right. He says,

5 This Section does not involved any elements of
6 fraud, breach of trust or bribery which are
7 expressly covered elsewhere.

8 He goes on to analyze the case law and decides that in cases
9 where there is no element of fraud or dishonesty or bribery
10 that it's permissible to give a non-custodial term. This,
11 however, the MacLean case was not such a case. You agree?

12 A. No, I agree with that.

13 Q. Were you aware of that in the Ruddock case at the time? Did
14 you look at the Ruddock case?

15 A. I can't recall if I did. What I had done, I looked at all the
16 reported series and I couldn't find any leading cases. I have
17 been since made aware of some unreported cases which I was
18 unable to locate.

19 Q. You were not aware at the time of cases like Parry?

20 A. No. I had not seen it at the time. And that's, quite frankly,
21 one of the, you know, by this time I'd been here in the
22 province three months, four months, and that's one of the
23 reasons I had sought out advice. Whether this was the
24 appropriate approach. And if it was not then I would
25 certainly go back and find out why it wasn't.

1 Q. In terms of reported cases were you aware of cases such as
2 Morrison and Murdoch?

3 A. I believe I was aware of the Morrison case because that was
4 fairly notorious.

5 Q. Because that was, I'm sorry?

6 A. It was notorious or I actually knew about that case, I think.
7 The facts.

8 Q. And they were all cases of imprisonment, correct?

9 A. Yes. But, again, we were dealing with a Cabinet minister and,
10 quite frankly, and I'm not trying to take away from it, my
11 main objective was to get the guilty pleas to the substantial
12 charges, the charges that we were laying. Sentencing was a
13 secondary factor. I knew there are cases that require, or not
14 require, but say that jail is appropriate. But as I said I was
15 aware, I can't cite them, I'm sorry, but I know there are cases
16 that go the other way.

17 1:00 p.m.

18 Q. The only other one you're talking about as going the other
19 way is Rizzetto. Can you spell that for me?

20 A. No, I can't.

21 Q. What year was it, approximately, so I can get a copy
22 eventually?

23 A. I can give you a copy, if you want, but I don't have it now.

24 Q. If you put one in the post to my office in Toronto, I would be
25 grateful.

1 A. We will.

2 Q. In Morrison, and I raise this because you had said that the
3 fact that he resigned and had future career consequences was
4 one of the factors you considered.

5 A. Uh-huh.

6 Q. The trial judge took the same view. "Having lost his family
7 and his profession, he had suffered enough or almost enough."
8 And the Court of Appeal disagreed with that. Were you
9 aware of that as being a factor that would govern the amount
10 of imprisonment?

11 A. No, I can't say that I was. But, again, I have to take you back
12 that I rely on the Court to be aware of such principles, as I
13 said earlier in my testimony. My position was what I
14 considered a reasonable position. I don't think it's incumbent
15 upon me to make recommendations. My function is to assist
16 the court, but I don't have to put words in the court's mouth.
17 All I was saying to the court was this was a reasonable
18 minimal position for the Crown to make. In other words, I'm
19 saying I'm not, we didn't...we felt that we had the restitution
20 we wanted. There were certain factors I knew the court was
21 going to take into account and if the court felt it necessary to
22 impose imprisonment, it was open to them to do so.

23 Q. You're right. The court is entitled to the assistance of counsel.

24 A. In fact, I have appeared before judges who have told me not
25 to make any representations. You know, I temper any

1 comment I make. I didn't know the style of practice in Judge
2 Atton's court but I was, felt that because of the case, it was
3 necessary to make some representations. But I was ... Let's
4 put it this way, I was not telling the court that he should not
5 go to jail.

6 Q. But you were recommending a particular fine.

7 A. I was outlining the minimum position I was taking. Now a
8 recommendation... No, I don't think it was a recommendation
9 in the sense that I say this is what we're asking for. This is
10 the bottom line, if you will, that we are prepared to live with.

11 Q. Would you look at page 76 of the booklet? Line 6.

12
13 I think it is important to look at the offender as
14 what he is as opposed to who he is. The Crown
15 feels that as a first offender in all of the
16 circumstances, and taking into account all of the
17 considerations, the Crown recommends a
18 substantial fine and would recommend a
19 minimum fine of five thousand dollars for all
20 matters.

18 And then you draw the court's attention that they have to
19 impose at least one year...

20 A. Well, that's...

21 Q. One day imprisonment or something else in lieu of
22 punishment. You'll agree with me that's a clear
23 recommendation.

24 A. Well, that's what I said all right.

25 Q. Do you not agree with me also that the judge would

1 understand by these words that you had researched the law
2 and that, in the view of the Crown, this was the appropriate
3 disposition, not merely a possible disposition, but the
4 appropriate disposition.

5 A. I think the judge can certainly understand that that is a
6 reasonable approach to take, if that's what he wants to read
7 into it. And if he's offended by it, he can alter it.

8 Q. You don't think a judge would take from this language that
9 the view of the Crown was that this was an appropriate
10 disposition as opposed to merely a possible or a reasonable
11 one.

12 A. I think that depends on the particular judge, what he wants
13 to take from it. If he feels that that is a reasonable approach,
14 then he will act upon a recommendation. That's all it is, a
15 recommendation. As I said, I'm not in any way telling the
16 courts, and, indeed, it's not my place to tell the court which
17 type of sentence should be imposed. He was fully aware of all
18 of the alternatives and I think I set them all out quite clearly
19 in the transcript.

20 Q. And you did not intend to convey to this court that the
21 recommendation of the Crown was for the most appropriate
22 sentence but merely for a reasonable sentence.

23 A. That's correct.

24 Q. Why wouldn't you instead do the proper research, come to
25 the conclusion with the most appropriate sentence was and

1 recommend that to the court? Isn't that the kind of
2 assistance that the court really has a right to expect?

3 A. Based upon the reading of the cases at the time, it is quite
4 possible that he would not have gone to jail. Especially where
5 he had plead guilty before going to even preliminary. I think
6 the cases that you talk about was after trial and, of course,
7 there is no remorse. I mean he's put the Crown to the
8 expense. He's called the witnesses. He has either testified or
9 not testified and he's asked the court to rely on whatever
10 story or untruth, as we see it, as the Crown would see it, and
11 ask the court to believe him. And if they do not believe him,
12 then open to say, well, this is only one more factor. Here, at
13 the time, and I'm not talking about what happened after the
14 court scene. At the time, Mr. MacLean came in. As I said, he
15 plead guilty in open court to four counts and we did not
16 reduce the counts in any way.

17 Q. I'm not quarreling with that aspect at all, Mr. Clair.

18 A. Right.

19 Q. It's a perfectly reasonable decision, it seems to me, in my
20 experience. I merely wanted to explore the basis for the fine
21 and if there's anything... I don't want to cut you off, if there
22 anything you want to add to it, please tell me.

23 A. No.

24 Q. One of the factors you said, you give a list of factors that
25 influenced you in terms of settling on this. One was the first

1 offence. That's clearly true.

2 A. Yes.

3 Q. Second, it was a guilty plea. And you mention the future
4 career consequences and the third was that he was a Minister
5 of the Crown. How is that relevant?

6 A. Well, I think that goes to the specific deterrence. Here was a
7 very high profile, and as it turns out, a high flying Minister of
8 the Crown, who, and we were asked to prosecute and we did
9 prosecute. We didn't give him any deference in that sense.
10 And I think, I think that that is perhaps... It's always difficult
11 to deal with a case so that you're not seen to deal with any
12 differently. But no matter what you do, you're always going
13 to say, well, you did it this way because it is who he is. And
14 that's the approach I tried not to take. But I felt that, for
15 purposes of general deterrence, it was clearly seen that the
16 Attorney General's Department was willing to take on this
17 man and prosecute him. We had him in court pleading guilty.

18 Q. But in terms of deciding of quantum of the fine...

19 A. Well...

20 Q. Why would you give it mitigating effect? I can see you
21 saying, for example, he's a Minister of the Crown, a person
22 who had a high public office.

23 A. I don't see...

24 Q. And he should, therefore, get a higher penalty than somebody
25 who was not in that position. I could see that as an argument

1 but I can't see the reverse. Can you explain it for me?

2 A. I didn't see it as my position to tell the court what to sentence
3 Mr. MacLean.

4 Q. And you're only making recommendations.

5 A. That's right. I only made a recommendation. The
6 recommendation was a middle-of-the-road recommendation,
7 as simple as that.

8 Q. Looking at it with hindsight, would you not agree with me
9 that it would be better if the position you had taken
10 regarding the fact that he was a Minister of the Crown was,
11 it's irrelevant. I'm going to treat him the same way in terms
12 of my ultimate...

13 A. I don't think I would have treated...

14 Q. Let me finish. Same way in terms of my ultimate
15 recommendation as to the level of sentence, as I treat a cab
16 driver or a plumber or a doctor, anybody at all.

17 A. Each case turns on its own fact and I'm not sure that I would
18 have made different recommendations had the facts been
19 there. I mean, as I said, you cannot take a cookie cutter
20 approach to these things. I mean it's wonderful to say, well,
21 this is the principle. But there are always some factors that
22 must be given weight. And I felt, in this case, there were
23 such factors and I made the recommendation based on those
24 factors.

25 Q. I don't want you to think, Mr. Clair, that I'm unsympathetic to

1 the fact that you...

2 A. I don't get that impression, Mr. Ruby.

3 Q. Make choices in a forum and that I have made decisions on
4 sentences that I have deeply regretted later. All I want to
5 ascertain now is whether you accept that principle of equality
6 now or whether you accept that, being a Cabinet Minister of
7 the Crown is a mitigating factor.

8 A. I try and be fair in all of the prosecutions. I feel that
9 sentences should be appropriate to the offender and the
10 offence. And I felt in this case that that was a reasonable
11 recommendation.

12 Q. And part of that process was taking into account as a
13 mitigating factor, he was a Minister of the Crown.

14 A. Well, I don't know if it's a mitigating factor. But it's certainly
15 a case... Well, one of the mitigating factors, and that was just
16 reiterated by Justice Hallett not too long ago in Sydney that a
17 person who gets a lot of high profile press, in fact, is a
18 mitigating factor. I think he just enunciated that in August in
19 a rape case of a police officer charged. And I certainly took
20 that into account. Yes, that is a mitigating factor.

21 Q. That's what I wanted to make clear. You've been very patient
22 with me, sir. One last question, if I might. You knew that the
23 money that was being withheld and was not going to be
24 subject to a restitution order was, in fact, contested by...

25 A. No, I didn't. No, that's, I heard Mr. Pink say that and I didn't

MR. CLAIR, EXAM. BY MR. RUBY

1 know that it was contested until he made those
2 representations in court.

MR. RUBY

4 Thank you, sir.

MR. PRINGLE

6 No questions, My Lord.

MR. CHAIRMAN

8 Mr. Saunders?

MR. SAUNDERS

10 Just a few matters.

EXAMINATION BY MR. SAUNDERS

12 Q. Mr. Clair, first of all, I believe on direct you had some
13 difficulty recalling whether or not it was your
14 recommendation to the Department on the extent of the range
15 of the fine. And so I just refer you to page 58 and 60 of the
16 book, the record in front of you, sir. Page 58 is your letter
17 to... I'm sorry, page 60 is the letter from yourself to Mr. Pink.
18 And, in particular, the second paragraph of that letter. Does
19 that help in refreshing your memory as to the decision taken
20 on the amount of the fine?

21 A. Oh, yes, that's the range of the fine that we were talking
22 about.

23 Q. Was that your decision, sir, that is, the fixing of the amounts in
24 terms of dollars?

25 A. Yes, I suspect that it might have been my recommendation.

1 Q. At any time, Mr. Clair, as the prosecuting officer when you
2 were looking at that kind of fine, that range of fine, did you
3 discuss that with the informant, Sergeant Nigel Green of the
4 R.C.M. Police?

5 A. Yes, I did.

6 Q. Was there, at any time, any criticism or objection expressed to
7 you as the Crown by the informant on seeking a penalty of a
8 fine against this accused?

9 A. I have been told by Sergeant Green that he had concurred
10 with everything I said, and he did. As I said, as we went
11 along, this was an unusual case and I was, I wanted to make
12 sure that... he was a senior investigator and I wanted to make
13 sure that what was going on was, he felt was appropriate, and
14 as I understand, he concurred. And then I went and sought
15 the direction of Mr. Herschorn to make sure that, in fact, that
16 that was in line with what the Department would think as
17 reasonable.

18 1:13 p.m.

19 Q. I draw your attention to page 50 of the record which is Mr.
20 Pink's letter to you of the 28th of April 1986.

21 A. Yes.

22 Q. And in the first paragraph of that letter Mr Pink asks for you
23 to show him statements of any witnesses. He doesn't ask you
24 to provide him with copies of statements of any witnesses.
25 Did you deliberate on whether or not to provide defence

1 counsel with copies of statements as opposed to giving them
2 access to statements?

3 A. Yes. Oh, yes. I took a specific position on that. First of all, I've
4 seen this letter and I know that Mr. Pink was, in fact,
5 provided with full disclosure. As you can see this is, rather
6 an unusual, this was early in the stages of the proceedings.
7 The preliminary was yet some five or six months away but,
8 ultimately, Mr. Pink was allowed to look at our file and read
9 the police reports and he was given a synoptic form of what
10 the witnesses will say or what they call a "Will-Say". I
11 allowed him to read the statements of each witness but I did
12 not give him copies and I specifically did not give him copies
13 because I was concerned for the witnesses. I'm aware of the
14 Attorney General's policy or position on disclosure and I'm
15 not taking an exception, but I feel that there has to be some
16 discretion on the Crown's part for two reasons. As Mr. Pink
17 quite correctly said, that some, if a lawyer dealing with a
18 prosecutor has breached undertakings and so forth, that yes,
19 we're more reluctant to be open and forthright because
20 they're not being open and forthright with us. And if we're
21 talking about a fair exchange, I think that that' s only fair.
22 But I want to take that one step further. Policemen are
23 professional witnesses and they're trained and it's part of
24 their job. But in a case specifically like this, people have a
25 great deal of courage to come forward and give us evidence.

1 It's given in confidence and to turn around and give this to a
2 strange person where it can be filtered out in the street,
3 which has happened on occasion, is a breach of that trust.
4 And if that's allowed to happen we're not going to have any
5 witnesses, they're not going to talk to us. And the police are
6 not going to take statements. Now I felt in this particular
7 case, because there had been suggestions of approaches, I was
8 not going to give Mr. Pink these statements. Now I'm not
9 suggesting that Mr. Pink was part of some conspiracy with
10 Billy Joe, because I don't think so. I have a great deal of
11 respect for Mr. Pink in that regard. But I knew that the
12 possibility, if they were in his possession, that they might
13 somehow get out and I wasn't going to allow that.

14 Q. Thank you, Mr. Clair. Finally, at page 74 of the transcript of
15 the proceedings before His Honour Judge Atton, I take it that
16 you had, at the top of page 74 had concluded your
17 representations to the court on the facts as far as the Crown
18 was concerned.

19 A. Yes.

20 Q. And tell me, Mr. Clair, did Mr. Pink take any exception to your
21 recitation of that facts?

22 A. None whatsoever. I think ...

23 Q. I just draw your attention to line 5 of the record.

24 A. Yes, I'm looking, oh yes, he made some reference about the
25 Sheiling Motel belonging to his client after foreclosure.

1 Q And that being the only matter in dispute as far as Mr. Pink
2 was concerned?

3 A. That's correct.

4 MR. SAUNDERS

5 Thank you, Mr. Clair.

6 WITNESS WITHDREW

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1 CHAIRMAN

2 That's all, thank you, Mr. Clair.

3 We have concluded 89 days of public hearings and heard
4 the testimony of 112 witnesses which I suspect has been one of
5 the most exhaustive public inquiries into the criminal justice
6 system in Canada. The public hearings will continue in Sydney,
7 Nova Scotia, for the sole purpose of hearing submissions from
8 counsel representing persons or groups of persons who have been
9 granted standing before this Commission.

10 Also counsel for any person or group granted observer's
11 status may, if they so desire, submit oral argument during the
12 same hearings in Sydney.

13 If any person or groups granted observer status wish to
14 submit oral argument or make representation to the Commission
15 at the Sydney hearing then, and in such event, they must file their
16 written submissions with the Commission secretary on or before
17 October 28th, 1988.

18 I confirm the dates on which counsel representing persons
19 or groups who have been granted standing and Commission
20 counsel will file their written arguments or factums with the
21 Commission secretary.

22 Commission counsel will file their written argument on or
23 before Wednesday, October 19th, 1988, and as soon thereafter as
24 is possible will furnish copies of same to all counsel representing
25 persons or groups who have been granted standing.

1 It is further directed that counsel representing persons or
2 groups granted standing will file their written argument with the
3 Commission secretary on or before Friday, October 28th, 1988,
4 and as soon thereafter as possible, will furnish copies of such
5 written arguments to Commission counsel and all other counsel
6 representing persons or groups who have been granted standing.

7 I express the hope that all counsel will present their
8 argument to the Commission in the sure and certain knowledge
9 that all three Commissioners will have read their written
10 arguments, and on the assumption such factums are in clear and
11 understandable language, we will understand what is contained
12 therein.

13 It is our hope, therefore, that oral argument will not be a
14 reading of the written arguments but rather a highlighting,
15 emphasizing and amplification of pertinent and relevant points
16 contained therein.

17 The Commission wishes to thank Monseigneur Murphy,
18 members of St. Thomas Aquinas Church, their ladies' organization
19 and the caretaker, Mr. Bud Clancy, for their patience and splendid
20 cooperation while we have been using their very satisfactory
21 premises.

22 These hearings stand adjourned to Sydney, Nova Scotia, to
23 continue in St. Andrew's United Church hall on Monday, October
24 31st, 1988, at 9:30 a.m. and to continue without further
25 adjournment until all arguments have been concluded.

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That will be the end of the public hearings of this Commission save and except the right to re-convene if matters presently before the Supreme Court of Nova Scotia do, in the opinion of the Commission, so warrant.

ADJOURNED TO 31 OCTOBER 1988 - 9:30 a.m. - SYDNEY, NOVA SCOTIA

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 21 day of September 1988 at Dartmouth, Nova Scotia