

1 A. I believe it is, My Lord. Yesterday I believe characterized the  
2 prosecutorial discretion in the context of my involvement  
3 here, or my thought processes in this case, substantial  
4 likelihood of conviction. I think is somewhat akin to the...

5 Q. Under...

6 A. Whether a jury would convict.

7 Q. But in addressing that issue, under 110(1)(c), you first would  
8 have to decide whether or not the person being investigated  
9 is an official or employee of a government, is that correct?

10 A. Yes.

11 Q. Then...

12 A. I don't think that was a dispute in this case.

13 Q. That would not appear in this case to be in dispute.

14 A. No.

15 Q. Mr. Thornhill, probably not an employee, but more likely  
16 would be an official of the government. Secondly, you would  
17 then have to decide whether or not you were satisfied that  
18 there had been a reward, advantage, or benefit of any kind  
19 directly or indirectly conferred upon the official of the  
20 government. Is that correct?

21 A. Conferred on, I believe, My Lord.

22 Q. Conferred, all right, on it.

23 A. Yes.

24 Q. If your decision was in the affirmative on these two counts,  
25 then the question of intent would not be relevant. Is that

MR. HERSCHORN, EXAM. BY CHAIRMAN

1 what you're saying?

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

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

9 A. Could be established.

MR. CHAIRMAN

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

MR. RUBY

15  
16 Thank you, My Lord.

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

**EXAMINATION BY MR. RUBY**

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

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

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

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

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

6 Q. Did you discuss those two counts?

7 A. Not that I specifically recall.

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

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

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

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

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

19 A. No.

20 Q. In that regard.

21 MR. MERRICK

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

23 MR. CHAIRMAN

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

1 MR. RUBY

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

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

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

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

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

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

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

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

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

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

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

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

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

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

7 A. Certainly not.

8 Q. You had no idea that would happen?

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

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

20 A. In respect to those charges, yes.

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

23 A. I beg your pardon?

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

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

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

9 A. Not that I recall.

10 Q. Why not?

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

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

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

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

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

1 MR. PINK

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

5 MR. RUBY

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

8 A. To that effect, yes.

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

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

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

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

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

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

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

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

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

15 A. Yes.

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

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

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

25 A. Yes.

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

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

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

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

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

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

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

13 A. I don't recall.

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

15 A. Well, not that I recall.

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

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

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

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

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

1 A. Yes.

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

5 9:03

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

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

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

13 Q. Your view is opposed...

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

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

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

18 Q. And that...

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

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

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

24 Q. Did you find none or some?

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

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

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

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

9 A. Yes.

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

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

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

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

1           purpose, and certainly not mine.

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

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

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

14          A.     No, I did not.

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

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

24          Q     You thought he would not expect.

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

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

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

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

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

23 A. I have no knowledge.

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

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

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

8 Q. How long...

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

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

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

1 parameters of subsection (c).

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

5 A. Yes, sure.

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

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

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

14 A. No.

15 Q. So you're speculating.

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

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

21 A. I would....

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

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

25 Q. You did.

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

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

5 A. That's right.

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

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

12 A. Yes.

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

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

18  
19 Do you remember those questions and those answers?

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

1           respect to what I recall from the facts.

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

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

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

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

17          Q.    This...

18          A.    Nothing wrong with that.

19          Q.    Nothing wrong with speculation.

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

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

25          A.    Well...

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

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

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

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

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

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

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

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

24 Q. The words are in writing.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

17 Q. That's what I thought to.

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

22 Q. Okay. If you...

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

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

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

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

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

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

15 Q. Right.

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

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

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

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

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

1 the charges.

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

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

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

17 A. Well, it...

18 Q. As far as the memo is concerned.

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

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

11 9:25 a.m.

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

15 A. Yes.

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

19 A. Sure.

20 Q. Sure.

21 A. If the evidence supports, yeah.

22 Q. Which element of the offence...

23 A. But I...

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

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

1 for in the section.

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

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

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

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

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

14 A. Yes, overall, yes.

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

16 A. Yes.

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

18 A. Yes, in essence, yes.

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

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

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

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

4 A. Yes.

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

6 A. Yes, which I found...

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

8 A. Yes.

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

10 A. Yes.

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

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

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

16 A. In Paragraph 10, I would say.

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

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

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

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

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

1 A. That's probably correct.

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

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

9 Q. This memo focuses on intent, yes?

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

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

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

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

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

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

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

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

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

5 A. Probably.

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

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

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

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

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

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

A. Well, that was not my intent.

1 MR. MERRICK

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

5 MR. RUBY

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

7 A. I'm sorry?

8 Q. 15,036. Line 5.

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

22 A. Well, that was not my intent.

23 Q. That was not your intent?

24 A. No.

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

charge?

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A. It was a combination of those factors.

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

A. I don't have any difficulty.

Q. You have no difficulty reconciling the two positions?

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

Q. Today...

A. Because the nature of the transaction.

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

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

Q. Yes.

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

1 attract the provisions of Subsection (c).

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

4 A. No.

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

13 A. Not at all. Not at all.

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

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

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

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

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

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

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

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

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

11          A.   And A?

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

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

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

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

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

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

MR. COLES, EXAM. BY MR. RUBY

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

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

5 A. Yes.

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

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

12 Were you looking for evidence of real fraud?

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

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

19 A. No.

MR. MERRICK

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

MR. RUBY

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

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

2 COMMISSIONER EVANS

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

5 MR. RUBY

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

9 A. Yes.

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

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

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

15 A. Oh, I wouldn't estimate.

16 Q Hundreds, certainly.

17 9:40 a.m.

18 A. Certainly.

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

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

25 And it refers to the Section involved.

MR. COLES, EXAM. BY MR. RUBY

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

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

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

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

13 And then you say at line 14:

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

16 You didn't consider them serious statements?

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

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

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

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

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

5 A. No.

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

7 A. No.

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

9 A. Yes.

10 Q. Where?

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

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

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

17 Q. Between your property and his property?

18 A. Yes.

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

20 A. Oh, of course.

21 Q. You saw him socially?

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

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

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

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

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

11 A. No, none whatsoever.

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

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

16 Do you remember those questions and those answers?

17 A. Yes

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

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

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

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

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

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

1 certainly was not intended to imply otherwise.

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

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

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

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

12 Q. Yes.

13 MR. RUBY

14 Thank you for your patience, sir.

15 EXAMINATION BY MR. PINK

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

24 A. Yes.

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

1 A. Yes.

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

4 A. Yes.

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

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

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

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

25 Q. You had that similar relationship with Chief Superintendent

1 Feagan's successors as well?

2 A. Yes.

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

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

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

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

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

17 A. Oh, yes.

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

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

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

23 A. As I recall, yes.

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

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

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

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

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

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

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

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

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

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

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

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

MR. COLES, EXAM. BY MR. PINK

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

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

8 A. Yes.

MR. PINK

9  
10 Thank you, sir.

RE-EXAMINATION BY MR. MacDONALD

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

18 9:54 a.m.

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

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

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

1 police exercise.

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

7 A. Yes, yes.

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

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

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

14 A. Yes.

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

20 A. No.

21 Q. ...it's different?

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

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

1 A. Yes.

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

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

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

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

13 Q. As Deputy...

14 A. That's...

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

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

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

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

1 it going ahead.

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

5 A. Yes, I agree with that.

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

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

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

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

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

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

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

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

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

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

1 terms.

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

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

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

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

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

15 A. I'm saying...

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

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

23 Q. You would...

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

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

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

5 MR. MacDONALD

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

7 MR. CHAIRMAN

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

17 MR. RUBY

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

19 MR. CHAIRMAN

20 Well, all right.

21 MR. RUBY

22 There's no harm being done.

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

24

25