ROYAL COMMISSION ON THE DONALD MARSHALL, JR., PROSECUTION

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Volume 89

Held: September 21, 1988, at the St. Thomas Aquinas Church Hall, Halifax, Nova Scotia

Before: Chief Justice T.A. Hickman, Chairman
Assoc. Chief Justice L.A. Poitras and
The Honourable G. T. Evans, Q.C., Commissioners

Counsel: Messrs. George MacDonald, Q.C., Wylie Spicer, and David Orsborn: Commission counsel

Mr. Clayton Ruby, Ms. Marlys Edwardh, and Ms. A. Derrick: Counsel for Donald Marshall, Jr.

Mr. Ronald N. Pugsley, Q.C.: Counsel for Mr. John F. MacIntyre

Mr. Donald C. Murray: Counsel for Mr. William Urquhart

Messrs. Frank L. Elman, Q.C., and David G. Barrett: Counsel for Donald MacNeil estate

Messrs. Jamie W.S. Saunders and Darrel I. Pink: Counsel for the Attorney General of Nova Scotia

Mr. James D. Bissell & Mr. A. Pringle: Counsel for the R.C.M.P. and Counsel for the Correctional Services of Canada

Mr. William L. Ryan, Q.C.: Counsel for Officers Evers, Green and MacAlpine

Mr. Charles Broderick: Counsel for Sgt. J. Carroll

Messrs. S. Bruce Outhouse, Q.C. and Thomas M. Macdonald: Counsel for Staff Sgt. Wheaton and Insp. Scott

Messrs. Bruce H. Wildsmith and Graydon Nicholas: Counsel for the Union of Nova Scotia Indians

Mr. E. Anthony Ross: Counsel for Oscar N. Seale

Mr. E. Anthony Ross and Jeremy Gay: Counsel for the Black United Front

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September 21, 1988

INDEX - VOLUME 89

Mr. Ruby - application		15752
	9:25	15764
Chairman - Ruling		15765
	9:40	15773
Wildsmith - Application		15770
Mr. R. Giffin		
Examination by Mr. Orsborn		15784
	10:10	15791
Examination by Chairman		15795
	10:25	15800
	10:55	15818
Examination by Mr. Ruby		15825
	11:10	15827
Examination by Mr. Pringle		15852
Chairman - Ruling		15856
Mr. Norman Clair		
Examination by Mr. Spicer		15859
	12:20	15864
	12:35	15874
Examination by Mr. Ruby		15886
Examination by Mr. Saunders		15901
Chairman		15906

EXHIBIT LIST

Exhibit	Description	Page	Volume
92	Four pages of Mr. Smith's handwritten	6833	37
93	Mr. Smith's record of polygraph examinations	6833	37
94	Copy of Donald L. Burgess' job description dated 1983	7134	38
95	A-5 with related notes and RCMP correspondence	7150	38
96	Copies of pages of Sgt. Cole's notebook	7225	39
97	Copy of Melinda MacLean's file	7243	39
98	Volume 29	7484	41
99	Volume 34	7484	41
90A	Photocopy of handwritten notes by Staff Sgt. Wheaton (typed version in Exhibit 90)	7490	41
90B	Original of Staff Sgt. Wheaton's notes (original in Exhibit 90)	7491	41
100	Statement of G.A. Ebsary dated April 19, 1982	7492	41
101	Statement of Donald Marshall, Jr. to Cpl. Carroll dated Feb. 18, 1982, taken at Dorchester Penitentiary	7493	41
102	Affidavit dated September 1982 of Staff Sgt. Wheaton	7495	41

Exhibit	Description	Page	Volume
103	Statement of Roy Newman Ebsary February 23	7574	41
104	Cpl. Carroll's handwritten notes	7581	41
105	six excerpts from Cape Breton Post dated May 29, 31, and June 1, 2, 3, and 5, 1971	7656	42
106	Volume 37. Transcript of June, 1984 examination for discovery of Heather Matheson, John F. MacIntyre v. Canadian Broadcasting Corporation.	7656	42
100A	Original of Greg and Mary Ebsary's statement	8014	44
88A	Copy of Staff Sgt. Wheaton's written notes	8163	44
107	Calender for years 1800 to 2500	8229	45
108	Photocopy of Staff Sgt. Wheaton's notes	8230	45
109	Diagram drawn by Staff Sgt. Wheaton of John MacIntyre's office with seating plan of meeting of April 26, 1982	8231	45
110	Three pages from discovery evidence of Heather Matheson	8277	45
111	RCMP guide for contact with media	8280	45
112	Correctional Services records of Donald Marshall, Jr. (Volume 35)	8516	46
113	Stephen Aronson's correspondence re fees (Volume 27)	8530	46

			C
105A	Article from Cape Breton Post concerning Donald Marshall's remand	8587	47
114	Original of Donald Marshall, Jr.'s statement taken at Dorchester Penitentiary, March 9, 1982		50
115	Supt. Scott's notes, 1982	9251	50
116	Cape Breton Post issue, June 19, 1986 one page		50
117	R.C.M.P. Operational Manual, one page	9303	51
118	Letter January 8, 1980 from Inspector Scott to Chief A. Christmas	9453	51
119	Mr. Urquhart's resumé	9476	52
120	Criminal record and fingerprint records of Robert Patterson	9551	52
121	Mr. Roy Ebsary's fingerprint record from Sydney Police Department,April 9, 1970	9614	52
122	Copies of portions of Criminal Code of Canada	9651	53
123	Volume 30 of Marshall Inquiry docs.	9651	53
124	Volume 31 of Marshall Inquiry docs.	9651	53
125	Volume 32 of Marhsall Inquiry docs.	9651	53
126	Copy of letter dated May 10, 1983 from the Chief Justice of Nova Scotia to Minister of Justice	9651	53
127	Notes of Mr. Ron Fainstein	9693	53

128	Report of Federal-Provincial Task Force	9762	53
129	Brian Williston's telephone notes	9864	54
130	Collection of newspaper articles	9893	54
131	Volume 38 of Marshall Inquiry docs.	9899	54
132	Vol. 28 - Correspondence, October December, 1984, 1986	10081	55
133	Single sheet of paper in S. Aronson's Handwriting - "meeting with Junior" September 3, 1981	10081	55
134	Volume 39, compilation of material court of appeal files	10082	55
136	Copy of sec. 4. of the Public Service Act	10337	57
137	Cabinet documents	10456	57
135	Volume 33	10462	57
139	Letter June 1984 from F. Cacchione to Attorney General's Department	10486	57
138	Telex from R. Giffin to Crosbie April/85	10528	58
142	Package of documents	10692	59
143	Toronto Star report of December 27, 1985	10703	59
140	RCMP contracts	10726	59
141	Volume 41 - correspondence from the Attorney General's Department re Indian Affairs	10735	59

144	Letter - 1983 - from Edmund Morris to the Union of Nova Scotia Indians	10741	59
145	References from Hansard, 1982-1983	10771	60
146	Article by Alan Story, The Toronto Star June 9, 1986	10914	61
148	Job description for director prosecution	11245	62
147	Prosecuting Officers Act, Chapter 240 (1967)	11250	62
149	Evaluation form of government of N.S.	11277	62
151	Photocopies of expense vouchers paid by Crown on behalf of Donald Marshall	12060	68
152	Edwards' notebook - Volume 17 - Summary of meeting of Frank Edwards and Staff Sergeant H. Wheaton	12206	69
150	1978 and 1986 Police - National Parole Board - re Claims of innocence.	12495	70
153	Draft report prepared by Staff Sergeant Barlow - 83/06/16 - 2 pages	12747	71
154	RCMP Service history of Superintendent A.E. Vaughan	12855	72
155	Role of criminal operations officer for Nova Scotia - 1 page	12857	72
156	Relationships with RCMP prepared by Superintendent A. Vaughan - 6 pages	12857	72
157	Federal/Provincial task force report on compensation of wrongfully convicted imprisoned persons	13202	74

				F
158	Federal/Provincial guidelines	13202	74	
159	Position description for director of criminal, Province of Nova Scotia, 1985	13282	74	
160	Three job descriptions, 1975.	13282	74	
161	Letter - March 16/87 to Mr. Gale from Department of Justice, Canada	13491	76	
162	Letter - Department of Justice to Attorney General's Department re Nova Scotia Indians Legal Aid needs and a research proposal (marked but not entered)			
163	Letter - June 21 1988 from K.S. Psychological Services re Donald Marshall	14327	81	
164	Statement of facts	14498	83	
165	Booklet of documents dealing with events after the filing of the August 29, 1980 report	14498	83	
166	Letter from Mr. Feagan to Attorney General's Department	14605	83	
167	Notes by Mr. Quintal	14736	84	
168	File notes of D. Thomas re Thornhill case	14877	84	
169	Document entitled "RCMP seeking documentation" dated April 18/80	14929	85	
170	Decison of Queen v. Ruddock	15020	85	
171	Decision of Queen v. Williams	15020	85	
172	Clipping *Chronicle Herald* April 12/88	15113	85	

				G
173	MacLean documents	15339	87	
174	Policy statements from David Thomas with attachments	15492	87	
175	Photocopies of cases appearing on sentence	15525	87	
176	Press conference of November, 1984	15852	89	

DISCUSSION
September 21, 1988 - 9:09 a.m.

MR. CHAIRMAN

Mr. Ruby?

MR. RUBY

My Lords, I rise again on a matter that's brief for which I want to draw to your attention, if I may. It's, I'm afraid, a request for an additional witness. It arises in the following way.

One of the unexplained matters in the Thornhill case is why after the very full and careful review by the Committee in Ottawa, Mr. Venner then reverses with the concurrence of the Deputy Commissioner the decision which had been taken so carefully. And Commissioner Simmonds was unable to assist us on the reasoning for that and none of the witnesses we have have been able to assist us on why that occurred. We know it occurred but we don't know why. After Commissioner Simmonds stepped down from the stand, and I believe went en route to the airport last day, I received information which I passed on to counsel for the Commission and counsel for the Government of Canada, and that was this. Former Corporal House, who was the officer in charge of...

MR. BISSELL

Objection. If my friends proposes to read evidence that a witness might or might not put in, I object to that. If he wants to make... I don't think this is proper place to put evidence before an Inquiry.

DISCUSSION

MR. RUBY

I'm sorry, I don't want to inconvenience my friend, but I don't see how I can apply for further witnesses to be called without explaining to you why they're relevant.

MR. CHAIRMAN

Well, I have to have some indication of what Mr. Ruby is talking about.

MR. BISSELL

I have no objection if my friend wants to make his motion, but I think it's improper to discuss the nature of evidence that somebody might give, particularly the nature of this type of evidence.

MR. ORSBORN

I may be of some assistance. I don't know if my friend would agree, Mr. Ruby would agree to casting the information received from Corporal House in general terms, to say that it was evidence that would, if accepted, would relate to the reasons for the R.C.M.P. not proceeding and leave it at that, rather than get into the details. I'm not sure that at this stage the details would be of assistance to the Commission in his application.

MR. BISSELL

I have no trouble with that.

MR. CHAIRMAN

Go ahead, Mr. Ruby.

MR. RUBY

It makes no sense. There is a note...

COMMISSIONER EVANS

Try it and we'll see.

MR. RUBY

There is a note in Corporal House's notebook dated the 16th of December, which is the time when the decision was being taken on the evidence, of a conversation he had with an officer named Blue who was in charge of commercial crime in Ottawa.

MR. PRINGLE

First of all, excuse me, My Lord. That's wrong in itself. Blue was in Halifax. My friend is...

MR. RUBY

Roy.

MR. PRINGLE

Excuse me, giving evidence and he's giving it erroneously and he's giving evidence on matters that probably are important, but it's very important, if he does give this evidence, that we recall the witnesses that gave evidence before, including the Commissioner, and we'd make that request.

MR. RUBY

Can I at least say what I want... what I think the evidence is important for?

MR. CHAIRMAN

So far, I gather it's not Blue you're speaking of.

MR. RUBY

1 It's Roy.

2 MR. CHAIRMAN

3 Roy?

4 MR. RUBY

5 Out of Commercial crime in Ottawa.

6 MR. CHAIRMAN

7 All right, go ahead, go ahead. I can't deal with it unless I
8 have some idea what's coming.

9 MR. RUBY

10 I'm quite surprised by all this. It's a matter that really
11 should not be arising this kind of strong feeling. They've known
12 about it since last Friday. They've had lots of time to consider it
13 and think about it. I just don't see the difficulty.

14 The information in his note that he says he got, and I've
15 spoken to him and confirmed this, from Roy explains why the
16 Commissioner did not want, was not going to make a decision in
17 favour of proceeding with the case, and it gives a reason. I want
18 to tell you what the reason was. I want to put it on record so the
19 public knows exactly what I know.

20 MR. SAUNDERS

21 That's not evidence. No, I will rise. My friend in saying
22 what the reason is is giving evidence.

23 MR. RUBY

24 I'm not giving evidence. I'm asking that a witness be called
25 and I want you to know what he says so you'll know why it's

1 important that he should be called.

2 MR. CHAIRMAN

3 You said that a Corporal, that a gentleman named House,
4 who was a corporal in the R.C.M.P. at the time of the original
5 investigation, allegedly made a note in a notebook which indicates
6 that there may be some reason why Commissioner... What's the
7 name? ...Simmonds arrived at a conclusion other than the reason
8 he testified to.

9 MR. RUBY

10 That's right. It said that... giving him advanced notice that
11 Simmonds was going to turn it down before the decision was
12 communicated through the official formal channels and telling him
13 why that was being done. And I think he ought to be called and
14 that matter ought to be explored in public evidence. Because we
15 have no evidence of why that decision was reversed, none. It's
16 inexplicable on the evidence we have. And I would like to tell
17 you what that notation says, in summary, so that you'll appreciate
18 the significance of it.

19 COMMISSIONER EVANS

20 If you're going to tell us what the summary is, then surely
21 you're giving evidence.

22 MR. RUBY

23 I'm not giving evidence, I'm making an application to call
24 this evidence and I want you to know what the evidence is that
25 I'm going to call. If, for example, the reason was because the

colour of your eyes are blue, he doesn't like you, I wouldn't be asking for this evidence to be called at all. But it's far more significant than that.

COMMISSIONER EVANS

But you're asking for something that (A) writes in his book that (B) told him that (C) said.

MR. RUBY

I'm not sure how he knows it. The note doesn't include that information. House may or may not know why he was told, or who told him that.

MR. ORSBORN

My Lord, if I may. As my friend indicates, he did us the courtesy of providing us with this information very shortly after he became aware of it and it has been the subject of some inquiries by Commission counsel, by counsel of the R.C.M.P. over the last couple of days. I am a little surprised that my friend is actually making an application to call additional evidence. It had been my understanding that, after our discussion, my friend was satisfied that the evidence was not going anywhere and he simply wanted to place the fact that he had been so advised on the record so that if it ever came up later, he could say, "Yes, I did bring it to the attention of the Commission."

We did pursue the note that was indicated in Corporal House's notebook. We interviewed, I interviewed Corporal House and inquiries were made of Superintendent Roy. And it was my

1 view that, at best, the evidence of Corporal House, if given, and
2 indeed the evidence of Superintendent Roy, if given, would
3 amount to nothing more than speculation on reasons for the
4 R.C.M.P. making the decision. These gentlemen were not involved
5 in the actual decision itself not to proceed with charges, and
6 Corporal House was unable to suggest anything other than what
7 was indicated to him by Superintendent Roy, was pure speculation
8 from two gentlemen that admittedly, were perhaps not happy at
9 that time with the decision. We have had evidence from the
10 decision maker, Deputy Commissioner Quintal, who signed his
11 name to correspondence directing Chief Superintendent Feagan
12 not to proceed and we also have had evidence from his superior,
13 Commissioner Simmonds. Whether that evidence is sufficient to
14 enable Your Lordships to draw a conclusion is for you to
15 determine. It may be or it may not be. It was our view as
16 Commission counsel that calling further evidence on that point
17 would, as I say, be at best speculative and it would not assist you
18 in reaching any conclusions.
19 COMMISSIONER EVANS
20 This would not be direct evidence, in any event.
21 MR. ORSBORN
22 No, the evidence that Corporal House could give to support
23 the entry in his notebook would be to say that I wrote this down
24 following a conversation with Superintendent Roy or Inspector
25 Roy. This is what Roy said to me. This is what Roy, I think,

1 thought at the time. He had no indication of where the thought
2 came from, other than that he was upset at the time. But it is
3 certainly at least third hand.
4 COMMISSIONER POITRAS
5 And this would apply to Roy as well?
6 MR. ORSBORN
7 My understanding is that if Roy were called to testified, he
8 would not have a recollection of the conversation in question, the
9 conversation with House.
10 MR. CHAIRMAN
11 Does the counsel for the R.C.M.P. wish to be heard?
12 MR. BISSELL
13 I have listened to the comments of my friend, Mr. Orsborn,
14 and that is the view that we hold in the matter as well. That, at
15 best, this is entirely speculation by people who are not involved in
16 the making of the decision and would have no means of
17 knowledge on what the decision was based at the time it was
18 made. And I think it's speculation that is irresponsible and is
19 brought at a time when the person about whom the speculation is
20 made is no longer in a situation to respond to it. I think it most
21 unfair.
22 MR. RUBY
23 Let me deal first with that last suggestion. Commissioner
24 Simmonds was questioned on what went into the reason...
25 Commissioner Quintal, and Commissioner Simmonds were

1 questioned on what went into the reasoning with regard to the
2 reversal of the decision. And they were all quite clear that only
3 proper and legitimate factors and nothing related to the force's
4 own interest were part of that decision. And if I remember, I
5 asked the question would it be wrong to take into account
6 anything having to do with the force's own personal interest and
7 they agreed that it would. So my friend's suggestion that they
8 won't have a chance to respond is just not there. If you knew
9 what was in this particular note, you would know that that
10 submission is nonsense. They have dealt with this issue. It's been
11 dealt with squarely.
12 Now I'm most concerned about the way in which this matter
13 is being dealt with. You'll recall we had a man on the witness
14 stand, Mr. Gale, who was concerned because the way the matter
15 was left, left the impression that something was being covered up.
16 And all of a sudden, these two gentlemen agreed that whatever
17 this information is, I shan't be allowed to tell you about it. And
18 it's just wrong. This is a perfectly routine matter.
19 This is my submission, My Lord, and I intend to make it.
20 This is a perfectly routine matter. We have heard evidence which
21 leaves a question wide open as to why a decision was reversed.
22 It's an important piece of evidence. We don't know why that
23 occurred. A man named Venner was involved in the decision.
24 He's not been called. He was clearly the man who drafted that
25 decision. I'm not saying we have to call him, but I do say that this

1 evidence would suggest that there was something else going on in
2 Ottawa, besides what we've heard about under oath, ought to at
3 least consider the matter of a decision by Your Lordships and you
4 cannot decide until you know what the allegation is.
5 Now I'm not in a position as counsel for Donald Marshall to
6 go to the senior officers and say, "I want to know what happened.
7 I want further documentation. I want to see more notes. Was
8 something going on which you want to tell me about?" But those
9 questions and the question of whether or not that should be done
10 is what's before you now and you can't decide that until you know
11 what we're talking about. You just can't decide.
12 MR. CHAIRMAN
13 Well, Mr. Orsborn says that as a result of his, which is the
14 responsibility of Commission counsel, as a result of his interview
15 of Mr. House, and as a result of his interview on some occasion, I
16 understand, with Superintendent Roy, that his conclusion is that
17 the evidence is speculative. That it's not direct evidence. And
18 speculative evidence is not going to help us. I have no difficulty
19 in accepting the fact that we have before us, last week, sufficient
20 evidence to allow this Commission to conclude, The one purpose
21 for the calling of this evidence, whether or not there was different
22 standards of dealing with or practices and procedures with some
23 cases in Nova Scotia and others. And that's the only purpose why
24 we call them. And, you know, we had a lot of evidence, we had a
25 week of evidence on that and I have no difficulty, having heard

1 all of the witnesses, in reaching conclusions that I think are
2 sustainable by the evidence. So how is this speculative evidence
3 going to help us?
4 MR. RUBY
5 If, in fact, person or persons at headquarters who were
6 involved in this matter (I'm not talking about junior officers) I'm
7 talking about someone at headquarters, head of commercial crime,
8 had at that time a view that there was, in fact, a motive, a
9 particular motive for killing this investigation of Thornhill, you
10 won't know about it and your conclusion as to why the R.C.M.P.
11 acted may be quite erroneous.
12 COMMISSIONER EVANS
13 Mr. Ruby, you put that suggestion to a couple of witnesses
14 and there was a denial.
15 MR. RUBY
16 That's right.
17 COMMISSIONER EVANS
18 So what more are you going to get?
19 MR. RUBY
20 Denial may not be credible, but it appear credible in the
21 absence of any other evidence.
22 COMMISSIONER EVANS
23 Well, if what we know now from Commission counsel is that
24 the man who is reported to have told this or stated this to House,
25 says I don't recall this at all, Where is the connection? How do

1 you get from (C) to (B) to (A)?

2 MR. RUBY

3 Okay.

4 COMMISSIONER EVANS

5 You don't have (D).

6 MR. CHAIRMAN

7 (A) is the Commissioner.

8 COMMISSIONER EVANS

9 Well, either way.

10 MR. RUBY

11 (B) is Venner. One of the questions I would expect
12 Commission counsel to ask, and I have no idea if he has asked it, is
13 whether Venner was dealing with a particular issue. You don't
14 know and I'm going to tell you what the issue was. May I tell you
15 what the issue was? Because Venner redrafted his opinion for
16 Quintal. I wonder what was on their minds?

17 COMMISSIONER EVANS

18 Well, I don't have any trouble figuring out what you think
19 was on their mind.

20 MR. RUBY

21 Well, why can't I talk about it?

22 COMMISSIONER EVANS

23 And I think that question was put to the witnesses and they
24 said, no, there was no extraneous influence whatsoever. That was
25 clear from the evidence of Quintal and Simmonds. Now whether

1 we accept that is something else. That was their evidence. Now I
2 take it you're trying to establish through this speculative
3 evidence, and it can be no more than that, that what they said is
4 incorrect.
5 MR. RUBY
6 I don't know whether it was more than that, but I would
7 assume, if this application is successful that somebody would start
8 asking questions of Venner concerning this subject matter. I don't
9 know if anyone has ever done that. I have no idea. And Your
10 Lordships can't know. So you can't know whether this evidence
11 goes anywhere because you don't know what it's about, first of all.
12 And, secondly, you don't know what's been done in terms of
13 inquiries of Venner.
14 COMMISSIONER EVANS
15 I don't have any trouble figuring it out what you're getting
16 at.
17 MR. RUBY
18 I'm not surprised. Thank you, My Lords.
19 COMMISSIONER EVANS
20 It's spelled out.
21 9:25 a.m.
22 MR. ORSBORN
23 My Lord, if I may, one comment of my friend that I would
24 not like to go unnoticed. I take strong exception, strong and
25 vigorous exception to his suggestion that the Commission counsel

is involved in any sense of a cover up of this matter. I believe that suggestion was made earlier in his comments. This was a decision made by us following a review of the possible evidence. It was made in good faith on the basis of our view of the relevance and the usefulness of the evidence to yourselves. I would hope that it would not be the situation, and any situation which Commission counsel disagreed with Mr. Ruby that we'd be accused of a cover up, and I take strong exception to that and would ask him to withdraw it.

MR. CHAIRMAN

Let me deal with the application. The purpose of our hearing evidence last week and again this week was simply to see if there is enough evidence, if there is evidence available to allow us to reach conclusions with respect to our recommendations to the Government of Nova Scotia concerning future practises in the justice system as to how investigations are handled and how charges by the police are laid and the role of the prosecutor, vis-a-vis senior officials in the Department of the Attorney General, and nothing more.

We've had four days of evidence where the issues raised were clearly put to the witnesses to our satisfaction and to the extent that I, and I think my fellow commissioners agree, that we are in a position to reach credible and factual conclusions and more importantly to make recommendations.

I do quarrel with Mr. Ruby's use of the phrase "cover up"

when dealing with the activities of Commission counsel. My experience has been, and I'm sure all counsel here, I would hope, verify it, Commission counsel has discharged their responsibility with a high degree of quiet professionalism. Their duty is to examine all of the evidence that they can lay their hands on and to bring before this Commission evidence that's relevant to us in the discharge of our mandate. I seen in the more than a year that this Commission has been in existence, I have seen nothing but nothing to indicate that they have failed one iota in the discharge of their duty. And I have no difficulty, and I accept without reservation the position put by Mr. Orsborn in this matter this morning.

Consequently the application to call the Mr....the corporal, or Mr. House or anyone else in this matter is denied.

MR. RUBY

If I could just indicate for the record, I don't want that remark to pass without saying that I intended and, I think, made no aspersions against counsel. I share your view of their task in the way they worked. I was intending to point out the peculiarity of the position they urged upon you in the course of argument that this application should be made and disposed of without the Commissioners ever knowing the subject matter of the comment. I meant no more than that.

MR. CHAIRMAN

Now let me deal with another application that was heard

yesterday. We've been asked by counsel for the Black United Front to provide them with an opportunity to present to the Commission through the sworn testimony of two witnesses the results of research they have conducted into five cases involving the death of black persons. This research, funded by the Department of the Secretary State, will describe the perceptions by the black community of their treatment by the criminal justice system in relation to these five cases. They propose to call Mr. Bernie Jones, the coordinator of the project, and Mr. Ken Crawford. The Black United Front wishes to make the case that racism in the criminal justice system is a very real variable in the treatment of black people in the justice system of Nova Scotia.

The Black United Front was granted full standing at this Inquiry and their counsel has had the same opportunity as all other parties with standing before this inquiry to present the position of their client. They have been active participants, not only in the public hearings of the Inquiry, but also in providing important assistance to the Commission in its research efforts. Counsel for the Black United Front has been fully funded by the Province of Nova Scotia. There has been no attempt to limit the scope of their participation before us except, as with all counsel, where the question of relevance to our mandate is raised. We are satisfied, however, that the Black United Front has had full access to these hearings.

Early in its deliberations the Commission reached the

conclusion that racism is an issue that is more effectively dealt with by means other than through sworn testimony at the public hearings. With the assistance of the Black United Front, the terms of reference of a significant research project were drawn up and a well-known researcher was hired to study the perceptions of racism in the criminal justice system by black people in Nova Scotia. The first draft of this paper was peer reviewed and the subject of an all-day workshop attended by academic, government and community experts including a sizeable representation from the Black United Front. A similar process has been followed in dealing with our research projects. It is clear to us that the participation of the Black United Front in the research process has been extremely important and relevant, in some cases resulting in raising issues that were not dealt with adequately in the research. We are most appreciative of their input and expertise. We anticipate that this input will be reflected in the final research reports and more importantly in the final report of the Commission. It should be noted that we have not called any of our researchers to testify before the Inquiry to defend their work or to air it in a public forum. But their work will nonetheless be considered most seriously by the Commission and will be published as an appendix to our final report.

The perception of the black and native community that racism may be a factor in the criminal justice system of Nova Scotia is a very important one, one that cannot be ignored. We

have been made aware of these issues through the active participation in these hearings of counsel for the Black United Front and the Union of Nova Scotia Indians and through the research process. We know that racism is extremely difficult to prove in a legal sense. To open up these issues to cross-examination by counsel may unnecessarily limit the extent of the comments that might be permitted only to those who can stand to courtroom scrutiny. There are many ways to arrive at conclusions and *viva voce* evidence is only one of the ways. We have not changed our view that the public hearing forum is not the most appropriate or effective one to deal with this type of information.

With very few exceptions, we have not called witnesses to speak only to the issue of racism, either as it affects natives or blacks. This issue has, in general, arisen when a witness was called to speak to involvement in the Marshall case and questions dealings with racism flowed from there. We did, however, hear evidence from Bernie Francis and Herb Desmond.

To deny the application of the Black United Front to call research evidence before this Inquiry is not to infer we are not interested in receiving this information. There are several opportunities remaining which might provide a forum for the Black United Front to bring such material before the Commission. The results of their research project might be submitted to Mr. Briggs, the Commission's director of research, to be circulated to the authors of the research projects and incorporated into the

final version of their studies for consideration of the Commissioners.

In the alternative counsel for the Black United Front will have the opportunity to make final written and oral argument and might incorporate the research of the Black United Front into those submissions. There may be another opportunity for the black community to give the Commissioners the benefit of their advice on the recommendations that might be contained in the final report of the Commission. This forum will provide an important opportunity for representatives of the black community to direct the Commissioner's minds toward recommendations which flow from the community itself.

In denying this application we wish to assure the Black United Front that we look forward to receiving the results of their research but direct that this information must be received by means of a forum other than the public hearings. We will strive mightily to ensure that their concerns are considered most seriously.

The application is, therefore, dismissed.

Now before we start the next witness I heard that there's another application somewhere.

MR. WILDSMITH

Yes, My Lord, I have another application. On behalf of the Union of Nova Scotia Indians an application that involves a real life living case example and not a research project.

I'm instructed to bring this motion to the Commission with respect to an administration of justice issue that is a vital concern to the Micmac people of Nova Scotia. This issue concerns the response of the law enforcement authorities, in particular the Department of the Attorney General and Ministers of the provincial Crown to the Micmac Treaty Moose Hunt.

At the outset I apologize to the Commission for the lateness of this application, to Commission counsel for not having full discussions with them on the matter to this point in time, and to my learned colleagues, particularly representing the Department of the Attorney General, for not being able to give them much in the way of advance notice, just a brief discussion this morning.

My instructions on this point came yesterday and they came as a result of a meeting of the Union of Nova Scotia Indians and other Micmac leaders in the Province. This meeting yesterday was held in response to events over the past weekend whereby the Province of Nova Scotia made clear its position and attitude to Micmac rights.

As you may be aware from media reports in the last couple of days nine Micmac hunters now stand charged, including one Chief, one former President of the Union of Nova Scotia Indians, and Commissioner of the Nova Scotia Human Rights Commission. They stand charged with offences under the Wildlife Act and it may well be that others will stand charged as well.

What we can see quite clearly is what the future holds on

1 this issue and we've come to ask ourselves a very fundamental
2 administration of justice question which we think ought to be of
3 interest to this Commission.
4 And that very fundamental administration of justice issue is
5 this. By what means can the Province of Nova Scotia, acting
6 through the Attorney General's Department and through the
7 Provincial Cabinet, ignore the substance of a legal declaration of
8 Micmac rights by the highest court in the land? How can it
9 happen that an issue is submitted to the courts for resolution that
10 the dispute works its way up the system to the Supreme Court of
11 Canada that the Micmac people win that case, and yet, as far as
12 the Province is concerned, nothing has changed? Business as
13 usual. How can the Micmac people respect the system of justice
14 whose decisions can be explained away and ignored by
15 governments that apparently don't like the outcome? One does
16 not have to be very cynical to wonder how this government would
17 have responded, would have treated Micmacs if the Province had
18 been the victor in court and not the Micmacs.
19 Now, of course, the decision I speak about is the Supreme
20 Court of Canada's decision in a case called James Matthew Simon
21 v. The Queen. For the record, it's citation (1985), 62 National
22 Reporter, page 366, a unanimous decision written by the Chief
23 Justice of Canada.
24 Now six of the Micmacs charged are facing the present day
25 version of the same offence that Mr. Simon faced, which involved

the possession of a firearm, a rifle, in a wildlife area during a closed season.

9:40 a.m.

So that Your Lordships might appreciate the significance of our submission and the strength of the decision of the Supreme Court of Canada, I would like to draw your attention to two paragraphs that appear towards the end of this decision and I'd be happy to provide you with a copy for your later reference.

This is the Chief Justice of Canada, Brian Dickson, speaking now in paragraph 60 of his decision.

> In my opinion, Section 150 of the Lands and Forest Act of Nova Scotia [which is, as I say, the former counterpart to the provisions of the Wildlife Act that six Indians are now charged with] restricts the appellan's right to hunt under the Treaty. The Section clearly places seasonal limitations and licensing requirements for the purposes of wildlife conservation on the right to possess a rifle and ammunition for the purposes of hunting.
>
> The restrictions imposed in this case conflict, therefore, with the appellant's to right to possess a firearm and ammunition in order to exercise his free liberty to hunt over the lands covered by the Treaty. As noted, it is clear that under Section 88 of the Indian Act, provincial legislation cannot restrict native treaty rights. If conflict arises, the terms of the treaty prevail, therefore, by virtue of Section 88 of the Indian Act, the clear terms of Article 4 of the Treaty must prevail over Section 150 of the Lands and Forest Act.

And a second paragraph, paragraph 62:

> I conclude that the appellant has a valid treaty right to hunt under the Treaty of 1752 which, by virtue or Section 88 of the Indian Act cannot be restricted by provincial legislation. It follows, therefore, that the appellant's possession of a rifle and ammunition in a safe manner referable to his treaty right to hunt cannot be restricted by this provision of the Lands and Forest Act.

So, of course, with these pretty definitive statements I would daresay absolutely clear statements, the Micmac community now asks itself "Why are Micmacs still being harassed and prosecuted for doing what the Supreme Court of Canada has said they could? Why is the province issuing press releases that call the Micmac activities illegal? Why is the Deputy Minister of Lands and Forests writing to all the Chiefs and leaders of the Micmac community telling them that the Micmac hunt is not authorized and that any Micmac hunting will be prosecuted? Why is the province seizing rifles, knives and moose meat? Why is the full force of the justice system (that is being examined by this Commission), wildlife officers, RCMP officers, prosecutors in courts, being unleashed on the Micmac harvest which is purely for subsistence and ceremony purposes?"

In our respectful submission there can be only one explanation, the same one that is evident in the Marshall case, the Thornhill case and the MacLean case, and this is an attitude problem. Somewhere the rule of law has broken down and the

1 rule of men with capacities for prejudice and bias is at work.
2 Personal views and other extra legal factors are undermining the
3 independence, objectivity and impartiality that are supposed to be
4 the hallmark of our justice system.

5 You may say well why bring this issue to you. Well, first of
6 all, we cannot, in our view, expect a political resolution. Three
7 years have almost gone by from the Supreme Court of Canada's
8 decision and despite some negotiations and some discussions, the
9 province has not publicly acknowledged the Micmac hunting of
10 any sort and negotiations with Micmacs over hunting rights is an
11 issue that's been played out very much as the Commission saw
12 with respect to compensation issues for Donald Marshall.

13 Second, we could always go back to the courts and
14 ultimately if these charges stand, we will have to do that, because
15 the charges must be answered. But to take the Simon case as an
16 example, it took more than five years for that case to proceed
17 from the activities leading to the charge to the Supreme Court of
18 Canada's decision. And, of course, the expense of doing so is
19 enormous with very little financial support for an important case
20 like that I might mention from the Federal Government.

21 And of course, which is really the issue that we're bringing
22 to you, we've already gone through the back route with the Simon
23 case. We've already been there and if that didn't do any good the
24 first time why should we expect that it will the second. Being
25 forced back to court can be a form of harassment and persecution.

And then, of course, the final reason for bringing it to Your Lordships, is that you are charged with the duty to make recommendations on the administration of justice in this province and have the independence and objectivity to look at this issue. Within your mandate, as you've already indicated this morning, you are looking at the treatment of Indians in the criminal justice system and as is evident from the Thornhill and MacLean cases, you are looking at the operation of extra legal factors such as political favoritism.

The Micmac hunting issue reflects on the operation of these extra legal factors and reflects on the possible existence of actual bias and on the undoubted operation of systemic bias. It also has the advantage of not just being a purely historical inquiry but looking at activities and personalities that are presently involved in the system.

So what is it, in particular, that we are suggesting to the Commission that you do? It's this. It's to examine the events from the Simon decision in 1985 to the present in the same way that you examined the Thornhill and MacLean matters and this, of course, would include not just the public response but the internal memoranda and documents generated within the Attorney General's Department and working their way up through the system to see if proper legal advice was formulated the same way we examined Mr. Coles' opinion to see whether proper legal advice was formulated and passed up the line on our instructions

1 eventually to Cabinet. And in this process to see if there were
2 other factors at work, other extra legal factors that should not
3 have been taken into account. And of course as has happened in
4 all of these other cases, we have absolute trust and faith in the
5 integrity of Commission counsel to examine this issue to see
6 whether there is anything worth putting forward to the
7 Commission in a public way such as this.

8 Finally, there is the question of Cabinet. My information and
9 what we seem to have confirmed through Commission counsel is
10 whether the decision to prosecute Micmacs for this offence was a
11 decision not made by law officers and the Crown but made by
12 Cabinet or through the direction of Cabinet. If the issue of the
13 subpoenas which Your Lordships already issued with respect to
14 Cabinet ministers and breach of Cabinet privilege are upheld by
15 the courts and there is a further session of this Commission to deal
16 with discussions in Cabinet, then of course it's our respectful
17 submission that this issue of how the MicMac hunting rights have
18 been treated since Simon in 1985 should be part of that exercise
19 as well.

20 If Your Lordships are in agreement that that would be an
21 appropriate course of conduct, of course in preparation for that we
22 would need to have gone through the exercise of seeing what
23 information was generated internally within the Attorney
24 General's Department and eventually found it's way into Cabinet's
25 hands.

1 Those are my submissions.

2 MR. ORSBORN

3 My Lord, I'd initially thank my friend for his apology in not
4 being able to brief us earlier on this matter. I appreciate the
5 difficulty that stemmed from his receiving late instructions in the
6 matter.

7 From his comments I think he has raised an issue that is a
8 real current grievance of the Micmac people and it is obviously a
9 matter of some complexity— legally, culturally and otherwise.

10 However, he has indicated that one of the reasons for
11 bringing the application this morning is because he cannot expect
12 a political resolution of the matter, and I would suggest that this
13 Commission cannot and should not be an alternative route to go
14 when one cannot expect a political resolution. The Commission is
15 not a standing remedial body through which particular grievances
16 may be addressed. And for that reason alone it would be my
17 respectful submission that the matter, although of current concern
18 to his clients, is not one that is within the reasonable mandate of
19 the Commission.

20 It is true that incorporated within the mandate of the
21 Commission we have considered it necessary to examine other
22 cases other than Mr. Marshall to see if a double standard does
23 operate in the administration of justice in the province. And it
24 will be for Your Lordships to consider whether or not that does
25 exist based on the evidence before you.

DISCUSSION

However, boundaries must be drawn in determining the number of examples that will be brought before you. And it is not unreasonable to draw a boundary where it has been drawn in the two cases presently before you.

Of perhaps more fundamental importance is the fact, as my friend indicates, that nine of his clients presently stand charged of an offence arising out of the moose hunt. As such, I would suggest it would be most inappropriate for this Commission and, indeed, anybody to embark on an inquiry as to the facts and circumstances surrounding this matter. Whether the province is correct it's interpretation of the Simon decision is an issue that will be presumably argued and decided by the courts who will be dealing with the prosecutions.

And for that reasons and for the others I have mentioned, it would be our submission, as Commission counsel, that it would be not appropriate nor within the reasonable boundaries of our mandate to proceed with consideration of that issue.

MR. SAUNDERS

My Lords, on behalf of the Attorney General of Nova Scotia I accept my friend's apology on the late notice. It was only five to nine this morning that Mr. Wildsmith alerted me to the application that he intended to place before Your Lordships and clearly I have not had time to consider Mr. Wildsmith's motion in any detail nor have I had any opportunity to seek the advice and instruction of my client to respond in any more detail that

1 Commission counsel has.

2 But I will remark that yesterday Your Lordships commented
3 on the efficacy of proceeding with dispatch and drawing these
4 hearings to a close and not continuing them in perpetuity, I think
5 was the word Your Lordship used. To accede to my friend's
6 request would seem to me to be calling upon endless days and
7 weekend of further deliberations to explore the questions that he
8 seeks to place before this Commission. And I say with deference
9 to my friend that the matter which he asks the Commission to
10 consider is beyond anyone's wildest interpretation of the ambit of
11 this Commission of inquiry.

12 And I've just been advised by my friend, Mr. Ross, that the
13 motion put by my friend, Mr. Wildsmith, is not a motion on behalf
14 of all native peoples in Nova Scotia. I understand from Mr. Ross
15 that the Confederation of Mainland Micmacs which Mr. Ross
16 represents, does not accede to the application made by the Union
17 of Nova Scotia Indians. So as my friend for the Commission says,
18 the issues are complex and not all of the complexity lies in the
19 interpretation of whatever the Simon case says. There are
20 considerations as to the representations made and by whom they
21 are made. And I just make that point before this Commission,
22 That apparently the motion, as put, is not representative of all
23 native groups as affected.

24 And, finally, My Lords, I have no doubt that the
25 interpretation of Chief Justice Dickson's decision in Simon would

be placed before the provincial court judge who was seized with jurisdiction in handling these nine offences and I would expect that defence counsel would argue the interpretation as placed on that decision by Mr. Wildsmith. But that's a matter for the court. I can't imagine that this Commission would want to get into things that, as of this weekend, are presently before the provincial court.
9:55 a.m.

MR. CHAIRMAN

What was the organization again that you took the position for?

MR. SAUNDERS

I understand that it's Confederacy of Mainland Micmacs, consisting of six bands on the mainland. The bands being, if Your Lordship cares to have them identified: Millbrook, Shubenacadie, Horton, Pictou Landing, Bear River, and Afton.

MR. CHAIRMAN

I take it that they have not been granted standing, Mr. Ross.

MR. ROSS

Mr. Ross is sitting.

MR. CHAIRMAN

You've imposed the Golden Rule of silence upon yourself.

MR. SAUNDERS

Thank you, My Lord.

MR. CHAIRMAN

Mr. Ruby?

MR. RUBY

If they have not been granted standing, I would be very surprised to hear them making an application, My Lord.

MR. SAUNDERS

Sorry, I didn't hear all of what my friend said.

MR. RUBY

As Your Lordship pointed out, since they have not been granted standing, I'll be very surprised to hear them make an application here.

MR. SAUNDERS

And I heard none.

MR. RUBY

And you shouldn't be surprised about that, because they have no standing and they never asked for any. I rise simply to say that I join Mr. Wildsmith's application and I urge Your Lordships to accept it.

MR. CHAIRMAN

Well, if you're on Mr. Ross' side, then I'm in some trouble. You met Mr. Ross, did you not, Mr. Wildsmith?

MR. RUBY

No, Mr. Ross has no client who is making any application, no client with standing. I am on Mr. Wildsmith's side. Mr. Wildsmith is correct in this issue.

MR. CHAIRMAN

I suspect that's what you meant to say.

MR. RUBY

In fact, if Mr. Ross has a position, he's not said it. It's rather counsel for the Government of Nova Scotia conveniently embroiled in the middle of a dispute who tries to bring in this red herring. I'm surprised that Your Lordship pays any attention to it at all.

MR. CHAIRMAN

I didn't interpret what Mr. Saunders said as being an application. I interpreted what he said was that he had been asked by Mr. Ross, as counsel for the Confederacy of Mainland Micmacs, to point out to the Commission that Mr. Wildsmith does not represent all of the Micmacs in Nova Scotia. And that, therefore, this application is not on behalf of all of them. That's all.

MR. RUBY

I would be very surprised, because Mr. Wildsmith never suggested that he did. I thought his client was the Union of Nova Scotia Indians.

MR. CHAIRMAN

I know. I realize that.

MR. RUBY

That's been clear from the very beginning. But perhaps counsel for the Attorney General of Nova Scotia doesn't understand that. Perhaps he's trying to make a political point.

MR. BISSELL

I rise to say we have nothing to say.

DISCUSSION

MR. CHAIRMAN

What we propose to do is to proceed now to hear... It's my understanding that there are two witnesses to be called. We will hear the first witness and then during our recess, before we start the second witness, I want to review the submissions of Mr. Wildsmith with my colleagues and then we will let you have our decision. Now are we ready to proceed? It's a good thing we started at nine.

MR. ORSBORN

The next witness will be Mr. Ron Giffin.

RONALD GIFFIN, recalled and previously sworn, testified as follows:

EXAMINATION BY MR. ORSBORN

Q. Mr. Giffin, you're still under oath, sir.

A. Yes.

Q. And if you've been following the proceedings of the last hour, if I could ask you to switch your mental gears and return to the events of 1983 and following. You were Attorney General from November, 1983 through to February, 1987?

A. Yes, that's correct.

Q. Could you tell the Commission, sir, when you were first made aware of the Auditor General's concerns about the expenses of Billy Joe MacLean?

A. I can't put an exact date on it but it would have been, my best recollection is some time in November of 1983.

Q. Shortly after you took office.

A. Yes, I was sworn in on November 9th.

Q. Did you give any instructions to your staff within the Department as to what type of review, if any, your Department should conduct?

A. Not at that point. My recollection is that I was first apprised of the concerns of the Auditor General by the Deputy Attorney General, Mr. Coles. We had a general discussion about it. I raised one question at that time that I specifically recall, because it was my understanding that this had developed in the context of a review conducted by the Auditor General of expense claims submitted by all MLA's over a particular period of time and the question that I raised with Mr. Coles at that point was whether or not anybody had met with Mr. MacLean to seek any explanation or answers from him about the questions that had been raised with respect to his claims. I understood that there were several other MLA's whose claims had also been questioned.

Q. And did you instruct Mr. Coles to insure that Mr. MacLean was interviewed?

A. I don't recall that I instructed him to do that. As I under... But I certainly conveyed to him as clearly as I could by my concern that I felt that any MLA whose expenses were being

1 questioned ought to be given an opportunity to explain the
2 claims or to attempt to answer the questions. But I can't say
3 that I put that in the form of instructions because the matter
4 had been raised by the Auditor General, and the Auditor
5 General is an independent office and certainly the Attorney
6 General's Department would have no authority to issue
7 instructions to the Auditor General or the Speaker's office.
8 Q. Were you made aware that the R.C.M.P. in their initial review
9 had identified possible offences that might require
10 investigation?
11 A. I was simply told that the Auditor General had communicated
12 with the R.C.M.P. I don't recall being told the substance of
13 those communications. But certainly when I realized that the
14 matter involved Mr. MacLean, who was a colleague in the
15 Legislature and the government caucus and I believe... I
16 believe Mr. MacLean entered the Cabinet at that time, I think,
17 in November of 1983, if my memory is correct. So he had
18 also become a Cabinet colleague. So the attitude that I took
19 towards the matter at that point was that I felt that I should
20 leave it in the hands of the Deputy Attorney General and the
21 senior officials in the Department to look at it and to make
22 whatever recommendations they might deem appropriate.
23 Q. Did you indicate that position to Mr. Coles?
24 A. Yes, I'm paraphrasing, but that...
25 Q. Yes.

1 A. Was certainly my attitude and my reasoning at that time was
2 that I did understand that that was the approach that had
3 been taken by my predecessor, Mr. How, as he was then with
4 respect to the Thornhill matter.
5 Q. Yes. Did Mr. Coles indicate to you that he did not wish the
6 R.C.M.P. to investigate the matter? I'm thinking now in the
7 time frame of November/December/January of '83-'84.
8 A. I don't recall his indicating that to me. At that point it
9 seemed to me at least in the discussions that we had that
10 there should be at some point in the process some
11 opportunity for Mr. MacLean to respond to whatever
12 questions had been raised about his expense claims. But I
13 don't recall ever saying to Mr. Coles that he should give any
14 instructions to the R.C.M.P. one way or the other.
15 Q. Did you discuss the concerns of the Auditor General with any
16 one or more of your Cabinet colleagues?
17 A. No.
18 Q. Prior to receiving Mr. Coles' memorandum in April of 1984,
19 did you have any further involvement with the matter?
20 A. Well, I was made aware that a meeting did take place which
21 involved, I believe, the Deputy Auditor General and Mr.
22 MacLean and the Speaker. And, at some point, I saw an
23 exchange of letters involving a number of items in Mr.
24 MacLean's expense claims in which, as I understood it from
25 that exchange of letters, that there had been a review of Mr.

1 MacLean's claims or those particular claims which were
2 questioned, that agreement had been reached at that meeting
3 on amounts that were owing by Mr. MacLean which had to be
4 reimbursed and that that matter had been dealt with at that
5 meeting and that they had reached that agreement. That was
6 my understanding from looking at that correspondence. I
7 can't tell you exactly when I saw that correspondence, but I
8 know I did.
9 Q. This would have been the correspondence between Mr.
10 Donahoe and Mr. Coles arising out of a meeting with the
11 Speaker and Mr. MacLean, I think, in January of '84?
12 A. I believe that was an exchange of letters between Mr.
13 Donahoe and Mr. Cormier.
14 Q. Mr. Cormier.
15 MR. CHAIRMAN
16 Q. Before we proceed, I'd like to get on the record, sometimes I
17 sense confusion. The Auditor General, as I understand it in
18 Nova Scotia, is a servant of the Legislature as opposed to
19 being servant of the Government, is that correct?
20 A. Yes, that's correct, My Lord. The office was established under
21 legislation that was passed, I believe, in the early 1970's.
22 Q. And the Speaker of the Legislature is not a member of, or a
23 representative of Government?
24 A. That is correct. That office as well is an office of the House of
25 Assembly.

1 Q. Is the Attorney General of the Province, as the Crown's law
2 officer, responsible for providing legal advice to Mr. Speaker
3 and to the Auditor General?
4 A. No.
5 Q. Where do they turn for legal advice in the event they require
6 it is necessary?
7 A. My practical experience being involved in this system over
8 the years is that the Speaker can turn to the Clerk of the
9 House and also to the Office of the Legislative Council, which
10 is responsible for drafting legislation dealing with private
11 member's bills and so forth. And, indeed, if my recollection is
12 correct, the Office of the Legislative Council would also have
13 been responsible for the drafting of any regulations with
14 respect to MLA's expense claims.
15 Q. So it's the duty of the Legislative Council to provide legal
16 advice to the Speaker?
17 A. Well, I hesitate to respond to that point without thinking
18 about it, My Lord, but the Office of the Legislative Council, as
19 I understand it, is there to serve all members of the House of
20 Assembly and not specifically the Speaker.
21 Q. Oh, I didn't mean that. I understand that. That that's the
22 Office of Legislative Council is to provide legal advice to all
23 members of the Parliament or members of the Legislature,
24 including the Office of the Speaker. Is that it?
25 A. Yes, I think that would be it.

1 Q. Now to whom does the Auditor General usually turn for legal
2 advice?
3 A. I can't answer that, My Lord. I don't know what practice the
4 Auditor General follows in that regard.
5 Q. In this particular case, it would appear as if he turned to the,
6 at least the Deputy Attorney General for advice.
7 A. I'm not clear because I was not involved in it at this stage.
8 Whether it was the Auditor General who communicated with
9 the Deputy Attorney General or the Attorney General's
10 Department or if there was a communication with the R.C.M.P.,
11 I'm not clear on who brought the Attorney General's
12 Department into the matter.
13 Q. It would appear from the report to the Auditor General and
14 from his testimony that whether he, that whoever made the
15 initial decision to go to the Deputy Attorney General that the
16 Auditor General relied upon the Deputy Attorney General's
17 interpretation of the law as it related to this case.
18 A. I think that's correct, based on what I know of how the
19 matter was dealt with.
20 MR. ORSBORN
21 Q. When you did become aware of the review taking place
22 within your Department, Mr. Giffin, did it give you any cause
23 for concern that your Department was giving a legal opinion
24 on matters arising out of the Speaker's office?
25 A. No, that didn't cause me particular concern. I didn't think

about it in that particular context. It was simply that the matter had been brought to the attention of the Department. At that point, I didn't know where it was going to lead or what our involvement would be. As I say, because it involved a colleague, I did not want to personally become involved in it. I was really taking a hands-off approach. I felt that I should rely on the judgement and advice of the Deputy Attorney General and the senior officials in the department.

10:10 a.m.

Q. If I could ask you to turn to page 35 of the booklet of materials, sir. I understand that to be a memorandum provided by Mr. Coles to yourself on April the 18th, '84.

A. Yes, that's correct.

Q. And I believe attached to that would be Mr. Gale's report which is found in the preceding three or four pages of the booklet.

A. Yes.

Q. Do you recall if you read Mr. Gale's accompanying memorandum?

A. I believe I did, yes. Yes, I certainly recall receiving the material and going over it.

Q. Did you discuss the matter on occasion directly with Mr. Gale?

A. I don't believe I ever discussed it with Mr. Gale alone. Most

of my discussions on this matter were with Mr. Coles. Now Mr. Gale may have been present on one or more of those discussions, but I wouldn't want to say that under oath, because I don't have a clear recollection of that.

Q. And is it fair to say that in Mr. Coles' opinion, as expressed in his memorandum, that there was no criminal wrongdoing and the matter did not warrant further investigation by the police?

A. Yes, that was what I understood that memorandum to say.

Q. And did you understand that that was also a view shared by Mr. Gale?

A. Yes.

Q. Did Mr. Coles express that to you?

A. Yes, well, in the memorandum, yes.

Q. Apart from the memorandum.

A. I don't recall what was said in oral conversation. It was certainly...nothing that was inconsistent with what he had put in the memorandum.

Q. If one reads Mr. Gale's memorandum and, in particular, the second paragraph on page 33. The last half of that paragraph he says,

> In the material we have, it appears that the claims are not fraudulent in that he made trips, expended money, although there is no hard evidence as to how many trips he made, how much he expended. There is no evidence to

contradict his assertions. If you want evidence to prove or disprove, then a police investigation will be necessary.

He seems to be saying that there are no facts to suggest wrongdoing unless we go out and look. Does that make sense that one would take that position?

A. It seemed...that seems somewhat ambiguous to me. But in any event, I accepted as the final recommendation from the Department to me as Attorney General the memorandum from Mr. Coles and the draft letter which had been prepared.

Q. You said "somewhat ambiguous". Can you tell us, sir, if you thought it was ambiguous at the time?

A. I would have difficulty recalling that. My concentration on that matter was on the final recommendations that I got from the Deputy Attorney General and as I said, I have to be careful, I'm under oath, and I'm just not...

Q. Yeah. Were you aware, sir, of any of the specifics of the problems in the documentation?

A. No, I did not at any time look at the documentation myself or review it. I felt that that was something that I should leave in their hands.

Q. So you formed no judgement of your own?

A. That's correct.

Q. Were you yourself familiar with these lead regulations?

A. Not in detail, no. I certainly had not reviewed them. I knew in a general way what MLAs were entitled to claim for by way of expenses and, indeed, for a couple of years, I think around 1979 to '81, I had served on the Internal Economy Board. But I was there because I was at that time chairman of the Management Board and, therefore, interested in expenditures. But I was never involved in the drafting of regulations. I believe those regulations were drafted by the Office of the Legislative Council.

Q. And you would have occasion from time to time yourself to file expense claims.

A. Oh, yes.

Q. Are you able to tell us if the regulations covered the manner in which expense accounts should be filed?

A. Well, there were forms prescribed which had been revised and changed over the years, but that's...basically it was done, as I recall it, in terms of filling out a form with appropriate amounts and calculation of trips or what have and then the Member signed it and would then send it on to the Speaker's office.

Q. The reason I ask is I'm looking at Mr. Coles' memorandum, the second paragraph on page 35, and he says to you, the last half of that paragraph,

Mr. MacLean's explanation of the manner in

> which he filed his statement of travel and living allowances is, in our opinion, a reasonable explanation, particularly in light of the manner in which these regulations are communicated to members of the Legislative Assembly.

I'm asking if there was any actual linkage between the communication of the regulations and the manner in which the claims were actually filed?

A. Well, I took... Perhaps I can relate my experience with it. Over the years, and I assumed this evolved from the traditions of the House of Assembly, after I was elected in 1978 I can recall attending caucus meetings at which the Speaker would come to the caucus meeting each year and would outline orally to whoever happened to be there those items for which Members could claim, the amounts and that sort of thing. The regulations were not circulated in written form to MLAs. So I took that to be part of what Mr. Coles was referring to, was that it was obviously from a legal point of view a highly unsatisfactory arrangement. It was something that had evolved over the years in a traditional way. It has since been changed.

Q. Mr. Coles enclosed with his memorandum a draft...

MR. CHAIRMAN

Q. You said it had been changed, Mr. Giffin, what's the practise now? For instance, you've just gone through an election. I think we can take judicial note of that. And there are

1 probably some new members in the Legislature.
2 A. Yes.
3 Q. How do they...how are they made aware of the regulations
4 governing their recovery of legitimate expenses incurred?
5 A. It's my understanding that this is all now in printed form
6 and is circulated to the MLAs and that the entire procedure,
7 certainly in the light of the MacLean case and other
8 difficulties which were experienced, the entire procedure
9 has been tightened up and I understand that the procedure
10 as it now exists has the approval of the Auditor General. I
11 think if I were to characterize that system as it was when I
12 first entered the Legislature, it seemed to be very much an
13 honour system, very loose.
14 Q. The Auditor General in his report, if you look on page 10 of
15 the briefing book you have there, would appear to indicate
16 that once the Auditor General made recommendations
17 before, at least at the time of making its report, there had
18 been a change of policy and you see it says, "The speaker
19 has initiated this year the practise of meeting all Members
20 to review regulations and guidelines with them." And then
21 on page 11 of our briefing book, the Auditor General would
22 appear, in a paragraph starting with, "In summation," to
23 confirm that there is now a satisfactory procedure
24 emanating from the Speaker's office. Is that the procedure
25 you're referring to when you say it's changed?

1 A. In a general way, yes, My Lord. I believe there have been
2 further changes since then. This was in 1984 and I think
3 there have been further changes in the system since then,
4 but I wouldn't be in a position to be able to review that in
5 detail. But I'm sure that information would be available
6 from the Speaker.
7 Q. The Speaker is always chairman of the Internal Revenue,
8 or...
9 A. The Internal Economy Board.
10 Q. The Internal Economy Board.
11 A. Yes.
12 MR. ORSBORN
13 Q. The memorandum found at pages 37 and following, Mr.
14 Giffin, was, I believe, prepared in draft form for you by Mr.
15 Coles.
16 A. I can't say if it was just Mr. Coles. I don't know if Mr. Gale
17 or others were involved. But it was submitted to me by Mr.
18 Coles.
19 Q. Do you remember if you made any changes in it?
20 A. I don't believe I did. I signed it in the form in which it is
21 there.
22 Q. Yes. It's dated April the 18th, the same date as Mr. Coles'
23 memorandum to you, so...
24 A. Yes, that's correct.
25 Q. It would appear it went out fairly quickly.

1 A. Yes.
2 Q. In substance, I think, your letter... I mean you did, if you
3 signed it, I presume you agreed with it, it has to be taken as
4 your letter.
5 A. Yes, although I think I have to qualify that answer by
6 repeating what I said earlier. That I did not personally
7 review the documentation or the material that the Auditor
8 General had or personally get involved in the explanations
9 put forward by Mr. MacLean. In other words, I was relying
10 upon the advice and information given to be my the Deputy
11 Attorney General, but recognizing, as well, that as the
12 Attorney General that I had the final responsibility in the
13 matter.
14 Q. So when the letter states that "Mr. MacLean's explanation is
15 satisfactory and that these matters are simply accounting
16 irregularities," these are your statements, but is it fair to say
17 that you were relying totally on Mr. Coles?
18 A. Yes, that's right.
19 Q. Once you sent that letter, did you believe that the matter
20 was closed?
21 A. Well, at least as far as the Department was concerned. I was
22 not aware of any further action to be done within the
23 Department. Now as to whether or not the Auditor General
24 or the Speaker or for that matter the RCMP would do
25 anything further, that was not really a question that I

1 addressed at that point. But after I signed and sent that
2 letter, at that point at least, I regarded the matter as
3 concluded as far as the Department was concerned.
4 Q. Did you have any view on whether the Auditor General was
5 satisfied or not with the explanation that had been
6 provided?
7 A. It was my understanding that he was and I based that on
8 the exchange of letters between Mr. Donahoe and Mr.
9 Cormier.
10 Q. Perhaps if we can turn back to that.
11 A. What page?
12 Q. I would assume, sir, the letter that you're referring to would
13 in large measure be found at page 29.
14 A. Yes.
15 Q. From Mr. Donahoe to Mr. Coles, when he sets out the
16 discussion that Mr. Donahoe and Mr. Cormier had with Mr.
17 MacLean and he does say in the last paragraph on page 31,
18 "That Mr. Cormier has seen the contents of this
19 memorandum and agrees that it accurately sets forth the
20 discussion."
21 A. Yes, and I also recall the exchange of letters, which I assume
22 is in the work here somewhere, between Mr. Donahoe and
23 Mr. Cormier.
24 Q. Yes.
25 A. Which specified the various amounts that were to be

1 reimbursed.

2 Q. Yes. If I could ask you to turn to pages 41 and 42 and 43
3 and 44. These are letters that were not exchanged until
4 January 4th, '85, between Mr. Cormier and Mr. Donahoe and
5 they comment on various matters that were dealt with to
6 the Auditor General's satisfaction, with the exception of the
7 expense claims and the documentation relating to them.

8 A. Yes, I'm sorry. I didn't mean to mislead you. Those letters
9 were exchanged in '85 after the...after the matter had arisen
10 again in the 1984 election. In any event, I was certainly...I
11 was satisfied when I signed the letter in April of 1984 that
12 the Auditor General was satisfied with the disposition of the
13 matter. I'm sorry, I should have stated that I was relying
14 on that memorandum which you just quoted because these
15 letters came later.

16 10:25 a.m.

17 Q. Were you relying only on that memorandum from Mr.
18 Donahoe to Mr. Coles or was there any other advice given to
19 you by your officials as to the position of the Auditor
20 General?

21 A. Certainly Gordon Coles and I had conversations on the matter
22 although I hesitate under oath to say specifically what he
23 said. But in any event, I was satisfied when I signed the
24 letter in April of '84 that the Auditor Generals' office was
25 satisfied with the way the matter had been dealt with.

1 Q. With respect to the decision as to whether the police should
2 investigate or not, this was the Department's really final word
3 on it and you've indicated that you relied on Mr. Coles. If
4 there were a serious difference of opinion between Mr. Coles
5 and Mr. Gale as to whether an investigation should take place,
6 would you have expected to have known about that?
7 A. I would certainly have wanted to have known about any
8 difference of opinion. Mr. Saunders summarized for me last
9 night over the telephone the differences of opinion that I
10 understand were expressed here yesterday by Mr. Coles and
11 Mr. Gale in their testimony on that area. I was certainly not
12 aware of any difference of opinion between Mr. Coles and Mr.
13 Gale.
14 Q. I think it's fair to say that on the evidence that we've heard
15 that Mr. Coles felt there should not be, Mr. Gale was directly
16 the opposite and felt that it should be and said so to Mr. Coles.
17 On an issue such as this involving a Cabinet minister, one of
18 obvious sensitivity, would you have not reasonably expected
19 that Mr. Coles would have said to you, "This is my position,
20 but in fairness, I should tell you that Mr. Gale feels the
21 opposite?"
22 A. Well, that did not happen. I took the memorandum from Mr.
23 Coles as being the Department's final advice to me on the
24 matter. No, that was certainly never communicated to me.
25 Q. Would you have expected that it should have been?

1 A. Yes. Because I think any, certainly to have somebody as
2 senior as Mr. Gale holding that view, I certainly should have
3 been advised of it, yes, no question.
4 Q. Again sir, up to and including the time that you wrote your
5 letter to the Speaker in April, had you discussed the matter
6 with one anyone or more or your Cabinet colleagues?
7 A. No. No, that was a matter that I regarded as being, having
8 nothing to do with Cabinet.
9 Q. I understand that the matter raised itself during the election
10 campaign of 1984, November 1984.
11 A. Yes.
12 Q. And that...
13 A. I'm not sure if that's the right phrase, but it was raised.
14 Q. It didn't raise itself obviously. And that in your response,
15 yes, right. The phrase we have had earlier in these hearings
16 that things "pop up".
17 A. Yes, I've had that experience.
18 Q. In any event, you thought it necessary, I take it, to release to
19 the press or to the public your letter of April 18th in response
20 to certain allegations that were made in the course of the
21 campaign?
22 A. Yes. That's correct. When the allegations were raised by Mr.
23 Cameron in the last week or so of the provincial election
24 campaign, I felt that I had to respond. Now that letter had
25 not been made public. It was a private communication to the

1 Speaker because we were dealing with the questions that had
2 been raised about an MLA's expenses and at least to my
3 understanding at that point in time, dealt with. So I had not
4 made the letter public. I was of the view that we had to get
5 the permission of Mr. MacLean to make the letter public and
6 that was done. And I then made the letter public and, in fact,
7 communicated that information, in response to the allegations
8 that Mr. Cameron had made.
9 Q. We have filed, My Lord, as Exhibit number 176 a transcript of
10 a press conference held by Mr. Giffin. I'm unable to advise
11 you of the exact date but, other than to say it would be very
12 early in November. The election being on November the 6th.
13 EXHIBIT 176 - PRESS CONFERENCE TRANSCRIPT - HELD BY MR.
14 GIFFIN re MR. MacLEAN
15 A. Yes, it was the, if I may be of assistance on that. It was the
16 Friday afternoon prior to the election.
17 Q. Yes. November the 1st? I'm advised also, My Lord, this is a
18 transcript prepared from a tape taken by a freelance
19 reporter, Miss Patsy, Betsy Chambers. I'm not able myself to
20 vouch for either its accuracy or its completeness but if there
21 is any question raised, I'm advised that there is a tape
22 recording available if anybody does wish to review any
23 particular aspect of it. I only wish to direct one question to
24 you at the moment, Mr. Giffin, on this press conference. And
25 it's on page 6 of the materials. And a question is put to you at

1 the top of the page. "Has that explanation satisfied the
2 Auditor General?" And the preceding questions relate to the
3 explanations that were provided and your answer is, "Yes.
4 Yes, sir." Do I take it that that was your understanding at the
5 time?
6 A. Yes, it was.
7 Q. Did you subsequently, on November 22nd, attend a meeting
8 with the Auditor General, the Speaker and officials from your
9 Department?
10 A. I believe there was a meeting. I wouldn't want to testify to
11 the date. I may just, if I may go back to this transcript for a
12 moment. I notice that it may not be complete. I recall a
13 reference to Premier Hatfield as being the last question in the
14 press conference and I don't see that there so there may be
15 other things missing.
16 Q. There may be, sir.
17 A. So I wouldn't want to say that that is complete.
18 Q. No, I understand that and I cannot advise that it is. I take it,
19 sir, you do recall attending a meeting with the Auditor
20 General following the election at which he basically advised
21 yourself and the Speaker as to his possible inclusions in his
22 report about Mr. MacLean's expenses?
23 A. Yes, I believe there was a meeting. I have some difficult
24 recollecting details of it but that there was a meeting.
25 Q. We have had evidence from Mr. Cormier that at that meeting

1 he pointed out that while he was not commenting on the
2 legality of the issue, he had grave reservations from an audit
3 point of view that he felt that the documentation was highly
4 irregular, perhaps fraudulent and that he did not accept the
5 explanations of Mr. MacLean, and accordingly, was not
6 satisfied that the issue was closed. Do you recall a
7 conversation to that effect?
8 A. No, I have difficulty recalling the conversation at that
9 meeting. Certainly there was a meeting and there was a
10 discussion about the situation with respect to Mr. MacLean.
11 But I would have real difficulty trying to recall specific
12 statements by individuals at the meeting. But I do recall
13 there was a discussion about Mr. MacLean's situation.
14 Q. Did you take from the meeting in total that the Auditor
15 General was not satisfied with the explanations given by Mr.
16 MacLean?
17 A. No, I can't really say that. Again, I have difficulty recollecting
18 the discussions at that meeting. So I, you know, I just better
19 not say, not since I'm under oath.
20 Q. Is it fair to say that you took nothing from the meeting that
21 would give you concern about a public position you had
22 enunciated during the election about the Auditor General
23 being satisfied?
24 A. That's correct. I didn't see anything. I don't recall anything
25 that happened at that or, that meeting that caused me that

kind of concern.

Q. If, in fact, the Auditor General had made it quite clear that he wasn't satisfied, are you able to tell us what you would have done in light of your public statements?

A. I think that probably what I would have done in that circumstance would have been to ask the staff in the Attorney General's Department to take another look at the matter.

Q. Did you have any other involvement in the matter prior to the release of the Auditor General's report in April of '85?

A. I certainly recall receiving the, or seeing the correspondence from Mr. Donahoe in '85, between Mr. Donahoe and Mr. Cormier dealing with Mr. MacLean's claims.

Q. Yes. And they dealt with a number of matters but indicated that the expense account documentation had been otherwise dealt with, I believe.

A. Yes.

Q. Now the Auditor General tabled his report in April of 1985 and it's quite clear from that report, I'm reading from page 10. He says,

> However, as Auditor General, it is my opinion that the documentation employed and the explanations provided by the Member are inappropriate for the expenses claimed and unacceptable from an audit standpoint.

1 CHAIRMAN

2 What date is that?

3 MR. ORSBORN

4 That was tabled very early in April of 1985, My Lord.

5 CHAIRMAN

6 Thank you. Now the page.

7 MR. ORSBORN

8 I was reading from page 10, the top paragraph, left-hand
9 side.

10 Q. Were you, Mr. Giffin, aware of that paragraph once the report
11 was released? Did you read it?

12 A. Yes I did.

13 Q. Did that give you any concern about your earlier conclusion
14 that the Auditor General was satisfied?

15 A. Which page are we on? Is this page 10?

16 Q. It's page 10 or page 64 of the report itself. The top
17 paragraph, sir, on the left-hand side.

18 A. Yes, the right top paragraph.

19 Q. And in fairness I should point out to you the preceding
20 paragraph on page 9 where the Auditor General says, "It's
21 quite clear that I'm not making judgements on legal matters."

22 A. Yes, that's right. The concern that I had was that I, at that
23 point, wasn't clear what the position of the Auditor General
24 was. It had been my understanding, going back to when the
25 matter was dealt with in the winter of '84, April of '84, that

1 the Auditor General was satisfied with the explanations put
2 forward by Mr. MacLean and he was satisfied with the way
3 that those matters had been dealt with. And I also recall,
4 although I cannot put a date on this, but I believe it was, I
5 know it was after the '84 election, but at some point having a
6 conversation with the Speaker of the House, Mr. Donahoe, in
7 the parking lot of the Legislature and saying, "Is there a
8 problem with,...does Mr. Cormier have a problem with this?"
9 And he said, "No," he said, "he's satisfied with what has been
10 done." So I didn't pursue the matter further. But I can't tell
11 you when that conversation took place but it did take place.
12 Q. Once you reviewed the Auditor General's report, did his
13 statements give you any cause for concern?
14 COMMISSIONER EVANS
15 Can I just, on page 37, the report that you've sent or the
16 letter which you sent to the Attorney General, I'm sorry, to Mr.
17 Donahoe, a copy went to the Deputy Attorney General, Deputy
18 Auditor General...
19 CHAIRMAN
20 That's Mr. Cormier.
21 COMMISSIONER EVANS
22 That was Mr. Cormier.
23 A. Yes.
24 COMMISSIONER EVANS
25 And there was no response in writing from Mr. Cormier to

1 that letter.

2 A. No. If I might, My Lord, by way of explanation. I should
3 point out that Mr. Sarty, who had been the Auditor General
4 had retired, and the new Auditor General had not been
5 appointed. There was a period of time when Mr. Cormier, in
6 effect, served as Auditor General although still had the title of
7 Deputy Auditor General.

8 COMMISSIONER EVANS

9 So that Mr. Cormier did not indicate to you that he was
10 dissatified with the contents of that letter.

11 A. That's right.

12 MR. ORSBORN

13 Q. Did you ask any of your staff to take another look at it once
14 the Auditor General's report was released?

15 A. No, I didn't. I recall being asked in the House of Assembly
16 and I can't put a date on this without going back to *Hansard*
17 but I recall being asked in the House of Assembly by Mr.
18 MacLean about the matter and responding that it was my
19 view that...I think he raised it in the context of a question of
20 whether or not there should be an RCMP investigation and
21 that the response I gave was that it was my view that the
22 RCMP were always free to investigate any matter at any time
23 that they deemed appropriate.

24

25

10:40 a.m.

Q. Given your knowledge of the matter and given the Auditor General's concerns, which he was still voicing, did you give any consideration to yourself requesting an investigation?

A. No, I did not at that point. I was still satisfied that the advice that I had been given in April of 1984. And I think the concern I had about the position of the Auditor General was that I wasn't quite sure what the position was. He seemed to say one thing on one occasion and something different. So I just wasn't clear on the position of the Auditor General. That was why when I had that particular conversation with Mr. Donahoe I just asked the question and he said that it was his understanding that the Auditor General was satisfied with the way the matter had been dealt with.

Q. Well, his report would not indicate that and given your confusion over the Auditor General's position did you take any steps to communicate directly with the Auditor General to say, "Look here, if you've got a problem I'd like to know what the details are?"

A. No, I did not. I just took the position that I was relying on the advice that I had had in 1984 and saw no reason to change that.

Q. A RCMP investigation was commenced in April of '85 following the request by Mr. Vince MacLean. Were you

aware, sir, that an investigation had been commenced?

A. Well, Mr. MacLean raised questions in the House about the matter, and in response to one of his questions I indicated that if he had concerns that he, as a citizen, had every right to go to the RCMP himself about the matter, and very shortly thereafter that is what he did.

Q. Did you receive interim reports from the RCMP as they proceeded?

A. Not personally.

Q. Were you briefed as to the investigation as it proceeded?

A. No, I was not. My view of the RCMP investigation when it was commenced was that since again it involved a colleague that I should take a completely hands-off approach. So I didn't ask for updates on what they were investigating or what results they were achieving or anything else. My view of it was that they should proceed totally on their own, totally independently. They could, of course, communicate with Gordon Gale, who normally would be the person in the Department with whom they would communicate if they felt any need to communicate with the Department. But I stayed completely away from it.

Q. Were you made aware that charges were being considered before they were laid?

A. No. The advice that I received on the laying of the charges was in a telephone call from Mr. Coles to my home in Truro

and that would have been, just, I think, perhaps a day before or the day the charges were laid.

Q. And what was the substance of that advice?

A. Well, he advised me that the result of the RCMP investigation was such that they were recommending the laying of numerous charges against Mr. MacLean and my response to that was, well, if...along the lines, if you need my approval for that, you've got it. I should explain that I was ill at the time. I was in my home in Truro. And so that's why this was done over the telephone.

Q. Did it come as a surprise to you that the charges were being laid?

A. Well, at the risk of being flippant, I suppose I could say nothing surprises me. But the serious answer to that would be that given the length of time that was involved in the investigation, (it took close to a year), and while I had no reports on the investigation, never looked at the files or anything like that, just the mere passage of time and the fact that the investigation was going on over that period of time, suggested to me that there must be something of substance that the RCMP were looking at. But that was just a personal...

Q. Sure.

A. ... conclusion that I drew. So that by the time I received the call from Mr. Coles, it did not come as a surprise simply

1 because of the length of time that the matter had gone on.
2 Q. You were advised that numerous charges were
3 contemplated. Did that give you any cause for concern
4 about the earlier advice that you had received from your
5 officials that number one, no investigation was warranted;
6 number two, no criminal wrongdoing was apparent, it was
7 merely an accounting irregularity?
8 A. Oh, yes, it caused me very great concern, and this caused me
9 a very great concern right up to the present time. However,
10 the reality was that the charges were being laid and that
11 was that. That was the just situation that we would have to
12 deal with.
13 Q. Did you have occasion to talk to Mr. Coles and indicate to
14 him your concern about the earlier advice?
15 A. I can't recall the specifics of conversations on that point. It
16 was obvious that the advice that I had received in 1984 was
17 wrong and that I was, therefore, wrong in accepting and
18 following that advice. But I don't recall that we got into any
19 great long discussion on it. My attitude was that it had
20 happened, and you just go on from there.
21 Q. Did you reprimand him?
22 A. No.
23 Q. Did you speak to Mr. Gale about it?
24 A. No, I don't recall that I did, no.
25 Q. I understand that you had, sir, some involvement in the plea

1 bargaining that took place in September of 1986.
2 A. Yes, I did.
3 Q. Did you instruct that you would be involved in that process?
4 A. No, my memory of that is that Mr. Martin Herschorn, who
5 was involved with the matter, asked to meet with myself
6 and I believe Mr. Coles. I'm not sure if Mr. Gale was there
7 or not. Certainly Mr. Herschorn was dealing with the plea
8 bargaining and that that meeting was requested.
9 Q. Had you been previously directly involved in plea
10 bargaining discussions during your term as Attorney
11 General?
12 A. In some situations, yes. Generally cases that were perhaps
13 unusual or that would involve public policy questions or the
14 setting of a new precedent. Not a great many, but there
15 were some.
16 Q. Was there any public policy question involved here?
17 A. I think so. I think with the conviction of a Minister of the
18 Crown, a Member of the Legislature on a serious criminal
19 charge, which had not happened before in the history of the
20 province. There had been people convicted of things like
21 impaired driving, but certainly never anything like this.
22 That, yes, I certainly felt that had public policy implications,
23 yes.
24 Q. Can you indicate to us what these public policy factors were,
25 given that a Cabinet Minister was involved?

A. Well...

Q. What were the interests that had to be considered?

A. Well, I think the interests in one sense, I suppose the interests that have to be considered in any sentencing. But the question of the impact of this on the general public, public perception of the administration of justice, the type of precedent that would be set, whether the fact that an individual holds that type of public office means that any particular sentencing considerations ought to apply, that sort of thing.

Q. Those factors that you have indicated, if I've written them down correctly, the impact on the public, the fact that the individual holds an office and the precedent that may be set. Would it be fair to say that these would all be factors that would tend to increase rather than decrease a sentencing position?

A. Well, I don't want to get into an argument on the authorities. I understand the courts have not been clear on their view or there have been different decisions over the years about the fact that the individual holds a public office, as to how that ought to impact on sentencing. The...and I don't intend what I gave you to be an exhaustive list of the matters of concern. But they just...when I was requested to take part in that meeting, that discussion, I felt, as Attorney General, that I had a responsibility to do so.

Q. Can I ask you, sir, why in the earlier matters involving the investigation and the review of the expenses and the laying of charges, you consciously took a decision that you should maintain a hands-off approach because it was a Cabinet colleague, and now you feel it's your responsibility to be involved in this plea bargaining process?

A. Yes. The case for me throughout presented a very serious dilemma and one that I've never been able to resolve. On the one hand if, as Attorney General, you take the hands-off approach, simply hand it over to your staff or the RCMP or what have you, then you run the risk of having happen to you what indeed happened to me. And so then you can be accused of having, in effect, abdicated your responsibility. On the other hand, if the Attorney General takes a direct involvement in a matter such as that, where it involves a colleague, then of course whatever decision is made, you're then subject to the potential criticism that you are, in effect, favouring a colleague. So it's a dilemma and I don't have the answer to it. But that was the problem I was faced with. In any event, given the seriousness of the matter and when the staff in the Department requested a meeting with me to discuss it and given that the hands-off approach, certainly back in '83, '84, had produced results which were highly unsatisfactory, I decided to accede to the request and to take part in the discussion.

1 Q. Is it fair then that because of the results that had followed
2 from the earlier advice given to you that you wanted to
3 exercise somewhat more of your own judgement in this case
4 and be somewhat better informed than you had been
5 previously?
6 A. Well, let me put it this way. If... I was quite prepared to
7 leave the plea bargaining in the hands of the staff in the
8 Department. I would have been quite happy to do that. But
9 when they requested the meeting with me and wanted to
10 discuss it with me, then I felt that I should accede to that.
11 But it is a dilemma for any Attorney General in that type of
12 case as to how you deal with it.
13 Q. I believe, sir, on page 57 of the booklet there is a memo to
14 you from Mr. Herschorn when he asks "For this opportunity
15 to discuss it with you," and he encloses in that a copy of the
16 information and a copy of the prosecutor's summary of the
17 counts in question. Did you...and that summary is found at
18 pages 53 through 56 immediately prior to that. Do I
19 understand, sir, that in your own law practise you had had
20 occasion to do a fair amount of criminal law?
21 A. Yes.
22 Q. As defence counsel.
23 A. Both as defence counsel and as a Crown prosecutor.
24 Q. Did you..
25 A. Not simultaneously.

1 Q. Of course. Settle it in your office.
2 A. Yes.
3 Q. Did you read Mr. Clair's summary of the counts?
4 A. Yes, I did.
5 Q. Do you recall prior to meeting with Mr. Herschorn and Mr.
6 Coles whether you formed any view in your own mind as to
7 what an appropriate disposition would be?
8 A. Not really. I felt that was the purpose of the meeting, was
9 so we would sit down and discuss the matter as openly and
10 freely as possible and see if we could come to an agreement
11 on what would be an appropriate response to the plea
12 bargaining proposal.
13 Q. And this was a meeting attended by yourself, Mr. Herschorn
14 and Mr. Coles?
10:55 a.m
15
16 A. Yes, I can't recall if Mr. Gale was there or not. But I, my
17 problem with some, with these meetings is that I never kept
18 notes myself of who was there or what took place in the
19 discussion. I always relied on the staff in the Department to
20 do that.
21 Q. And can you give us to the best of your recollection the
22 substance of that meeting?
23 A. I can only do it in paraphrase or summary. My recollection is
24 that the main issue that was discussed was whether or not
25 the Crown should insist upon requesting a period of

1 incarceration for Mr. MacLean. That was the main issue. At
2 least that's the one that stands out in my memory.
3 Q. And were there views expressed to you by Mr. Herschorn and
4 Mr. Coles?
5 A. Well, it was the, I'm not sure that I would put it that formally.
6 It was just a discussion in which we, as I recall it, explored
7 the various factors and I don't recall that anybody came in
8 there with a fixed agenda and said it should be this, this, this,
9 and this. That we had a back and forth discussion which was
10 very informal.
11 Q. What were the various factors?
12 A. Well, all of the factors that would be taken into account in
13 sentencing. Whether or not the individual was a first
14 offender, family situation, impact on the community,
15 deterrent factor. That's not a complete listing, but I think
16 they were all covered in the submissions that were made to
17 the court. But all of the factors that would ordinarily be taken
18 into consideration in sentencing.
19 Q. Was any legal authority discussed?
20 A. I don't recall any. However, I left any research on law or on
21 authorities to the staff in the Department. I'm sure there must
22 have been reference made to legal authorities, but I can't
23 recall any specifically.
24 Q. Did Mr. Herschorn express any concern that not asking for a
25 period of imprisonment would be contrary to authority?

A. I don't recall him saying that. It seemed to me that this was a case that was not totally unprecedented but certainly was the first one of its kind that we had had in Nova Scotia.

Q. surely it wouldn't be the first case involving fraud charges and forgery charges.

A. Oh, no. No, certainly not.

Q. First case insofar as it involved a Cabinet Minister.

A. That's right.

Q. Why would that affect the sentencing position?

A. Well, I think it would come into play in several issues. Certainly on the question of deterrence, for example. The question of the public perception of the administration of justice.

Q. Yes. Again, sir, if I may, the matter of deterrence and the matter of public perception, would they be issues that would tend to increase rather than lighten the Crown's position on sentence?

A. Well, I think they would probably tend to increase but they were not the only factors to be considered.

Q. What were the others?

A. Well, other factors that come to my mind would be the fact the individual in question was a first offender. The record of community service that the individual had had. The fact that Mr. MacLean at that time was the breadwinner for quite a large family. I think there were still five or six children at

1 home. The fact of Mr. MacLean's record of community service
2 over the years, which was very substantial. So there were all
3 sorts of factors that obviously had to be taken into
4 consideration. And no two cases are the same.
5 Q. Looking at the record of community service, is that a factor
6 you would normally take into account in a sentencing
7 position. That because you had been a great fellow in the
8 past, therefore, we won't ask so much now?
9 A. I think that's relevant. I think if you have an individual who
10 has made a...as Mr. MacLean had certainly in that area,
11 particularly in Port Hawkesbury and the surrounding area,
12 had been involved in a large number of volunteer activities
13 and so forth over the years, I think that's the factor because I
14 think that the... Well, without belabouring the point, I do
15 think it's a factor, yes.
16 Q. Did you want Mr. MacLean to go to jail?
17 A. I didn't have a preconceived notion on the matter. My
18 concern was more in terms of process and also the view of the
19 matter held by staff in the Department. As I've said, it was
20 an informal type of meeting. A fairly free-wheeling
21 discussion, as I recall it. But I did not have that preconceived
22 notion that he should go to jail. In my own mind, although I
23 don't see any reference to this in the transcript or the
24 submissions that were made to the court on sentencing, the
25 point that really tipped the scales in my own mind in favour

of a more compassionate approach was the state of Mr. MacLean's health. He had suffered a major heart attack, from which I understood he was still recuperating. Mind you, in any decision on sentencing and plea bargaining, all of these factors have to be taken into consideration. But the one that tipped the scales in my own mind was the state of his health, as I understood it to be at that time.

Q. You mention the views of your staff. Is it fair to say that it was the view of your staff that there should not be a request for imprisonment?

A. Well, I think the discussion was more free-wheeling and informal than that. And the discussion was in the context of whether or not we should accept the plea bargaining proposal and eventually, when the discussion was concluded, we were all in agreement that we were prepared to accept the proposal.

Q. Did both Mr. Coles and Mr. Herschorn participate substantially in the discussion?

A. Oh, yes.

Q. Were you given any assessment of the merits of the Crown's case?

A. Yes, it was certainly my understanding that if the case had proceeded to trial that we would have expected to get convictions on probably several of the counts. Now mind you, one can never predict the outcome of a trial, but it was

1 certainly my understanding that the Crown's case was a
2 reasonably strong one.
3 Q. Given that, what benefit is there to the Crown in bargaining at
4 all? Particularly in a case like this. Why would you not have
5 said, and given your concerns about the earlier advice you
6 had received, we think we'll get a conviction. It's a public
7 official. Let's back off and let the court decide what the
8 sentence is.
9 A. Of course, in the final analysis, even with plea bargaining, the
10 court decides the sentence.
11 Q. I appreciate that.
12 A. But there were also questions about the trial itself. Some of
13 the witnesses were people who had been close to Mr.
14 MacLean. It would have been very trying and difficult for
15 them to testify and there was also the point, which I suppose
16 arises whenever plea bargaining arises, that if the matter was
17 concluded, then a long and costly trial would be avoided.
18 Q. There's an indication at the bottom of page 63, Mr. Giffin, a
19 file note prepared by Mr. Herschorn, the bottom paragraph.
20 There's some to-ing and fro-ing between Crown and defence
21 counsel and Mr. Herschorn is requesting right at the bottom
22 here that instructions about a firm representation on a fine of
23 five thousand dollars and he appears to indicate that you
24 agreed that a Crown representation to this effect was
25 satisfactory. Do you recall giving Mr. Herschorn instructions

that a firm fixed five thousand dollar fine was agreeable to you?

A. My recollection is that the five thousand was to be put forward as a minimum figure. Originally, there was talk about a range of between five thousand and ten thousand.

Q. Yes. So insofar as this note indicates, your agreement to a firm representation of five thousand dollars, it's not quite accurate, is that what you're saying?

A. Well, I understood that to be a minimum figure.

Q. Did you, in the totality of things and given your experience as a defence counsel, have any view on whether or not this was a good deal for Mr. MacLean?

A. I didn't really think of it in those terms. I don't know that you could say at that point in time that Mr. MacLean was in a very good situation, anyway. He had lost his position as a Cabinet Minister and he faced the loss of his position in the House of Assembly.

Q. His own lawyer viewed it...

A. Along with the other thins that were associated with being found guilty of a serious criminal offence.

Q. His own lawyer yesterday characterized it as a great deal for his client. Would you disagree with that?

A. Well, that's Mr. Pink's view of it. I didn't really ever characterize it in my own mind one way or the other.

Q. You talked about the importance of this from a precedential

point of view. Do I take that given the position that the Crown took, it was your view that it would be appropriate for the Crown in future cases involving a businessman and fraud or forgery-related cases in the twenty-five thousand dollar range, that a five thousand dollar fine would be an appropriate disposition in future?

A. Well, I think you have to look at each case on its merits. Each case is different. And, indeed, there have been cases in which incarceration has been ordered and which that has been criticized as being too harsh. It's the kind of a situation which there's really no easy answer. You just make the judgement on the facts of the particular case and that's all you can do.

MR. ORSBORN

Thank you, sir.

MR. CHAIRMAN

Mr. Ruby?

EXAMINATION BY MR.RUBY

Q. Mr. Giffin, would you look with me at page 37 to 39, which is the letter dated April 18, 1984 which you wrote to the Speaker, Mr. Donahoe? And, particularly, at the bottom of page 38.

A. Yes.

Q. The last six lines on that page:

> Although some of the other particulars in the

> supporting statements may raise questions as to the need for the purpose intended, Mr. MacLean's explanation of the nature and purpose of the supporting statements and the letter from the apartment owner acknowledging receipt for payment of accommodation, refutes any otherwise *prima facie* consideration of criminal wrongdoing in the matter.

As I understand your evidence, you, in fact, did not direct your mind to the issue of whether the "explanation refuted the otherwise *prima facie* consideration of criminal wrongdoing" because you looked at none of the material. You did not examine the explanation.

A. That's correct.

Q. I don't understand, then, why you would write the Speaker in language which communicates that, indeed, that was your view and that you had done that.

A. Well, as I've said before, I relied on the advice, information that was given to me by the Deputy Attorney General and he prepared the letter for my signature.

Q. But why didn't you say to the Speaker that if you want to accurately communicate the situation, Mr. Speaker, I haven't the faintest idea of whether this explanation refutes or not, but my senior law officers have told me it does and I accept their word on the matter. Wouldn't that have been honest and accurate?

A. It would have been more accurate, yes. There was certainly no intention to mislead. That was the way the letter was

1 drafted for my signature.

2 Q. You agree that the way it's drafted leaves the impression that

3 you personally have directed your mind to the issues.

4 11:10 a.m.

5 A. Yes, that's correct.

6 Q. If you look at the press conference, and no one's drafting a

7 press conference for you, look at page 1, at the bottom.

8

9 My letter, therefore, marked the end of the matter as far as the Department of the Attorney

10 General was concerned. There were simply no facts to suggest wrong-doing and I told the

11 Speaker and the Auditor General so in writing.

12 Do you not agree that once again that implies that you've

13 addressed your mind to the matter?

14 A. Well I think I should point out to you that in the press

15 conference I did point out that I placed the matter in the

16 hands of these senior non-elected officials in the Department.

17 So I, in fairness, I think you're taking that somewhat out of

18 context.

19 Q. That's in the third paragraph from the bottom but you don't

20 say there that they were the only ones who dealt with the

21 issue. You speak as if you were giving an opinion, your own

22 opinion. Is that not so?

23 A. Well, I'll certainly have to go through the transcript but I

24 certainly recall indicating at the press conference that I had

25 placed the matter in the hands of the senior non-elected

1 officials in the Attorney General's Department.

2 Q. You'll see at page 5, in the third paragraph, what you told the
3 press on that day was,

4

> 5 The second point I want to make about that is
> that Mr. Cameron's allegation that we sat on the
> 6 file of the matter and did nothing. That is totally
> untrue. My senior officials reviewed this matter.
> 7 They received information and documentation
> and reviewed the regulations and the legislation
> 8 and they came to the opinion, an opinion that I
> 9 share because I signed the letter, there was no
> wrong-doing. And there was nothing here that
> 10 required an RCMP investigation.

11 Are you not communicating there quite clearly that this is
12 your opinion? You share this opinion.

13 A. I stated that. But I also stated quite clearly, I think, that I
14 placed the matter in the hands of the senior non-elected
15 officials of the Attorney General's Department.

16 Q. You were not intending to communicate by that language that
17 you, personally, had that opinion. Is that correct?

18 A. What I was intending to communicate was that I accepted the
19 advice, recommendation given to me by the Deputy Attorney
20 General.

21 Q. And when you say "an opinion that I share," I take it what
22 you meant then is not that you shared the opinion but that
23 you accepted it.

24 A. That's correct.

25

1 Q. So that's simply the wrong use of language there. That's at
2 page 5, third paragraph. Third last line. The fourth last line.
3 "An opinion that I share." What you really meant to say was,
4 "An opinion that I accepted."
5 A. Well yes, but I think in fairness, too, you have to take all of
6 the discussion that took place at the press conference. I
7 certainly made it abundantly clear that I had placed the
8 matter in the hands of these senior non-elected officials of the
9 Attorney General's Department.
10 Q. And that was the only involvement you had in the matter.
11 A. I'm sorry, I don't quite follow your question.
12 Q. That was the only matter, the only involvement you had in
13 the matter was to say, "Okay fellows, you go ahead and look
14 at it, give me your opinion and I accepted it." That was the
15 intent of your communication.
16 A. Yes. And as I've also indicated earlier, when the matter was
17 first brought to my attention, I did indicate to Mr. Coles my
18 concern that at least at that point in time Mr. MacLean had
19 not been given an opportunity to explain or respond to
20 questions about his expense claims.
21 Q. You say at the bottom of page 5, paragraph 3,
22
23 When those questions were posed to the Speaker
24 and the Deputy Auditor General during the
25 review of the matter, Mr. MacLean then
provided satisfactory explanations on these
matters and those explanations, as far as I'm

concerned, meant the end of the matter.

A. That's correct.

Q. And when you said as far as you were concerned, did you intend to communicate that they were satisfactory to you?

A. Well again, based on the recommendation and advice that I received from the Deputy Attorney General.

Q. The Deputy Attorney General told you the Deputy Auditor General accepted these explanations and found them satisfactory, did he?

A. Yes. That was certainly my understanding.

Q. And at page 6, in the fourth paragraph, third line,

> When we completed our review of the matter we were satisfied with the explanation given and there was nothing that had to be turned over to the RCMP.

That was not intended by you to you mean you personally but, rather, you in the sense of the officials of your office.

A. That's right. When I'm saying "we" I was talking about the Attorney General's Department.

Q. The allegation Mr. Cameron made, continuing on in the reading,

> ...was that I, as Attorney General, had intervened and stopped an RCMP investigation in progress. That allegation is totally untrue.

A. That's right. It was untrue.

Q. Are you aware that the RCMP investigation had never gotten

1 off the ground because the advice from your Department was
2 not forthcoming.
3 A. I wasn't involved myself in any communication with the
4 RCMP about the matter. But, in any event, the allegation that
5 I was responding to was the allegation that there was an
6 investigation underway and that I had stopped it and that
7 allegation was untrue.
8 Q. Did you know that the investigation had commenced with
9 inquiries and that your office had, in fact, stopped it...
10 MR. SAUNDERS
11 Sorry?
12 MR. RUBY
13 Q. And that your office had, in fact, stopped it by not giving the
14 advice that was sought by the RCMP?
15 MR. SAUNDERS
16 No, I object to that, My Lord. There's not evidence that the
17 RCMP stopped whatever they were doing or didn't proceed with
18 whatever they intended to proceed because the Attorney
19 General's Department did or did not do anything.
20 MR. RUBY
21 That's the evidence of Inspector Feagan, Superintendent
22 Feagan. He says that's what's happened. My friend may not
23 accept...
24 MR. SAUNDERS
25 Superintendent Feagan?

MR. RUBY

All the names are going wrong today. The officer in charge.

MR. SPICER

Chief Superintendent MacGibbon.

MR. RUBY

Thank you, MacGibbon.

CHAIRMAN

I think MacGibbon's testimony, his exact words are at a loss, following the meeting with the Auditor General and the Deputy Attorney General and others that it was indicated to him that an opinion or interpretation for further instructions would be forthcoming from the Deputy Attorney General and that none were forthcoming.

MR. RUBY

And therefore he closed the file.

CHAIRMAN

Yeah. That's somewhat different from stopping it. It may have the same result but the question seems to indicate an overt act on the part of someone to stop it. I don't think we've had evidence on that. We've had evidence of the interpretation that the RMCP placed on the advice they received or non-advice from the Deputy Attorney General.

MR. SAUNDERS

That's right.

MR. RUBY

1 Q. I thought that my question encompassed all this but you tell
2 me if it's wrong, and if it's wrong and I'll try and rephrase.
3 Were you aware that your office, by failing to give the advice,
4 had, in effect, stopped the RCMP from proceeding with an
5 investigation?
6 A. No.
7 Q. No one told you anything about what the RMCP was doing? Is
8 that right?
9 A. That's correct. My attitude throughout was that the RCMP
10 were at liberty to conduct whatever investigation they
11 deemed appropriate.
12 Q. You were not told by your Deputy that they had asked for
13 advice.
14 A. No, I certainly don't recall that.
15 Q. Would you not agree that given the political furor that is
16 arising just prior to an election, it's shocking to think that that
17 kind of information would not have been given to you.
18 A. I'm not quite sure understand your question. When the
19 matter came up during the election campaign the response
20 that I, responses that I made in the letter that I made public
21 were based upon the advice and information that I had
22 received from the Deputy Attorney General.
23 Q. You've told me that you knew nothing of what was going on
24 with the RCMP and you merely assumed that they could
25 investigate anything they wanted.

A. Yes.

Q. We now know that they had come asking for advice from the Deputy Attorney General and were awaiting that advice as you spoke to the press and were doing nothing because they wanted the advice. That's what they say. Do you not think it's shocking that that information, the advice had been sought from the Deputy Attorney General on this very matter, the MacLean case, would not have been given to you in this context, a press conference just prior to an election?

A. Well I certainly did not receive any information along those lines. I should point out that the matter arose in the midst of an election campaign and it was very difficult to find the time to even pull together the information that I knew of. That is, the letter to the Speaker and so forth. And I guess one has to have been a candidate to appreciate how bad it is but, you know, we had great difficulty just finding the time to discuss the matter and when I say "we" I'd better clarify that. I'm talking about advisers in the campaign because this had been raised in the political arena and was a political issue. And we had one or two meetings, I think one in Truro and one in Halifax, but it was very difficult to deal with something like this under those time pressures in the closing days of a campaign and so this was certainly put together in great haste and I do not recall having any meetings with people in the Attorney General's Department to go over the matter again.

1 That it was just a case of pulling together what we could get
2 as quickly as we could get it in order to make a response
3 prior to the end of the election campaign.
4 Q. You mean you made a public response without inquiring of
5 the Deputy Attorney General what was going on in this
6 matter?
7 A. Well I was basing the public response on the advice and
8 information that I had received from the Deputy Attorney
9 General earlier in 1984.
10 Q. Months earlier, was it not?
11 A. Yes, but as far as the Department was concerned I wasn't
12 aware of anything else that the Department was doing or had
13 to do in connection with the matter. In other words, I felt
14 when I was going into the press conference that I was dealing
15 with a matter which had been closed.
16 Q. You made no inquiries before making a public statement in
17 the midst of a campaign as to whether or not your
18 information was current or was months out of date?
19 A. No, I simply got the information that I had but I think it's
20 important to keep in mind that at that point in time I
21 regarded the matter as closed. So I wasn't looking for up-to-
22 date information, I was just looking for historical information
23 on how we had dealt with the matter.
24 Q. Do you not think it's shocking, to return to my earlier
25 question, that the Deputy Attorney General, at the time when

he was communicating to you that the matter was closed some months earlier, would not advise you that he'd been asked for advice from the Attorney General, from the RCMP and wasn't giving it.

A. I was just never advised of that.

Q. But you don't find that shocking.

A. Well it's difficult for me to speak to something that involved communication or lack of communication between parties other than myself because I don't know what discussions they had or what understandings or misunderstandings may have occurred. So I can't really testify to that.

Q. You're assuming then that there's a misunderstanding.

A. I'm not making any assumptions, I'm just saying that I don't think I can testify to it.

Q. Okay. I want you to assume for the purposes of my question, Mr. Coles in fact was asked for advice from the RCMP.

A. Yes.

Q. Would you not think it shocking that you were never told that? Apparently at any stage while you were dealing with this matter and disposing of it.

A. Well certainly I know that the regulations in question were reviewed by, I assume, Mr. Gale and Mr. Coles.

Q. I'm not talking about the regulations, I'm talking about the MacLean case. The question of criminality.

A. Well I'm talking about the regulations that were referred to

in the letter to the Speaker.

Q. I'm not talking about that, I'm talking about the question of criminality of Mr. MacLean's activities.

A. Well I'm sorry, then, I still don't understand your question.

Q. You never knew that the RCMP had asked for advice on that issue.

A. No.

Q. Do you not find it shocking...

A. Those communications were between Mr. Coles or Mr. Gale and the RCMP and I did not participate in them.

Q. I take it, then, that the logical inference from the answer you've just given me is that you don't find that shocking at all. You find that normal.

A. No, I didn't say that either. I find it difficult...

Q. Well which is it?

A. To use adjectives just to characterize things. I think all that I can really do is relate to you my recollection of the facts.

Q. I'm trying to find out what your reaction to that lapse. I want to know whether it is the kind of lapse that, the kind of communication that one would expect to get and be very surprised if one didn't get, or that normally in the function of your Department you would not be told this sort of thing, whether you accept that.

11:25 a.m.

A. Well, it's difficult to answer when I don't know what the communications were between the parties. I was not a participant in that.

Q. I'd ask you to assume that the RCMP asked for advice from your department on the question of the criminality or the non-criminality of Mr. MacLean's activity.

A. Well, I suppose I could answer it this way by saying that if the RCMP had a concern that they had asked for something and were waiting for something and had not received it, that sooner or later they would bring that to my attention, if they felt that somebody in the Department was not dealing with them in a way that they wished them to deal with them.

Q. And would you consider it right that you should not be informed of the fact that that inquiry was made while you were disposing of the issue?

A. Well, given the circumstances of the press conference and so forth. Let me put it this way, it's easy to do what we're doing now, which is to take items like this and go into them in great depth. The circumstances in which I was operating and trying to deal with this in the closing days of an election campaign, I just didn't have the luxury of getting into that kind of question. I was just taking the information that I had.

1 Q. But they hadn't told you earlier either when they were
2 dealing with the matter substantively without the hustle
3 and bustle of an election campaign.
4 A. That's right. I certainly have no recollection of that.
5 Q. Do you think it right that they should not have told you or is
6 it wrong?
7 A. Well, again that raises a difficult question, because I was
8 taking a hands-off approach to the matter and I suppose
9 that raises a question as to how much, if you say to your
10 staff, in effect, I want you to deal with this matter, then I
11 suppose that raises a question as to how often they come
12 back to you on the matter or what they communicate to you
13 on the matter.
14 MR. CHAIRMAN
15 Q. Would it be fair to conclude that not only did Mr. Coles not
16 tell you about the RCMP investigating the matter, if we look
17 at page 35 it would appear that he was indicating to you
18 that they weren't investigating it. And he says, "We have
19 communicated our opinion in the matter to the RCMP who,
20 although they were not formally asked to investigate the
21 matter, nevertheless were made aware of the concerns of
22 the Auditor General."
23 MR. RUBY
24 That's right.
25 A. Yes.

1 MR. CHAIRMAN

2 Q. Do you recall now if when you read that letter you
3 interpreted that as meaning that there was...that the RCMP
4 were not investigating?

5 A. Well, it was certainly my understanding that they were not
6 conducting an investigation and I assume that that was the
7 result of what had been communicated to them from the
8 Attorney General's Department.

9 MR. RUBY

10 Q. What did you understand that they were doing?

11 A. Pardon?

12 Q. You said that you understood they were not conducting an
13 investigation. What was it that you understood that they
14 were doing?

15 A. At that point in time, as far as I know, they simply weren't
16 doing anything.

17 Q. Let's take a look together at page 35, if you would. You
18 were given this document together with Mr. Gale's opinion
19 in writing.

20 A. Yes, that's correct.

21 Q. Did you read them both?

22 A. Yes.

23 Q. In the second paragraph Mr. Coles said,

24

25 It is Mr. Gale's opinion, with which I concur, that

> the irregularities in Mr. MacLean's compliance with the general regulations made pursuant to the House of Assembly Act are more accounting irregularities rather than such as to warrant any further criminal investigation.

Did you see that anywhere in Mr. Gale's opinion?

A. I don't recall seeing it in the memorandum from Mr. Gale.

Q. If you turn to page 33, Mr. Gale's memorandum which you had before you at page 2, third paragraph, second paragraph, the last line, and if we outline the facts or the explanation.

> If one wanted evidence to prove or disprove his assertions, then a police investigation would be necessary.

What did you take from that when you read it?

A. Well, I took the memorandum from the Deputy Attorney General as being the final advice to me from the Department on the matter. And so that's...that was what I acted on.

Q. If you read the next line, at page 35 of the Coles' memorandum, which you considered the Department advice. "Mr. MacLean's explanation of the manner in which he filed his statements of travel and living allowances is, in our opinion, a reasonable explanation." Now that paragraph starts off by saying it's Mr. Gale's opinion and so forth. So clearly "our" there means he and Gale, you'll agree?

A. That was certainly my understanding, yes.

1 Q. Gale, in the passage I just read to you, at page 33 seems to
2 be saying nothing like that at all. He's saying you can't tell
3 whether it's a reasonable explanation unless there's a police
4 investigation, isn't that so?
5 A. Yes.
6 Q. Well, what did you take from that when you read it?
7 A. Well, I didn't know what conversations had taken place
8 between Mr. Gale and Mr. Coles, but I took the
9 memorandum from Mr. Coles as being the final word from
10 the senior staff in the department on the matter.
11 Q. You'll agree with me that in the result by taking that
12 position either Mr. Coles has allowed you to be seriously
13 misled or you have seriously misread the letter, one or the
14 other, because the two cannot stand together, the Gale
15 memorandum and the Coles' memorandum.
16 A. Well, except that I did not know and did not inquire into
17 what conversations took place between Mr. Gale and Mr.
18 Coles apart from what was on paper. I simply took Mr. Coles
19 memorandum as the final result of whatever discussions or
20 deliberations had taken place within the Department on the
21 matter.
22 COMMISSIONER EVANS
23 I noticed that the report of Mr. Gale is on April the 2nd and
24 the report of Mr. Giffin or Mr. Coles, rather, is on April the 18th,
25 and he refers there, "Enclosed is Gordon Gale's summary report on

1 the matter." He doesn't expand on it. Then he goes on and he
2 said, "It is Mr. Gale's opinion." Now that doesn't necessarily mean
3 that his opinion, final opinion, or if there had been some
4 discussions between April the 2nd and April the 18th, that his
5 opinion might not have been different or improve or whichever
6 way you want to look at it, since writing the summary report on
7 April the 2nd.
8 MR. RUBY
9 Q. Mr. Giffin, is that exactly what happened? Did you
10 misconstrue or did you take the word "opinion" in the
11 second paragraph to mean not the written opinion that you
12 were being given but rather a verbal opinion contrary to it
13 of which you have been told nothing?
14 A. I did not inquire into that. I simply took Mr. Coles'
15 memorandum at face value.
16 Q. Isn't it more likely that...
17 A. That was the final word.
18 Q. So you were aware that Gale's memorandum and Coles' were
19 contradictory in these important aspects. You knew that
20 then.
21 A. Well, that the...that Mr. Gale had included the paragraph
22 about Mr. MacLean's explanations. However, I accepted the
23 final memorandum, the one dated April 18th.
24 Q. Did you know, did you notice when you got these two
25 documents and read them that the two documents were

1 inconsistent? For example, one saying "It is our opinion it is
2 a reasonable explanation," that's the Coles' memorandum.
3 And the Gale memorandum saying, essentially and I
4 paraphrase, you can't tell unless you have a police
5 investigation. Did you notice that at the time?
6 A. Oh, yes, I believe I did. But I certainly, as a Minister over
7 the years, had the experience numerous times of receiving
8 recommendations from staff which involved memoranda
9 and so forth from different people going up the chain of
10 command and that the final result might not...the final result
11 or the final recommendation of the Minister might not
12 reflect what staff people...what some staff people had said at
13 some earlier stage in the deliberations.
14 Q. Okay. We're no longer here, we're not yet here in the hurly
15 burly of an election campaign, correct?
16 A. Yes. Right.
17 Q. You're not really busy beyond the duties of your office
18 ordinarily.
19 A. Busy enough.
20 Q. Yes. But this is what you're busy with.
21 A. Yes.
22 Q. Ordinary work, right?
23 A. Sure.
24 Q. And you're telling me you didn't have the time or didn't
25 have the interest to say to Coles, "By the way, did Gordon

1 Gale change his view?"
2 A. No, I don't recall raising that question. I just accepted Mr.
3 Coles' memorandum as it was written.
4 Q. The last line of the third paragraph on page 33 in the Gale
5 memoranda. "On the information we have there is no basis
6 for criminal charges in that there is no *prima facie* case, if
7 one accepts the explanation given by Mr. MacLean." Did
8 you take the time to ask Mr. Coles why he accepted the
9 explanation or what it was that made it believable and
10 credible?
11 A. No, I didn't. I relied on his advice to me.
12 Q. Does it not seem to you now, looking at it with me in
13 hindsight, that you were overly eager to accept that position,
14 that a prudent Attorney General would have asked the
15 questions I'm suggesting should have been asked?
16 A. I think an Attorney General is entitled to rely upon
17 information communicated to him by the Deputy Attorney
18 General. Now certainly with the advantage of hindsight one
19 can always question that. But I see nothing wrong with an
20 Attorney General relying upon information and advice given
21 to him by the Deputy Attorney General.
22 Q. And doing so without asking questions, correct?
23 A. Well, I won't say you never ask questions, but I was
24 certainly prepared to accept after I read his memorandum
25 and the draft letter, I was prepared to accept that as the

1 Department's advice to me on the matter.
2 Q. Let me turn with you to the plea bargaining issue if I may.
3 I want to know if when you got into this discussion about
4 whether or not imprisonment was appropriate, whether or
5 not you understood that the ordinary rule for first offenders
6 with good backgrounds who commit substantial frauds,
7 frauds in substantial amounts, such as the ones here,
8 whether the ordinary rule is that these people go to jail for
9 substantial periods of time. Did you know that or not?
10 A. No, it was my understanding that it varies with individual
11 cases as to whether or not a jail term is appropriate.
12 Q. And you thought *inter alia* it varied with the personal
13 circumstances and the background of the accused.
14 A. I think that should be taken into consideration, yes.
15 Q. And one of the circumstances you took into account here
16 was the fact that this man had a record of community
17 service.
18 A. Yes.
19 Q. You've practised criminal law for a long time.
20 A. Well, I practised a general practise for twelve years which
21 included criminal law.
22 Q. Have you ever heard the Court say, and I paraphrase, the
23 offender's good background in cases of fraud matters not
24 one whit because were it not for that good background, he
25 would never have been in a position where he could have

committed the fraud successfully? Have you heard that?

A. I'm not sure I've heard a court put it in that fashion.

Q. I'm not sure I have either, but that general thrust of idea.

A. Yes, I'm reaching back a number of years. But my understanding of that in terms of sentencing is that the record of community service of an individual can be taken into consideration and, indeed, ought to be taken in to consideration in determining whether or not that individual is one who should be sentenced to a period of incarceration.

Q. And that was the advice you got from your law officers, that despite the amount involved here that this was quite open and would determine...be determined by his background.

A. No, not simply by that. We had a very, as I recall it, informal discussion of the entire matter in terms of whether or not the plea bargaining proposal put forward by Mr. Pink was acceptable. Now one point that I think I should make clear is that if the staff in the Department had said to me that the proposal was unacceptable, then I would have taken that advice.

Q. I'm just trying to understand the context in which you were evaluating the proposal, just to make it clear.

A. All right. I certainly wasn't doing this on the basis of a personal analysis of the case law or anything like that. But it was on the basis of a discussion among ourselves on the proposal which Mr. Pink had put forward and whether or

not the Crown should insist upon incarceration in this particular case.

11:40 a.m.

Q. And no one told you that being a first offender, having a good record of community service, being the breadwinner for a large family, were factors which in a fraud case would not mitigate to the extent of avoiding imprisonment. No one told you that.

A. No, I cer...

MR. SAUNDERS

My Lord, I'm not even sure that's the law. I know it's my friend's cross-examination but he cites these far-ranging principles and then asks the witness, who hasn't researched the law, whether he accepts them or rejects them or may halfway agree to them. And, frankly, if we're going to get into an argument over what the case law stands for and what first principles are in fraud cases, then maybe Sydney in November is the time for that. But I really think it places this witness at a disadvantage, who admits that he did not apply any independent research to the case law. For my friend to put these propositions to him as standing for the law at the time. I just don't accept it. And it's clear from the transcript of the sentence imposed by the trial judge in the MacLean case that he didn't accept it either. And these mitigating circumstances that my friend poses as not being important were made by his own counsel and made by the

1 Crown and, obviously, found some persuasion as far as the trial
2 judge was concerned.
3 MR. RUBY
4 My friend misconceives what I'm doing. What I'm asking
5 the witness is not whether he accepts that as a view of the law
6 but whether or not he was told that. I will argue later what the
7 view of the law is and whether he was accurately informed of it.
8 MR. CHAIRMAN
9 I have great difficulty as a trial judge, I listen as a trial
10 judge to all these comments going on between counsel in the last
11 couple of days. I'm trying to recollect ever having been involved
12 in a case where counsel for the accused didn't place great
13 emphasis on the community effort.
14 MR. RUBY
15 No one suggested that they don't. All I've suggested is...
16 MR. CHAIRMAN
17 I remember in a more serious case than this one time not
18 taking it into account and being overruled for not doing it. But I
19 know what you're saying. That there are decisions in the Province
20 of Nova Scotia, in particular, and I think there was a suggestion
21 that the Supreme Court of Canada seems to assiduously avoid
22 sentencing problems and had not dealt with it. But the trend in
23 Nova Scotia would appear to be incarceration where there is
24 fraud, presumably uttering as well. But, in any event, the
25 question simply put to Mr. Giffin is whether or not he was advised

of this by his, to his...

MR. RUBY

That's right. I'm not asking for his view of the law on fraud.

MR. CHAIRMAN

No.

MR. RUBY

I want to know, though, whether or not Mr. Giffin...

MR. CHAIRMAN

There's nothing wrong with that question. We are not asking Mr. Giffin to give an analysis of the law, Mr. Saunders.

MR. GIFFIN

A. It wouldn't be very good. May I answer in this way, Mr. Ruby, that I'm sure that I was advised by the solicitors involved that there were cases, fraud cases in which individuals had been incarcerated. But I didn't do any research myself, obviously.

Q. I take it then that you were not told that first offenders, substantial... where the amounts are substantial, in cases of fraud even with good backgrounds, unless there are exceptional circumstances, go to jail. That was not your understanding of the law when you applied your mind to this plea bargaining proposal.

A. No, it was my understanding that it was more, what would be the right word, more flexible than that. That certainly there were cases in which people had been incarcerated but that

that was not a uniform rule and that you had to look at these circumstances of each individual case.

Q. If you had known, I know you did not, that Mr. Pink thought that twelve to eighteen months was the appropriate sentence for this, would you have agreed to a five thousand dollar fine?

A. Well, I certainly wasn't aware of Mr. Pink's opinion on that. We were simply discussing the matter in the context of the plea bargaining proposal that Mr. Pink had put forward.

MR. SAUNDERS

My Lord, and as I recall, the answer given by Mr. Pink to that, that his expectation of that kind of incarceration imposed was following a trial where his client who have gone to trial and been convicted on several of those counts in the information.

MR. RUBY

Let's put it that way then. I thought it assumed all that.

MR. CHAIRMAN

Well, I guess it's up to us to decide on how much weight to give to the opinion of Mr. Pink or anyone else on these cases.

MR. RUBY

I'll argue eventually that that's a well-supported opinion. For the moment, I want to know whether or not the advice which he got from his department influenced as to what the law is, influenced the decision he came to as to the propriety of this agreement.

Q. So I'm asking whether or not, if you had known what Mr. Pink's view was, that given a trial and given conviction on a substantial number of these charges, that the amount would be substantial, that twelve to eighteen months would be the appropriate sentence. If you had known that, if your law officers had told you that, would you have agreed to plea bargain with five thousand dollars?

A. Well, when you put the question in that form, the obvious answer is no. But we were simply dealing with the plea bargaining proposal put forward by Mr. Pink and the opinion and the advice that I was relying upon was the opinion and advice that I was getting from my own staff.

MR. RUBY

Thank you very much, sir.

EXAMINATION BY MR. PRINGLE

Q. A couple of questions, Mr. Giffin. With respect to the press conference of November, 1984, Exhibit 176, were you briefed, sir, prior to that conference by anyone in the Department?

A. No, I was not.

EXHIBIT 176 - PRESS CONFERENCE OF NOVEMBER, 1984.

Q. Had you been briefed on the matter prior to that since April 18th, 1984?

A. No, I had not been.

Q. I refer you to the second last paragraph in Exhibit 176, and you apparently responded to a question as follows. Exhibit

176, the second last paragraph, your response apparently was:

> The R.C.M.P. never at any time started an investigation as they are free to do at any time and never at any time requested that one be started. Further, at no time since my letters has the Auditor General or the R.C.M.P. questioned me or any of my officials on any aspect of my letter.

Now, sir, your letter, which is the one of April 18th, 1984, which is found on page 37 of that other exhibit booklet, page, exhibit 173, that letter was never sent to the R.C.M. Police, was it?

A. That's correct. That letter was sent to the Speaker.

Q. Yes, so how could the R.C.M. Police comment on that letter, when they were never privy to it, had no knowledge of it?

A. That's perfectly correct, yes.

Q. Why did you make that statement at that time, or do you recall? What was the basis for making that statement, that the R.C.M. Police hadn't responded to that letter?

A. Well, what I was stating was that as far as I was concerned, after that letter had gone, I just had not heard anything more about the matter from anybody.

Q. With respect to the meeting of November 22nd, 1984, your briefing on that meeting, at whatever time you received a briefing, would have come from Mr. Coles, I assume, as to

what took place.

A. I assume that, yes, but I can't state that as a fact, but I assume it.

Q. Did you talk to Mr. Gale about what took place at that meeting?

A. I just don't recall.

Q. Okay. On Exhibit 176, at page one again, with respect to that meeting, you answer to question as follows, and this is about the middle of the page, and your answer apparently was:

> Subsequently, a meeting took place among the Auditor General, the Deputy Auditor General, and senior officials of the Auditor General's Department. Senior officers of the R.C.M.P. joined the meeting at its conclusion and were advised that the matter was to be referred to the Attorney General's Department for their consideration and advice.

And the basis for that, sir, would be what? Was Mr. Coles, Mr. Gale, or someone else in the Department telling you that?

A. Yes, Mr. Coles. I think I should explain that in the third line there, I think that should read "senior officials of the Attorney General's Department".

Q. The third line, "Senior officials..."

A. Where it says: "Subsequently, a meeting took place among the Auditor General..."

Q. Yes.

A. I believe that should read "senior officials of the Attorney

1 General's Department."

2 Q. Yes, that would make sense.

3 A. But, yes, that was based on the information given to me by

4 Mr. Coles.

5 Q. And on page six of Exhibit 176, the transcript of the press

6 conference. Paragraph 3. You answer to question as follows:

7

8 > The decision which we had to make in the Attorney General's Department was whether or

9 > not this matter ought to be referred to the R.C.M.P. for an investigation.

10 Again, sir, the basis for that answer would be what?

11 A. That would be based upon the memorandum from Mr. Coles

12 in April of '84.

13 MR. PRINGLE

14 Thank you, Mr. Giffin.

15 MR. SAUNDERS

16 I have no questions for Mr. Giffin, My Lord.

17 MR. CHAIRMAN

18 Thank you very much, Mr. Giffin.

19

20 **THE WITNESS WITHDREW.**

21 BREAK.

22

23

24

25

12:08 p.m.

CHAIRMAN

We're supposed to deal with the application made on behalf of the Union of Nova Scotia Indians. We've been asked by counsel for the Union of Nova Scotia Indians to inquire into issues relating to the Micmac moose harvest. This issue has arisen as a result of the fact that nine Micmac hunters have been charged with violations of the Wildlife Act, an action which, in their eyes, flies in the face of the Supreme Court of Canada decision in the Simon case. This case deals with hunting rights in the context of the Treaty of 1752 between the Crown and the Micmac people.

Treaty rights are germane in that, together with legislation and case law, they prescribe the legal situation of native people in Nova Scotia today. Our research will explore the historical and constitutional context of native people and to that extent the Simon case and others are of relevance to us.

However, the matter of the nine Micmac hunters is now before the courts and it would be inappropriate for us to interfere in such a process.

We also accept the view of Commission counsel that this inquiry is not a proper forum for engaging in political argument. We believe that it is beyond a reasonable interpretation of our mandate to undertake a detailed exploration of this issue except to the extent that I have described above and this application is denied.

1 Mr. Ruby?

2 MR. RUBY

3 Thank you, My Lord. In connection with the earlier
4 application which I made and which you refused, I want to make
5 a further application consequent upon it. I want to call
6 Superintendent Roy...

7 COMMISSIONER EVANS

8 Superintendent who?

9 MR. RUBY

10 Roy. He's the officer who made that phone call. Mr. Venner,
11 who's the officer who was involved in the decision-making
12 process on the evidence but who has not been called. He's the
13 glaring gap in that narrative, and I want to call the officer in
14 charge of an issue that I'm forbidden to mention or discuss and
15 whose name I do not know but I'm certain can be ascertained.

16 The application might not be any more intelligible than the
17 last one but that's the application I make.

18 MR. ORSBORN

19 Well given that in Mr. Ruby's own words the application is
20 no more intelligible than the last one, it's difficult to respond
21 intelligently.

22 MR. RUBY

23 I can make it intelligible very easily.

24 MR. ORSBORN

25 I think everything that I would wish to say as Commission

1 counsel in respect of that application has already been said
2 concerning the earlier application. I can indicate that in the
3 course of our inquiries, Commission counsel have interviewed
4 both Superintendent Roy and Mr. Venner and it was our view that
5 they would not add appreciably to the evidence before Your
6 Lordships and as I re-iterate our earlier view on the particular
7 issue that Mr. Ruby raised earlier, it is our view that such
8 evidence as could be called on that issue would be speculative.
9 COMMISSIONER POITRAS
10 Mr. Ruby has indicated you want to question someone else
11 as well, a third person? This Venner, Roy and?
12 MR. RUBY
13 The subject matter of the note in Mr. House's book.
14 COMMISSIONER POITRAS
15 House.
16 MR. RUBY
17 Mentions the subject matter. There's an officer in charge of
18 that subject matter, I want to call him.
19 CHAIRMAN
20 Mr., any other counsel wish to be heard?
21 MR. PRINGLE
22 I think our position is stated by Mr. Orsborn very
23 adequately.
24 CHAIRMAN
25 Mr. Saunders?

DISCUSSION

MR. 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?

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

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

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

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.
11 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.
16 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

what charges ought to be laid?

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

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

A. Yes

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

12:20 p.m.

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

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

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

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

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

Q. What was your approach at that time?

A. Well, the way it unfolded was Mr. Pink made the approach to myself and he initially offered us one count of uttering, and I 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

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

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

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

Q. Page 53?

A. Yes.

Q. Right. At this point in time, had you already had discussions with Mr. Pink concerning the reasonableness of a fine as a 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?

A. The fine.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

12:50 p.m.

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

A. No.

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

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

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

A. No.

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

A. Yes.

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

A. Yes. Now I've had this happen before. Mr. MacLean was, in fact, entitled to some monies by the virtue of submitting claims. It was important for me to know how to separate what monies he was entitled to and what monies he was not entitled to. And that's why I asked the RCMP and the Speaker's office to go back and recalculate, deducting those 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?

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

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

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

Q. Sure.

A. Is not the case.

Q. Let's leave aside the welfare mothers then and let me ask you were you aware then, and can you point me now to any appellate decision in Nova Scotia which indicated that a fine 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

with the government, a different proposition entirely.

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

Q. That's right. He says,

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

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

A. No, I agree with that.

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

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

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

A. No. I had not seen it at the time. And that's, quite frankly, one of the, you know, by this time I'd been here in the province three months, four months, and that's one of the reasons I had sought out advice. Whether this was the appropriate approach. And if it was not then I would 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.
1:00 p.m.
17 Q. The only other one you're talking about as going the other
18 way is Rizzetto. Can you spell that for me?
19 A. No, I can't.
20 Q. What year was it, approximately, so I can get a copy
21 eventually?
22 A. I can give you a copy, if you want, but I don't have it now.
23 Q. If you put one in the post to my office in Toronto, I would be
24 grateful.
25

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

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

Q. But you were recommending a particular fine.

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

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

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

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

A. Well, that's...

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

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

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

1 know that it was contested until he made those
2 representations in court.
3 MR. RUBY
4 Thank you, sir.
5 MR. PRINGLE
6 No questions, My Lord.
7 MR. CHAIRMAN
8 Mr. Saunders?
9 MR. SAUNDERS
10 Just a few matters.
11 **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 you 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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CHAIRMAN

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

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

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

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

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

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

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

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

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

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

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

CHAIRMAN

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