

MR. THOMAS, EXAM. BY MR. MacDONALD

1 from our point of view, that the schedule be maintained. So what
2 I'm proposing is that we rise for, say, 15 minutes, and then
3 proceed.

4 BREAK - 6:44 p.m.

5 7:00 p.m.

6 MR. MacDONALD

7 The next witness is David Thomas, My Lord.

8 DAVID THOMAS, duly called and sworn, testified as follows:

9 EXAMINATION BY MR. MacDONALD

10 Q Your name, sir, is David Thomas?

11 A. Yes, sir.

12 Q And you're employed by the Attorney General's Department?

13 A. Yes, sir.

14 Q What's your present position with the Department?

15 A. I'm the Prosecuting Officer for Halifax County.

16 Q And how long have you held that position?

17 A. Currently I think about eight years and previous to that two
18 and a half years, I think.

19 Q What are your duties in a general fashion, in a general way?

20 A. Well basically to see that the criminal justice system is
21 properly processed through the courts at all levels in Halifax
22 County.

23 Q Is it part of your responsibility to assign prosecutors to
24 various cases in Halifax County?

25 A. Yes, sir. Not cases specifically. At times specific cases are

1 assigned, but generally prosecutors are assigned to a
2 particular court.

3 Q. Okay. And so any charge arising in, if it's going to be
4 prosecuted in a particular court, it's done by a particular
5 prosecutor. Normally.

6 A. Generally speaking.

7 Q. What is the relationship generally existing between the RCMP
8 and your prosecutors?

9 A. Well lately it hasn't been too good. I think the rapport is good
10 at the, with the Sackville detachment and our Bedford office.
11 And I think the rapport is good with the Cole Harbour
12 detachment and the Dartmouth office. Generally speaking I
13 think it's good with the Halifax detachment in highway patrol
14 with the Halifax office, but at times the rapport with the GIS
15 Section leaves a bit to be desired.

16 Q. Is there contact, complete from the normal circumstances,
17 between the RCMP and your prosecutors during the time an
18 investigation is going on? In other words, does the RCMP
19 members contact prosecutors for assistance and advice as
20 they carry out their investigation?

21 A. From time to time. It depends a lot on the nature of the
22 investigation.

23 Q. Dealing particularly with commercial crime investigations, is
24 there anything, is there any normal practice that's followed?

25 A. The normal practice that they have been following in that

1 section is to call when they feel they're ready to get some
2 input or advice from a prosecutor.

3 Q. And who would they call?

4 A. They would call me and ask for a prosecutor.

5 Q. And would you assign a prosecutor?

6 A. Yes.

7 Q. And that...

8 A. I may, well, again, depending on the nature of the file, if it's
9 not what we refer to as a "heavy" one, a long time-consuming
10 one, I might refer it up to John Wade who supervises at the
11 Spring Garden Road office. If it's a time-consuming one, I
12 would assign someone specifically to the file.

13 Q. And do you have to get input or permission, if you will, from
14 the senior officials in the Attorney General's office before you
15 can assign a prosecutor in those type of circumstances?

16 A. No.

17 Q. What normally, if there is such a thing, if there's a difference
18 of opinion between the police and a prosecutor whether a
19 charge is warranted, how is that resolved if, in fact, you have
20 any experience in this?

21 A. We rarely have that experience with municipal police forces.
22 We have had it, I have had it personally with the GIS Section
23 of the Mounted Police. As I understand it their operational
24 manual requires them to, if there is a difference of opinion
25 between the investigator and the prosecutor, their operational

1 manual, I think, requires them to have it resolved or,
2 resolved I think at Divisional level or resolved with the senior
3 people in the Criminal Section of the AG's Department.

4 Q. Who are the criminal law experts, if you will, at the AG's
5 Department?

6 A. Experts. I don't think any of us are expert in anything. The
7 people who head up the Criminal Law Section are Gordon
8 Gale, who's the Director of the Criminal Section and Martin
9 Herschorn is the Director of Prosecutions.

10 Q. I want to talk to you about the Thornhill case and the brief
11 involvement that you would have had in it. And I've had
12 marked, Mr. Thomas, as Exhibit 168, copies of notes that were
13 in your file.

14 EXHIBIT 168 - FILE NOTES OF D. THOMAS re THORNHILL CASE

15 A. Yes, sir.

16 Q. And those all in your handwriting, are they?

17 A. Yes, sir.

18 Q. Feel free to refer to those if you like as we go through and at
19 the end I may refer to them in detail. When were you first
20 aware of an investigation being carried out by the RCMP in
21 the Thornhill matter?

22 A. As indicated in my notes, sir, sometime in June or July of
23 1980.

24 Q. And how did you become aware of that?

25 A. I'm using these notes to refresh my memory. They weren't

1 made contemporaneously but a summary of, within a day or
2 two after an item that I heard on the news. So I'm referring
3 to them and I would say I originally heard of the matter from
4 Inspector Blue who, at that time, was the officer in charge of
5 the Commercial Crime Section here in "H" Division.

6 Q. And that would be a normal sort of course of events that you
7 would hear of an investigation from the RCMP who were
8 involved in carrying it out, is that correct?

9 A. Well in a case like this obviously Inspector Blue had called me
10 about it. The particulars of which I don't recall but it would
11 probably have been a situation where he said I have
12 something that I'm going to have an investigator contact you
13 about or something like that. I don't recall anything specific
14 about it eight years later.

15 Q. And your note indicates that Constable House came to see you
16 and you assigned Kevin Burke to the file.

17 A. That's correct, sir.

18 Q. That, again, would be just the normal course of events, would
19 it not?

20 A. Yes, sir.

21 Q. Is there any particular reason that you would have assigned
22 one prosecutor as opposed to another?

23 A. At that point in time Burke was doing frauds to the exclusion
24 of anything else. He was tied up on the time-consuming fraud
25 cases.

1 Q. He was considered by you to be the guy in your office or in
2 your control that would have the most experience in this type
3 of case?

4 A. No, sir. We have two doing frauds. I think Duncan Beveridge
5 and Burke were doing frauds at that point in time or Burke
6 and perhaps Norton. One or the two.

7 Q. Okay. Now subsequent to that assignment of Burke you were
8 advised, I believe, by Mr. Gale that the RCMP were not to
9 have any contact with a prosecutor in this case?

10 A. No, sir, I didn't get any instructions from Mr. Gale.

11 Q. Who did you get instructions from?

12 A. I got a memo from Burke on the 28th of August of 1980, as
13 indicated in my notes, indicating that Inspector Blue, I think,
14 had called him, no he had called House, I guess. He called
15 Constable House to arrange an appointment. House had been
16 in, had had contact with him on previous occasions and he
17 called House to make an appointment to go over the file and
18 then I guess Burke got the word that the Department were
19 monitoring the file and Burke sent me the memo and I sent a
20 copy of the memo to Gale and that was it as far as I was
21 concerned.

22 Q. Okay. Exhibit 165, it's that booklet of documents in front of
23 you, Mr. Thomas.

24 A. Yes, sir.

25 Q. Look at page 22, if you would, first.

- 1 A. Yes, sir, I have it.
- 2 Q. 22 is the memo from Mr. Burke to you.
- 3 A. Yes, sir.
- 4 Q. And that was the first indication that you had of this, the fact
5 that Burke was being called off.
- 6 A. Yes, sir.
- 7 Q. Now Mr. Burke in that first paragraph relates what you've
8 just said, that he was given instructions, and then he said he
9 was to forward his recommendations to you and wait further
10 instructions. Would that be the normal practice?
- 11 A. Yes, sir.
- 12 Q. He notes that he has met with Constable House on several
13 occasions, familiarized himself with the investigation...
- 14 A. Excuse me, sir, that would be the normal course to follow in
15 an investigation of this nature, in a file of this nature. Burke
16 wouldn't forward a report to me on all the files he was
17 working on. But because of who the subject of this
18 investigation, that's the way it would go.
- 19 Q. Because of the...
- 20 A. Because Thornhill was the subject of the investigation the
21 report would come to me.
- 22 Q. And why is that? Because...
- 23 A. Well because I would want to look it over and be aware of
24 what was going on and if charges were contemplated I would
25 refer it to Herschorn.

1 Q. Okay, so the practice, or the, the procedure to be followed you
2 would have expected is from Burke to you to Herschorn?

3 A. Well, it would depend. If I agreed with Burke that charges
4 were warranted, then it would go to Herschorn. If I disagreed
5 with him, then it would go back to him with, or we'd talk
6 about it perhaps, or I'd memo it back to him, memo back to
7 him and indicating why I didn't feel that charges were
8 warranted.

9 Q. And would that, you're confident that Burke would
10 understand that that's the procedure to be followed in a case
11 such as this. Why is that, because you're dealing with
12 someone of, who's known publicly or...

13 A. Well again, I'm talking about this file, yeah.

14 Q. So you would have expected that Burke would first of all,
15 having reviewed the matter with the investigator conclude
16 whether charges, in his opinion, should be laid, then come to
17 you for your assessment.

18 A. I probably told him that that's the way it would go.

19 Q. Okay. And then you would contemplate that if you agreed
20 with Burke, it would then go to Herschorn.

21 A. That's right.

22 Q. Again, for review and assessment?

23 A. Well because of who was involved.

24 Q. And at what stage would charges actually be laid?

25 A. Well that would depend, if it went to Herschorn, they would

1 get their heads together there and we would be advised
2 whether or not charges were to be laid.

3 Q. Okay. Is that the same procedure followed when dealing with
4 normal commercial crime investigations?

5 A. No, sir.

6 Q. When is it followed or are you able to tell me?

7 A. Well it's a judgement call that I would make, I guess.

8 Q. So there's no articulated policy that one could look at, you
9 rely on your own judgement in those cases.

10 A. Well apparently, I've read the copy of this exhibit and
11 apparently there was some agreement between the Deputy
12 and the CO of "H" Division with respect to how this file was to
13 be handled. I wasn't privy to that. I had no knowledge that
14 the, that's the way it was supposed to be investigated. Now
15 that goes back to your question on policy. If that, what I'm
16 saying is if that policy was in place and it appears that it was
17 with respect to this investigation I wasn't aware of it.

18 Q. Yeah. And I understand that. What I'm trying to determine,
19 if you can tell me, what type of cases you would say to your
20 prosecutor, "You come to me after you've made your decision,
21 you come to me, I'm going to review it and then I'm going to
22 ask Martin Herschorn or other people in the Attorney
23 General's office to get their concurrence before charges are
24 laid."
25

1 7:15 p.m.

2 A. Well, I didn't say that it would go to them for their
3 concurrence. It would go to them, well, for a final decision
4 and the types of cases would be high profile ones such as
5 this one.

6 Q. Has there been other types of cases like that in your...like
7 this one in your time as prosecuting officer?

8 A. That I referred to Herschorn.

9 Q. That you got a...you had an opinion or a conclusion from
10 your prosecutor, you agree and then you go up to Herschorn
11 or anyone else for a final decision.

12 A. I suppose there have been but I can't recall. I'm just trying
13 to think of that Billy Joe one, whether I got involved in that
14 one or not.

15 Q. I was going to ask you about that. We're going to deal with
16 that next week. But that was prosecuted out of your office,
17 was it not?

18 A. Yes, sir.

19 Q. And do you know if you had to get the decision from Mr.
20 Herschorn or people at that office before those charges were
21 laid?

22 A. I think the dec...before the charges were laid, no, I don't
23 recall that, no, whether I had any... Norman Clair had that
24 file and... I think that that was probably decided by
25 Herschorn and Gale and whomever over there. I don't think

1 I was involved in the laying of that charge.

2 Q. Okay. Thank-you. In this memo from Mr. Burke to you,
3 which is on page 22, he notes in the first paragraph that he
4 had met with Constable House on several occasions and
5 familiarized himself with the investigation and concluded
6 that having examined the materials and discussions with
7 House "That one or, if not more charges could be laid in this
8 matter." That would just be a preliminary view I assume, is
9 that correct, is that the way you took it?

10 A. That's the way I would interpret it, although he said that it
11 was near completion, he must have had a fair amount of
12 evidence before him to conclude that.

13 Q. You forwarded Mr. Burke's memorandum to Mr. Gale.

14 A. Yes, sir.

15 Q. And that's on page 21 of your covering letter, Mr. Thomas.

16 A. Yes, sir.

17 Q. And then, as I understand, your involvement was
18 terminated until the events took place later that fall that
19 gave rise to you making the notes that we've introduced.
20 That's a...

21 A. Yes, sir, I considered it concluded as far as my office was
22 concerned.

23 Q. So when did you next become involved in anything at all to
24 do with this case?

25 A. I think it was November 1980 when I heard something on

1 the radio.

2 Q. If I can refer you to page 58 in that booklet.

3 A. Yes, sir.

4 Q. That is a copy, transcript of a press release given by Mr.
5 Coles when he was in Victoria at some meeting, I think, of
6 Deputy Attorney Generals, and I understand it may have
7 been that press release that prompted your taking some
8 action, is that correct?

9 A. Yes, sir, I heard...if that's the press release that originated in
10 British Columbia.

11 Q. Yes, it is.

12 A. Well, I heard that on the radio I guess it was, I don't know
13 which station it was on, but I heard it on the radio and my
14 reaction to it was that it was making...it appeared that Burke
15 was not accurately saying what had happened with respect
16 to the file. In other words, Burke appeared to be a liar, and
17 that bothered me. So I called...I called Herschorn at home
18 and asked him to get ahold of Coles out in B.C. and get some
19 clarification on that, that the file, in fact, had been in our
20 office. So I guess Herschorn called him because in my notes
21 I have an indication that I called him back.

22 Q. Let me take you to page 3 of your notes, Exhibit 168.

23 A. Page 3 of my notes.

24 Q. Of your notes.

25 A. This is...

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- 1 Q. Those are numbered on the top of the pages as well.
- 2 A. Okay.
- 3 Q. These notes, as I understood you to say earlier, were made
4 at or about the time this press release was...
- 5 A. That's correct, sir.
- 6 Q. Okay. So you note that, "On 6 November of 1980 the Deputy
7 Attorney General issued a press release to the following
8 effect: First, he denied of assisting an assistant PO," that's
9 prosecuting officer, is it?
- 10 A. Yes, sir.
- 11 Q. "Had been assigned to the Thornhill investigation," and you
12 took issue with that.
- 13 A. Yes, sir.
- 14 Q. "He denied the assistant prosecuting officer had the
15 investigation withdrawn from him." You took issue with
16 that.
- 17 A. Yes, sir.
- 18 Q. "He denied that he had assigned or designated any
19 prosecutor for this investigation. " Had Mr. Coles assigned or
20 designated any prosecutor to the investigation?
- 21 A. Not to my knowledge. I don't think anyone suggested that
22 he did.
- 23 Q. No. In fact, Mr. Coles doesn't assign prosecutors anyway,
24 does he?
- 25 A. Not as a general rule, sir, no.

1 Q. Does he ever?

2 A. I don't know.

3 Q. Has he ever in your experience?

4 A. You mean assign prosecutors to do cases in my office or just
5 generally speaking assign prosecutors?

6 Q. I mean assign prosecutors to handle a particular case, to
7 prosecute a particular case.

8 A. Well, he may have where there are conflict problems in
9 another county or... Well, let's say we have a policeman
10 charged here and because of the association of the
11 prosecutors with that policeman over the years, they don't
12 want to prosecute him, Coles might get involved there in
13 signing a document appointing somebody from Colchester
14 County or Cape Breton County to come in and do it. But, in
15 that context, yes, he has, but in the context of assigning a
16 prosecutor to deal with an investigation normally done by
17 the police in the area, I can't recall him ever doing it.

18 Q. Then you say, "He made reference to a clearly understood
19 policy and accepted practise between the RCMP and the AG's
20 Department re major investigations, particularly commercial
21 crime and fraud cases." If I could take you back to the press
22 release, which is on page 58.

23 A. Yes, sir.

24 Q. The second paragraph there he says,
25

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1 He restates his previous advice that it was
2 clearly understood policy and accepted practise
3 between the RCMP and the Attorney General's
4 Department that in matters of major or involved
5 criminal investigation, particularly those
6 involving allegations of so-called commercial
7 crime and fraud the police investigation into the
8 fact was referred to the Deputy Attorney General
9 or other senior lawyers in the department
10 experienced in the criminal law to assess the
11 report and determine whether the facts support
12 any allegation of wrongdoing and thereby
13 warrant the laying of charges.

14 Are you aware of any such policy?

15 A. No, sir.

16 Q. Was there any such policy to your knowledge?

17 A. Not to my knowledge, sir, no.

18 Q. And your department has certainly been involved in the
19 prosecution of so-called commercial crime and fraud.

20 A. You said "my department", sir, you mean "my office"?

21 Q. Your office.

22 A. Yes, sir.

23 Q. And, in those cases, police officers investigating have had
24 access to prosecutors in your office that you've assigned?

25 A. Yes, sir. The police in this county have access to a
prosecutor on a twenty-four hour basis. If a policeman
wants to contact a prosecutor, he has a phone number he
can call and a pager and he can get a prosecutor any time.

Q. Are you aware of any case, other than the Thornhill case,

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1 where the police have been told they are not allowed to
2 discuss the matter with people in your office?

3 A. Well, I can infer from a situation that I observed in the
4 courthouse one day that that may have been the case.

5 Q. In another case.

6 A. In another case that ultimately wound up in our office but
7 the Deputy and a policeman were involved in it initially or
8 would appear to have been involved in it initially,
9 unbeknownst to me.

10 Q. And subsequently it was referred to your office by the
11 deputy?

12 A. No, I think it came in through the policeman.

13 Q. Was that case prosecuted?

14 A. Yes, sir.

15 Q. So it's a public matter, it has been prosecuted.

16 A. I'm just trying to think now. I went to Guysborough on that
17 one and Yarmouth on that one and I don't recall. The
18 subject of that investigation is since deceased but there
19 were three, I think there were three accused in that one, in
20 that file that were ultimately charged.

21 Q. Was it a commercial crime matter?

22 A. Yes, sir.

23 Q. And there were charges laid?

24 A. Yes, sir.

25 Q. And first of all, it was dealt with between the Attorney

1 General's office and the police without any involvement of
2 the prosecutor.

3 A. Well, it would appear so. I don't know where they were in
4 the investigation. But I don't know how long the
5 investigation had been underway, but somewhere along the
6 line, the file wound up in our office.

7 Q. And charges were laid.

8 A. Yes, sir.

9 Q. But you're not able to say whether prosecutions actually
10 were...

11 A. Well, I remember going to Yarmouth. There was a guilty
12 plea in Yarmouth which was a part of that investigation and
13 I was also...I was also up in Guysborough on that one but I
14 don't recall whether ...we didn't have a trial there. Perhaps
15 there was a guilty plea there, and I don't recall what
16 happened in Halifax.

17 7:30 p.m.

18 Q. Why would the Halifax office be involved in Yarmouth and...

19 A. Well, because of where the accused lived and where the
20 offences took place.

21 Q. Back on your page number three of your notes.

22 A. Yes, sir.

23 Q. The last, number five, you say: "He made reference to senior
24 lawyers in the department experienced in
25 the criminal law." Is there any significance to the fact that

1 you noted that?

2 A. Yes, sir. I probably had been at the Bar longer than Mr. Gale
3 or Mr. Herschorn and I'm certainly as experienced in the
4 criminal law as both of them are. And John Wade in my
5 office and Brian Norton, I think at that time, were both what I
6 would deem to be senior counsel experienced in the criminal
7 law.

8 Q. You considered that the people in your office and perhaps
9 Burke, in particular, would not have been capable of dealing
10 with House on this matter and giving him whatever advice he
11 needed?

12 A. Dealing with who?

13 Q. Inspector, Constable House?

14 A. Oh, yes, Burke was qualified to advise House.

15 Q. Were you ever advised by the Deputy Attorney General why
16 he told the R.C.M.P. that they were not to have any contact
17 with your office?

18 A. No, sir.

19 Q. Did you ever ask them?

20 A. I never had any memos from them indicating that the
21 Mounted Police were not to bring that file to our office. No, I
22 never asked him.

23 Q. But you did become aware of that instruction. Were you
24 upset that the Attorney General would take that position?

25 A. No, sir, nothing that went on in there would surprise me.

1 Q. Now you said having heard the press release or learned of it,
2 you called Mr. Herschorn and said...

3 A. Well, I asked Mr. Herschorn if he would... Coles and the
4 Minister were at a conference in B.C. and I asked Herschorn if
5 he would call Coles and have that press release clarified to the
6 extent that a further one would indicate that, in fact, the file
7 had been in our office, just to take the inference that Burke
8 was lying out of it.

9 Q. Now what did Mr. Herschorn do, or what did he tell you?

10 A. I think he called him. I've got a note here somewhere. He
11 called Herschorn... I have a note here, Exhibit 168, page seven,
12 I have a note here, "What time on the 6th of November did
13 Martin talk to Coles conveying my concern for clarification?"
14 And I have a note there "9:30 p.m." So Herschorn must have
15 called him that evening. And then it looks like one of the
16 radio stations, CHNS, talked to Coles on the 6th of November,
17 some time close to 3 p.m., I guess.

18 Q. Well, was Mr. Herschorn able to persuade him to, did he tell
19 you that there would be an amendment to the press release?

20 A. No, I think my recollection of Herschorn's response was that
21 Coles had nothing further to say.

22 Q. Okay, so what did you do after that?

23 A. Well, I made an appointment. I don't know whether the
24 Minister and the Deputy were coming back, that 6th of
25 November. I don't know whether that was a Sunday or

1 Monday or whatever. It must have been on the weekend. I
2 don't know whether they were coming back the following day
3 or the following Monday, but whenever it was, I made an
4 appointment to see both of them. Coles first and then the
5 Minister, because I knew what I was going to get from Coles.

6 Q. What did you know?

7 A. Well, I knew that Coles wasn't going to change his position on
8 it and I went in asked him to clarify it and he wouldn't.

9 Q. So what...

10 A. He said he had nothing further to say.

11 Q. What did you do then?

12 A. Then I went in to see the Minister.

13 Q. And the Minister was Mr. How?

14 A. Yes, sir.

15 Q. What did you and the Minister talk about?

16 A. Well, I don't recall the specifics of it but the message that I
17 was conveying to the Minister was this has got to be clarified.
18 That that file was in our office and they're making Burke out
19 to be a liar. And I don't recall exactly what I said about it.
20 I'm not known for my diplomacy, but I obviously made the
21 point to the Minister that if he didn't do something about it, I
22 was going to do something about it.

23 Q. What were you going to do about it?

24 A. I was going to, I had my secretary line up the media for
25 twelve noon that day and I was going to tell the media how it

1 went.

2 Q. So you were going to advise the media yourself.

3 A. Yes, sir.

4 Q. What time had you seen Mr. Coles and Mr. How?

5 A. Oh, I don't know. I probably had the appointment with Coles,
6 let's say for ten and the Minister at ten thirty.

7 Q. Did you tell them in your own diplomatic way what you were
8 going to do at noon?

9 A. No, sir. I may have conveyed that to the Minister. I don't
10 know what I said to him.

11 Q. What happened?

12 A. Well, obviously, the Minister got the point because shortly
13 after I got back to the office, the second press release was out
14 from Coles admitting that the file had been in our office.

15 Q. And that second press release is on page 61 of that booklet, is
16 that correct?

17 A. Yes, sir.

18 Q. And you were satisfied that that press release at least
19 satisfied, at least overcame your concerns that Mr. Burke was
20 being made out as a liar.

21 A. Yes, sir.

22 Q. Did you have any further involvement?

23 A. No, sir.

24 Q. Have you ever seen any of the opinions given in this
25 particular file, legal opinions on... Other than having read the

1 documents perhaps in preparation for this hearing?

2 A. No, the only material I've seen, sir, is, if this is the one I was
3 given a copy of, this is all I have seen. And I think I saw a
4 letter from one of the banks when the file was in our office. I
5 don't recall which bank it was or what the text of the letter
6 was, but there was something about a letter that a bank had
7 written that was consistent with the way Burke appeared to
8 be thinking and that charges may be warranted.

9 Q. Are you aware of any procedure or policy in the Department
10 today that would prevent you from having one of your
11 prosecutors assigned to a case involving a prominent person
12 to assist the police in their investigation?

13 A. Would you say that or ask that question again, please?

14 Q. Are you aware of any policy within the Department that
15 would prevent you from assigning one of your prosecutors to
16 assist the police who were investigating charges to be laid
17 against prominent people?

18 A. Well, sir, when you use the word "policy", it appears from
19 what goes on with the Mounted Police, that they may strike a
20 policy on a particular investigation that they are aware of
21 with the Mounted Police. But we don't get into that with
22 municipal police departments. Well, the Thornhill file is a
23 good example. Presumably, the Department was made aware
24 of that investigation and struck the policy that was agreed
25 upon for that particular file. I wasn't aware of it and I'm not

1 aware of any general policy like that being in place.

2 Q. Are you aware of any other case where it has, the case has
3 been taken from you or by you from one of your prosecutors
4 after it was assigned to a prosecutor because of a directive
5 from your head office?

6 A. I'm not sure I got that one.

7 Q. Well, in this case, you had assigned Burke to the Thornhill
8 matter.

9 A. Yes, sir.

10 Q. At the direction of head office, he was taken off the case.

11 A. The police came in and got the file.

12 Q. Had it ever happened before, where a prosecutor has been
13 assigned and then taken off?

14 A. Not that I can recall, sir.

15 Q. Did the procedure followed in this case have any effect on you
16 or your staff in any way?

17 A. Well, I suppose the biggest effect that it had on me was a
18 demoralizing one. As I indicated earlier, I probably have
19 more experience than Gale and Herschorn in the criminal
20 law...

21 Q. What about Coles?

22 A. Well, no, Coles is senior to me. Well, I probably have more
23 experience in the criminal law than Coles.

24 Q. Yeah.

25 A. And that's not to downgrade Mr. Coles' ability as a lawyer.

MR. THOMAS, EXAM. BY MR. MACDONALD

1 I'm just talking in my knowledge of him when he was in
2 private practice and he, to my recollection, didn't practice
3 very much criminal law. But it was demoralizing to me in the
4 sense that (a) this is not the sort of thing that Thomas should
5 be privy to, or it would appear that's not the sort of thing
6 Thomas should be privy to and it begs the question why not.
7 With respect to Burke, I suppose it demoralized Burke, I don't
8 know. You'd have to ask him.

COMMISSIONER EVANS

9
10 Q. Would it be fair to say it didn't improve morale in your office,
11 anyway, your Department?

12 A. That's correct, sir. It certainly didn't, no.

MR. MACDONALD

13
14 Q. I understood from what you told me earlier that if Burke had
15 recommended charges, if you would have then reviewed his
16 recommendation and then would have forwarded it to the
17 A.G.'s office, in any event, to get their final position?

18 A. That's correct, sir.

19 Q. And do you consider that you and your staff would have been
20 competent to review?

21 A. Yes, sir.

22 Q. The R.C.M.P. reports and make recommendations in this?

23 A. Yes, sir.

24 Q. How did Mr. How react to your suggestion that the report
25 issued by Mr. Gale... Or Mr. Coles in Victoria was incorrect?

MR. THOMAS, EXAM. BY MR. MACDONALD

1 A. I don't recall, sir. Obviously, he had some concerns about it
2 because it wasn't very long... I wasn't long gone from his
3 office before that second press release was on my desk.

MR. MACDONALD

4 Thank you. That's all the questions I have.

EXAMINATION BY MS. DERRICK

6
7 Q. Mr. Thomas, my name is Anne Derrick and I represent Donald
8 Marshall, Jr. I just have a few questions for you. I take it
9 that although Mr. Burke wasn't the only Crown prosecutor in
10 your office that was doing fraud cases, that he was becoming
11 something of a specialist in them? Is that fair to say?

12 A. He was working in frauds exclusively at that point in time, I
13 think.

14 7:44 p.m.

15 Q. And had he been doing so for a little while?

16 A. I don't know when we started that. I wouldn't think too long,
17 no. This is back in 1980.

18 Q. I take it you had confidence in his ability in the area, though,
19 and as a Crown Prosecutor generally.

20 A. Yes, I have.

21 Q. Now you have said that in the normal course of events in a
22 file of this nature, you would have expected Mr. Burke to give
23 his recommendations, or give you a memo and you would
24 have reviewed the file and then handed it on to Mr.
25 Herschorn. Is that...

1 A. No, I think I said I probably told him to give me a report on
2 it.

3 Q. But would it have been the normal practice be then to review
4 the file in a case of this nature and then have Mr. Herschorn
5 look at it as well?

6 A. Well, this is the first one of this nature. This was a pretty
7 high profile one. That's why I feel certain I told Burke to give
8 me a report on it before he laid any charges.

9 Q. So in the course of your tenure at the Crown Prosecutor's
10 office you, in fact, had not dealt with a file of this nature
11 before this one?

12 A. I think we had another file involving a politician, yes.

13 Q. Would that have been the only other one that you can recall?

14 A. It's the only one I can recall right now.

15 Q. And was that a file that you also reviewed and it then went to
16 Mr. Herschorn?

17 A. Yes, I think that went to Herschorn.

18 Q. And so those were the two cases that you can recall making
19 what you've described as a judgement call in deciding that
20 Mr. Herschorn should look at them as well?

21 A. Those are the only two I can, well, Thornhill didn't go over
22 from me but...

23 Q. But it would have in the normal course of things.

24 A. It would have, yeah.

25 Q. And I was going to ask you what factors you would have

1 considered in making that judgement call but both these cases
2 you say involved politicians...

3 A. Um-hmm.

4 Q. So in both these cases it was an issue of political prominence
5 that would have...

6 A. Well, it's high profile stuff. I'm not going to make those
7 decisions when there's somebody else to make them.

8 Q. Right. So that was the case, you were moving it up the line.

9 A. Mmm.

10 Q. Now this was a decision of yours. I take it that this hadn't
11 come down as a directive that if you came into contact with
12 high profile cases you were to refer them further up into the
13 Attorney General's Department. This is just something that
14 you decided as Mr. Thomas, that this was the way to handle
15 this particular case?

16 A. Oh yeah, I had no direction to do that, no.

17 Q. And in the event that there had been some conflict, let's say
18 that you had decided, Mr. Burke had decided or some other
19 Crown Prosecutor, that charges should be laid, but then it
20 went up to Mr. Herschorn and the decision was that they
21 shouldn't be, that would be a decision that you would then
22 have abided by?

23 A. Oh yeah, I have no choice when they make the decisions.

24 Q. Because Mr. Herschorn is senior to you.

25 A. Oh, yeah. Well I don't think Herschorn was making them

1 independently. I think he was probably getting some input
2 from Coles and Gale.

3 Q. Now in the case here involving Mr. Thornhill where the file
4 was removed from Mr. Burke, that was very irregular, a very
5 irregular practice, in your experience.

6 A. I can't recall that ever happening before.

7 Q. You never actually got an opportunity to review this file?

8 A. No, I didn't.

9 Q. Is that correct? So when you say that you saw this booklet of
10 documents do you mean with respect to your coming and
11 testifying?

12 A. That's correct yes.

13 Q. Now if I can just refer you to your notes where you were
14 making comments with respect to Mr. Coles' press release...

15 A. What page is that?

16 Q. And there's reference to a clearly understood policy and
17 accepted practice.

18 A. Which page is that, ma'am?

19 Q. Well I've been referring to page 2.

20 A. Thank you.

21 Q. I think you've said already that, in your understanding, there
22 was no such policy.

23 A. That I was aware of.

24 Q. And if there had been such a policy would you have expected
25 that your office would have known about it?

1 A. Now what policy are you talking about? The...

2 Q. The policy...

3 A. Reporting to the Department by the police.

4 Q. The policy that Mr. Coles refers to in his press release where
5 he says that they're to be, that the police report is to be
6 referred to the Deputy Attorney General or other senior
7 lawyers in the Department experienced in criminal law.

8 A. Well that appears to be a policy in place between the
9 Mounted Police and the Department according to Mr. Coles
10 with respect particular types of cases. I'm looking at the
11 second one now. I don't know anything about that policy.

12 Q. You said you were not aware of it. And my question was
13 would you have expected that if there was such a policy that
14 your office would have known about it?

15 A. Well I suppose we could be expected to know what policies
16 are in place.

17 Q. In your office do you generally know about the policies of the
18 Department of the Attorney General, policies to do with
19 disclosure, policies to do with...

20 A. Oh yes, that's all clearly set out in what's commonly known as
21 the "blue books". But if the, you see, the difference between
22 the way things work with municipal forces and the Mounted
23 Police is a Thursday morning meeting in the Attorney
24 General's Department. The, I guess the CIB Officer or one of
25 the officers meets with Gale and Herschorn every Thursday

1 morning. Now that's not done with municipal police
2 departments. So there's, I suppose, a good reason for that
3 because the Mounted Police are policing the province from
4 Cape Breton to Yarmouth and there may be a lot of things
5 they want to talk about but if, in the course of those Thursday
6 morning meetings, the Department or the Deputy is apprised,
7 or Gale or Herschorn, of potentially high-profile investigation,
8 they might strike a policy with respect to how that's going to
9 go. I don't know, you'd have to ask Gale or Herschorn but I'm
10 just not privy to any of that procedure.

11 Q. If there were policies developed by the Attorney General's
12 Department that would affect your office, would you expect
13 that someone would tell you about that?

14 A. I would expect it with the Deputy that we have now.

15 Q. But not at the time that this case took place.

16 A. No.

17 Q. Might policies be developed on a fairly ad hoc basis in your
18 experience in those days?

19 A. Well there haven't been enough files to agree with that
20 suggestion.

21 Q. So you couldn't say that.

22 A. I don't think so. There haven't been enough, there haven't
23 been that many files where...

24 Q. You did say in the course of your evidence that nothing that
25 went on in the Attorney General's Department would surprise

1 you. Can you elaborate on what you meant by that?

2 A. Well I probably could but I don't know that the Commission
3 want to be bored with the problems that the lawyers are
4 having.

5 CHAIRMAN

6 No, we don't want to be bored with your internal problems.

7 MR. THOMAS

8 No, I wouldn't think so.

9 MS. DERRICK

10 Q. Was there anything about Mr. Coles' conduct that didn't
11 surprise you?

12 CHAIRMAN

13 What do you mean by that, "conduct"...

14 MS. DERRICK

15 Q. Then let me ask this question then. I'm interested in
16 knowing from you, Mr. Thomas, what sort of relationship Mr.
17 Coles had with other members of the Department, people in
18 your office.

19 COMMISSIONER EVANS

20 I'd have to ask relationship with whom?

21 MS. DERRICK

22 Q. Let me ask you then of Mr. Coles' relationship with you...

23 COMMISSIONER EVANS

24 Before you answer I think...
25

14905 MR. THOMAS, EXAM. BY MS. DERRICK

1 MR. SAUNDERS

2 What bearing does that have, My Lords, to the evidence that
3 Mr. Thomas has been called to testify to. That is to say, his notes
4 and the press release...

5 CHAIRMAN

6 That's right.

7 MR. SAUNDERS

8 And his conversations with Martin Herschorn.

9 CHAIRMAN

10 It has none.

11 MR. SAUNDERS

12 I don't think he had any communication with Mr. Coles
13 about it. His communication was with the Attorney General so
14 what does it matter what relationship this witness had with Mr.
15 Coles?

16 MR. MacDONALD

17 Well he had conversations, he said he talked to Coles about
18 the press release and he certainly had conversation with Coles.

19 CHAIRMAN

20 In Victoria.

21 MR. THOMAS

22 No, sir, I didn't...

23 CHAIRMAN

24 That's Herschorn.

25

1 MR. SAUNDERS

2 He spoke to Martin Herschorn.

3 CHAIRMAN

4 Oh yes, but you did go and see Mr. Coles after his return.

5 MR. THOMAS

6 That's correct, sir.

7 CHAIRMAN

8 Well, if want, if Ms. Derrick's question relates to that, fine,
9 but your general relationship, I don't think I have to be very
10 astute to conclude that you're not bosom pals.

11 MR. THOMAS

12 All right. Gordie Coles is all right, he just, well like I say,
13 that's not within your mandate.

14 MS. DERRICK

15 Not any more.

16 Q. Were there any cases that you were involved in where Mr.
17 Coles tried to have files removed from your supervision?

18 A. Not that I can recall but there was that one instance where he
19 was obviously involved in assisting an investigator with a file
20 that eventually wound up in our office.

21 Q. And was that a case of a politically-sensitive nature?

22 A. Well the subject was...

23 MR. SAUNDERS

24 Well, My Lord, before...
25

1 CHAIRMAN

2 Let's be careful because we don't be dragging other people
3 into...

4 MS. DERRICK

5 No, no...

6 MR. SAUNDERS

7 And that's my point, My Lord, and I know my friend is
8 trying to be careful, I know my friend is trying to be careful and
9 I'm certainly assured that the witness will be very careful, but I
10 want to make it clear that we're here to discuss the one case and
11 if there are similarities with another case that Your Lordships
12 consider to be important and relevant and if the matter has been
13 prosecuted so that the names are in the public domain then...

14 CHAIRMAN

15 Again, what I gather from Mr. Thomas' testimony that one
16 of the three is since deceased...

17 MR. SAUNDERS

18 Deceased.

19 CHAIRMAN

20 What useful purpose could it possibly serve to resurrect and
21 open old wounds...

22 MR. SAUNDERS

23 I know of none.

24 CHAIRMAN

25 They've apparently paid their debt to society, whoever they

1 are, we're certainly not interested in them.

2 MR. SAUNDERS

3 Thank you, My Lord.

4 MS. DERRICK

5 My Lord, I'm not interested in knowing anything further
6 about the case except whether or not it was of a politically-
7 sensitive nature.

8 CHAIRMAN

9 Well, I don't know...

10 MS. DERRICK

11 And I think that is exactly the issue that's being explored
12 here, whether cases that involve common people or are politically
13 sensitive receive different treatment, or have received different
14 treatment than other types of cases and so I respectfully submit
15 that's a very relevant question. The Deputy Attorney General was
16 involved in another case and I think it's...

17 CHAIRMAN

18 The Deputy Attorney General.

19 MS. DERRICK

20 Yes, that's what Mr. Thomas said. Mr. Coles, the then Deputy
21 Attorney General.

22 CHAIRMAN

23 Well his testimony so far has been that he has reason to
24 believe that the Deputy Attorney General was involved, and I
25 think you used the word "assisting" a police officer in carrying out

MR. THOMAS, EXAM. BY MS. DERRICK

1 an investigation. That he subsequently, that the file subsequently
2 came to his office, that is Mr. Thomas, that he and Mr. Thomas
3 subsequently prosecuted those who were being investigated and,
4 I mean...

MS. DERRICK

6 But still, and respectfully My Lord, doesn't explain why he
7 supposedly had been involved in it in the first place.

CHAIRMAN

9 Well I don't know.

MS. DERRICK

11 And one possible explanation could be that the case was
12 politically sensitive but we can't know that unless this witness can
13 tell us whether or not that was the case.

COMMISSIONER EVANS

15 He's already stated that he didn't know the state of the
16 investigation or where it had started or whether Coles had been
17 involved. He just saw them in the corridor as I understood it.

CHAIRMAN

19 In the Court House.

COMMISSIONER EVANS

21 In the Court House.

MS. DERRICK

23 They may well be able to tell us whether or not it involved
24 common people or politically sensitive...

14910 MR. THOMAS, EXAM. BY MS. DERRICK

1 CHAIRMAN

2 Well, you know, I wanted to be very, very careful that we
3 don't start, this doesn't develop into a slander session that people
4 are not able to defend themselves and the purpose, I repeat again,
5 of this whole exercise is not, is to look at the practice of the
6 Department of the Attorney General of Nova Scotia vis-à-vis police
7 and some may argue that that's very remotely connected with
8 Donald Marshall, Jr., and I'm sure it is in a sense. Except we do
9 have to make some recommendations and obviously teh
10 recommendations must relate to the Department of the Attorney
11 General and I want...

12 MS. DERRICK

13 My Lord, I respectfully submit that the answer to the
14 question of whether or not the case was politically sensitive can
15 hardly identify anybody. Because that could relate to a great
16 number of people....

17 MR. SAUNDERS

18 My Lord, that's the point I'd like to respond to if my friend
19 has finished if she insists on the right to assert that question.
20 That places my client and me at a distinct disadvantage because
21 my friend can have an answer to that question and leave it and sit
22 down and the question would be, "Was that a factor in the case?"
23 And so the answer might be "yes". The answer might be, "Yes, it
24 was a feature" and there may have been countless other factors
25 and I don't know.

MR. THOMAS, EXAM. BY MS. DERRICKMS. DERRICK

Then we can...

MR. SAUNDERS

And the only, excuse me, I'm not finished, My Lords. The only way in which I would be able to pursue it with this witness would be to seek Your Lordships' permission to delve into the details of the case history which I think would be unfair to everyone who had anything to do with the case. This witness is here to speak to one matter. We put him forward several times for interviews with Commission counsel and those are the bases of the instructions that I have with this client. For my friend to be, and able to pursue some exploration of other cases with this gentleman, places us, as I said, at a real disadvantage.

CHAIRMAN

You're correct in your summation. If, for instance, Ms. Derrick, the answer is yes then the Attorney General's counsel, or someone in the Department of the Attorney, not the Attorney General necessarily but someone, would have to, would be entitled to be called upon to explain and then you've identified these people and that is not part of this exercise. I am not going to have innocent Nova Scotians' names dragged through this Inquiry.

8:00 p.m.

MS. DERRICK

No, and I can assure you, My Lord, I'm not seeking to do that.

MR. THOMAS, EXAM. BY MS. DERRICK

1 MR. CHAIRMAN

2 Anyway, that's...I'm not prepared...

3 MS. DERRICK

4 So your ruling is that that question is not allowed.

5 MR. CHAIRMAN

6 Yes.

7 MS. DERRICK

8 Q Mr. Thomas, you said in your direct evidence that the police
9 in Halifax County have twenty-four hour access to a Crown
10 prosecutor. Is that true as well of the RCMP?

11 A. Yes, ma'am.

12 Q And has that been the case for some time?

13 A. Several years, I don't know how many.

14 Q Several years.

15 A. Yes.

16 Q You were asked, Mr. Thomas, about the effect of the removal
17 of this file from your office on the staff in your office. Is it
18 correct that Mr. Burke left the office of the...the Crown
19 Prosecutor's office shortly after this matter happened?

20 A. I don't know when in...I can't relate his resignation with this
21 file, I don't know.

22 Q And he's now in private practise, is that correct?

23 A. As far as I know he is.

24 Q Those are my questions.

25 A. I should say yes, he was in court this morning with...yes, I

MR. THOMAS, EXAM. BY MS. DERRICK

1 would say he's in private practise.

2 MS. DERRICK

3 Thank you very much, those are my questions.

4 MR. CHAIRMAN

5 Mr. Bissell.

6 MR. BISSELL

7 No questions.

8 MR. CHAIRMAN

9 Mr. Merrick.

10 MR. MERRICK

11 No questions.

12
13 EXAMINATION BY MR. SAUNDERS

14 Q. Mr. Thomas, on just one matter, sir. Going back to your
15 testimony that it was November the 6th when you first
16 heard this press release that apparently had been given by
17 Mr. Coles in Victoria, and that the document booklet before
18 you at page 60 indicates that it was November the 13th that
19 the clarification release was issued by Mr. Coles, are you
20 able to tell the commissioners when it was between the 6th
21 of November and the 13th of November that you prepared
22 your notes?

23 A. It was...do we know when the 6th of November, 1980, was?
24 Was that a Sunday?

25 Q. The day of the week, I'm sorry, I don't know that.

- 1 A. If we can determine that I probably made these notes the
2 Monday or that weekend or the day before, the night before
3 I went to see Coles and the Minister.
- 4 Q. So am I correct in suggesting to you that you did not have
5 the notes prepared when you called Martin Herschorn
6 urging that he contact Mr. Coles on the west coast and clarify
7 the release?
- 8 A. No, no, I just summarized for Herschorn what I heard on the
9 radio.
- 10 Q. Yeah. But when you attended upon the Attorney General
11 you had your notes prepared.
- 12 A. I would have had this prepared before I went to him
13 because I figured I was going to be talking to the media.
- 14 Q. And did you review in detail with the Attorney General the
15 matters that you have set forth in your notes?
- 16 A. Oh, I don't recall specifically what I said to him. I...as I
17 indicated, the point I wanted to make to the Minister was I
18 was upset about Burke being made out a liar, would you
19 please do something about it?
- 20 Q. I understand that. Is your best recollection, Mr. Thomas,
21 that you canvassed the reasons why you took exception to
22 the release when you met with the Attorney General?
- 23 A. No, sir, I don't remember exactly what I said to the Minister.
- 24 Q. In any event, at page 60 of the booklet it's clear from this
25 memorandum from the Deputy to his Attorney General that

MR. THOMAS, EXAM. BY MR. SAUNDERS

1 he issued the clarification release as he says, "Further to
2 your concerns," and that he directed a copy of the
3 clarification release through to you, sir.

4 A. Yes, sir.

5 Q. And that's a fact, is it?

6 A. Yes, sir, I got it, well, it would have been that day, the day
7 it was released. Well, that was the day I went over to see
8 them, I guess.

9 Q. Yes.

10 A. That's the day I went to see them the 13th.

11 Q. And you were copied with a revision.

12 A. That's correct, sir.

13 Q. Yes.

14 MR. SAUNDERS

15 Thank you.

16 MR. CHAIRMAN

17 Mr. MacDonald.

18 MR. MacDONALD

19 No, I have nothing else.

20 MR. CHAIRMAN

21 That's all. Thank you very much, Mr. Thomas.

22 INQUIRY ADJOURNED - 8:05 p.m.

23

24

25

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 13 day of September 19⁸⁸ at Dartmouth, Nova Scotia