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June 17, 2008

**Delivered Via E-Mail and Courier**

Mr. David Paciocco
Commission Counsel
Taman Inquiry
Room 30 – 200 Vaughan Street
Winnipeg, Manitoba
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Dear Mr. Paciocco:

**Re: Taman Inquiry – Expert Witness Report on Prosecution Ethics and Standards**

Further to your letter of March 4, 2008, this letter constitutes my expert report to the Taman Inquiry. It is designed to address paragraph (b) of Order in Council 403/2007, which mandates the Commissioner

> *(b) To inquire into whether all aspects of the prosecution of Derek Harvey-Zenk, including the Crown's position on sentence, were conducted in accordance with the professional and ethical standards expected of lawyers and agents of the Attorney General.*

This report consists of three parts and is organized in the following way:

> **Part One** discusses in general terms the role of the Crown counsel, ethical considerations for prosecutors, standards of performance applicable to them and their supervision;
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> **Part Two** recites the facts that I have been asked to assume for the purposes of my opinion as to how the principles discussed in Part One apply to the circumstances being inquired into by this commission of inquiry; and
>
> **Part Three** sets out my opinion on the issues contained in paragraphs (a) through (o) of your letter of March 4. These issues relate to the quality and propriety of specific actions taken and decisions made during the prosecution of Mr. Harvey-Zenk.

Attached please find a current copy of my curriculum vitae. Briefly, beginning with my call to the Ontario Bar in 1983, I was counsel at the Crown Law Office-Criminal, a branch of the Ontario Ministry of the Attorney General that was and is responsible for conducting special

prosecutions and representing the Crown in the Ontario Court of Appeal and Supreme Court of Canada. Two of my areas of interest and specialization were representing the Crown in cases where Crown misconduct was alleged and Crown counsel's disclosure obligations were at issue. I argued several early post-*Charter* disclosure cases and, in addition, was assigned to appear for the Crown on a lengthy pre-trial motion arising in the second trial of Guy Paul Morin.[1] Aspects of my testimony before the Commission on Proceedings involving Guy Paul Morin (the "Kaufman Commission") are referred to the Commissioner's Report.[2] While in private practice, I was retained to appear for the Crown in connection with a pre-trial motion concerning disclosure in *R. v. Paul Bernardo*. Additionally, I have written and lectured about disclosure rights and obligations, as reflected in my curriculum vitae.

While employed by the Ministry of the Attorney General, I was seconded as the first executive legal officer to what is now known as the Superior Court of Justice (1991-1993). I left the public service in 1994 for private practice at this law firm. My practice includes criminal law, administrative law and civil litigation.

I have previously testified as an expert witness. I testified before the Nova Scotia Supreme Court in *R. v. Regan*, where I was called by the Crown to testify about the practices of Crown counsel in Ontario concerning pre-charge interviews, and the more general topic of the relationship between Crown counsel and police officers.[3]

## Part One: The Role of the Crown

### *(a) What is the role of the Crown?*

a. Rand J.'s dictum in *Boucher*

Crown counsel have a duty of fairness, which distinguishes their role from the resolutely partisan role of criminal defence counsel. Virtually every discussion of the role of Crown counsel in Canada begins with the dictum of Rand J. in *Boucher v. The Queen*:

> It cannot be over-emphasized that the purpose of a criminal prosecution is not to obtain a conviction, it is to lay before a jury what the Crown considers to be credible evidence relevant to what is alleged to be a crime. Counsel have a duty to see that all available legal proof of the facts is presented: it should be done firmly and pressed to its legitimate strength but it must also be done fairly. The role of prosecutor excludes any notion of winning or losing; his function is a matter of public duty than which in civil life there can be none charged with greater personal responsibility. It is to be efficiently performed

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1 That motion was for a stay of proceedings due to police and Crown misconduct, including non-disclosure.

2 Toronto: Queen's Printer for Ontario, 1998, at pages 818 -819, 837 - 838, 879, 906, 973 - 974, 1037, 1045 -1047, 1070, 1075 - 076, 1078 -1080, and 1091

3 The decision of the Supreme Court of Canada in that case is reported at [2002] 1 S C R 297 The majority referred to my testimony at paragraphs 81 and 84 (pp 342-343) The minority addressed the expert testimony at paragraph 189 (pp 387-388)

> with an ingrained sense of the dignity, the seriousness and the justness of judicial proceedings.[4]

The CBA's *Code*[5] elaborates on the duties of prosecutors in these terms:

> When engaged as prosecutor, the lawyer's prime duty is not to seek a conviction, but to present before the trial court all available credible evidence relevant to the alleged crime in order that justice may be done through a fair trial upon the merits. The prosecutor exercises a public function involving much discretion and power and must act fairly and dispassionately. The prosecutor should not do anything that might prevent the accused from being represented by counsel or communicating with counsel and, to the extent required by law and accepted practice, should make timely disclosure to the accused or defence counsel (or to the court if the accused is not represented) of all relevant facts and known witnesses, whether tending to show guilt or innocence, or that would affect the punishment of the accused. There is a clear distinction between prosecutorial discretion and professional conduct. Only the latter can be regulated by a law society. A law society has jurisdiction to investigate any alleged breach of its ethical standards, even those committed by Crown counsel in the exercise of their prosecutorial discretion.[6]

The duty of fairness should not be construed as meaning that Crown counsel cannot be strong advocates.[7]

It has been recognized that in performing certain prosecutorial functions, Crown counsel has a broad discretion that is normally not the subject of curial review.[8] The Supreme Court of Canada

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4 [1955], S.C.R. 16 at pp. 23-24. This passage was quoted by Mr. Minuk in the course of his submissions on September 12, 2007: see **Transcript of Proceedings, September 12, 2007**, pp. 13-14.

5 Canadian Bar Association *Code of Professional Conduct* ("CBA *Code*"). Note that the CBA *Code* was last amended in 2006.

6 CBA *Code*, Chapter IX ("The Lawyer as Advocate"), pp. 61-62; the Manitoba Law Society's *Code of Professional Conduct* is identical to the CBA *Code*, except that it does not contain the last two sentences in this paragraph.

7 [1997] 1 S.C.R. 1113, (1997), 114 C.C.C. (3d) 481, at para. 21, *per* L'Heureux-Dube J. (for the Court).

> Nevertheless, while it is without question that the Crown performs a special function in ensuring that justice is served and cannot adopt a purely adversarial role towards the defence (*Boucher v. The Queen*, [1955] S.C.R. 16; *Power*, *supra*, at p. 616), it is well recognized that the adversarial process is an important part of our judicial system and an accepted tool in our search for the truth: see, for example, *R. v. Gruenke*, [1991] 3 S.C.R. 263, at p. 295, *per* L'Heureux-Dubé J. Nor should it be assumed that the Crown cannot act as a strong advocate within this adversarial process. In that regard, it is both permissible and desirable that it vigorously pursue a legitimate result to the best of its ability. Indeed, this is a critical element of this country's criminal law mechanism: *R. v. Bain*, [1992] 1 S.C.R. 91; *R. v. Jones*, [1994] 2 S.C.R. 229; *Boucher*, *supra*. In this sense, within the boundaries outlined above, the Crown must be allowed to perform the function with which it has been entrusted; discretion in pursuing justice remains an important part of that function.

8 See Edwards, J. L. J. *The Law Officers of the Crown: A study of the offices of Attorney-General and Solicitor-General of England with an account of the office of the Director of Public Prosecutions of England* (London: Sweet & Maxwell, 1964). On the subject of curial deference to matters within what the Supreme Court of Canada would later describe as the "core" of prosecutorial discretion, Edwards explained that political accountability acts as a check against abuse of discretion.

> Despite the avowed impotence of the courts in these matters, it must not be concluded that the Attorney-General is a despot capable of striding indiscriminately across the vast territory covered by the criminal law. There remains the responsibility of the Attorney-General to Parliament, as a member of the executive and chief Law Officer of the Crown, for the manner in which he discharges the discretionary powers inherent in, or attached to, his ancient office. (at p. 227)

has said that "prosecutorial discretion refers to decisions regarding the nature and extent of the prosecution and the Attorney General's participation in it."[9] Its core includes (a) the discretion whether to bring the prosecution of a charge laid by police; (b) the discretion to enter a stay of proceedings (c) the discretion to accept a guilty plea to a lesser charge; (d) the discretion to withdraw from criminal proceedings altogether; and (e) the discretion to take control of a private prosecution.[10] However, decisions that do not go to the nature and extent of the prosecution, such as tactical decisions, are governed by the courts' exercise of inherent jurisdiction to control their own processes.[11] Quoting Binnie J. in *Regan*, the Supreme Court explained the rationale for the deference to prosecutorial discretion in these terms in *Krieger v. Law Society of Alberta*:

> ... Courts are very slow to second-guess the exercise of that discretion and do so only in narrow circumstances. In *R. v. Beare*, [1988] 2 S.C.R. 387, for example, the Court noted that a system which did not confer a broad discretion on law enforcement and prosecutorial authorities would be unworkable, *per* La Forest J., at p. 410:
>
> > Discretion is an essential feature of the criminal justice system. A system that attempted to eliminate discretion would be unworkably complex and rigid. Police necessarily exercise discretion in deciding when to lay charges, to arrest and to conduct incidental searches, as prosecutors do in deciding whether or not to withdraw a charge, enter a stay, consent to an adjournment, proceed by way of indictment or summary conviction, launch an appeal and so on.
>
> See also: *R. v. Power*, [1994] 1 S.C.R. 601; *Smythe v. The Queen*, [1971] S.C.R. 680, at p. 686; *R. v. T. (V.)*, [1992] 1 S.C.R. 749; and *R. v. Lyons*, [1987] 2 S.C.R. 309, at p. 348.[12]

The courts' reluctance to review prosecutorial discretion can be best explained as arising out of concern about its own independence: "If the court is to review the prosecutor's exercise of his discretion the court becomes a supervising prosecutor. It ceases to be an independent tribunal."[13]

- **The role of the prosecutor as a minister of justice**

The concept that Crown counsel functions as a "minister of justice" is deeply imbedded in Canadian law. In *R. v. Regan*, Binnie J. referred to various manifestations of this concept and concluded that

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9 *Krieger v. Law Society of Alberta*, [2002] 3 S.C.R. 372, 168 C.C.C. (3d) 97, para. 47

10 *Ibid.*, para. 46

11 *Ibid.*

12 *Ibid.*, para. 48

13 *R. v. Power*, [1994] 1 S.C.R. 601 at p. 623, quoting J.A. Ramsay, "Prosecutorial Discretion: A Reply to David Vanek" (1987-88), 30 *Crim. L.Q.* 378 at pp. 379-380

> These statements suggest at least three related but somewhat distinct components to the "Minister of Justice" concept. The first is objectivity, that is to say, the duty to deal dispassionately with the facts as they are, uncoloured by subjective emotions or prejudices. The second is independence from other interests that may have a bearing on the prosecution, including the police and the defence. The third, related to the first, is lack of animus – either negative or positive – towards the suspect or accused. The Crown Attorney is expected to act in an even-handed way. [14] [15]

- **The role of the prosecutor as an Officer of the Court**

As officers of the Court, all counsel are under a duty to be scrupulously honest with the Court. As Lord Morris explained in *Rondel v. Worsley*, "The advocate has a duty to assist in ensuring that the administration of justice is not distorted or thwarted by dishonest or disreputable practices."[16]

The CBA *Code* provides, "When acting as an advocate, the lawyer must treat the court or tribunal with courtesy and respect and must represent the client resolutely, honourably and within the limits of the law."[17]

- **The Attorney General as the head prosecutor and of the delegated authority to prosecute**

Crown counsel derive their powers as agents of the Attorney General,[18] who in addition to being a member of the cabinet is the chief law officer of the Crown. As a guardian of the public interest, the Attorney General has the responsibility of superintending the administration of justice in his or her jurisdiction. However, because oversight of day-to-day prosecutorial decisions would leave the Attorney General vulnerable to claims of political interference with the justice system, the practice is to leave those decisions in the hands of the Attorney General's agents, Crown counsel.[19]

  - ***the role of Ministerial polices***

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14 See *supra*, note 3 at paragraph 156

15 The Manitoba *Crown Attorneys Code of Professional Conduct* states that "(t)he Crown Attorney's first obligation is to act as a Minister of Justice, and second, as independent adversary within the criminal justice system, and to see that, as far as it is possible for him or her to do so, justice is done, and has appeared to be done." Similarly, the Ontario *Crown Policy Manual* states, "Public confidence in the administration of criminal justice is bolstered by a system where Crown counsel are not only strong and effective advocates for the prosecution, but also Ministers of Justice with a duty to ensure that the criminal justice system operates fairly to all: the accused, victims of crime and the public."

16 *Rondel v Worsley*, [1969] 1 A C 191 (House of Lords)

17 CBA *Code*, Chapter IX ("The Lawyer as Advocate"), p 57

18 *The Crown Attorneys Act*, C C S M c C330, sub-s 5(3) provides,

> 5(3) Every Crown attorney and every person acting as a prosecutor, as defined in the *Criminal Code* (Canada), under the authority of this Act is the agent of the Attorney General for the purposes of the *Criminal Code* (Canada)

19 However, some prosecutorial decisions are expressly left to the Attorney General or his or her deputy: see, for example, *Criminal Code*, ss 318(3) and 319(6) which each require the consent of the Attorney General prior to the commencement of any prosecution for advocating genocide or wilfully promoting hatred (respectively)

Ministerial policies perform the function of providing guidance to the Crown counsel – who exercise the Attorney General's authority – about how they should perform their duties. This is an important function. Ministerial policies should establish standards with a view to ensuring similar treatment to persons in similar circumstances, and serve the additional purpose of advising the public about factors that will influence the exercise of prosecutorial discretion.[20]

- ***challenges in communicating and enforcing Ministerial policies***

The trend toward compiling ministerial polices in policy manuals such as the Manitoba *Crown Policy Manual*, the Ontario *Crown Policy Manual* and the *Federal Prosecution Service (FPS) Deskbook* allows prosecutors access to ministerial policies in an indexed and thematically organized format. However, because Crown counsel face significant work pressures, have competing needs for professional development and are geographically dispersed, communication of these policies is a continual challenge. Enforcement of ministerial policies is complicated by the fact that Crown counsel perform their functions individually and by their attitudes toward prosecutorial discretion.

- **the role of the Crown in police investigations both before and after charges are laid**

It is well accepted that at the pre-charge stage, Crown counsel can provide legal advice to police investigators. This can include advice on search and seizure, arrest and other issues. The advice can also include whether the necessary grounds exist to lay a charge, although the charging decision is for the investigator, not Crown counsel. As the Ontario *Crown Policy Manual* states, "Given the current reality of large and complex police investigations, access to timely advice from Crown counsel in these cases may be crucially important."[21] The Supreme Court of Canada has extended solicitor-client privilege to advice given to investigators.[22]

In some provinces, such as British Columbia, attorneys general have introduced policies that involve Crown counsel in pre-charge screening. The remaining provinces, however, have not introduced such policies, after having consciously considered whether to do so.

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20 The Ontario *Crown Policy Manual* ("Preamble", p 4) describes the manual's purposes in these terms.

> One of the chief mechanisms by which the Attorney General for the Province of Ontario provides advice and guidance to Crowns on the exercise of prosecutorial discretion is the Crown Policy Manual which sets out the overall philosophy, direction, and priorities of the Ministry In carrying out the duties of the Crown Attorney, a natural tension exists between prosecutorial discretion exercised in individual cases and general prosecution policy formulated by the Attorney General
>
> Crown counsel have a broad discretion to conduct cases to ensure that justice is done in individual circumstances. This prosecutorial discretion is necessary to allow Crown counsel to respond to unique circumstances in cases including victims, offenders, and local conditions. Prosecutorial discretion, when exercised fairly and impartially, is an essential component of the criminal justice system.
>
> Notwithstanding the importance of discretion, it is also necessary in the public interest to have uniform prosecution policies applicable across the province Policies assist and guide individual prosecutors in exercising their prosecutorial discretion. The policies in this Manual are not intended to replace the sound judgment that Crown counsel exercise They set out appropriate considerations for prosecutorial decision-making, while supporting flexibility Crowns are expected to exercise their discretion in accordance with overall priorities in the Manual, keeping in mind the need to see justice done in individual cases Directives which bind the discretion of Crown counsel in the conduct of individual cases are few and far between

21 Ontario *Crown Policy Manual*, "Preamble", p 3

22 *R v Campbell*, [1999] 1 S.C.R. 565, (1999), 133 C.C.C (3d) 257

Notwithstanding such involvement, at the pre-charge stage, Crown counsel should not participate in the investigation itself. In its discussion of special task forces comprised of investigators and Crown counsel, the Ontario *Crown Policy Manual* appropriately stresses, "The independence of roles and responsibilities, upon which the justice system depends, must be respected in any of these special working relationships."[23] Prosecutors should not confuse their roles, and become investigators. One commentator has put it this way:

> ... the practice in England and in Ontario is to insulate Crown counsel from involvement in the investigation at the pre-charge stage. This both preserves Crown counsel's independence as legal adviser and officer of the court and preserves the police officer's exclusive control over the investigation.[24]

Once the police form the belief on reasonable grounds that an offence has been committed and proceed to lay a charge, it is up to Crown counsel to decide whether to proceed with the prosecution of the offence. In making this decision, Crown counsel must determine whether there is a reasonable prospect of conviction, and whether the prosecution is in the public interest. This requires a "fair and objective assessment of the strength of the case and the appropriateness of proceeding."[25]

Crown counsel's determination that these criteria are met does not preclude the Crown from directing further investigation. In my view, the *Federal Prosecution Service Deskbook* correctly summarizes the roles of Crown counsel and police at the post-charge stage by stating, "Once charges are laid, full responsibility for the proceedings shifts to the Attorney General. On request, police have the responsibility to carry out further investigations that counsel believes are necessary to present the case fairly and effectively to the court."[26]

## Ethics

### *(b) When will a prosecutor be in a conflict of interest, and how should the prosecutor respond when faced with a potential conflict of interest?*

The Canadian Bar Association's *Code of Professional Conduct* ("CBA *Code*") captures the concept of conflict of interest well in setting out the following rule:

> The lawyer ... shall not act or continue to act in a matter when there is or is likely to be a conflicting interest.[27]

The first of the guiding principles for this rule defines a "conflicting interest" as "one that would be likely to affect adversely the lawyer's judgment on behalf of, advice to, or loyalty to a client or prospective client."[28] This problem can arise when the interests of two or more of the

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23 *Supra*, note 21

24 Michael Code, "Crown Counsel's Responsibilities When Advising the Police at the Pre-Charge Stage", 40 *Crim. L.Q.* 326 at p. 341

25 FPS *Deskbook*, ch. 11, "The Relationship Between Crown Counsel and Police" (2005) section 11.3.1

26 *Ibid.*, section 11.3.5

27 CBA *Code*, Chapter V ("Impartiality and Conflict of Interest Between Clients"), p. 25.

28 *Ibid*

lawyers' clients conflict, or where the there is a conflict between the interests of the lawyer and those of the client.[29] This latter type of conflict embraces not only legal conflicts of interest, but also what lawyers term "business conflicts". If it arises, it calls into question whether the lawyer will meet the advocate's duty to represent the client resolutely and honourably and to raise every issue, advance every argument and ask every question that will advance the client's case.[30]

Some conflicts can be cured through adequate disclosure to, and consent from, the clients involved.

In my view, the CBA *Code*'s direction that lawyers should observe the spirit as well as the letter of the rules of professional conduct, and in so doing avoid questionable conduct, has special application to prosecutors.[31] In the context of conflicts of interest, Crown counsel's special, quasi-judicial role requires that conduct that could erode public confidence in the administration of justice should be avoided.[32]

The *Federal Prosecution Service Deskbook* expresses the following guiding principle in relation to standing agents:

> Legal agents must avoid any conflict of interest or appearance thereof in carrying out their mandate as agent of the Attorney General of Canada. Legal agents must take all necessary steps to avoid a conflict of interest and are expected to comply with their law societies' rules regarding conflicts.[33]

In general, agents cannot prosecute offences under federal legislation if the agent or members of the agent's firm are currently defending persons charged with offences under the same legislation which the agent was appointed to prosecute.[34]

Any discussion about conflicts of interest and bias on the part of the prosecutor must be undertaken while keeping in mind that the fact that an accused person is not entitled to an unbiased prosecutor. Prosecutors are expected and entitled to have a view concerning an accused person's guilt, and indeed, should not continue with a prosecution unless they believe an accused person is guilty and are prepared to pursue a conviction vigorously but fairly.

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29 CBA *Code*, Chapter VII, ("Conflicts of Interest Between Lawyer and Client"), Rule 3: "The lawyer shall not act for the client where the lawyer's duty to the client and the personal interests of the lawyer or an associate are in conflict." (p. 46)

30 See the sole rule in CBA *Code*, Chapter IX ("The Lawyer as Advocate") and the first guiding principle. (p. 57). In *R. v. Neil*, [2002] 3 S.C.R. 631, 168 C.C.C. (3d) 321, Binnie J. described this duty as the "duty of commitment to the client's cause" (para. 19).

31 The sole rule in the CBA *Code*, Chapter XIX, ("Avoiding Questionable Conduct") states, "The lawyer should observe the rules of professional conduct set out in the Code in the spirit as well as in the letter." (p. 111)

32 The guiding principles underlying the rule set out in the CBA *Code*, Chapter XIX ("Avoiding Questionable Conduct") emphasize the lawyer's duty to maintain public confidence in the administration of justice:

> 1 Public confidence in the administration of justice and the legal profession may be eroded by irresponsible conduct on the part of the individual lawyer. For that reason, even the appearance of impropriety should be avoided.
>
> 2 Our justice system is designed to try issues in an impartial manner and decide them upon the merits. Statements or suggestions that the lawyer could or would try to circumvent the system should be avoided because they might bring the lawyer, the legal profession and the administration of justice into disrepute. (p. 111)

33 FPS *Deskbook*, ch. 7, "The Role of Agents in the Delivery of Prosecution Services" (2002) section 7.5.1.1

34 *Ibid.*, section 7.5.1.3

That said, when faced with an actual or potential conflict of interest, the wisest course of action for a prosecutor is to pass on the file.

### *(c) Is plea bargaining appropriate for prosecutors, and what ethical limitations are there when undertaking plea bargains?*

Plea bargaining is now recognized as an appropriate and necessary feature of the Canadian criminal justice system.[35] Prosecutors derive guidance concerning plea bargaining from policy directives and guidelines, and, to a lesser extent, from the applicable rules of professional conduct.

The Manitoba Department of Justice policy directive on plea bargaining appropriately reflects the principles surrounding plea bargaining. It contains key terms such as the requirement that guilty pleas only be accepted in relation to offences supported by facts established by the police investigation, that counsel may agree to adopt a joint position as to sentence, and that agreements should not be made on the basis of expediency.[36]

The ethical limitations encountered when undertaking plea bargains arise primarily from the general duty to the administration of justice and the duty of candour to the court. It is unethical to knowingly accept a guilty plea from an innocent person and to withhold information to the effect that a material element of the charge cannot be proven. It is also unethical to enter into an agreement that results in the court being misled.[37]

Plea negotiations generally revolve around three issues: (1) which charges should be prosecuted, stayed or withdrawn; (2) the Crown's position on sentence on a plea of guilty; and (3) the facts to be placed before the sentencing court in support of the plea. As an officer of the court and a minister of justice, a prosecutor should not accept a plea based on facts that he or she knows to be untrue.

If a plea bargain is made, the Crown has an ethical duty to uphold it. In certain circumstances, the repudiation of a plea agreement may constitute an abuse of process, and may violate an accused persons rights under s. 7 of the *Charter of Rights and Freedoms*[38]. Upholding a plea bargain also involves supporting the plea bargain in submissions to the court. It is unethical, for example, to remind the court that a joint submission on sentence resulting from a plea bargain is not, strictly speaking, binding on the court and to invite the court to depart from it, should the court see fit.

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35 For a discussion of the evolution of views toward plea bargaining in Canada, see The Hon M Proulx and D Layton, *Ethics and Canadian Criminal Law*, (Toronto Irwin Law Inc , 2001), pp 419-420

36 Manitoba Department of Justice Policy Directive/Guideline No. 2-PLE 1 (October 1990), pp 1-2 The Ontario *Crown Policy Manual* (2005) is more direct in stating as binding directives that Crown counsel must not accept a guilty plea to a charge knowing that the accused is innocent, and must not knowingly accept a guilty plea to a charge when a material element of that charge can never be proven unless that fact is fully disclosed to the defence

37 See *supra*, note 17 Note that Manitoba *Crown Attorneys Code of Professional Conduct* provides that the Crown Attorney "shall never misrepresent or fail to disclose something that is material to the Court"

38 *R v R N M* (2006), 83 O R (3d) 349 (Ont S C J.)

***(d) What ethical obligations does a prosecutor have in presenting a plea bargained arrangement to a court?***

In jurisdictions such as Manitoba, where trial judges are required to afford heightened deference to joint submissions on penalty that are the product of a "true" plea bargain (a "*quid pro quo*"), [39] prosecutors should advise the court as to whether a plea bargain underlies the joint submission. However, the Manitoba Department of Justice policy directive on plea bargaining has not been amended to include this requirement. In my view, it should be.

**Standards of Performance**

***(e) What is the role of the prosecutor where the prosecutor determines that an investigation has been defective?***

Where a prosecutor determines that an investigation has been defective, the prosecutor should identify the deficits in the evidence at the Crown's disposal. This can include directing the police to take specific investigative steps such as interviewing particular potential witnesses. Crown counsel should be available to provide advice to the investigators, as needed.

***(f) What is the appropriate standard for proceeding with charges, or alternatively, withdrawing or staying charges?***

Federal and provincial prosecutorial guidelines establish a twofold standard for proceeding with the prosecution of criminal charges: there must be a reasonable prospect or likelihood of conviction and the prosecution must be in the public interest.[40]

Similarly, when determining whether to stay charges, prosecutors are guided by whether there continues to be a reasonable prospect (or likelihood) of conviction and whether there continues to be a public interest in proceeding.

In assessing whether the public interest militates in favour of prosecuting, Crown counsel derive guidance from policy directives and guidelines that set out specific factors.[41]

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39 See the discussion concerning the relevant decisions of the Manitoba Court of Appeal at page 25 of this letter, and Note 76, *infra*

40 See, for example, Manitoba Department of Justice Policy Directive/Guideline No. 2.INI.1.1, p. 1; Ontario *Crown Policy Manual* ("Charge Screening"), and the FPS Deskbook, ch. 15, "The Decision to Prosecute" (2005). Note that both the Ontario Ministry of the Attorney General and the Public Prosecution Service of Canada both base the first aspect of the test as a "reasonable prospect of conviction". This standard is described by the *Ontario Crown Policy Manual* as an objective one that is higher than a *prima facie* case that merely requires evidence whereby a reasonable jury, properly instructed, could convict, but not requiring "a probability of conviction", that is, a conclusion that a conviction is more likely than not. In Manitoba, however, the first aspect of the standard is "whether or not there exists a reasonable likelihood of conviction" (emphasis added)

41 See, for example, Manitoba Department of Justice Policy Directive/Guideline No. 2.INI.1.1, pp. 2-3 and FPS *Deskbook*, ch. 15, "The Decision to Prosecute" (2005) section 15.3.2

(g) ***Do supervisors exercise authority over the appropriateness of plea bargained arrangements, and, if so, what standards are used to judge the appropriateness of a plea bargained arrangement?***

In the course of the everyday exercise of prosecutorial discretion and plea arrangements, Crown counsel *are* accountable to their superiors, and subject to supervision. Supervisors oversee the work performed by individual Crown counsel, and ultimately, Crown counsel are accountable to the Attorney General, who is in turn accountable for their actions. Supervision and accountability take place, however, outside of the courtroom and generally without the knowledge of defence counsel, the court and the public, for obvious reasons. Moreover, approval for decisions can only be effective before any undertakings are given to defence or positions taken before the court. Where the nature of the offence, the circumstances surrounding the proceedings, or the experience of individual Crown counsel dictate, approval for certain significant decisions should be sought prior to a final position being taken[42].

For plea resolutions to continue to play the role they do in resolving the majority of criminal proceedings, defence counsel and accused persons simply must be able to rely on the word of Crown counsel. Absent extraordinary circumstances, those responsible for supervising Crown counsel should not seek to resile from an undertaking made or an agreement reached by individual Crown counsel. The courts have placed a heavy burden on any party seeking to repudiate a plea agreement or resolution. Moreover, any such repudiation is subject to the review of a court, as a potential abuse of process.[43] Similarly, positions taken before the court bind the Crown, regardless of how supervisors may regard such positions. In short, for the integrity of the Crown's office is to be upheld and the system to function effectively, it is essential that every participant in the criminal justice system be confident that they can rely on the word of Crown counsel.

The normal rules concerning the supervision of Crown counsel are modified in the case of independent counsel. In Manitoba, independent counsel are appointed in circumstances where a reasonable person would perceive that an accused person may receive differential treatment because of his/her relationship with Manitoba Justice.[44] Such counsel are governed by the scope of their individual retainers, and are to be guided by Ministerial prosecution polices, and are required to meet regularly with Directors of Regional Prosecutions. Department of Justice policy directives emphasize, however, that "the ultimate decision-making authority remains with the independent counsel."[45] This emphasis, combined with the circumstances requiring the appointment of independent counsel, suggest that direct supervision of independent counsel would be inappropriate and would likely frustrate the objective behind their appointment, i.e., maintaining public confidence in the justice system by ensuring the independent exercise of prosecutorial discretion.

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42 *R. v. R.N.M.* (2006), 83 O.R. (3d) 349 (Ont. S.C.J.), at paras. 64-68

43 In *R. v. R.N.M.* (2006), 83 O.R. (3d) 349 (Ont. S.C.J.), Hill J. noted that while in some instances, Crown repudiation of a plea agreement pre-trial might not amount to an abuse of process, such repudiations could form the basis for a finding of abuse of process, and were therefore subject to the Court's review

44 Manitoba Department of Justice Policy Directive/Guideline No. 5 COU 1, Policy Statement, p. 1

45 Manitoba Department of Justice Policy Directive/Guideline No. 5 COU 1, Appendix Terms a)-i)

The appropriateness of any plea agreement should be judged on the extent to which it protects the public interest and the Crown's obligations to the court. The manner in which that interest is to be protected, and Crown obligations to be fulfilled, are set out in the various codes of conduct, ministerial policies and directives, and authorities referenced in this opinion.

**Supervision**

(h) ***Are there any external controls on the discretion and competence of prosecutorial decisions?***

Professional regulators exercise limited control over prosecutors' decisions and so the manner in which they exercise prosecutorial discretion. As outlined above, in *Krieger v. Law Society of Alberta*,[46] the Supreme Court of Canada distinguished between two aspects of prosecutorial discretion. The first of these generally concerns whether a prosecution should proceed, and is informed by a broader public interest. The exercise of prosecutorial discretion within those areas that concern "the nature and extent of the prosecution and the Attorney General's role in it"[47] are not subject to regulation by law societies or, for that matter, courts. Its exercise is therefore immune from disciplinary action at the instance of the law societies, but Crown counsel remain accountable to the Attorney General. The second area of discretion encompasses all other discretionary decisions made in the prosecutor's role as an advocate within the adversarial process. It is only with respect to the exercise of discretion in the latter capacity that a prosecutor is subject, like any other advocate and lawyer, to disciplinary action by his or her professional regulator.

## Part Two: Hypothetical Facts

In the late evening hours of February 24, 2005, Mr. Harvey-Zenk, then a constable with the Winnipeg Police Service, went to a restaurant/bar immediately after his shift. He was there with up to twenty-five other off-duty Winnipeg Police Officers. Reports indicate he consumed some alcohol. After 2:00 a.m., along with ten or so of the officers, he went to the home of Cst. Shawn Black north of Winnipeg. Again, alcohol was available, although no-one reported noting whether or not Mr. Harvey-Zenk consumed any alcohol at the Black residence. He left the residence close to 7:00 a.m on February 25, 2005. Shortly after his departure, he collided with Ms. Taman's vehicle.

At the time of the collision Ms. Taman was commuting to work. Her vehicle was stopped for a red light. The light was about to turn green, or had just turned green when her vehicle was struck from behind by a vehicle, a light duty truck, being operated by Mr. Harvey-Zenk. Mr. Harvey-Zenk's vehicle did not slow before the collision. His vehicle is reported to have been traveling at ordinary road speed, estimated by a witness to be in the range of 80 kilometres per hour. The

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46 [2002] 3 S C R 372

47 *Krieger supra*, at para. 47

road he was traveling on was straight, giving Mr. Harvey-Zenk an unobstructed view of the intersection, and that the conditions were clear and visibility excellent. It was light out. There was traffic signage warning of the red light ahead, and that there were lights on the rear of at least two that were stopped at the lights. No explanation for Mr. Harvey-Zenk's failure to stop has ever been advanced.

As a result of the collision, Mr. Harvey-Zenk was charged with four offences: (1) criminal negligence causing death, (2) impaired driving causing death, (3) dangerous driving causing death, and (4) refusing to provide a breath sample.

I have been asked to assume the following facts:

(a) Police officers from the investigating police force, the East St. Paul Police Service, arrived at the scene at 7:16 or so. None of the five police officers who arrived at the scene set out to determine whether Mr. Harvey-Zenk had consumed alcohol or was impaired, in spite of the unexplained accident;

(b) The ranking officer on the scene, Chief Bakema, escorted or placed Mr. Harvey-Zenk in the back of a police vehicle, probably at or around 7:42 a.m. That police vehicle was being operated by Cst. Woychuk, a police officer of between four and six months experience. It appears that Chief Bakema knew Mr. Harvey-Zenk to be an off-duty police officer and may have known him personally. Chief Bakema's notes record that he placed Harvey-Zenk in the back of the vehicle because of the cold and Mr. Harvey-Zenk's emotional condition. The implication is that Mr. Harvey-Zenk was not being arrested. In any event, Mr. Harvey-Zenk remained in the vehicle until approximately 8:08 a.m. (in the range of 26 minutes) before being transported to the police station by Cst. Woychuk. The explanation offered by Constable Woychuk for the transportation of Mr. Harvey-Zenk to the station has varied. On one version, it was to complete a Traffic Accident Report. On another version, it was on the instructions of Chief Bakema so that the matter could be taken care of by Sergeant Carter, a more experienced officer who was at the station. At no time before he arrived at the police station was Mr. Harvey-Zenk advised of the right to counsel;

(c) Although the evidence is unsettled, the investigative file contains several indications that while he was still at the scene police officers may have had the following reasons to suspect that Mr. Harvey-Zenk had alcohol in his body;

   a. Paramedics interviewing Mr. Harvey-Zenk in the back of the police vehicle at some point between 7:42 and 7:58 a.m. detected on odour of alcohol from Mr. Harvey-Zenk and it appears that one or even both of them mentioned it to a police officer, probably Cst. Woychuk;

   b. Cst. Graham noted the odour of alcohol in Mr. Harvey-Zenk's vehicle; and

c. Cst. Woychuk noted an odour of alcohol either when Mr. Harvey-Zenk was waiting in the police vehicle on scene, or *en route* to the police station. His notes suggest that this occurred while *en route*.

No demand was made on scene or *en route* for a roadside breath screening or for an evidentiary breath sample.

(d) Upon Mr. Harvey-Zenk's arrival at the East St. Paul police station at or around 8:12 a.m., Sgt. Carter, who had not been at the accident scene, formed the opinion that Mr. Harvey-Zenk was impaired. Sgt. Carter noted a strong odour of alcohol and observed that Mr. Harvey-Zenk was unsteady on his feet as he was being escorted into the station to an interview room. Cst. Woychuk apparently confirmed seeing the unsteadiness. Sgt. Carter's notes record that he arrested Mr. Harvey-Zenk at 8:18 a.m., and then issued a *blood* demand. In his notes, Cst. Woychuk describes it as having been a breath demand. In any event, I have been asked to assume that Mr. Harvey-Zenk initially agreed to furnish a breath sample, consulted with counsel, and then refused to provide a sample;

(e) the following issues arise relating to the officer's notes:

a. Chief Bakema had two sets of notes;

b. No officers record having been advised by the paramedics that Mr. Harvey-Zenk smelled of alcohol;

c. Cst. Graham's notes do not record that he smelled alcohol in the Harvey-Zenk vehicle and there is no record of when this happened;

d. Sgt. Carter's notes record a "blood" instead of a breath demand;

e. Cst. Pedersen, who processed Mr. Harvey-Zenk for the *Identification of Criminals Act*, claims to have observed signs of impairment at that time, 1:25 p.m., yet there is no record of it in her notes or in the investigation report; and

f. There are reports by Cst. Woychuk made many months after the investigation that Cst. Graham and Chief Bakema made their notes together, and that he himself crafted the contents of his own notes to reflect directions provided by Chief Bakema;

(f) The investigation of the Winnipeg Police Service witnesses who had been in the company of Mr. Harvey-Zenk prior to the accident was conducted by Winnipeg Police Service Professional Standards Unit. That investigation produced no police witnesses who could provide helpful information about the amount of alcohol Mr. Harvey-Zenk had consumed prior to the accident, and all of those witnesses who described noticing him said that he was showing no signs of impairment, including shortly before the collision;

(g) Some of the police witnesses confirmed that Mr. Harvey-Zenk had been drinking beer in unknown quantities at the restaurant/bar. A waitress told investigators that if he was the officer who had been there a few weeks before for the Super Bowl and who was celebrating that his wife was wife (sic – pregnant), then he had consumed seven or eight pints of beer. (Mr. Harvey-Zenk's wife was in fact pregnant at the time.) When subsequently shown a photo pack including a photo of Mr. Harvey-Zenk, however, the waitress did not pick him or anyone else out.

Because the case involved a local police officer, and consistent with Manitoba Justice Policy, an independent prosecutor was assigned. Mr. Martin Minuk, a senior Winnipeg defence lawyer who had prosecuted cases for the province on other occasions, was retained.

(a) Mr. Minuk was consulted by Sergeant Carter while Mr. Harvey-Zenk was still in custody. He approved the charges being contemplated by Sergeant Carter, and advised Sergeant Carter that he could release Mr. Harvey-Zenk on a promise to appear without conditions;

(b) On April 21, 2006, not long before the scheduled June 5, 2006 preliminary inquiry, Mr. Minuk was made aware of allegations by Cst. Woychuk about Chief Bakema's conduct during the investigation. By this point Chief Bakema was no longer chief of police. Sergeant Carter had replaced him. As a result of the allegations Mr. Minuk caused an independent RCMP investigation to be undertaken into Chief Bakema's conduct, and he arranged for the adjournment of the preliminary inquiry, which was rescheduled for the following summer;

(c) As a result of that investigation, Mr. Minuk subsequently received additional investigative material from the RCMP. It contained no significant evidence assisting the prosecution, other than Cst. Pedersen's unrecorded claim to observing signs of impairment on Mr. Harvey-Zenk at 1:25 p.m. However, those observations are

contradicted by Winnipeg Police Service "Wellness Officer" who attended with Mr. Harvey-Zenk immediately before his release and noted no signs of impairment. The RCMP investigation also disclosed some modest inconsistencies in statements made by Cst. Woychuk which defence counsel could attempt to exploit were he to testify at trial;

(d) On July 16, 2007, the first day of the rescheduled preliminary inquiry, the matter was adjourned to the next day. On July 17, 2007, Mr. Harvey-Zenk pled guilty to dangerous driving causing death before Chief Justice Wyant. The other three charges were stayed by Mr. Minuk. No factual foundation was offered at that time for the plea that was made, and the proceedings were adjourned to August 22, 2007, for submissions on sentencing;

(e) At the August 22, 2007 sentencing hearing, a single sentencing book of authorities was offered to the court, endorsed by both counsel. A joint position was taken requesting a conditional sentence of two years, on conditions that had been recorded in advance. No request was made for a court ordered driving prohibition.

(f) On September 12, 2007, Chief Justice Wyant reconvened court for further argument. He was uncomfortable with the joint position that had been put forward.

a. It appears that Chief Justice Wyant understood for the first time at this hearing that the joint position offered during the August 22, 2007 hearing was not just two lawyers agreeing on an appropriate sentence, but rather was being presented as a *quid pro quo* compromise or true plea bargain. Manitoba authority requires more judicial deference to plea bargains than joint positions, and you will notice that Chief Justice Wyant was troubled that the parties had not made it clear to him during the August 22, 2007 sentencing arguments that the joint position they were advancing had been plea-bargained;

b. It was made clear to Chief Justice Wyant that the defence was not admitting the consumption of alcohol by Mr. Harvey-Zenk. The defence took the position that its admission on August 22, 2007 that there was anecdotal evidence of alcohol consumption was not an admission that there was in fact alcohol consumption;

c. Mr. Minuk, after being asked by Chief Justice Wyant whether he was going to try to prove that Mr. Harvey-Zenk had alcohol in his body, declined to do so.