Taman Inquiry
into the investigation and prosecution of Derek Harvey-Zenk
Honourable Roger Salhany, Q.C., Commissioner

TAB 2B

The Attorney General and Delegated Authority

C.C.S.M. c. C330

The Crown Attorneys Act

Table of Contents

HER MAJESTY, by and with the advice and consent of the Legislative Assembly of Manitoba, enacts as follows:

Appointment of Crown attorneys

1 Such Crown attorneys as may be required to perform the duties herein mentioned may be appointed as provided in *The Civil Service Act*; and every person so appointed shall as may be prescribed by the Lieutenant Governor in Council, hold, and discharge the duties of, any office authorized by law.

Deputy Attorney-General a Crown attorney

2 The deputy Attorney-General is, ex officio, a Crown attorney for the province at large.

Crown attorneys to be Manitoba barristers

3(1) No person shall be appointed a Crown attorney, or shall act in that capacity, who is not a barrister-at-law in good standing at the bar of Manitoba.

Students acting as Crown attorneys

3(2) Despite subsection (1), an articling student, as defined in *The Legal Profession Act*, may act as a Crown attorney in chambers or in the provincial court in summary conviction matters.

Non-lawyers acting as prosecutors

3(3) Despite the other sections of this Act but subject to the *Criminal Code* (Canada), the Attorney General may appoint persons who are not lawyers or students, within the meaning of *The Legal Profession Act*, to act under the general direction and supervision of a Crown attorney as prosecutors, as defined in the *Criminal Code* (Canada), in the Provincial Court in any locations within the province prescribed by regulation under this Act.

Limitation

3(4) No person who has been disbarred, suspended or struck off the rolls or books of the law society of any province shall be employed under subsection 3(3).

S.M. 1993, c. 38, s. 4; S.M. 2002, c. 44, s. 106.

Restrictions on right of Crown attorney to act

4 No Crown attorney shall,

(a) by himself or his partner in legal practice, act or be directly or indirectly concerned as counsel or solicitor for any person in respect of a charge against him of committing an offence against, or punishable under, any law in force in the province; or

(b) appear on behalf of or represent the Crown at an inquest or investigation held or made by a provincial judge, if his partner in legal practice appears on behalf of or represents any person thereat; or

(c) appear or act as Crown attorney on the hearing of a charge against any person of committing an offence against, or punishable under, any law in force in the province, or in respect of any other cause or matter, if his partner in legal practice is the magistrate or justice of the peace who tries, hears, or adjudicates the charge, cause, or matter.

Duties of Crown attorneys

5(1) Every Crown attorney shall, for the district or area for which he is appointed and as may be required by the Attorney-General,

(a) institute and conduct, on the part of the Crown, prosecutions for criminal and penal offences, with all the rights and privileges of the Attorney-General, and attend to all criminal business at the sittings of Her Majesty's Court of Queen's Bench for Manitoba and perform also the like duties in the

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inferior courts in the province; and

(b) if so requested in writing by a magistrate or justice of the peace who, in the request, states the particular case, advise and instruct him with respect to criminal offences or other matters brought before him for preliminary investigation or for adjudication; and

(c) generally assist in the administration of justice in the province and, without restricting the generality of the foregoing, assume, perform, and discharge, all duties and services, whether in courts of civil or criminal jurisdiction in the province or otherwise,

(i) that are required respecting, or that arise out of or in connection with, or with respect to, the enforcement of, or prosecution for breaches of, the criminal law or any statute or other law in force in the province; or

(ii) that might be performed by the Attorney-General; or

(iii) that the Lieutenant Governor in Council prescribes as part of the duties of a Crown attorney; or

(iv) the assumption, performance, or discharge of, which may be deemed necessary or advisable by the Attorney-General.

Members of Department of Justice staff act as Crown attorneys

5(2) The Attorney-General may, at any time, direct any barrister-at-law or attorney-at-law on the staff of The Department of Justice to perform any or all of the duties of a Crown attorney for any period or in respect of any one or more matters that the Attorney-General may specify.

Agents of Attorney General

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).

S.M. 1993, c. 38, s. 5; S.M. 1993, c. 48, s. 54.

Appointment of acting or assisting Crown attorneys

6 The Attorney-General may appoint a barrister-at-law in good standing at the bar of Manitoba

(a) to act for a Crown attorney during his illness or absence; or

(b) to assist a Crown attorney;

and may fix the fees or other remuneration to be paid to any such person for his services while so acting or assisting.

Regulations

7 For the purpose of carrying out the provisions of any Act imposing duties on Crown attorneys, the Lieutenant Governor in Council may make such regulations and orders as are ancillary thereto and are not inconsistent therewith; and the Lieutenant Governor in Council may also make regulations and orders touching the office of Crown attorney and for the prosecution of offenders against the criminal law or against any statute or other law in force in the province; and every regulation or order made under, and in accordance with the authority granted by, this section has the force of law.

MISSION STATEMENT: PUBLIC PROSECUTIONS

There are several elements to the statement of mission.

1. To provide timely, effective, efficient and quality legal services on behalf of the Crown in matters involving alleged criminal activity, regulatory misconduct, and proceedings under the Fatality Inquiries Act. This includes, where appropriate, competent legal advice to police forces and agencies within the purview of Public Prosecutions, as well as a public education function. Services also include policy advice to government, and the development and promotion of policies and programs which contribute to the reduction of crime and which will contribute to the public understanding of and participation in the criminal justice system.

2. To foster respect for rights, freedoms, the law and the Constitution of Canada.

3. To support the Minister of Justice in working to ensure that Manitoba has just and law abiding communities with an accessible, efficient and fair system of justice. The overall purpose of all members of Public Prosecutions is to contribute to ensuring Manitoba has a justice system that is responsive to the community's needs as they evolve, while reflecting an adherence to openness, fairness, and democratic principles, and the value of efficiency demanded of all governments in times of increasing fiscal pressures.

4. In delivering its services, Public Prosecutions will draw on the high level of unique skills, as well as the strong commitment of all staff, the use of progressive and innovative policies, input and guidance of management staff to ensure effective and efficient operations in the administration of criminal justice.

Relevant Passages from *Krieger v. Law Society of Alberta* (S.C.C., 2002), paras. 42-47

[2002] 3 S.C.R. 372 (Iacobucci and Major JJ.)

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D. *Prosecutorial Discretion*

42 In making independent decisions on prosecutions, the Attorney General and his agents exercise what is known as prosecutorial discretion. This discretion is generally exercised directly by agents, the Crown attorneys, as it is uncommon for a single prosecution to attract the Attorney General's personal attention.

43 "Prosecutorial discretion" is a term of art. It does not simply refer to any discretionary decision made by a Crown prosecutor. Prosecutorial discretion refers to the use of those powers that constitute the core of the Attorney General's office and which are protected from the influence of improper political and other vitiating factors by the principle of independence.

44 L'Heureux-Dubé J., in quoting David Vanek's work, "Prosecutorial Discretion" (1987-88), 30 *Crim. L.Q.* 219, at p. 219, said that "[p]rosecutorial discretion refers to the discretion exercised by the Attorney-General in matters within his authority in relation to the prosecution of criminal offences" (*Power, supra*, at p. 622).

45 As discussed above, these powers emanate from the office holder's role as legal advisor of and officer to the Crown. In our theory of government, it is the sovereign who holds the power to prosecute his or her subjects. A decision of the Attorney General, or of his or her agents, within the authority delegated to him or her by the sovereign is not subject to interference by other arms of government. An exercise of prosecutorial discretion will, therefore, be treated with deference by the courts and by other members of the executive, as well as statutory bodies like provincial law societies.

46 Without being exhaustive, we believe the core elements of prosecutorial discretion encompass the following: (a) the discretion whether to bring the prosecution of a charge laid by police; (b) the discretion to enter a stay of proceedings in either a private or public prosecution, as codified in the *Criminal Code*, R.S.C. 1985, c. C-46, ss. 579 and 579.1; (c) the discretion to accept a guilty plea to a lesser charge; (d) the discretion to withdraw from criminal proceedings altogether: *R. v. Osborne* (1975), 25 C.C.C. (2d) 405 (N.B.C.A.); and (e) the discretion to take control of a private prosecution: *R. v.* Osiowy (1989), 50 C.C.C. (3d) 189 (Sask. C.A.). While there are other discretionary decisions, these are the core of the delegated [page395] sovereign authority peculiar to the office of the Attorney General.

47 Significantly, what is common to the various elements of prosecutorial discretion is that they involve the ultimate decisions as to whether a prosecution should be brought, continued or ceased, and what the prosecution ought to be for. Put differently, prosecutorial discretion refers to decisions regarding the nature and extent of the

prosecution and the Attorney General's participation in it. Decisions that do not go to the nature and extent of the prosecution, i.e., the decisions that govern a Crown prosecutor's tactics or conduct before the court, do not fall within the scope of prosecutorial discretion. Rather, such decisions are governed by the inherent jurisdiction of the court to control its own processes once the Attorney General has elected to enter into that forum.

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Relevant Passages from the Ontario *Crown Policy Manual* (2005), "Preamble", p. 2

Constitutional Foundation for the Role of the Crown

It is a fundamental principle that the Attorney General must carry out prosecution responsibilities independent of any partisan political influences. Crown counsel, as agents of the Attorney General, share the Attorney General's independence from partisan political influence but are not independent themselves of the direction of the Attorney General. Because of the potential for suggestions of political influence and, given that there are hundreds of thousands of criminal cases which flow through the courts every year in Ontario, it would be imprudent and impractical for the Attorney General to become involved in individual cases on a routine basis. The common practice is for the Attorney General to grant broad areas of discretion in criminal prosecutions to Crown counsel (except in those few circumstances where the *Criminal Code* requires the Attorney's personal involvement or consent). This granting of decision-making latitude reflects respect for the professional judgment of Crown counsel and is consistent with Crown counsel's Minister of Justice role.

The Attorney General is accountable to the Legislature for the entire process through which justice is administered in the province. Because of this accountability, which includes specific cases, a continuum of responsibility within the Ministry has been established. This continuum extends from Crown counsel at the operational level upward to the Deputy Attorney General and the Attorney General. Each Crown counsel or Assistant Crown Attorney reports to a Crown Attorney or Director. Crown Attorneys in turn report to Directors, while Directors report to the Assistant Deputy Attorney General, who reports to the Deputy Attorney General. The Ministry also employs *per diem* counsel to act as Crown counsel and provincial prosecutors. They are subject to this internal reporting structure...

Relevant Passages from the Ontario *Crown Policy Manual* (2005), "Attorney General's Consents"

PRINCIPLES

As a precondition to the institution of certain steps in criminal proceedings including, but not limited to, initiating specific prosecutions, restarting a prosecution where jurisdiction has been lost, preferring a direct indictment, laying informations in support of specific recognizances to keep the peace, and initiating dangerous and long-term offender applications, the consent of the Attorney General, as Chief Public Prosecutor of the Province of Ontario is required. In certain instances, the consent required is either that of the Attorney General or the Deputy Attorney General.

In making decisions to consent or refuse to consent to certain steps in criminal proceedings, consideration of the public interest is paramount. The Attorney General and Deputy Attorney General exercise this discretion in a just, honourable and conscientious manner, unmoved by irrelevant considerations or partisan motives. Individual cases must be assessed rigorously, objectively and dispassionately.

The Attorney General has the power to delegate and in certain instances, has delegated the power to consent to the Assistant Deputy Attorney General, the Director of Crown Operations, the Crown Attorney or to Crown counsel. In all instances where the Attorney General has delegated consent, the decision to consent or to refuse to consent must be made in the same way, and on the same basis, that the Attorney General exercises this discretion.

Relevant Passages from the *Federal Prosecution Service Deskbook*, ch. 8, "Independence and Accountability in Decision Making" (2005)

8.1 Introduction

The principle of the independence of the Attorney General is firmly entrenched in our legal system, widely respected, and carefully safeguarded. The theory underlying the principle and the leading statements concerning it are dealt with in detail elsewhere. Perhaps less well understood is the operation of the independence principle in the day-to-day decision-making of individual Crown counsel. Crown counsel exercise their independence as the representative of the Attorney General. As such, the "independence" of Crown counsel is a delegated independence. Crown counsel are obliged to make decisions in accordance with the policies of the Attorney General in this deskbook, and they act under the direction of FPS Directors, Regional and Senior Regional Directors, who are in turn responsible to the Assistant Deputy Attorney General (Criminal Law). Crown counsel retain a significant degree of discretion in individual cases.

Crown counsel, like the Attorney General, are accountable for their decisions. Since the Attorney General is accountable to Parliament and the public for decisions made in his or her name, this may mean that the Attorney General (either personally, or through the Assistant Deputy Attorney General (Criminal Law)), may provide Crown counsel with instructions in a particular case, though such situations would be relatively rare.

The independence principle also does not mean that Crown counsel need not consult. Quite to the contrary, responsible prosecutorial decision-making often requires consultation with colleagues, superiors or investigators. Indeed prosecutorial discretion is not exercised in a vacuum. The principle of independence means that the Attorney General does not take instructions as to how to exercise discretion. Similarly, Crown counsel do not take instructions as to how to proceed, except from those in the line of authority leading to the Attorney General, namely, the FPS Director, the Regional and Senior Regional Director, the Assistant Deputy Attorney General (Criminal Law) and the Deputy Attorney General.

The interaction of the principles of independence, accountability and consultation mean that what is protected is a system of prosecutorial decision-making in which the prosecutor is an integral component. A large measure of independence is conferred on Crown counsel, but absolute discretion is not.

8.2 Statement of the Policy

Crown counsel are obliged to exercise independent judgment in making decisions. Because their decision-making powers are delegated to them by the Attorney General, Crown counsel are subject to the same constraints faced by the Attorney General personally: they are accountable for their decisions, and they must consult where required. Prosecutorial independence is not a license to do as one wishes, but to act as the Attorney General personally should act.

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8.4 Delegation of Decision-Making Power

As a practical matter, Crown counsel exercise most of the functions assigned by the Criminal Code to the Attorney General. The Attorney General delegates these powers to counsel, but retains a discretion to direct that a particular decision be made.

The power to direct actions to be taken in the name of the Attorney General has been statutorily recognized in British Columbia since 1991. Section 5 of the British Columbia Crown Counsel Act states:

> If the Attorney General or Deputy Attorney General gives the A.D.A.G. [Assistant Deputy Attorney General] a direction with respect to the approval or conduct of any specific prosecution or appeal, that direction must be given in writing to the A.D.A.G. and be published in the Gazette.

The section recognizes both the power of an Attorney General to intervene in particular cases, and the desirability of safeguarding prosecutorial independence by making the Attorney General's action a matter of public record. Safeguards exist within the Federal Prosecution Service, and are dealt with in section 8.6.

8.5 Consultation

Just as the Attorney General is well-advised to consult with Cabinet colleagues on certain decisions, so too may prosecutors consult with others. Examples of persons with whom counsel can and should consult include police officers or other investigators, client departments, and senior departmental counsel.

The purpose of consultation is to ensure that counsel has access to a wide range of viewpoints and information ensuring that the decisions are made with full knowledge of all the circumstances. Cabinet colleagues do not dictate litigation positions to the Attorney General; in the same way, neither client departments nor police officers can dictate to prosecutors that a certain course of action be followed. This does not mean that their views are not entitled to appropriate weight in determining what the public interest demands in particular situations.

Consultation within the Department of Justice rests on a somewhat different footing. As a practical matter, the Attorney General delegates considerable authority to responsible officials. Because those officials continue to act in the Attorney General's name, it is important that consultation be undertaken to ensure that the Attorney General is made aware of potential problems, and, in some cases, to direct that a particular course of action be undertaken. This is necessary to ensure consistent decision-making, and that the Attorney General approve of decisions for which he or she is publicly accountable. It also helps avoid the unfortunate situation in which appellate counsel must resile from a position taken by trial counsel.

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B. The Attorney General and Crown Prosecutors

Individual prosecutions are actually conducted for the most part by public prosecutors, or "Crown Attorneys", acting as agents for the Attorney General. The historical development of the office of public prosecutor, and its present relationship to the Attorney General, must therefore be understood.

In the pre-Confederation Province of Canada, the Attorney General had little time to devote to court appearances as a result of the increasingly political nature of responsibilities in the Executive Council and Parliament.[56] This was also the case with the deputy, the Solicitor General. As well, the increase in population made it more difficult for these two law officers personally to appear in court on all of the Sovereign's business. When neither was available, Queen's counsel or "Crown counsel" were appointed on an *ad hoc* basis to represent them for the duration of a session of the court. However, these counsel did not enjoy the prerogatives of the law officers. In Upper Canada, and later in Ontario, it became expedient to appoint County Attorneys, who were later known as Crown Attorneys. These attorneys supervised the prosecution work, at first, on a part-time fee for service basis.

Following Confederation similar duties were conferred on officials designated as prosecuting officers or Crown attorneys in other provinces. The theoretical degree of independence varied among the provinces: in some provinces the local prosecutor was legally under the complete control of the provincial Attorney General, while in other cases the Crown attorneys enjoyed the rights and privileges of the Attorney General and Solicitor General when carrying out their prosecution functions. In other provinces, and in the federal system where there was no statutory recognition of Crown attorneys or public prosecutors, counsel are still employed on a full-time or part-time basis and exercise prosecutorial authority as counsel, agents, or delegates of the Attorney General.[57]

There have only been relatively minor changes in the duties of Crown attorneys during the last 130 years.[58] Their primary responsibilities are to conduct prosecutions for indictable offences, to conduct prosecutions for summary conviction offences (where the public interest so requires), to supervise private prosecutions and take over the case where justice towards the accused requires, to deal with questions of the sufficiency of sureties, and to provide legal advice to justices of the peace.[59] At the present time Crown attorneys must also examine documents sent by coroners, justices of the peace, and provincial judges to determine if further evidence needs to be gathered, or witnesses summoned to avoid a charge being dismissed for insufficiency of proof.[60]

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56. Stenning, *supra*, note 6 at 109-110.

57. *Ibid.* at 121-130.

58. See *The Upper Canada County Attorneys' Act*, *supra*, note 15 and *Crown Attorneys Act*, R.S.O. 1980, c. 107.

59. *Crown Attorneys Act*, *supra*, note 58, s. 12. Subsection 12(j) of this Act, giving the Crown Attorney the power to determine the sufficiency of sureties, was recently challenged under the *Charter*, but was upheld. However, the court held that this power was subject to Part XVI of the *Criminal Code*, allowing an applicant to have the question determined by the court. See *R. v. Dewsbury* (1989), 39 C.R.R. 301 (Ont. H.C.).

60. *Crown Attorneys Act*, *supra*, note 58, s. 12(a).

It is our view that Crown attorneys are accountable to, and under the control of, the Attorney General. Some writers have disputed this position, particularly in Ontario,[61] but the majority of historical and contemporary evidence supports the existence of this accountability.[62] However, of necessity the local Crown attorney has a "broad and generous area of unfettered discretion in criminal prosecutions."[63] Thus while Crown prosecutors are theoretically accountable to, and under the control of, the Attorney General, it is only in the most exceptional cases that the Attorney General would become directly involved in, or even knowledgeable about, a particular case. The Attorney General bears responsibility for the issuing of "wide and general guidelines as to policy",[64] but the day-to-day administration of justice must be in the hands of the local Crown attorneys or agents.

The legal effect of these policy guidelines has received some recent attention. In *R.* v. *Catagas*[65] the Manitoba Court of Appeal considered an allegation of abuse of process because the accused, a native Indian, was prosecuted for breach of the *Migratory Birds Convention Act*;[66] this prosecution, the accused alleged, was contrary to a policy of the provincial and federal governments (though the policy does not appear to have come from the Attorney General). The court held that the abuse-of-process argument failed since the policy itself was illegal, contrary to well-established constitutional principles that "[t]he Crown may not suspend laws or the execution of laws without the consent of Parliament; nor may it dispense with laws, or the execution of laws; and dispensations by *non obstante* [notwithstanding] of or to any statute or part thereof are void and of no effect, except in such cases as are allowed by statute."[67] The court, however, went out of its way to point out that the holding in this case did not affect the legitimate exercise of prosecutorial discretion:

> Not every infraction of the law, as everybody knows, results in the institution of criminal proceedings. A wise discretion may be exercised against the setting in motion of the criminal process. A policeman, confronting a motorist who had been driving slightly in excess of the speed limit, may elect to give him a warning rather than a ticket. An Attorney-General, faced with circumstances indicating only technical guilt of a serious offence but actual guilt of a less serious offence, may decide to prosecute on the latter and not on the former. . . . But in all these instances the prosecutorial discretion is exercised in relation to a specific case. It is the particular facts of a given case that call that discretion into play. But that is a far different thing from the granting of a blanket dispensation in favour of a particular group or race. . . .

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61. K. Chasse, "The Role of the Prosecutor" in S. Oxner, ed., *Criminal Justice: Papers Prepared for Presentation at the Canadian Institute for the Administration of Justice Conference on Criminal Justice held at Halifax, October 28, 29 and 30, 1981* (Toronto: Carswell, 1982).

62. See, *e.g.*, the comments of former Ontario Attorney General John Clement, quoted in Chasse, *ibid.* at 83, and also the remarks of a former Crown Attorney, the Honourable Judge Graburn, "The Relationship of the Crown Attorney to the Attorney General" (1976) 35 C.R.N.S. 259 at 270-271.

63. Former Ontario Attorney General John Clement, cited in Chasse, *supra*, note 61.

64. *Ibid.* at 84.

65. (1977) 38 C.C.C. (2d) 296 (Man. C.A.).

66. R.S.C. 1970, c. M-12.

67. *Halsbury's Laws*; 3rd ed., vol. 7 (London: Butterworths, 1954) para. 486 at 230, cited in *R.* v. *Catagas*, *supra*, note 65 at 297.

> The Crown may not by Executive action dispense with laws. The matter is as simple as that, and nearly three centuries of legal and constitutional history stand as the foundation for that principle.[68]

Therefore the Attorney General cannot unlawfully fetter the discretion that is inherent in that office, nor that of the counsel who derive their power from, and are accountable to, it. To determine the legality of guidelines one would have to determine whether they would be a lawful exercise of discretion if exercised by the Attorney General personally. It would seem that, so long as there remains room to examine the individual case on its own merits, the guidelines would not be improper.[69]

The Attorney General is accountable to the legislature for the actions of the agents employed as prosecutors, and so must have the right to intervene in any particular case and direct the manner of the prosecution. Such direct interventions, however, leave the Attorney General vulnerable to allegations of partisan political influence. While there is nothing improper in the Attorney General personally exercising power, perhaps in the face of advice from the local prosecutor, in practice one would expect this to occur only when the matter was of such importance that a decision at the highest level was required. Interventions in more mundane prosecutions would raise the question as to why it was felt necessary to intervene. Therefore there is a useful function fulfilled in issuing broad policy guidelines to Crown counsel: the guidelines keep prosecutors accountable to the Attorney General, without seeming to involve improper considerations.

To conclude, while theoretically the public prosecutors are accountable to, and under the control of, the Attorney General, as a practical matter responsibility for individual prosecutions is in most cases exercised at the local level.

C. The Attorney General and Private Prosecutors

Another important aspect of the role of the Attorney General, similar in some ways to the relationship to Crown prosecutors, is the relationship between the Attorney General and private prosecutors.[70] On the one hand, by its very nature, criminal law concerns acts that are serious enough to be regarded not merely as wrongs to an individual, but to the state. For this reason, most criminal proceedings involve the resources of the state, being investigated by the police and prosecuted by a Crown prosecutor. On the other hand, most

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68. *R.* v. *Catagas*, *supra*, note 65 at 301.

69. An example of guidelines that have affected a very large number of prosecutorial decisions are those of the federal Department of Justice which set out when the charge of importing will be laid in an "border possession" case (which carries with it a statutory minimum of seven years), and when the charge of possession for the purpose of trafficking (which carries no minimum sentence) will be laid. Although the mandatory minimum seven years has recently been struck down by the Supreme Court of Canada (*R.* v. *Smith*, [1987] 1 S.C.R. 1045), these guidelines operated for several years, and affected the exercise of a prosecutorial discretion which had enormous impact on accused.

70. The Commission has considered this issue at length in a previous working paper: see LRC, *Private Prosecutions*, Working Paper 52 (Ottawa: The Commission, 1986).

ESSENTIALS OF
CANADIAN LAW

ETHICS AND CANADIAN CRIMINAL LAW

HON. MICHEL PROULX

Quebec Court of Appeal

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of the Ontario Bar

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C. THE PRINCIPLE OF PROSECUTORIAL DISCRETION

> "The *sine qua non* of a prosecutor's duty is discretion. This is recognized as essential to the effective working of our system. Yet, it is this feature that makes the prosecutor so vulnerable to pressure. Discretion is our Achilles' Heel. It is actually easier not to exercise it. The grief often comes when we do."[52]

Many decisions concerning the operation of the criminal justice system involve the exercise of a discretion by the prosecutor. Prosecutors exercise discretion in the decisions to prosecute; to proceed by way of indictment or summary conviction; to oppose or consent to bail; to prefer an indictment; to withdraw a charge; to enter a stay; to consent to elections and re-elections; to appeal; to consent to an adjournment; to intervene in private prosecutions; and to provide pre-trial disclosure. Prosecutorial discretion is also exercised in the selection of witnesses and in the sentence process. As Mr. Justice La Forest stated in *R.* v. *Beare*, "a system that attempted to eliminate discretion would be unworkably complex and rigid."[53] In short, the prosecutor's discretion is an essential feature of the criminal justice system.

Not surprisingly, the Supreme Court of Canada has clearly affirmed that the existence of prosecutorial discretion does not offend the principles of fundamental justice.[54] As to judicial control of this discretion, the courts have articulated several principles. First, the exercise of a discretionary power is not absolute and can sometimes be reviewed by the courts.[55] Second, the prosecutor's broad discretion is not well suited for judicial review and should be afforded deference.[56] Third, on a case-by-case basis, the exercise of discretion can be reviewed under the doctrine of abuse of process, which gives the courts a residual ability to remedy an abuse of the court's process in the clear-

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52 Walsh, above note 27.

53 *R.* v. *Beare*, [1988] 2 S.C.R. 387 [*Beare*]. For a review of various aspects of the prosecutor's discretion, see B. Archibald, "The Politics of Prosecutorial Discretion: Institutional Structures and the Tensions between Punitive and Restorative Paradigms of Justice" (1998) 3 Can. Crim. L. Rev. 69 at 80–81; as well as W. Gorman, "Prosecutorial Discretion in a *Charter*-Dominated Trial Process" (2000) 44 Crim. L.Q. 15.

54 See *Cook*, above note 12; *Beare*, above note 53; and *Jones* v. *R.*, [1986] 2 S.C.R. 284.

55 See *R.* v. *T.(V.)*, [1992] 1 S.C.R. 749 [*T.(V.)*].

56 *Ibid.* at 762.

est of cases.[57] Fourth, a judicial stay is not an automatic remedy for past Crown misconduct, since a stay is appropriate only where necessary to prevent further damage to the integrity of the judicial process (that is, Crown misconduct does not necessarily vitiate the criminal justice process and justify termination of the proceedings).

1) Policy and Guidelines

In most of the areas of prosecutorial discretion identified above, the *Criminal Code* provides no guidelines for the exercise of this power. However, in Canada and elsewhere in the Commonwealth, as well as in the United States, attorneys general have typically issued policy statements or directives that provide prosecutors with guidance. At the federal level in Canada, these policies and directives are set out in the FPS Deskbook and are intended "to assist prosecutors in the principled discharge of their prosecutorial duties while informing the public of the basis upon which prosecutorial discretion is exercised."[58] This is not to say, however, that the courts are bound by such guidelines. For instance, in *R. v. K.(M.)*,[59] the Department of Justice had adopted a policy of "zero-tolerance" in cases of domestic violence, and the accused was charged with assaulting his son. The Manitoba Court of Appeal held that this policy position regarding charging was subject to judicial review and was objectionable because it nullified prosecutorial discretion. In *R. v. Catagas*,[60] the same appeal court similarly accepted that the Crown has the ability, in the exercise of prosecutorial discretion, to stay proceedings in an individual case but has no right to dispense with the application of a statute in favour of a particular group or race. The Crown policy was subject to judicial intervention because a dispensing power was automatically applied in favour of a particular group.

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57 See *Power*, above note 8; *R. v. O'Connor*, [1995] 4 S.C.R. 411; and *Canada (Minister of Citizenship and Immigration) v. Tobiass*, [1997] 3 S.C.R. 391 at 427 [*Tobiass*].

58 *Supra*, Part I, chap. 9.

59 (1992), 74 C.C.C. (3d) 108 (Man. C.A.).

60 (1977), 38 C.C.C. (2d) 296 (Man. C.A.).

61 In *Power*, above note 7, reference was made to *United States v. Redondo-Lemos*, 955 F.2d 1296 at 1299 (9th Cir. 1992), in which Kozinski J. observed that "even were it able to collect, understand and balance all of these factors, a court would find it nearly impossible to lay down guidelines to be followed by prosecutors in future cases."