

MR. COLES, EXAM. BY MR. MERRICK

HIS HONOUR CHIEF JUDGE HOW

Your Lordships.

MR. CHAIRMAN

Mr. Orsborn.

MR. ORSBORN

My Lord, the next witness is Judge Harry How. Judge How has testified previously before this Commission and remains under oath.

HIS HONOUR CHIEF JUDGE HOW , recalled and still sworn, testified as follows:

EXAMINATION BY MR. ORSBORN

Q. Judge How, I understand that you were Attorney General in 1980 during the currency of the Thornhill matter which we are considering.

A. That's correct.

Q. And would I be correct in my understanding that your first involvement in this matter would be very early in 1980?

A. Yes.

Q. When you attended a meeting of senior staff of your department and RCMP which spoke of certain inquiries being initiated as a result of an anonymous letter being received by the RCMP.

A. That's correct.

Q. What's your recollection of that involvement of yourself?

A. Well, I remember vaguely that meeting. I think the matter

1 had arisen in the House, that is the House of Assembly,
2 when mention was made to me there that a letter was
3 circulating throughout parts of Halifax alleging some kind of
4 impropriety on the part of Mr. Thornhill in connection with
5 a settlement of his debts at the banks in Halifax.

6 Q. Were you of the view that the RCMP had conducted a full
7 investigation in to the matter?

8 A. Well, I didn't know when I first heard, of course, but what
9 was revealed at the meeting, if I remember rightly, was
10 that, in fact, yes, they had known of this, yes, they had
11 looked into it and conducted what they thought was
12 sufficient inquiries at that point to suggest that there wasn't
13 a foundation enough to it that they would carry...they would
14 make a full investigation.

15 Q. Did you consider the matter closed at that point?

16 A. I suppose I did.

17 Q. And we understand that it subsequently came up again and
18 was proceeded with.

19 A. It was raised, I think, in the House. When...following that
20 meeting Superintendent Christen, in charge of the criminal
21 investigation branch here in Halifax, in "H division, advised
22 us that...then gave us advice and, indeed, followed it with a
23 written statement to the effect that what I had said in the
24 House that further investigation...that an on-going
25 investigation was not in progress at that time.

- 1 Q. Uh-hum.
- 2 A. Was correct.
- 3 Q. Do I understand that following a statement by the Premier
4 some time in late March or early April to the effect that Mr.
5 Thornhill was indeed a member of the government when
6 this settlement was negotiated that the RCMP again
7 investigated the matter?
- 8 A. Yes, let me just briefly give you my recollection and it was
9 that in the House after the Christen statement was issued
10 the...there was then some mention, I believe, of the Premier
11 having made comments about it and this seemed to prompt
12 the opposition to ask if, in view of those remarks, alleged
13 remarks, that if I would have the RCMP introduce or initiate,
14 better put, a further inquiry, and I said, "Well, if you think
15 there's something here that you honestly believe is
16 some...there's some impropriety or something improper
17 that's been done, yes, I will." And I went back to, I think,
18 Mr. Coles and asked him if he would get in touch with the
19 RCMP and ask them to reinstitute, if you will, an inquiry.
- 20 Q. Yes, we have an RCMP memo in the booklet in front of you,
21 Judge How.
- 22 A. Yes.
- 23 Q. At page 7.
- 24 A. Oh, yes.
- 25 Q. Dated the 10th of April. It's at page 7, the numbers are at

1 the top of the page, and that indicates that following the
2 statements in the House and the Premier talking outside the
3 Legislature that Mr. Gale had requested the RCMP to start
4 this investigation. Would this then be pursuant to your
5 instructions?

6 A. Yes, yes, indeed it would.

7 Q. When you instructed, I think you said you instructed Mr.
8 Coles to get the matter proceeded with, did you issue any
9 specific instructions to him concerning how it should be
10 proceeded with?

11 A. No, if I recall correctly, I simply asked him to ask the police
12 to do whatever they thought was necessary.

13 Q. Did you give Mr. Coles any instructions as to the manner in
14 which the police may get access to a prosecutor during the
15 course of their investigation?

16 A. No, I don't remember that at all.

17 Q. Did you give him any instructions as to the manner in which
18 the police report should be forwarded and to whom it
19 should be forwarded?

20 A. No, I don't have any recollection of any direction to him in
21 that regard.

22 Q. Did you give him any direction or suggestion at all that the
23 manner should be handled in any way differently from a
24 run-of-the-mill investigation?

25 A. I don't recall that, no, none to my recollection.

1 Q. But in any event, you understood following your instructions
2 that the RCMP would carry out a full investigation?

3 A. Yes.

4 Q. We introduced as an exhibit this morning, Judge How, a
5 press clipping dated April 18th, 1980, it's Exhibit 169. I'm
6 not sure if you have that in front of you or not.

7 A. Ah, I don't believe I have.

8 Q. No, not that...169, the one we had this morning.

9 A. That's a press release, but it's mine and...

10 Q. I'm not able to indicate to you what newspaper this is taken
11 from but the date of April 18th is apparently accurate
12 giving the context.

13 A. Well, from the type I could guess, but I won't.

14 Q. Yes. The third column speaks of a conversation that you
15 evidently had with reporters and it reads, "He," meaning
16 yourself, "...told reporters later he is convinced Mr. Thornhill
17 did nothing improper in his settlement with the banks and
18 he hopes the Minister will stay in his job for a long time to
19 come." Do you have any recollection of making statements
20 to that effect to reporters around the 17th of April?

21 A. I really don't. I might have said it, however, I wouldn't
22 deny that I said it. You have to remember that at that time
23 the only information I had from the police was that they
24 didn't, except for our...my direction, they didn't have any
25 reason to continue or indeed to conduct an investigation.

1 Q. Yes, but the week previously you had instructed Mr. Coles to
2 get an investigation going.

3 A. I suppose, yes, it might have...I might have perhaps said it,
4 yes.

5 Q. Yes.

6 A. I'm not going to deny it.

7 Q. And assuming the report is accurate you are...

8 A. Sometimes, you know, political life you're pressed for some
9 comments sometimes and perhaps one is off guard at times.

10 Q. I see. The last statement there which is in quotes in that
11 column attributed to yourself, "We are not going to be seen
12 as exercising any political interference with what they do."

13 A. Yes.

14 Q. What did you mean by that?

15 A. Just what it said.

16 Q. What possible political interference could there be with the
17 investigation you could envisage?

18 A. Well, perhaps it...that would be...that would be in reference,
19 of course, to the investigation and it was, yes, according to
20 this, "Mr. How said his department is letting the RCMP
21 conduct the investigation and," quotes me as saying "We are
22 not going to be seen as exercising any political interference
23 with what they do."

24 Q. And how did you intend not to be seen as exercising any
25 political interference? How did you intend to safeguard

1 against that?

2 A. I don't know as I had a precise design to what I would
3 do...except they would carry on without any comment or
4 advice from us.

5 Q. But was it your understanding that the investigation would
6 proceed as in the normal course of events?

7 A. Yes, uh-hum.

8 Q. And in the normal course of events and in your experience
9 who would make the eventual decision as to whether or not
10 a charge should, in fact, be laid?

11 A. Well, in the normal course I think it's fair to say the practise
12 was that the RCMP would determine if they thought charges
13 were laid. But that determination I would say in more
14 complicated cases would often involve consultation with the
15 department.

16 Q. Now when you say with the department.

17 A. Or some members of it.

18 Q. Are you speaking...

19 A. It might be prosecutors, it might be senior officials.

20 Q. So do I understand you to say that it was your
21 understanding that if the normal course of events proceeded
22 that the RCMP would decide whether or not a charge should
23 be laid following consultation with the Crown?

24 A. Something like that, yes.

25 Q. Given that, is it not perhaps inappropriate for the chief law

1 enforcement officer to be saying "I don't think he did
2 anything wrong"?

3 A. Well, perhaps it was, but you see the...under the system
4 you're both a politician and you're an Attorney General.
5 Now I've strenuously, I may say, over the years to try and
6 keep separate mandates in mind, but sometimes one did
7 stray and not really intention...my intention wasn't to
8 interfere with the police. I think I made that clear right
9 after that.

10 Q. Uh-hum.

11 A. In the same news item. But, as I said, sometimes one
12 articulated a thought that you didn't analyze sufficiently to
13 say, could this be interpreted later as an improper
14 statement. I didn't consider it was. I didn't consider that it
15 would in any way affect what the police did and I made it
16 clear just after that that I didn't want any interference. So
17 if mine was, it was entirely inadvertent, if I may say so.

18 Q. Did you make any suggestion or any request to Mr. Coles
19 that you, because of your dual roles, should be removed as
20 far as possible from the investigation?

21 A. Oh indeed, I did.

22 Q. Can you give us some indication specifically what you said to
23 him?

24 A. Well, after the inquiry, after I requested the police conduct
25 a further inquiry, I made it plain to him that I would try, in

1 view of the fact that Mr. Thornhill was a colleague in
2 Cabinet, that I was trying to determine the most
3 independent way that I could deal with it. We
4 unfortunately, and I say that advisedly, don't have an
5 independent prosecutor, so to speak. I suppose the Attorney
6 General is, in technical terms, a prosecutor, yes. But I gave
7 it considerable thought and decided and spoke, and directed
8 Mr. Coles accordingly, that is, I suggested to him that he
9 being a permanent civil servant, having no political activity,
10 and indeed, I think, as I mentioned at one point in the
11 House, in *Hansard*, having indeed been appointed under a
12 previous administration, I felt that he had...and knowing of
13 his long experience as a lawyer, indeed as a Deputy
14 Attorney General, and his splendid scholastic standing,
15 training for those roles, and finally his honesty and integrity
16 as I had known him both previous to this and, of course, at
17 this time, I felt that I could do this, direct that he receive,
18 that he deal with the RCMP as he saw fit on this matter and,
19 indeed, from what...and from those dealings that he make a
20 determination as to whether or not Mr. Thornhill should be
21 prosecuted and I said to him, in essence, "You make that in
22 the form, yes, of a recommendation," because under the
23 system I ultimately, as Attorney General, had to make the
24 determination or make the decision to...whether or not
25 prosecution would be proceeded with, but you make it, you

1 tell me what you think ought to be done, whether Mr.
2 Thornhill ought to be prosecuted or not. I will accept that as
3 binding on me and I will follow it.

4 4:43 p.m.

5 Q. Did you express the opinion to Mr. Coles, as is indicated in this
6 clipping that "I don't think Mr. Thornhill did anything
7 wrong"?

8 A. No, I don't remember saying that to Coles at all. Not at all. I
9 didn't pre-judge if that's what you might be concluding from
10 that, no, not to him.

11 Q. Well, with respect, Your Honour, this statement attributed to
12 you here would suggest a pre-judgement.

13 A. Well, I suppose that one could take it that way. I'm tried to
14 give you the context in which it was said. It wasn't a pre-
15 judgement, no.

16 Q. You then left in Mr. Coles' discretion how the RCMP report
17 was to be handled within the Department...

18 A. Yes.

19 Q. What prosecutors were to be used to assist the RCMP and
20 what have you.

21 A. All those determinations.

22 Q. Did Mr. Coles come back to you asking for any advice or
23 guidance in the course of the investigation?

24 A. I don't recall any such occasion, no.

25 Q. Were you aware that instructions were issued to the RCMP

1 saying that you will not have contact with the local Crown
2 Prosecutor, you will have contact only through Messrs. Gale,
3 Coles and Herschorn.

4 A. No, I wasn't made aware of that.

5 Q. In hindsight, do you approve of that?

6 A. I don't quite know how to answer that. All I can say I think
7 is that I'm not able to make such a judgement because I don't
8 know the circumstances in which it was said. That is, his
9 discussions with the RCMP. And, therefore, I would hesitate
10 to be critical of him without knowing the context in which this
11 was made.

12 Q. You were concerned about maintaining an appearance of
13 independence and impartiality in handling this matter I take
14 it.

15 A. That was my one desire.

16 Q. Okay. Can I ask you, Your Honour, why you simply did not
17 say to Mr. Coles, "Make sure this case is not handled any
18 differently than any other case but make sure that it is
19 extremely carefully and competently reviewed at every
20 level."

21 A. Well, I don't know, perhaps one might have. I, for one thing,
22 I think it's fair to say that no one thought at that time that it
23 necessarily had the profile that it apparently, you know, later
24 achieved. We would be mindful if the police had said at one,
25 at an early stage, February or March 1980,

1 Look here, we've looked into this letter, this
2 anonymous letter. [I think I called it a poison
3 pen one one time.] We've looked into it we don't
4 see there's anything here and we've talked with
5 the bank inspectors and they don't see anything
6 improper here whatsoever...

7 In other words, I think it was treated, at that stage at least,
8 that it was an unfortunate financial situation for Mr. Thornhill
9 which he was trying to achieve a settlement. Much as most
10 people, many people have had to do with banks.

11 Q. Is that the context in which you gave your instructions to Mr.
12 Coles that this thing looks like it's originated from a poison
13 pen letter, let's, it's probably not too high profile, let's get it
14 out of the way?

15 A. No, I don't mean that. But I mean if you're, you're asking me
16 why didn't I take pains to give him certain supplementary
17 directions.

18 Q. Yes, you did say that gave it considerable thought.

19 A. Yes. But I think, in explanation, that's the only explanation I
20 have. Is that we, until it all, the whole thing unfolded
21 through this, the conclusion of this supplementary, if you will,
22 inquiry by the police, it might well have been just a case of a
23 Minister or anybody else trying to pay off their debts as best
24 they could.

25 Q. Did your staff keep you advised of the investigation as it was
 carried on in the summer of 1980?

1 A No.

2 Q No briefings?

3 A. No.

4 Q There is mention in an RCMP file memo found at page 20 of
5 the volume of a conversation between the RCMP and Mr. Gale
6 in which Mr. Gales indicates, "It would be the wish of the
7 Attorney General to brief the Premier concerning any decision
8 to prosecute." Did you, at any time, advise Mr. Gale or Mr.
9 Coles that you wished to advise the Premier concerning any
10 decision to prosecute?

11 A. No, I don't have any recollection whatsoever. In fact, I, and
12 I'm therefore of the view that I never would have said such a
13 thing. I think I explained one other time before this Inquiry,
14 this Commission, that my view of the Attorney General's role
15 was that it was independent of government, Cabinet, the
16 Premier, and that was in keeping with the British tradition,
17 traditional practices of their Attorneys General. And this was
18 definitely a matter I never discussed with the Premier and,
19 indeed, no cases where I had to make decisions with respect
20 to proceedings in our courts. The only time I ever recall
21 discussing anything with Cabinet or the Premier was budget.

22 Q Mr. Coles testified today that he would have, indeed, expected
23 was the word he used, that there may have been a
24 communication with the Premier to the effect that an
25 investigation was underway and charges may or may not be

1 laid.

2 A. I don't have any recollection. They're saying it.

3 Q. Do I take it if he had that expectation it did not come from
4 you?

5 A. Well, that's right. I have no recollection of it. I didn't, I took
6 pains not to discuss these kind of things with the Premier, let
7 alone Mr. Thornhill. I would consider that highly improper
8 for me to talk to either one.

9 Q. The final RCMP report was forwarded to your Department on
10 September the 11th. Do I understand your evidence to be
11 that certainly between the time you told Mr. Coles to handle it
12 and September that you had no dealings whatsoever with this
13 investigation?

14 A. I wasn't in touch with it, no.

15 Q. And were not asked for advice by Mr. Coles, Mr. Gale, Mr.
16 Herschorn?

17 A. No.

18 Q. Was not advised of any events or developments that had
19 happened with respect to the assignment of prosecutors?

20 A. None that I recall at all.

21 Q. Were you aware that the RCMP report was received by your
22 Department in September?

23 A. I can't say that I wasn't aware. I don't remember anybody
24 specifically bringing it to my attention.

25 Q. We were told by Mr. Coles that the matter of the investigation

1 and what was happening with it was the subject of some
2 pressure by the media. So is it fair to say that once the report
3 was in hand that you would have at least known that the
4 report was in the Department?

5 A. You mean by reading the papers or...

6 Q. No, no. By discussions within the Department.

7 A. He may have said the report has come in but I say again, Mr.
8 Orsborn, I tried to put myself as much as possible in a
9 position of independence of this decision-making process.
10 And to put Mr. Coles as much as possible in the position of a
11 Director of Prosecutions.

12 Q. You expected him to make your decision for you.

13 A. Yes. Because of the particular circumstances here where a
14 colleague was involved. I frankly say I knew of no other way
15 or better way to do it than that.

16 Q. Were you provided with a copy of the report once it reached
17 the Department?

18 A. No, I don't remember ever seeing it then or later.

19 Q. Were you briefed as to its contents?

20 A. I don't recall that either. Ever being briefed on it. I recall
21 meeting, Coles came in to tell me what he had concluded.

22 Q. And what did he tell you?

23 A. Hmm?

24 Q. What did he tell you?

25 A. He told me that he had determined, from the police reports

1 and all other relevant information, that charges were not
2 warranted against Mr. Thornhill because there was not the
3 necessary intent on the part of Mr. Thornhill or, indeed, the
4 banks to provide the element of criminal wrongdoing that
5 was inherent in this charge.

6 Q. And is it your recollection that Mr. Coles, in fact, focused on
7 this issue of intent when he was briefing you?

8 A. Yes.

9 Q. Did he speak about the issue of whether or not a benefit had
10 been received?

11 A. Well he may have. He may have.

12 Q. Did he speak about whether or not there was any difficulties
13 with the consent from the head of Government?

14 A. Well the only discussion I think on that point was that if one
15 looked at this Section in technical terms the Minister was not
16 "an official". That I recall, I believe I recall being mentioned.
17 But that he based his decision not on that technical ground if
18 one were to look at that but on the general lack of the
19 element of any criminality or wrongdoing on the part of Mr.
20 Thornhill or the banks.

21 Q. Pages 31 through 37 or 38, Judge How, there's a
22 memorandum to yourself from Mr. Coles in which he sets out
23 essentially what you've told us starting at page 31.

24 A. I'm glad my memory is in accord with that. This was written
25 at the time but, yes.

- 1 Q. Mr. Coles arrives at the conclusion that charges are not
2 warranted. Can I assume that you read his memo?
- 3 A. Oh, that might well have been, yes, I have no doubt, but I do
4 remember in particular a discussion with him in person. It
5 may have been when he delivered this.
- 6 Q. And with respect to the decision on whether or not charges
7 would go forward.
- 8 A. Yes.
- 9 Q. Did you apply your independent judgement to the opinion
10 that you got from him or did you simply accept what he told
11 you?
- 12 A. Basically I accepted what he told me as I explained
13 previously. And also his rationale seemed to me to make
14 good sense in law.
- 15 Q. What was his rationale?
- 16 A. His rationale, that there wasn't the criminal intent that you
17 would require under the Criminal Code.
- 18 Q. Were you, yourself, familiar with the cases dealing with the
19 requisite intent under 110(1)(c).
- 20 A. No, I wasn't then but, rather curiously, I happened across one,
21 of I've forgotten, some months ago.
- 22 Q. But nonetheless...
- 23 A. Supreme Court of Canada, this very section, 110, where I
24 think it was Mr. Justice Ritchie...
- 25 Q. 110 (1)(c)?

1 A. No, it was 110 (1)(b) but in that Mr. Justice Ritchie made it
2 very clear, I think it was Cooper, R. v Cooper, very clear that
3 intent was involved in that particular segment of Section 110.

4 Q. Were you aware at the time that the issue of intent under
5 110 (1)(c) is somewhat different than that one of 110 (1)(b)?

6 A. Well I've never analyzed it to that extent, no.

7 Q. But you accepted Mr. Coles' rationale as making good sense.

8 A. Well I think if you know Mr. Coles as well as I do, you would
9 have too. But nevertheless, let me to say you, I have the
10 utmost confidence, not only in his objectiveness but in his
11 legal ability, as a person who not only practiced privately for
12 years but was an outstanding student in his law school days,
13 but has been a long time as Deputy Attorney General advising
14 a succession of people in that role. Yes, I did have utmost
15 faith in him.

16 Q. What you're saying, in effect, is that you did not exercise your
17 own independent judgement on the facts in the law involved
18 but you said to Mr. Coles, "Give me your decision and that will
19 be it."

20 A. Yes, for the reasons I explained...

21 Q. Yes, I understand.

22 A. One or two points here before.

23 Q. Were you advised by Mr. Coles as to what recommendations,
24 if any, the RCMP had made?

25 A. No, I don't recall being advised.

1 Q. I take it, then, you were not aware at the time that you got
2 Mr. Coles' opinion that the RCMP recommendations differed
3 from the Mr. Coles' conclusion.

4 A. I don't have any recollection of that.

5 Q. And you were, thus, not aware when you announced your
6 own decision that the RCMP's recommendations were contrary
7 to that.

8 A. No, if I, my view of, and recollection is that I left it in his
9 hands, as I said, I perhaps assumed or felt that he, that there
10 would have been discussions between Coles, Mr. Coles and the
11 RCMP criminal investigation people.

12 Q. If I could just draw your attention, Your Honour, to a letter
13 that you wrote in 1988, just to clear up a little confusion in
14 my own mind and it's been marked, My Lord, as Exhibit 172
15 an distributed.

16 EXHIBIT 172 - CLIPPING - "CHRONICLE HERALD" - April 12, 1988

17 A. Yes.

18 Q. Which reproduces a letter to that paper from Judge How.

19 A. Yes.

20 Q. And I just direct your attention to the third column of your
21 letter, Judge How, the first full paragraph.

22 A. Yes

23 Q. And you say,

24
25 Despite these findings which I reported to the

1 Legislature, the Opposition requested that I
2 make a further investigation and I obliged and
3 asked the RCMP to re-examine the matter, which
4 they did. At this time they came back with the
5 suggestion that Thornhill, in making settlement
6 of his debts, may have committed a breach of
7 Section 110 and with that I discussed the matter
8 with my Deputy, Mr. Coles, and asked him to
9 review the whole matter.

10 My question is, that suggests is that you were perhaps aware
11 of the conclusion of the RCMP...

12 A. Well that is, yes, that's possible. I may have been. But I don't
13 recall it with any precision at all. The reasons I gave there
14 that I tried to leave it entirely to the judgement of Mr. Coles.

15 Q. And to be fair to you, there is no reference in Mr. Coles'
16 memorandum of the RCMP recommendations.

17 A. No.

18 Q. So unless he had advised you verbally...

19 A. You say in the one you referred to me a few minutes ago?

20 Q. Yes. There's nothing in that.

21 A. No. No, I, in my letter there I may have been referring to
22 something that occurred, or I heard later. That's all I can
23 explain it by. But as I said I, perhaps not entirely
24 successfully, I tried to keep myself in a position where Coles
25 would independently advise me what ought to be done.

 Q. Okay. You subsequently released to the press your decision
 that no charges would be laid.

 A. Yes.

1 Q. And I think that was done some six days after the report was
2 received from Mr. Coles. Did you advise anyone in
3 Government of your intention to make a press release in
4 respect of the matter?

5 A. I don't recall ever saying to anybody we were going to make
6 it. I simply, either I decided or he suggested it and I agreed,
7 that we would make the matter public as to what his
8 determination had been.

9 Q. Before the matter was made public but subsequent to your
10 receipt of the memo from Mr. Coles, did you advise, for
11 example, Mr. Thornhill that no charges would be laid and "I'll
12 announce it later."

13 A. I don't recall ever telling him.

14 Q. Did you advise the Premier that, "We've decided that no
15 charges will be laid."

16 A. I don't recall ever telling him. The same reason.

17 Q. There are two press releases there, Judge How...

18 A. Yes.

19 Q. One on 43 which I believe is a draft and one at page 44 which
20 we understand is the one that was eventually released. The
21 substantive difference between the two is that the reference
22 to releasing Mr. Coles' memorandum is deleted.

23 A. May I just ask you again for the page? 43...

24 Q. Page 43 is, we understand, a draft press release...

25 A. Oh, yes.

1 Q. And page 44 is the one that was actually released and the
2 substantive difference between the two is the last paragraph
3 on page 43. Do I take it from that that it was suggested to
4 you that you release Mr. Coles' memorandum to the press?

5 A. Just let me, if I may, just run through that. Your question,
6 I'm sorry.

7 Q. Were you advised by Mr. Coles that his memorandum should
8 be released to the press as part of the press release?

9 A. I don't think I was, no. He went on there and I recall, I'm
10 sure he had some papers with him. I made a preliminary
11 statement if I remember the occasion correctly and then
12 asked him to explain.

13 Q. There is a suggestion later in the materials, I can't point you
14 to it right now but it was distributed to Mr. Gale that you, as
15 Attorney General, were not in favour of releasing Mr. Coles'
16 memorandum or his opinion to the press, his written opinion.

17 A. I don't know.

18 Q. That doesn't refresh your memory at all?

19 A. No. I do remember that I wasn't in favour of releasing the
20 RCMP report.

21 Q. Yes, of course.

22 A. Because that would run counter to all practices in terms of
23 RCMP reports submitted to the Department historically.

24 Q. Was it your idea that this decision should be announced
25 publicly?

1 A. I can't remember precisely, Mr. Orsborn. I'd like to be more
2 precise but I can't be. I don't know what, as a, well, guess I
3 would say, that perhaps I might have decided that the matter
4 had received such media and political attention, the Members
5 of the House, that I ought to make it public as soon as possible
6 but that's only a guess I have.

7 5:05 p.m.

8 Q. If you had been aware...

9 A. Well, I did anyway.

10 Q. If you had been aware that the RCMP had recommended a
11 contrary conclusion, would you have still gone ahead and
12 made this sort of public pronouncement?

13 A. I don't know how to answer that. I suppose it might have
14 given one some pause, but I don't know that...that probably
15 makes me, I believe I didn't know at that time that there
16 had been any ...any contrary views by the RCMP.

17 Q. Did you at any time ask Mr. Coles "What did the RCMP say"?

18 A. I don't think so. I think I said moments ago, Mr. Orsborn,
19 that I had assumed or I believe I assumed that that
20 consultative process would have taken place.

21 Q. Okay. There was a brief flurry of activity while you were
22 at a conference in Victoria with Mr. Coles in a matter
23 concerning the...how this matter was assigned to or not
24 assigned to a Crown prosecutor.

25 A. Yes.

1 Q. Do you remember discussing that issue with Mr. Coles while
2 you were in Victoria?

3 A. Yes.

4 Q. What do you remember of that?

5 A. Not very much, but save and except that he was quite
6 irritated by what...by the information that we received in BC
7 at the time as to statements allegedly made by a Crown
8 Prosecutor.

9 Q. Did you ask him if the statements were correct?

10 A. I don't know. I think the gist of it was that he said, "I'm
11 going to reply to it," and he did. I don't know as I quizzed
12 him about it.

13 Q. Uh-hum. Did you have a later meeting with David Thomas
14 about that matter?

15 A. I may have, I don't precisely recall having one.

16 Q. Do you recall...

17 A. I met Mr. Thomas, may I just add, some times with
18 particular respect to the salary levels for senior prosecutors
19 like himself.

20 Q. Do you recall having a meeting with Mr. Thomas specifically
21 about having a further press release issued to clarify
22 matters?

23 A. Not offhand, but possibly.

24 Q. Do you recall, in fact...

25 A. Possibly I did, but...

1 Q. Do you recall, in fact, issuing any instructions or giving any
2 suggestion to Mr. Coles that he better issue another press
3 release to clear the matter up?

4 A. I don't have any recall of that, no.

5 Q. We've had evidence that you attended at least part of a
6 meeting on November 12th between Chief Superintendent
7 Feagan and Mr. Coles.

8 A. Yes.

9 Q. Do you remember that meeting?

10 A. Yes.

11 Q. Do you remember being there for at least part of it?

12 A. Yes.

13 Q. Was it at that meeting that you became aware there was a
14 difference of opinion between the RCMP and Mr. Coles?

15 A. Well, certainly if I hadn't before I was then, yes.

16 Q. What's your recollection of that meeting?

17 A. I guess I can say that I have some recall that Feagan was,
18 Chief Superintendent Feagan was somewhat upset, but that I
19 don't remember it being a stormy meeting, that is the part
20 that I attended at all.

21 Q. Maybe they had blown themselves out before you got there.

22 A. Perhaps so, but, yes, I think, to answer it, yes, there seemed
23 to be some suggestions of a difference of opinion between he
24 and Mr. Coles.

25 Q. Do you recall the possibility being raised that the RCMP and

1 Mr. Coles could not work together if the RCMP persisted in
2 challenging Mr. Coles' decision?

3 A. Well, I...my recollection is I didn't really say very much
4 during the meeting. I was more of a listener.

5 Q. Yeah, that is indicated.

6 A. Than a contributor.

7 Q. That is indicated in the minutes.

8 A. Well.

9 Q. I'm asking you if you recalled that subject matter being
10 raised about the problems with the working relationship
11 between the force and the department if the force persisted
12 in this matter?

13 A. Well, I can't be as definite as that. I...perhaps the whole
14 subject of the general relationship between the two was
15 raised, and I suspect it was, but I don't think...I don't recall
16 it as any ultimatums having been issued. I wasn't that kind,
17 and I had the final say.

18 Q. You say you weren't that kind. From your observation and
19 experience was Mr. Coles of that nature?

20 A. Well, I must say Mr. Coles could be rather positive at times,
21 yes. In fact, I used to think I was more of a diplomat than
22 he was, than he was. I would agree.

23 Q. Did you yourself...

24 A. But you see, but let me just add, I think that's one of the
25 duties of the Deputy is that there they have dealt generally,

1 certainly in this case, as...on behalf of the department for
2 many, many more years that I had, and is often the case
3 with deputies, with Deputy Attorney Generals and I must
4 say I had...in Mr. Coles' case I deferred to him many times
5 when it came to legal judgements.

6 Q. So if Mr. Coles had suggested that there might be problems
7 with the future working relationship if the RCMP persisted
8 you would have believed him.

9 A. Well, no, I would...I'll tell you what I would have thought
10 was that once they had both reflected on this that we'll go
11 on pretty well as we have in the past.

12 Q. Even if the RCMP had persisted in their...

13 A. Sure.

14 Q. ...course of action.

15 A. Sure, because let's face it, they would have had a right, they
16 would have had a right to lay a charge or charges, no
17 question about that.

18 Q. And it's your view, I take it, that had they, in fact, laid a
19 charge against the advice and, indeed, direction of Mr. Coles
20 that after a bit of a kerfuffle it would blow over.

21 A. We would have had to deal with that on the basis of a stay
22 or not.

23 Q. But in terms of the day-to-day working relationship
24 between your department and the force that it would not
25 suffer any long-term detriment.

1 A. Not at all. I tell you in political life you learn that that you
2 may have heated arguments today, even your opponents
3 there, but that doesn't mean that you don't deal with them,
4 that you don't work with...

5 Q. Did you...

6 A. That you don't respect them, you do.

7 Q. Did you consider this an aspect of political life this particular
8 dispute?

9 A. You know, it's funny how much you learn about people and
10 getting along with them in political life. It's a rather good
11 experience, I could recommend it to you.

12 Q. For sure. Especially for picking the right side.

13 A. You learn a lot of human psychology.

14 Q. So you were simply applying the principles of human
15 psychology learned from your political life to your own
16 political duties here as Attorney General.

17 A. I was that old, I had had experience quite apart from
18 political life, but I found it...I found it useful in that regard,
19 learning not to hold grudges, if you will, or biases.

20 Q. Had you imparted that wisdom to your Deputy?

21 A. I think perhaps I might have tried at least, yes, I used to
22 talk to him about...

23 Q. At this time or certainly immediately prior to this time we
24 understand that the contract negotiations for the policing
25 agreement were either completed or pretty close to

1 completion. Were you involved in that process?

2 A. No, I don't recall that. Those negotiations, if I remember
3 rightly, took place with say senior people like Mr. Coles in
4 the department, maybe Mr. R. A. MacDonald would have the
5 facts and figures and negotiations by Mr. Coles, and they
6 were often times conducted in Ottawa. They would come
7 back and report what they thought ought to be done.

8 Q. Uh-hum.

9 A. Yes. So just to explain, I really wasn't in on a, what,
10 negotiation basis.

11 Q. Is it the...

12 A. I'd have to make, I suppose, make the decision in
13 consultation with say the Cabinet.

14 Q. Sure.

15 A. Because after all it involved money.

16 Q. Would you have any face-to-face contact with any RCMP
17 personnel?

18 A. Oh, I don't think so. I don't remember that.

19 Q. Not even at say the commissioner level.

20 A. Not on that, I don't remember talking with Commissioner
21 Simmonds for example.

22 Q. Page 67, Your Honour, there is one comment that
23 Superintendent Feagan attributes to yourself, even though
24 you didn't say very much, the second last paragraph there,
25 the fourth line.

1 A. He's got it right, I didn't say anything of significance he says.

2 I accept that.

3 Q. No, it's really the next sentence I was interested in.

4 A. Yes.

5 Q. He says, "He," meaning you, "Claimed he couldn't understand
6 why we were taking any further action," because he was
7 talking about getting further opinions and, "He said he felt I
8 had received bad advice from the people who worked for
9 me, which he intimated did not speak well for them."

10 A. Oh.

11 Q. Did you make any suggestion or comment of that nature to
12 the Superintendent?

13 A. I can't dispute it. I may have made a comment of that kind.
14 You see, I don't want to repeat myself, but only sufficiently
15 to say that I would take Gordon Coles' advice over the
16 people that I understood were giving Mr. Feagan advice.

17 Q. Were you concerned that the people giving Mr. Feagan
18 advice were motivated by concerns or factors other than
19 just doing their job?

20 A. Oh, no, not really.

21 Q. Well, why would the fact that they differed from Mr. Coles
22 not speak well for them?

23 A. Well, only that if they didn't understand the criminal law, as
24 I believe Gordon Coles understood it, that I would be
25 concerned about their judgement, their legal judgement in

1 laying charges or other procedures.

2 Q. Did you advise anyone in government of this difference of
3 opinion or this dispute between Mr. Coles and the RCMP?

4 A. I don't have any recollection of doing it, no.

5 Q. And notwithstanding the fact that Superintendent Feagan
6 was talking about getting further opinions and what have
7 you, was the issue closed in your opinion?

8 A. Yes.

9 Q. Superintendent Christen makes a comment on page 78 of
10 the materials, Your Honour.

11 A. Yes, thank you.

12 Q. And again, this is an internal RCMP document written on
13 November the 18th following this meeting with Mr. Coles,
14 yourself and Superintendent Feagan.

15 A. Uh-hum.

16 Q. The third paragraph from the bottom on page 78
17 Superintendent Christen concludes, and this is his conclusion
18 based on Feagan's report of the conversation with Coles, so
19 it's down the pipe a bit. Last sentence of that paragraph,

20 It would appear in future any major
21 investigations involving politically prominent
22 persons the decision as to whether there is
23 evidence to support charges will be made at the
24 Deputy Attorney General's level.

25 Was that in your view the policy of the Department of

1 Attorney General in 1980?

2 A. No, no, no, it was only in this one.

3 Q. Yes, the...was it your view that in future...

4 A. No.

5 Q. ...investigations or charges involving politically prominent
6 persons would be made at the Deputy Attorney General
7 level?

8 A. No. I don't recall ever suggesting that at all.

9 Q. How...

10 A. Or holding that view even.

11 Q. Okay. What was the view...how would they then be handled
12 in future?

13 A. Well, I think on an ad hoc basis, if you will, on the...probably
14 on the same basis that this one was handled, but not
15 necessarily. I recall that we had another...we another
16 instance where a member of our caucus was charged.

17 Q. Uh-hum.

18 A. And I got the advice I think I'm sure from Mr. Coles that
19 that charge ought to proceed on that particular member of
20 caucus. I may add that he was acquitted later in court.

21 Q. What are the factors that lead you to suggest that
22 investigations involving politically prominent persons would
23 be sort of monitored or handled on an ad hoc basis?

24 A. Well, because I hadn't, I suppose, made any such
25 determination. I did it in this case for the reasons I've

1 explained.

2 Q. Uh-hum.

3 A. To try and be as independent of the decision, in other words,
4 as objective as I possibly could and I took this approach and
5 this procedure to try and achieve that, yes.

6 Q. Mr. Herschorn suggested to us that, this morning in his
7 evidence, that one of the factors that may be relevant in
8 determining how a case such as this is to be handled is the
9 effect on the career of a politician. Would you agree that
10 that is a factor that will be taken in to account?

11 A. No, I don't think...I don't agree with that. I...it may sound
12 trite to you and everybody here, but let me say very simply,
13 my view is that because I was in political life or some
14 person, Mr. Thornhill, that we didn't warrant any different
15 treatment than other people before the law.

16 Q. But is it not true, Your Honour, that in this case, although
17 you may not have been aware of it or not, you didn't
18 instruct it, that the facts of this case, the process by which
19 this case was handled was, in fact, different. There was no
20 access by the RCMP to a regular Crown prosecutor, the
21 decision as to whether or not charges would be laid was
22 made by the Deputy himself without further consultation
23 with the police and in contradiction to the RCMP's
24 recommendation and the decision as to whether or not
25 charges will be laid was announced publicly.

1 A. Yes.

2 Q. In again contrary to the decision of the RCMP. And with
3 respect, sir, I would suggest that that is not how the normal
4 case is handled.

5 A. Well, in the sense that nobody is above the law, that the
6 sense I'm making my statement to you. Now the manner in
7 which you reach that is perhaps arguable, if you wish. I
8 chose this route. I placed my faith in the integrity and
9 ability of a certain Deputy Attorney General, and I said if I
10 make it they're either going to say...if I said that he wouldn't
11 be charged they'd say "You favoured your colleague." If I
12 didn't make it, you'd say, you were unfair...if I said he
13 should be charged, "You're unfair to your colleague." You
14 were in a no-win position. I wanted to place myself in
15 this...or Mr. Coles in a position of making the decision that an
16 in...the director of public prosecutions would have done had
17 we had one of them. I wouldn't have interfered with him. I
18 didn't interfere with Mr. Coles.

19 Q. Uh-hum. Some time later there was a letter tabled in the
20 House in 1981, you tabled a letter from Superintendent
21 Simmonds.

22 A. Yes.

23 Q. To yourself.

24 A. Yes.

25 Q. Leaving aside the question of that letter.

1 A. Yes.

2 Q. Between the meeting with Superintendent Feagan and that
3 letter did you have any involvement or discussion
4 concerning this case?

5 A. Not that I recall.

6 Q. Okay. Are you able to tell us how you came to receive that
7 letter, sir?

8 A. Well, I think my best recollection is that I met Simmonds in
9 one of the occasions that we were out of the province and he
10 was there either some kind of function, proceeding, that
11 would be approximately the time of the constitutional talks,
12 but I'm not so sure that would have been the occasion when
13 I met him. Oh, yes, something comes back to me here. I
14 think it was an occasion when we were talking about...or this
15 was a seminar on the role of the police or something to do
16 with them. And I went to it, and I almost think it was on
17 the west coast, and it was at that time that I recall him
18 saying that they had in the...within the department
19 reviewed the legal decision, if you will, of Mr. Coles and had
20 come to exactly the same conclusion that he had, that
21 charges were not warranted. And I remember asking him,
22 and I said in this, I think, this little article, without going
23 back to it, that I asked him, well, "Would you be prepared or
24 care to put that in writing?" and he didn't hesitate, he said
25 he would.

1 5:25 p.m.

2 Q. Why did you ask for that?

3 A. Well, it's always nice if somebody agrees with you, I suppose,
4 and particularly because of the profile of this case. And,
5 indeed, more importantly, the information that I later
6 learned, that there had been some dissension within the
7 RCMP, or disagreement better put...

8 Q. Did you...

9 A. As to whether or not a charge was warranted. And he said,
10 our people at the highest level made this determination and
11 they concluded, they came to the same conclusion as your
12 Deputy.

13 Q. Did you intend to make his letter public once you received it?

14 A. Well I intended, and did, I think, repeat it or quote it in the
15 House.

16 Q. Yes.

17 A. See, after all, it was the Opposition that were very critical of
18 us.

19 Q. And did you make Superintendent Simmonds aware of your
20 intention to table it in the House?

21 A. I may have, I don't know this day. He never wrote me after
22 and said you shouldn't have done it. I know that.

23 Q. And...

24 A. Or communicated in any way.

25 Q. The letter...

1 A. I may, and in fairness, I may have said to him, you know, I
2 wouldn't mind having it in writing so that I could do just that.

3 Q. I see. The letter tabled in the House is reproduced both in
4 your...

5 A. Yes.

6 Q. Exhibit there and also a photocopy at pages 117 and 118 of
7 the booklet. The covering letter is on page 116 and that
8 covering letter reads, it's very short...

9 A. 116.

10 Q. 117, yes, Your Honour.

11 A. Thank you.

12 Q. It's addressed to you from the Commissioner. It says,

13
14 Following our conversation of this morning you
15 will find attached the letter to which minor
16 corrections were made.

17 A. Yes.

18 Q. I read from that that somewhere along the line there was an
19 earlier draft of the letter and a conversation between yourself
20 and the Commissioner.

21 A. Yes

22 Q. That is so?

23 A. That's true. What happened was after telling me verbally on
24 the occasion I mentioned that he had it, he then, this came
25 some time later, he went back to Ottawa and composed a
letter and sent it down and I, essentially in the same form as

1 this, this one here, substantively the same. But I, my
2 recollection is that I wanted it to be clear that what they had
3 done was entirely independent of us and, indeed, unknown to
4 us. That this high-level decision had been arrived at, review
5 and decision. And I don't think in the first one that that was
6 quite clear. In other words, my concern was that it wouldn't
7 be seen as if we had invited them to do it, firstly, and that we
8 had encouraged them to reach a certain conclusion.

9 Q. Well did his first letter in any way suggest that that...

10 A. No. As I recall it it didn't make that point clear but this was
11 an independent effort on their part.

12 Q. And you went back to him and asked him to...

13 A. Yes, I called...

14 Q. Reinforce that aspect...

15 A. And I pointed that out...

16 Q. Of the letter.

17 A. I said, would, you know, "Would you care to amplify it to that
18 extent?" He had no problem with it at all.

19 Q. Did you...

20 A. But it didn't change the complexion of this letter in any way,
21 the substance of this letter.

22 Q. Did you suggest or send any wording to Superintendent
23 Simmonds?

24 A. No. That was a matter for himself.

25

1 MR. ORSBORN

2 Thank you, Your Honour.

3 MR. PRINGLE

4 No questions.

5 CHAIRMAN

6 Mr. Merrick?

7 EXAMINATION BY MR. MERRICK

8 Q. Just one question, Your Honour. At any time during this
9 process in 1980 leading up the recommendation of the Deputy
10 Attorney General, or your decision that was announced in the
11 press release, did you receive any input or suggestions or
12 influence whatsoever in any way from Mr. Thornhill?

13 A. None.

14 Q. In fact, did he even call him to find out what was going on?

15 A. No.

16 MR. MERRICK

17 Thank you.

18 JUDGE HOW

19 Let me just add before you resume your seat that I was very
20 particular not to have any conversation with Mr. Thornhill on
21 this matter.

22 MR. MERRICK

23 Thank you.

24 MR. PINK

25 If I may, one last time, make the same reservation.

HIS HONOUR CHIEF JUDGE HOW, EXAM. BY MR. MERRICK

1 CHAIRMAN

2 I'm going to have to ask you, Chief Judge How, if you would
3 be, if you would come back tomorrow morning...

4 JUDGE HOW

5 I had already planned to, My Lord. I had been advised that
6 I'd be starting tomorrow and I set the day aside for that purpose.

7 CHAIRMAN

8 The reason being that counsel for Donald Marshall, Jr. were
9 both unavoidably absent today. They will be furnished with a
10 transcript of today's testimony and they may wish to cross-
11 examine you on matters relating to the testimony which you've
12 given today.

13 JUDGE HOW

14 Very well.

15 CHAIRMAN

16 We propose to start at 8 tomorrow morning. I can't give you
17 a precise time that you will be required but it'll be 8 o'clock or
18 soon thereafter his counsel can be heard.

19 5:30 p.m. - ADJOURNED TO 15 SEPTEMBER 1988 - 8 a.m.

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REPORTER'S CERTIFICATE

I, Margaret E. Graham, Court Reporter, certify that the foregoing is a true and accurate transcript of all the evidence taken by way of recording and reduced to typewritten copy.



Margaret E. Graham

DATED THIS 14 day of September 19 88 at Dartmouth, Nova Scotia